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**THE TALKING CURE: HOW CONSTITUTIONAL  
ARGUMENT DRIVES CONSTITUTIONAL REFORM IN THE U.S. .... 0**

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INTRODUCTION

Let's say that you believe that the American political system has become spectacularly dysfunctional – that it has grown a gargantuan national government that, in a fit of law and rulemaking, that has choked the economy and the business and private lives of citizens with generations of invasive, niggling, and expensive regulations. That governments at all levels have restricted liberty and violated basic principles of equality that were part of the society's foundational social contract. And let's say that you were convinced that the U.S. Constitution was in large part to blame for this dire and increasingly alarming state of affairs. Not the Constitution rightly understood, but the Constitution as understood for the better part of the last century, from the time of the revolution wrought by the Progressives, and institutionalized through the New Deal, the Warren Court, and the Great Society – a

Since World War II, American conservatives have availed themselves of all of the above constitutional options in response to what they took to be America's political dysfunction. While it would be worthwhile to study efforts by Republicans to push for a more conservative slant to public policies operating within a settled and accepted modern liberal constitutional order, or to study the many proposals that have emanated from the Right for formal Article V amendments to bring back elements (if not the entirety) of a

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preoccupied with constitutional *law* and not constitutional *development*.<sup>3</sup> Only the most radical amongst them – for example, Critical Legal Studies Scholars (or Crits) long since out of fashion – argue that constitutional law is mostly (if not exclusively) politics, and that meanings are continually made and remade through (constitutional) politics, an argument that will not fly in most courts.<sup>4</sup> But what is radical for law professors appealing to judges is work-a-day for political scientists and historians whose chief interest is in dispassionately describing and telling causal stories about actual, altering meanings and settlements.<sup>5</sup>

Accounts of American political and constitutional development are full of unembarrassed descriptions of institutional and constitutional change, liberated from the (common) lawyer's predisposition to conceptualize all change as fidelity to the past.<sup>6</sup> During the first half of the nineteenth century, an era of robust "interpretative pluralism," the respective roles of Congress, the President, and the Supreme Court, and the relationship of the national government to the states, which many today consider hard-wired features of the Constitution's text and architecture – to say nothing of the understandings of the principles of liberty and equality – were ill defined and unsettled.<sup>7</sup> As

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<sup>3</sup> See, e.g.

the polity moved forward through time, a series of “constitutional constructions” and institutional settlements took hold, lending the political order a core of operative stability.<sup>8</sup> Path dependency and mechanisms of entrenchment and institutionalization helped forge a “thickened” constitutional order in which, over time, dislodging and reconstruction became increasingly onerous endeavors.<sup>9</sup> That said, American constitutional development is rife with examples of the most seemingly settled institutions being remade across time, often via slow-moving, long-term, incremental processes.<sup>10</sup>

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the Constitution has always been subject to new, reordering interpretations capable of meeting new social, economic, and political challenges.<sup>12</sup> If, as has been shown through empirical studies of constitutionalism around the world, the average lifespan of a constitution is nineteen years, the American case, although an ostensible exception, is, in fact, not all that different.<sup>13</sup> Through the effective mobilization of the sovereign people with distinctive – and often sharply antagonistic – political visions, significant constitutional change, for better or worse, is possible.<sup>14</sup> Liberals, it seems, no longer believe this.<sup>15</sup>

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interplay of stasis and settlement and change, some glacial, some slow moving but continuous, and some rapid. American Political Development (APD) scholars have identified a taxonomy of dynamics of stasis and change including an array of regime theories (for example, Burnham, Sundquist, and Lowi), path dependency (Pierson), institutional thickening (Skowronek), and institutional layering (Schickler). *See*

Conservatives apparently do.<sup>16</sup> It is for this reason that liberals in recent years have despaired, while conservatives have reoriented the main lines of

they are themselves outputs – the product of movements and organized interests, operating within the parties or, first, outside of them, and seeking to join or pressure the coalition. The arguments of these movement and interests are fashioned by creative men and women who lead, wielding political and constitutional ideas.<sup>21</sup> Political scientists have mapped the micro-level processes by which ideas move from glints in the eyes of creative theorists, policy entrepreneurs, and political leaders to party positions and ideology, and then to the conventional political and constitutional wisdom of a dominant political regime.<sup>22</sup>

