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A Constitution Day Defense of the Constitution

I normally don't use this website to stake out positions on political issues. I've noted before that I lack conviction on pretty much all issues because I can't help but subject myself to both sides so much that they both sound reasonable -- or, just as often, unreasonable.

That's not to say I'm devoid of at least weakly held opinions; I certainly find myself more drawn to one side of many issues, but not with much partisan consistency. For example, I'm closer to Republicans than Democrats on competitive tax rates, Israel, nuclear energy, and entitlement reform, but I'm closer to Democrats than Republicans on education spending, marriage equality, international cooperation, and appreciation for civil servants' expertise. Sometimes I'm even politically divided *within* an issue. I agree, for example, with the *Dobbs v. Jackson* ruling, but I hope the political branches of our federal and state governments protect abortion rights.

One area where I think the left has lost the thread is their recent frustrations with the Constitution as an "undemocratic" document that has gotten in the way of pushing through progressive policy. These frustrations usually manifest through complaints about the unelected Supreme Court, archaic Electoral College, states' equal representation in the Senate despite vastly disparate population, and the difficulty amending the Constitution itself.

I think these attacks have lost sight of the forest by focusing on the trees. That's a shame, because it's a beautiful forest, one deserving of the kind of conservation liberals would appreciate were it found in nature. The Constitution isn't the cause of our problems. It's the opposite. It's the solution.

Yes, on the Constitution, I am a conservative. And since today is Constitution Day, held to commemorate the signing of the Constitution on September 17, 1787, I'd like to tell you why.

The Constitution is full of contradictions, which some say undermine the document and gum up our government. I'd like to argue these contradictions are a feature, not a bug. Before I do that, however, we must first talk about the document the Constitution replaced.

The Articles of Confederation

In the autumn of 1787, when the framers emerged from the Pennsylvania State House with the Constitution, many Americans were shocked, and a not insignificant number were appalled. The mandate from the delegates' home states was not to write a new governing document for the nation, but rather to make changes to the existing laws of the land as outlined in the Articles of Confederation.

Since 1781, the Articles had loosely bound together the 13 states five years after they collectively declared independence from the British Empire. Its drafters knew that to gain support from each of the 13 states, the document would have to overtly gesture toward self-rule for each of them. Few wanted to exchange one faraway powerful capital in London for a less faraway powerful capital in Philadelphia.

The Articles therefore decentralized authority. There was no chief executive that could resemble a king and no federal judiciary that could overturn states' laws. The country's sole branch, a unicameral Congress where every state got one vote and therefore every state felt respected as an equal, was almost totally neutered; it couldn't enforce its laws, regulate trade, or directly tax the people, and so it couldn't fund a robust military that could potentially patrol the streets and monitor citizens. Finally, the document could not be amended without approval from all 13 states; each state could therefore feel sovereign and safe in the rules to which it had agreed. This hard-won sovereignty could never be ceded without their own approval.

Each of these provisions were clear reactions to colonial rule, particularly during its latter days when colonists felt both their natural and British rights were denied. It was Britain that imposed laws on the colonists and could veto their local assemblies. It was Britain, through its Navigation, Molasses, and Tea acts, that controlled colonial trade. It was Britain, through its Sugar, Stamp, and Townshend acts, that taxed the people without their consent. It was Britain, through its Quartering Act, that forced its soldiers upon resistant colonists. And then it was Britain that plundered seas, ravaged coasts, burnt towns, and destroyed the lives of Americans during the Revolutionary War.

Coming out of the colonial period and in the midst of the War of Independence, we can forgive the Americans for a collective PTSD when framing a new government. Traumatized as they were, the framers of the Articles devised a government that could place itself on the opposite end of a political spectrum -- opposite of Britain, and therefore opposite of tyranny.

In a way, it was a liberal triumph, one that could be just as celebrated as the liberal triumph in the war, the one that overwhelmed the Loyalist, Tory resistance. By enacting the Articles of Confederation, the liberals codified the spirit of the Declaration of Independence as best they could, allowing everyone to live, enjoy liberty, and pursue happiness while living under a severely limited government.

It didn't go well. The Articles are generally deemed a failure. States saw themselves as economic competitors, harming free trade and the broader economy. States resisted supplying requested tax money to a perpetually underfunded national government. The national government therefore had trouble paying down its war debt and faced bad credit. Military readiness suffered. Threats

surrounded the fragile and decentralized nation as the Spanish Empire denied access to the Mississippi and wooed American pioneers, France demanded reparations and loyalty, and British soldiers lingered on the American frontier while supplying arms to hostile native tribes.

