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For Love of Country

Nationalism can be a healthy and constructive force. Since nationalistic sentiments also have wide appeal and durability, it would be wiser to cultivate that kind of nationalism than to attempt to move beyond it. *Ramesh Ponnuru & Richard Lowry*



COVER: FREDERICK CHILDE HASSAM'S *FLAGS ON FIFTH AVENUE, WINTER 1919*, 1918.
(PHOTO BY BUYENLARGE/GETTY IMAGES)

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state's eight House seats (62.5 percent) with just 47.9 percent of the statewide vote. How? They let House Democrats run unopposed in two of those eight districts, one of which (Ron Kind's D+5 third district) Trump actually won by five points. In the other six, Republicans won 58.5 percent of the two-party vote and carried five districts. Had they run candidates in those two districts, a reasonable estimate would have them winning more than 52 percent of the two-party vote statewide, comparable to Republican majorities of the two-party vote in the Senate and presidential contests, which were 51.7 percent and 50.4 percent, respectively. Even if House seats were awarded proportionally in Wisconsin, Democrats would have won only one additional seat. And proportional districts would be hard to draw: Hillary Clinton carried just twelve of Wisconsin's 72 counties, mostly in the Madison, Milwaukee, and Eau Claire areas; there were only two places in the state where she carried adjacent counties.

In Virginia, Republicans won seven of eleven seats (63.6 percent) with 49.8 percent of the statewide two-party House vote. The map was likely a larger factor in Virginia than in Wisconsin, but once again Republicans would probably have won a majority of the two-party vote just by running a candidate in every district. Democrat Gerry Connolly ran unopposed in a district where Trump got 29 percent of the two-party vote. Republicans won seven of ten contested seats with 53.4 percent of the two-party vote, and would have cleared 51 percent statewide if they'd won just the Trump voters in Connolly's district. Democrats in Virginia are also highly concentrated in a few urban areas; despite winning the state, Hillary Clinton carried just 30 percent of its 133 counties, and no adjacent counties outside the Virginia Beach, Richmond, and D.C.-suburbs areas.

Political professionals put great effort into favorable gerrymanders, just as they do with many aspects of campaigning that matter at the margins. But the margins matter only when the race is very close. If Democrats want to retake the House, their best bet is a combination of the factors that benefited them in 2006: a national Democratic wave and the recruitment of more House candidates appealing to voters outside the big blue cities. Complaining about a practice that dates back to the Founding Fathers won't make either of those things happen. **NR**

Fair-Weather Originalists

The Left discovers the Constitution

BY JOSH BLACKMAN

ALL of a sudden, progressives have discovered the separation of powers. After eight years spent ridiculing tea partiers who bitterly cling to the Constitution, liberals now embrace its structural protections as their last, best hope to stop President Trump. Today's Left is just the most recent social movement that has appealed to the Framers after failing at the ballot box. And while I always welcome new students of originalism, I can offer only two cheers for our fair-weather constitutionalists. Their conversion, alas, is born of political expediency, not any sense of constitutional consistency.

From 2009 through early 2017, President Obama's supporters blithely enabled him as he trampled the Constitution's parchment barriers to implement progressive policies: granting lawful presence to millions of aliens, suspending enforcement of marijuana laws, rewriting onerous provisions of Obamacare, entering into international "agreements" without Senate ratification, and the list goes on. At each juncture, charges of lawbreaking on the right were met with crickets on the left. Their defense: The president has the discretion to act; courts should not serve as forums for political disputes; gridlock in Congress justifies the president's actions. All the while, I warned that the precedents set by the 44th president would pave the way for even bolder actions by the 45th president.

Obama acolytes, who should have foreseen this risk, were complacent, perhaps because it was simply unthinkable that a Republican could regain the White House. What's the downside to giving boundless authority to an executive you like? Alas, on Election Day, the Left was

left flat-footed by Trump's unexpected victory. On a dime, they turned to an unlikely source to preserve their progressive values: the text and history of the Constitution.

Frustrated that President Trump never released his tax returns and refuses to divest his business interests, newly minted textualists seized on one of the most obscure provisions of the Constitution. Article I, Section 9, Clause 8, known as the emolument clause, provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." At a minimum, the provision means that certain federal officers cannot receive certain types of payment from foreign governments.