The peculiar structural features of the American constitutional system have made constitution-talk an especially important vehicle for both constitutional maintenance and change. In what Madison called the nation's "compound republic," political power is fragmented both within the national government and divided (with intimations of dual sovereignties) between the national and state governments.<sup>23</sup>





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The political scientist Adam Sheingate has noted that, across time, complex, heterogeneous institutional environments with ambiguous and uncertain borders like ours are subject to distinctive patterns of constitutional development across time in which the foundational rules fall into complicated patterns of stability and change, settlement and unsettlement, interpretation, reinterpretation, and adjustment.<sup>29</sup> In this iterative process, uncertainties about rules and boundaries are both inherent in the rules themselves and generated by goal-directed political actors in whose interest it is to unsettle and change less advantageous into more advantageous rules.<sup>30</sup> In such an order, political and intellectual entrepreneurs and leaders can draw from a diverse set of traditions of political culture and thought that are robust and continually in flux.<sup>31</sup>

While of course one will not find all resistance permanently vanquished – which would be disturbing in its own right – the history of American constitutional development provides many instances in which coherent constitutional theories work successfully to overcome potential veto points and countervailing centers of power. The Whig’s theory of congressional preeminence sharply limited executive power,<sup>32</sup> just as later the theory of the “modern” presidency put the President at the head of the parties and government.<sup>33</sup> Periods of unified (party) government in times of robust, disciplined parties mitigated against the activating of veto points, as did – under certain institutional conditions – the establishment of autonomous expert

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content of the programmatic policies on offer or the prospects of what, from the Founding forward, they pejoratively called “consolidated” government – who are grateful for the checks the Constitution provides, and labor assiduously to preserve them. *See, e.g.*, PETER BERKOWITZ, *CONSTITUTIONAL CONSERVATISM: LIBERTY, SELF-GOVERNMENT, AND POLITICAL MODERATION* (2013).

<sup>29</sup> Adam Sheingate, *The Terrain of the Political Entrepreneur*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING* 13, 15 (Stephen Skowronek & Matthew Glassman eds., 2007).

<sup>30</sup> *Id.* at 15, 18-20.

<sup>31</sup> *Id.* at 21; *see also* GREENSTONE, *supra* note 11, at 5. On the important distinction between goal-directed policy “entrepreneurs” and political “leaders,” see Bruce Miroff, *Leadership and American Political Development*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING*, *supra* note 29, at 33, 33-37. Simply put, this may be the more institutionalist way of saying that ours is a system designed to function by the lights of a “living originalism.” *See* JACK M. B

administration.<sup>34</sup> Considerable consensus was reached in periods in which

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political agents.<sup>40</sup>



racial liberalism and opposition to the modern welfare state were initially not conjoined positions, but were made so by culture work.<sup>57</sup> Recent scholarship has emphasized the debt the civil rights movement owed to the dynamics of the Cold War.<sup>58</sup> Those who want to win political power and institute governing policy regimes will have to work to bundle and resignify in order to reconstruct allegiances and reconfigure political identities, through a process that is simultaneously concrete and highly theoretical and abstract.<sup>59</sup> They will need to use symbols and stories creatively, framing friends and enemies, loyalties and aspirations – as modern conservatives have done – to create an operative and effective web of meaning.<sup>60</sup>

#### IV. CASE STUDY: MODERN CONSERVATIVE CONSTITUTIONAL ARGUMENT

In the second half of the twentieth century, the conservative movement has

movement.<sup>64</sup> Conservatives have worked self-consciously and aggressively to reconstruct constitutional memory (not only of the eighteenth century

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the American revolution was at its core a modern, bourgeois revolution,