The feeble national government was overwhelmed, its hands tied. Change was necessary. The task of deciding what to change fell to a delegation of 12 states' representatives in the hot Philadelphia summer of 1787.

The Constitution

As noted earlier, the delegates at the Constitutional Convention were sent by the states to make sensible changes to the Articles. Most of these delegates, however, found the document fundamentally flawed. Rather than merely applying a new coat of paint to a house with a brittle foundation, they decided to rebuild from the ground up. They drafted a totally new document, cognizant that upon its completion they'd have to sell this document to the country and secure *ex post facto* approval for their failure to follow instructions.

The general structure of their proposed government is likely familiar to you. Articles I, II, and III created three branches: a greatly empowered Congress that could directly legislate and tax; a strong, one-man executive called a president; and a Supreme Court with purview to interpret the Constitution. The Constitution that this Court interpreted was, according to Article VI, "supreme" over states. Article IV placed limits on state power. Article V made it easier to amend the Constitution than had the Articles, which demanded unanimity from the states. That said, it wouldn't be *too* easy to amend; a proposed modification must earn two-thirds support from each Congressional chamber and approval from three-quarters of the states, ensuring that sufficient consensus, rather than a narrow and transient majority, assents to the modification.

In sum, it was an acknowledgement that coming out of the traumatic late colonial period, the Articles had over-corrected. The Convention determined that rather than running to the spectrum's other extreme, it was more prudent to be somewhere in the middle, one of the many lessons the framers, who forged numerous compromises to settle divergent views, hoped would reverberate across time.

The Constitution's seventh and final Article was its *pièce de résistance*. It would not be forced upon the people by fiat. It wouldn't even seek approval from state legislatures, who might interpret the proposal as an outright usurpation of their power. No, Article VII proposed that "Ratification of the Conventions of nine States" would be seen as sufficient for those nine states to form a more perfect union. Delegates at these state-level conventions would be elected by the people for the express purpose of debating and then either supporting or rejecting this document. Only through this process could the document truthfully begin with "We the People," and not "We the States" or "We the Delegates."

It was also a clever ruse. By deciding not to amend the Articles, which would have been impossible without all 13 states (and in fact tiny Rhode Island didn't even attend the Constitutional Convention because its absence ensured no changes could be made to a system that gave them authority on par with mighty Virginia and Pennsylvania), writing an entirely new document with democratic rules and a lower threshold greatly increased its chances for ratification. Plus, no sovereign state was being forced out of the Articles agreement, in which up to four states could still choose to remain. Rather, sovereign states were choosing to leave it, as was their right.

What followed should make very American proud. Never before in human history had so many people partaken in the democratic process on a singular question about how they would be governed. The Constitution, short enough to be published in newspapers from New Hampshire to Georgia, was poured over by the voters. The 85 epic *Federalist* papers circulated, defending and expounding on every single Constitutional clause while persuasively articulating the federalists' prioritizes of stability, unity, and national defense. States loosened property requirements to partake in the deliberation and voting. A genuine debate filled social taverns, city squares, and column inches.

It wasn't easy -- antifederalists worked to either stop ratification or first extract concessions before acquiescing, first and foremost among them the promise of a bill of rights to be added -- but over the next few years, each of the states agreed to the new document. In 1789, the new branches accepted control from the old Congress, and our Constitutional period began. And here's another thing to make Americans proud: the document is now the world's oldest and longest-standing written and codified national constitution.

And yet, instead of pride, these days we too often hear about what some Americans *don't* like about the Constitution, rather than their appreciation for all it has given us.

Fair enough, it contains confusing contradictions and its principles tend to frustrate ambitious activists, but it's ultimately these very contradictions that offer us guidance on how to resolve our frustrations and create the kind of unity wisely prioritized by the framers themselves.

The Constitution's Contradictions and Frustrations

There is no doubt that the Constitution has its share of contradictions. The Parliamentary systems of the world might find it funny that one half of Congress can block the other half. It's admittedly strange that the president is not in the legislative branch but can veto legislation. It is also questionable that a democratic people give power to an unelected high Court, whose members have lifetime tenure, and that this Court can overturn the will of democratically elected branches and state governments. Meanwhile, we have uneven laws and administration across our country due to federalism reserving some powers to state governments, a reality writ large after last year's *Dobbs v. Jackson* ruling. And finally, the Constitution created a much stronger national

government than the government it replaced, yet it also limited that national government through separation of powers, checks and balances, and states' rights.

Considering all of the above, one would be permitted to diagnose our Constitutional framers as mad schizophrenics. Was there even a grand plan at work?