Up until 2016, discussions of the emolument clause were limited to law reviews. Scholars debated about what an emolument is and whether the prohibition applies to the commander-in-chief. For example, President Washington accepted a key to the Bastille from the Marquis de Lafayette without seeking Congress's permission, but when President Jackson received a gold medal from Simón Bolívar, he surrendered it to Congress. Whether our first president violated the emolument clause was an interesting theoretical question, but practically it was irrelevant—until it became useful to progressive causes. A few days after the recent inauguration, Citizens for Responsibility and Ethics in Washington (CREW) filed a federal lawsuit against the president. The group alleged that revenue collected by President Trump's business interests from foreign governments (e.g. hotel bills) constituted an unconstitutional emolument.

Despite the current outrage about payments from foreign governments, not a single constitutional scholar has ever batted an eyelash when sitting presidents profited from foreign governments. (Indeed, of the four law professors who joined CREW's lawsuit, only one's scholarship had actually discussed the Emoluments Clause before 2016.) President Obama's books, for example, have generated nearly \$17 million in royalties. It is safe to assume that at least one copy has been purchased by a foreign government. Where were the demands

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President Donald Trump signs an executive order on immigration, January 25, 2017.

for the president to release his global royalty statements so we could determine whether Vladimir Putin or the National Library of China bought *Dreams from My Father*?

It doesn't matter that book royalties are counted in pennies; the Constitution does not set a threshold amount for an unconstitutional emolument. Nor does Article I distinguish between payments made through a publishing company and those made through a real-estate trust. Do such payments constitute emoluments from foreign states? Who knows? Not even the most ardent tea-partier opponents seized upon this obscure clause, let alone filed a legal challenge. The issue has never been litigated.

As a matter of policy, I think President Trump should divest his business interests. But this is inherently a political question—one that can be resolved only by Congress. Indeed, the Constitution specifically states that the president may receive foreign emoluments with “the Consent of the Congress.” Here the Framers offered a hint to the judiciary: Stay away. Under the Supreme Court's precedents, if there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” judges should leave its resolution to the elected branches. The emoluments clause provides just such a commitment. After eight years of charges

that Republicans were dragging all manner of political disputes into federal courts, a modicum of consistency would ensure that debates over President Trump's foreign emoluments are best left to the ballot box.

Then there is the matter of federalism. Before Hillary Clinton had even conceded, elected officials in blue states, out of desperation, appealed to an unlikely patron saint: James Madison. California boasted that it seeks to become the new Texas and rely on the principles of federalism to resist incursions from the Trump administration. In due time, California will assert that it is unconstitutional for the Trump administration to withhold federal funds from sanctuary cities.

Once, and only once, has the Supreme Court held that clawing back federal funding from states for their refusal to adopt a policy change violates the principles of federalism. Under the Affordable Care Act (ACA), if a state refused to expand its Medicaid rolls, the federal government threatened to withhold all of its Medicaid funding. For example, the Obama administration warned Arizona that it stood to lose nearly \$8 billion of federal funding, which was nearly a quarter of its state budget. The Supreme Court observed that, across the board, “Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to

83 percent of those costs.” In other words, states stood to lose on average 10 percent of their budgets for failing to comply with Obamacare.

Back in 2012, California and a dozen other states urged the Supreme Court to rule that this policy was perfectly lawful. “Although withdrawing from” Medicaid “may be difficult and politically unpopular,” they wrote, “it remains an option.” Fortunately for California—the California of today, at least—seven justices disagreed with their position. The ACA's “financial ‘inducement,’” explained Chief Justice Roberts, “is much more than ‘relatively mild encouragement’—it is a gun to the head.” Because “pressure turn[ed] into compulsion,” the Court concluded, the ACA's Medicaid-expansion provision was unconstitutional. Today, blue states proudly wrap themselves in the Obamacare decision they once opposed.