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did not square with the Founding, no matter how many times they did so.<sup>89</sup> Under this new approach, many contemporary conservatives now reject the old (Progressive) democracy-versus-the-courts framework that underwrote earlier originalist critiques of *Dred Scott/Lochner/Roe* as abominations of counter-majoritarianism. They, for example, no longer hold *Lochner* to have been wrongly decided.<sup>90</sup> And the problem with *Roe* is increasingly being framed less as a problem of counter-majoritarianism per se than as a case study in the perils of secularism – of abandoning “the laws of nature and nature’s God” as the foundation of law and the U.S. Constitution.<sup>91</sup> *Roe* is then linked directly to *Dred Scott* within a wholly new frame: it is presented as a case study in the ways that the abandonment of God’s law as foundation leads to moral abomination (first, slavery; then, abortion).<sup>92</sup>

This sort of constitutional culture work is pervasive on the modern Right, at both the scholarly and popular level. For instance, proponents of natural law as constitutional sheet anchor have built an associative chain joining both *Dred Scott* and *Roe* with the Supreme Court’s infamous eugenics decision in *Buck v. Bell*<sup>93</sup> – where, significantly, given the history of these debates, the Court upheld the law in question, noting that the oft-celebrated “Progressive” justices on the Court, Oliver Wendell Holmes, Jr. and Louis D. Brandeis, voted with the majority, and that the only dissent in *Buck* was from the Court’s only Roman Catholic, Justice Pierce Butler.<sup>94</sup> These decisions are then tied rhetorically to the modern liberal Court’s jurisprudence concerning the

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<sup>89</sup> *Id.* at 393.

<sup>90</sup> *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL  
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“separation of church and state” (a fiction, they contend, of which the Founders would never have approved), the perils of the expansion of a godless federal bureaucracy, most significantly, into areas involving life and death, like national health care – a nascent sphere in which ungrounded secularists will be newly empowered to impose their own amoral standards to decide who lives and who dies.<sup>95</sup>

Contemporary conservatives are actively rewriting the histories of entire eras and of the grand trajectory of U.S. constitutional development to create congenial terrain for discursive recombination and the forging of new associative chains. Straussian natural rights theorists like Jaffa (and his many “West Coast Straussian” followers) have, for instance, devoted sustained attention to the Civil War era – and, most prominently, to the political thought of Abraham Lincoln.<sup>96</sup> This has been extended outwards to include strong interests in abolitionist and civil rights movement thought (Frederick Douglass and Martin Luther King, Jr., respectively).<sup>97</sup> These deep and serious studies, by Harry Jaffa, Herbert Storing, and others, provide the framework within which

conservative movement for an expansive understanding of the constitutional powers of the national government.<sup>100</sup> Over time, however, as the civil rights movement succeeded and white supremacy was discredited, neoconfederate thought became *persona non grata* on the Republican Right (as such, this is the story of the subsequent dismantling of Charles Collins's thought). Jaffa's insistence on the centrality of the Declaration and the equality of natural rights to the Constitution was adopted, however, in time by both libertarian and old southern states rights conservatives.<sup>101</sup> While disagreements remain on the Right concerning constitutional theory, a shared commitment to timeless natural rights (incompletely theorized, to be sure – and usefully so)<sup>102</sup> now joins the Religious Right, libertarians, and neoconservatives. This act of discursive recombination has the added benefit of telling those parts of the coalition formerly tied to neoconfederatism that their commitment to natural rights demonstrates that they are more antiracist than modern liberals.

As I have detailed elsewhere, revisionist histories of the Progressive Era have, in recent years, become a core component of conservative stories of the post-founding trajectory of U.S. constitutional development.<sup>103</sup> Although contemporary conservatives are telling many stories about the Progressive Era and its constitutionalism, a set of key themes predominate in both scholarly and polemical accounts. These histories emphasize the Progressive movement's faithlessness, betrayal, treachery, shifting the moment of abandonment back from Franklin Delano Roosevelt and the New Deal (where modern conservatives had traditionally fixed it) to the Progressive Era, where, as they emphasize, the Founders' Constitution was rejected, not just in fact or by implication, but frankly and proudly, under the auspices of an openly articulated and aggressively heretical political theory.<sup>104</sup> Modern conservatives condemn this betrayal by the Progressives on various grounds: for its impiety, for its antinomianism, and for the bad consequences it will entail for foundational political principles (like liberty).<sup>105</sup> Beyond the overarching

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<sup>100</sup> *Id.* at 197-227 (citing, e.g., JAFFA, *supra* note 75; STORING, *supra* note 75).