Yes, absolutely. Both the cause *and goals* of this ostensible schizophrenia was the same exact thing: compromise.

First the cause, then the goals. Compromise created our two-house Congress because representatives of the big and little states were at loggerheads over the issue of fair representation in Congress; Convention delegates from the big states thought representation should be proportional, giving more populous states more seats in Congress, whereas delegations from the small states, worried about being pushed around by big states, insisted on the equal representation previously granted by the still-in-effect Articles of Confederation. The solution, as put forward by Connecticut's Roger Sherman in what became known as the Great Compromise, was a bicameral (two-chamber) Congress that could reflect population in one chamber and states' equality in the other. These chambers became the House of Representatives, where states' delegation size are proportional to their population, and the Senate, which gives every state two seats. Neither can pass a bill out of Congress without the other, and so neither big nor little states could control the agenda.

If a bill does survive both chambers, it heads to the executive's desk. The president's veto pen allowed the presidency to guard itself against a Congress that might look to encroach on executive authority, thus maintaining a defensive barrier between a branch looking to reflect the people's will and a branch meant to safeguard the nation, two not always compatible motivations. Coming out of the Articles period, when state legislatures could too easily get pushed around by their voters and threaten mathematical minorities -- a specter often called "tyranny of the majority" -- the Convention worried that Congress might get caught up in majoritarian, myopic lawmaking. The compromise, here, was to make the people's branch the most powerful -- Congress makes the laws, lays taxes, funds operations, and has oversight over the other branches -- but also to make sure that it couldn't run amok. It was an acknowledgement that just because something is popular didn't mean it was right.

A chief executive with a stable four-year term and elected neither by the people nor Congress could send back a bad bill, which could still be overridden with two-thirds support. All considered, although the veto pen disrupts action, it does force Congress to further reflect upon a bill.

Even if the president concurs, there is yet a third branch that can weigh in. The federal judiciary is also rooted in compromise. Many Americans were reluctant to turn over states' judicial powers to a federal body of unelected judges, whereas others saw value in a clear, ongoing interpretation of the Constitution and federal law that was not affected by the siren song of popularity. To assuage fears of judicial tyranny, the branch was created as the weakest of the three. Unlike its proactive counterparts, the judicial branch is purely reactive, waiting for cases to come to it. Its

members are bound by text. It had no military or police to enforce its decisions. Its structure can be revamped by Congress and its members impeached by it. Article III still mandated trial by local juries in criminal cases. Still, for issues of Constitutional or national importance, it was deemed important to give a qualified, experienced body the power of judicial review.

Finally, for the cause behind frustrating federalism, which reserves many powers to the states, we must consider that neither the state governments, nor the vocal antifederalists who resisted the Constitution, would have complied with a document that subsumed all state powers into a unitary government. Although enough reasonable people saw the wisdom in a strengthened national government, it was conceded that some powers, such as regulating education, intrastate trade, and local law enforcement, should be left to the states. Only with this compromise would the Constitution have garnered enough support for ratification. Here, the Electoral College was critical. Sherman's Great Compromise doubled as a sop to the nervous small states in presidential elections as well; since a state's number of House members plus its number of senators determines its allotted electoral votes, the two electoral votes all states receive from their senate delegation smooths states' population imbalance. This allowance propped up small states that were worried about losing their power and soothed their reservations about joining the new compact. (The infamous Three-Fifths Compromise also infected the Electoral College, as it boosted southern states' populations for the purposes of representation even if its enslaved blacks weren't full citizens with voting rights. A straight popular vote would have led to northern domination of the presidency, an unacceptable circumstance to southern states.)

All of these compromises lead to what is perhaps the most prominent complaint about Washington: these internal contradictions create gridlock. A Congress divided. A presidential veto. Judicial review. As many as 50 states pulling in separate directions. *Nothing can get done!*

Is the Constitution indeed the cause of our problems in Washington?

The answer, as you should know by now, is no.

The Constitution's Lessons

I started today's post by saying "The Constitution isn't the cause of our problems. It's the opposite. It's the solution." Here's what I mean.

The beauty of separation of powers, paired with checks and balances, isn't just what's emphasized in school -- that these principles obviate tyranny. That's easy. But there's more to it.

These principles ask our elected officials to listen, negotiate, and at times concede. Members of the House must consider what the Senate wants and vice versa. Both chambers know the veto pen looms and must dialogue with the person wielding it. The Court, too, forces our lawmakers to consider constitutionality and perhaps revise breaches of it. The system aims to launder all ideas before the country is asked to breathe them in.