However, a passing familiarity with federal policy over the last several decades will show that virtually no programs that withhold money from noncompliant states are unconstitutional. Congress routinely dangles aid to encourage states to comply with federal programs. For example, South Dakota challenged a law that would withhold 5 percent of federal highway funds if the state refused to raise its drinking age to 21. In 1987, the Supreme Court upheld this law, finding that “Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose.” The amount at issue was minuscule, roughly \$4 million—“less than half of one percent of South Dakota's budget at the time.”

President Trump's recent executive order on immigration threatens to withhold from sanctuary jurisdictions all “Federal grants, except as deemed necessary for law enforcement purposes.” New York City's comptroller general indicated that the city could lose roughly \$9 million in grants. The Big Apple has a total budget of nearly \$90 billion, so the withheld funds would constitute perhaps 0.01 percent of the city's budget. This falls far short of the 10 percent at issue in the Obamacare case, an amount that progressive states insisted in their brief was not coercive.

Still, if California and New York seek to urge the Supreme Court to

expand its federalist principles and make it harder for the federal government to coerce states to act, I would be all too happy to join their fight. Putting more teeth into spending jurisprudence will work to the benefit of the cause of limited government, as other federal programs, which threaten to withhold comparably small amounts—including many environmental regimes—would be subject to invalidation.

Another favorite target of liberals is, or at least was, *Printz v. United States*. This 1997 case held that Congress could not commandeer state law-enforcement officials to perform firearms background checks. A gaggle of blue states filed a brief in *Printz* supporting the constitutionality of the Clinton administration's conscriptive gun-control law. The provision, they wrote, was "no different in kind from the type of joint state-federal law enforcement efforts that occur routinely in many contexts" and "represent[ed] a minimal and temporary request for ministerial assistance from the States."

Further, the brief explained, because the mandate affected only individual law-enforcement officers, and not "states as states," it did not "coerce state compliance." Rather, the law "merely request[ed] that executive officers—law enforcement officials—undertake an activity that is similar to many performed in the normal course of their duties." After his retirement, Justice John Paul Stevens suggested a constitutional amendment to override the *Printz* decision. Now, however, many of those same states are objecting bitterly to the new president's attempts to require state and local law-enforcement officers to enforce federal immigration law, and are using the "anti-commandeering" rule, which they opposed in *Printz*, to argue against it.

All these examples of ambivalence to principle are the embodiment of fair-weather constitutionalism. But a principle that was not justified by the text and history of the Constitution before November 8, 2016, does not become justified after Election Day. Those committed to the original understanding of the Constitution should welcome those who—at least for the moment—defend federalism and the separation of powers, but must not shirk from exposing this marriage of convenience. NR

Doctor Doom

Michael Mann, climate scientist, demands that you submit

BY IAN TUTTLE

IN early January, *Slate* columnist Eric Holthaus tweeted: "I'm starting my 11th year working on climate change, including the last 4 in daily journalism. Today I went to see a counselor about it." Holthaus announced that he was in "despair" over climate-change inaction: "There are days where I literally can't work. I'll read a story & shut down for rest of the day. Not much helps besides exercise & time." His job, he says, is "chronicling planetary suicide."

Holthaus's tweets, and the massive online group-therapy session that followed, would be amusing were they not so pitiful. Here is the emotional toll of buying into one of our most saleable beliefs at present: that the

planet faces imminent destruction as a result of anthropogenic climate change, rescue from which is being held up by greedy midwestern oilmen, the political operatives in their pocket, and obnoxious Republican uncles swallowed up in ignorance.

There is an extensive literature in this new millenarianism, the latest contribution to which is Michael E. Mann and Tom Toles's *The Madhouse Effect: How Climate Change Denial Is Threatening Our Planet, Destroying Our Politics, and Driving Us Crazy*. Mann, as NATIONAL REVIEW readers may know, is the creator of the much-ballyhooed "hockey stick" climate graph, which purports to show an unprecedented, precipitous warming of the climate beginning in 1920; he is also currently suing NATIONAL REVIEW for having the audacity to question his findings. Tom Toles is a cartoonist for the *Washington Post*, whose contribution to the book is several dozen smug, self-congratulatory drawings mocking Republicans as avaricious, oblivious, and/or simply stupid.

Readers familiar with climate-change zealotry will find recognizable

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