<sup>101</sup> See Thomas, *supra* note 97, at 985 (linking originalism with the Declaration of Independence in the context of banning slavery).

<sup>102</sup> Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 47 SOC. RES. 1, 1 (2007); see also JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (illustrating Rawls's notion of "overlapping consensus.").

<sup>103</sup> Kersch, *Constitutional Conservatives*, *supra* note 51.

<sup>104</sup> *Id.*;

allegation of betrayal and repudiation, conservative histories repeatedly level five substantive charges against the Progressives: (1) statism; (2) democratism; (3) elitism; (4) hostility to free markets, business, and accumulated wealth; and (5) racism.<sup>106</sup> The Right's revisionist histories of the Progressive Era are crucial because they provide the terrain upon which conservatives can trace the origins of innumerable contemporary liberal policies – and the histories cast early twentieth-century progressivism as a direct progenitor of contemporary

his fellow progressives foisted on America.”<sup>109</sup> If it were not for the Progressive Era’s democratizing reforms, Napolitano asks, citing the Sixteenth Amendment legalizing the federal income tax and the Seventeenth Amendment providing for the direct election of Senators, would Congress have abused the Constitution’s spending clause as they have ever after?<sup>110</sup> Would the Patriot Act, the Affordable Care Act, or TARP have become law?<sup>111</sup> Through these histories – whose lines of argument make their way down from conservative scholars to mainstream conservative media outlets and email alerts – Michelle Obama’s recommendations on healthy eating, President Obama’s “leadership” on issues like financial and healthcare reform, or calls for an active compassionate federal government are all rooted in the gargantuan constitutional betrayals of the early twentieth century.<sup>112</sup> And Republican intransigence on the budget, federal grants to social scientists, and action on climate change are framed as heroic acts of resistance in defense of the Founders’ Constitution. How successful this constitution-talk is likely to be over the long term remains to be seen. But, even if its advance were halted tomorrow, it has had a powerful run and many triumphs in combining seemingly inconsistent elements narratively and symbolically through rhetoric, discourse, symbols, and stories. On the Right, at least, it has been naturalized “tak[ing] on a common-sense quality, a naturalism that elides [its] constructed

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In this on-going fight we will need a better, smarter conservative movement. The Claremont Institute is unique in fighting to win the battle of ideas, the key to overturning the progressive expansion of government in the 20th century. Think of us as a school dedicated to identifying and educating the conservative leaders of the future and advancing their careers.

. . . .

Your support is critical to our mission. I am grateful for it and encourage you to join us by rededicating yourself to victory in the battle of ideas and a return to the government we deserve.

With warmest regards,

Brian Kennedy

President<sup>114</sup>

Distinctive features of the U.S. constitutional order – characterized by a relatively brief, written Constitution fashioned, *ab initio*, to fragment political power, but with its stipulated boundaries and divisions overlapping, shared, abstract, and uncertain – make it (especially when combined with a tradition of providentialist nationalism in its political thought), highly susceptible to influence through stories about purpose and about how understanding the boundaries in certain ways either advances or thwarts that purpose.

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the Affordable Care Act, Democratic Speaker Nancy Pelosi expressed shock that anyone would even raise the law's constitutionality as an issue.<sup>116</sup> In the recent government shutdown by Constitution-wielding conservatives in which it could have been very plausibly contended that Congress was abrogating its duty under the Fourteenth Amendment to honor the national debt, neither the President nor Democratic Party leaders made any serious effort to advance the constitutional case politically.<sup>117</sup> While, true to the moldy commitments they have held since the 1950s and 1960s (as justified by John Rawls and Ronald Dworkin in the 1970s), they are ever willing to fashion arcane and tendentious arguments to judges, they have all but ceded constitutional argument in the public sphere to the Right.<sup>118</sup> This has helped reinforce public perceptions that liberals simply don't care about the Constitution, and do not see it a touchstone of the American political order – a perception that conservatives have taken extensive pains over the course of the last decade to reinforce through genealogies of contemporary liberalism that trace its foundations back to the expressly anti-constitutionalist and anti-Founder commitments of early-twentieth-century Progressives.<sup>119</sup>

One outgrowth of this train of liberal political and intellectual failures is a growing commitment to the proposition that the Constitution itself has failed and needs to be either ditched or radically altered through formal means. Conservatives, of course, will see this too – and conferences like this one – as all the more evidence that they have got liberalism right: that it is a disloyal ideology that seeks to dispense with the foundational commitments of the American constitutional and political order.

