Paulsens Give the Constitution Its Due

realclearpolitics.com/articles/2015/06/07/paulsens_give_the_constitution_its_due_126880.html

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June 07, 2015

What is the proper role of the U.S. government in regulating the economy and providing a social safety net? Do two men (or two women) in the United States have a right to marry each other? What are the boundaries of the wide latitude that America gives to speech, including money-funded campaign speech and hate speech?

Increasingly, prominent Democrats are inclined to answer these controversial questions by insisting that their favored policies must flow from the Constitution because it would be unthinkable for America's founding charter not to prescribe outcomes that are fair and just. This is a rationale for disregarding the Constitution as written in favor of justice—as understood by progressives—and for marginalizing their political opponents as not only mistaken but essentially un-American.

In contrast, Tea Party conservatives believe that controversial political questions are best answered through recovering the Constitution in its original purity. But their claims about what the Constitution dictates also bear a suspicious resemblance to their preferred policy outcomes.

In insisting on the need to return to the Constitution, conservatives get closer to the truth than progressives. America has a written Constitution that, according to Article VI, represents—along with federal laws and treaties made in accordance with it—"the supreme law of the land." Our written Constitution does not give Congress, the president, or the courts a boundless mandate to enact whatever laws and take whatever actions they believe will advance the public interest. Rather, it lays out a framework that restrains, and specifies the procedures for the exercise of, government power.

Tea Party types, however, often exaggerate the Constitution's purity and clarity. While it creates a federal government of enumerated and limited powers, the Constitution nevertheless employs broad language—"the regulation of commerce," "privileges and immunities of citizens," "equal protection of the laws"—whose original meaning can be elusive, and whose application to contemporary challenges depends on a shifting landscape of social understandings, economic and technological developments, and moral judgments.

It is therefore regrettable—indeed, it is harmful to the public interest—that college education has marginalized study of the Constitution. History departments prefer to dwell on the ways in which the United States has oppressed people on the basis of race, class, and gender. Political science departments specialize in equipping students with the latest methodological

techniques for transforming the study of politics into a proper science on the model of physics. The progressive scholars who dominate the nation's law schools frequently place a transformative political agenda ahead of mastery of constitutional text, structure, and history.

Where, then—whether one wishes to become an informed citizen, write about national politics as a journalist or scholar, or argue or adjudicate constitutional questions in a court of law—is one to acquire the indispensable knowledge about the Constitution and the history of the nation's efforts to live in accordance with it?

A great place to start is "The Constitution: An Introduction," a new book by the remarkable father-son team of Michael Stokes Paulsen, an eminent professor of law at the University of St. Thomas, Minneapolis, and Luke Paulsen, a recent graduate of Princeton, where he majored in computer science with minors in the classics and humanities.

The Constitution, the Paulsens demonstrate, actually represented a re-founding. In 1776, in a revolutionary act, the Declaration of Independence announced the moral, political and legal basis for the colonists' break with Great Britain and the establishment of the United States of America. Eleven years later, delegates from the states returned to Philadelphia to undertake, the Paulsens write, a "quasi-revolutionary" act: the repudiation of the first government of the United States—the weak and ineffectual Articles of Confederation—and the forging of a new one.

Never before had representatives gathered, as they did in Philadelphia in spring and summer 1787, to produce a "written constitution for a confederate republic covering a vast territory and embracing thirteen separate states." Never before had government so explicitly and emphatically been grounded in individual liberty and the consent of the governed. And never before had citizens subjected the design of government—representation, separation of powers, and federalism—to such exacting debate.

Their extended deliberations produced a marvel of political craftsmanship. The Paulsens clarify the intricate arrangement of checks and balances by means of which the Constitution thwarts government from invading individual liberty while preserving the power and flexibility government needs to accomplish its proper tasks. They highlight the compromises between the big states and small states that yielded a House of Representatives based on proportional representation and a Senate in which each state is represented equally. They examine Alexander Hamilton's argument that the Constitution's structure adequately protected liberty, but explain how the Bill of Rights—promptly incorporated into the Constitution in the form of the first 10 amendments—provides salutary reinforcement to the structural protections. And while recognizing the political factors that impelled Northern states to compromise on slavery, the Paulsens deplore the document's original sanction of that heinous institution.

The Paulsens give Chief Justice John Marshall his due for laying out in landmark cases in the early decades of the 19th century the constitutional bases of judicial review and the scope of federal power. But they celebrate Abraham Lincoln—who, even when he stretched his constitutional authority to the hilt, did so with an acute appreciation of constitutional form and principle—as the supreme hero of the Constitution's first hundred years.

Lincoln did not live to see the great post-Civil War constitutional amendments that carried forward his life's work: the 13th Amendment abolishing slavery, the 14th guaranteeing due process and equal protection of the laws, and the 15th securing against racial discrimination the right to vote. These revisions also greatly increased the federal government's reach by expanding the responsibility of all three branches to protect citizens' liberty from infringement by the states.

Between 1876 and 1936, however, the Supreme Court betrayed the Constitution. The Paulsens show that it "denied equal rights to women; upheld racial segregation; refused to protect the constitutional right to vote without discrimination on the basis of race; denied the full benefits of the Constitution to persons in newly acquired overseas territories; struck down social welfare legislation it disliked on policy grounds; cheered on discrimination against persons with disabilities; and sided with government power to suppress the freedom of speech and the free exercise of religion."

The middle of the 20th century, the Paulsens argue, brought a restoration. While making way for the New Deal by declining to impose its view of sound social welfare legislation, the court clarified in *West Virginia State Board of Education v. Barnette* (1943) the Constitution's broad protection of freedom of speech; spelled out constitutional limits on executive power in *Youngstown Sheet and Tube Co. v. Sawyer* (1952); and in *Brown v. Board of Education* (1954) struck down as a denial of the equal protection of the laws the pernicious practice of consigning black children to separate schools.

The period since 1960, according to the Paulsens, has been marked by another "surge in judicial activism." The paradigm case is *Roe v. Wade* (1973). There, the court short-circuited political debate of a controversial issue by constructing out of evanescent constitutional intimations a right of women to terminate their pregnancies, and by fashioning a trimester scheme for regulating the exercise of the new right—an act of legislation masquerading as a judicial decision. The court has subsequently marched across an array of tough policy disputes—including voting rights, the use of race in decisions about university admissions, and property rights—becoming "more cavalier about legal analysis and less concerned with principled application of the document itself."

A better approach shines forth from the Paulsens' measured and incisive exploration of constitutional principle and practice. To deal wisely with the controversial questions that inevitably arise under our written Constitution, it is not some delusive purity that we must

recover. Rather, it is to the supremacy of the Constitution in its complex dedication to liberty and limited government that we should return.

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