The Constitution's call to compromise is as loud today as it was in 1787, but it seems we stopped listening. It's much sexier these days for politicians and candidates to be labeled a "fighter" rather than a "compromiser," but that's not the Constitution's fault. It's ours.

The Constitution doesn't want a fighter. No one in the Constitutional system can be successful alone. They are one cog in an intricate machine, one that is calibrated to ensure a fighter cannot become a tyrant, that a legislator must be concerned with not just with the needs of their own constituencies, but the needs of other legislators and other constituencies.

This fighter, it is sometimes thought, will be able to lead by example and by force of will build a coalition large enough for one party to control the agenda for years to come. This is a partisan pipe dream. Little about recent US history tells us that one party will be defeated so thoroughly that it won't be able to resist the majority. Even President Obama with 60 Democratic senators struggled to put through his top priority, the Affordable Care Act.

The framers anticipated this difficulty. They recognized the United States was an ideologically diverse nation. In such a society there is no chance to reach unanimity on most issues, or even come close. There were deep divisions then, and there certainly are today.

But the best solution to that problem is not to enable a narrow majority to force its views on the minority. To best govern, the Constitution requires us to compromise, because compromise is good. Both sides should get something. Neither side should be intransigent. If they are, good governance is nearly impossible. It should be seen as the mark of a successful government that many parties are generally satisfied, not that the majority party got everything it wanted.

By trying to reach this kind of consensus, we increase our chances for unity. Unity, in this case, doesn't mean that everyone agrees on the issues. Rather, unity means that the system by which we make decisions is seen as legitimate. And that only happens if all sides feel heard. Fighters have never made the best listeners.

Because of this recent obsession with fighting the other side, our problems have become exacerbated. Democrats have become hijacked by the idea that an undemocratic Constitution has propped up the Republican Party and led to a conservative Supreme Court that is now countermanding the will of the people. The solution, some of them think, is not to listen, learn, and grow, but to ban social media accounts, insist they know best, and change the rules to increase their political power. Didn't liberals use to complain that *conservatives* wanted to ban speech and claim moral absolutism?

But Republicans aren't any better here. After losing the last presidential election, many of them rejected election results certified by our Constitutional system, and when their challenges came up empty in the courts due to a lack of evidence or standing, they took to mobbing the Capitol building in hopes of forcing their will on the duly elected government. They now reward the driver of this extralegal scheme with a commanding lead in the party's primary less than three years after he organized a mob to maintain his political position. What has become of a

conservative movement that used to value institutions and stability only via slow, deliberate change? I thought *liberals* were supposed to be the radical revolutionaries.

Not tied down to anything, which is precisely what a Constitution aims to do, both sides have lost themselves. It's more important than ever to have our Constitutional ballast, because without it we'd be adrift in dangerous waters governed by partisan tides.

Our two parties have become so thoroughly disgusted by the other side, they can't bear to cooperate, and so little gets done. To that, critics of the Constitution say I'm making their point. Because it is now so hard to govern, they argue, the Constitution is broken. I ask, however, whether governing by small majorities is really the better way.

Imagine the political turbulence of one majoritarian government overturning all the legislation of the last. It's embarrassing enough that presidential candidates of both parties feel compelled to promise executive orders undoing their predecessor's on "day one" -- this kind of instability is precisely the opposite of the presidency intended by the framers -- but if our Congress can follow suit, it would put the country on a dizzying swivel. In a majoritarian governing system, neither party would triumph for long; as they have for the last 30 years, they'll continue trading the Speaker's office as if it were fronted by a revolving door, only they'd treat it like their own kingdom for two years at a time.

If that were to happen, those in the minority would thank our founding fathers for that one last Constitutional contradiction, federalism, where local control can still govern in a way local voters prefer. Although federalism disrupts national policy, what's lost in national action is gained in our famous "laboratories of democracy." Why trot out one idea for the nation when we can have up to 50 ideas, allowing the most effective to catch on and the least effective to deservedly die? As long as issues of national importance *can* be handled in a national way -- an option afforded by the Constitution and not by the Articles of Confederation -- it is sensible for a freeing federalism to prevail, with competition between states forcing legislatures to oversee sensible government or lose population and revenue.

By learning these lessons from the Constitution -- that listening is more valuable than fighting, that compromise is the only way to consensus, that unity is better than division, and that a competition of ideas increases the chances that one of them will be good -- we'd recognize that it's not the Constitution that is broken. It's us. The Constitution is how we mend.

Happy Constitution Day, everyone.