In their sustained commitment to using (and creatively refashioning and reinventing) American constitutionalism in the public sphere, conservatives are lapping liberals. All I am arguing here is that, if they want to be successful, they need to make serious attempts to engage in effective constitution-talk in the public sphere, of the sort that their progenitors have engaged in throughout American history. Indeed, even if formal changes to the Constitution are warranted – and I do not argue that they are not – such talk will be needed to secure ratification of these changes in the first place. Either way, as modern

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<sup>116</sup> Doug Bandow, Op-Ed., *Constitutional Death for Obamacare? The Left Threatens John Roberts and the Supreme Court*, FORBES (May 28, 2011), <http://www.forbes.com/sites/>

conservatism has demonstrated, in the U.S. context, successful constitution-talk is essential.<sup>120</sup>

Is formal change needed? Constitutional discourse is essential. But it may not be sufficient. However powerful a discursive approach alone may have been to significant constitutional change in the past, it may be plausibly argued that it no longer (as) significant for the future because, in a firm disjuncture between past and present, the institutional conditions of constitutional politics have changed because of what Stephen Skowronek has called “institutional thickening.”<sup>121</sup> The fluid conditions in which discursive politics flourishes as a route to transformational constitutional change may no longer exist. A developmental past, marked by fundamental shifts, even “constitutional revolutions,” may no longer be consonant with the operative conditions of the constitutional present. This theory of disjuncture is held by Adam Sheingate, who emphasizes contemporary partisan polarization, the declining power of political parties in Congress, and a waxing power of small-bore interests, empowered by changes in the financial sector and campaign finance rules<sup>122</sup> – to which I would add both a cascading commitment to the privatization of public functions and a diverse and growing set of plutocrat policy entrepreneurs with strong interests in making public policy through private means. Sheingate argues that the problem is not too little creative political entrepreneurship, but too much.<sup>123</sup> This entrepreneurship “has accelerated the diffusion of authority in the American political system, exacerbating the effects of separated powers and institutional fragmentation. This has produced tensions between the pursuit of individual and collective political goals . . . .”<sup>124</sup> The result is a new disconnect between political leaders and the public, and the rise of deracinated “governance” via “issue networks” as opposed to government.<sup>125</sup> Under these conditions, a proliferation of veto points and regions of micro-governance (increasingly through the delegation of public authority to private actors, both corporate and plutocratic) has trumped the traditional mechanisms of coordination via public authority that had functioned even in a system of dispersed power.<sup>126</sup>

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<sup>120</sup> Contemporary conservatives offering a list of proposed Article V amendments to the Constitution are immersed in the framings of the Right’s constitution-talk venerating the Founders and the Constitution. See LEVIN, *supra* note 1, at 1 (“I undertook this project *not* because I believe the Constitution, as originally structured, is outdated and outmoded, thereby requiring modernization through amendments, but because of the *opposite*—that is, the necessity and urgency of *restoring* constitutional republicanism.”).

<sup>121</sup> SKOWRONEK, *supra* note 2, at 31.

<sup>122</sup> Sheingate, *supra* note 29, at 17, 23, 28 (discussing the impact of these changes on American political development).

<sup>123</sup> *Id.* at 21.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 28.

<sup>126</sup> *Id.* at 21, 27, 29, 31; see also Joanne Barkan, *Big Philanthropy vs. Democracy: The Plutocrats Go to School*, 60 DISSENT 47, 48 (2013); Joanne Barkan, *Plutocrats at Work:*



A second possible objection to my call for a renewed commitment to public constitution-talk on the left as a means of constitutional reform, renovation,

