Constitutional government: the soul of modern democracy

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ALTHOUGH modern democracy is unhappy with the word “soul,” it has one nonetheless; and its soul is not healthy today. The disease is widely known as “dependency,” the popular disposition, denounced mainly by conservatives, to depend on others, especially government, to secure one’s well-being. This disease extends beyond welfare dependency in the narrow sense to include all who depend on their entitlements in a society that no longer requires or encourages (and often does not permit) free choice. The liberal version of dependency, heard a generation ago, was “apathy” toward social problems; and the radical or neo-Marxist term has been “false consciousness” distracting the people from revolution.

Clearly a similar concern exists in diverse quarters, but defined diversely in partisan modes. One might be tempted to object that the complaints cancel each other out because each is aimed at the others. One might add that to be concerned with one’s health is a sign of health rather than of dependency, apathy, or false consciousness. But these objections to the diagnosis are complacent. If nothing else, the authority of Tocqueville, whose word is worth far more than our perceptions (because it is based on his), should prompt us to fear the onset of “individualism,” as he called the dis-
ease. The similarity in the complaints we hear today suggests that each may have hold of an important truth in its own way, though not necessarily with equal discernment. And the healthiness of concern for one’s health depends on the cure one chooses.

To understand this disease of modern democracy, we should begin by comparing it to the evil that the American Founders feared from popular government when they made the Constitution. We see quickly that whereas we fear a people with too little spirit and activity, they feared one with too much spirit and aggressiveness. Whereas we fear an apathetic or dependent majority that does not know how to claim its rights or to exercise them, they feared an overbearing majority faction—Madison’s famous argument in Federalist No. 10 leaps to mind. The Founders’ remedy against an over-active people was, to describe it most generally, a constitution that puts government at a distance from the people. By contrast to previous republics outside America, this one was entirely representative; the people could not act themselves but could only elect others to act in their place. These representatives (in the federal government) had longer terms of office than were usual even in the American states. And since within the government the Founders were most wary of “legislative usurpation” from the branch closest to the people, they built a strong executive and an independent judiciary to stand up against the people. These two branches were said to be derived from the people and to be acting in the interest of the people, but their strength, it was thought, would not be exercised at the behest of the people. On the contrary, these two essentially non-republican institutions, whose democratic legitimacy we now take for granted, were originally intended to oppose the momentary inclinations of the people. This popular government would not “lead” the people (“leadership” is mostly used pejoratively in The Federalist) so much as “control” it. Imagine an official today who offered his excellent “control” of the people as an inducement to his reelection. And yet, when one reflects on it, what is so wrong with a people controlling itself through its government? In the choice between government leadership and government control, we note that a people or an individual may achieve self-control, but can only be led by someone else.

1 “Individualism is a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself.” Tocqueville, Democracy in America, G. Lawrence trans. (New York: Doubleday Anchor, 1969), II.2.2, p. 506.
Or must we accept that leadership and control are necessarily in conflict? According to the argument so far, the Constitution would seem to be precisely a combination of the two in which the people governs itself by electing leaders to control it. The Constitution establishes a limited government not only in the sense that the people has set limits to its scope, but also because in establishing it, the people set limits on itself. Ratifying the Constitution was a choice of the people to set limits on its choice. For if the American people had merely wanted a government to serve it as an instrument, it could have done without a constitution and have set up a system of mandates and commissions. But the essential character of the American Constitution is that while all its parts are derived from the people, none of them is the people. Indeed, the people that ratified the Constitution in 1787-88, the sovereign people, has disappeared from view except for an occasional appearance to make an amendment (which is not a fully sovereign act because amendments are made under the procedures of the Constitution). The sovereign people has been replaced by the constitutional people, the highest authority to be sure, but highest under the Constitution. This "constitutional people" is self-controlled; in its ordinary feelings, it does not want to govern more or otherwise than by electing officials who will govern it.

It appears, then, that the American people, as sovereign, transformed itself with the leadership of the Founders into a constitutional people. While retaining its sovereign right under the Declaration of Independence to alter or abolish a defective government and set up a new one, it would do any of these things with the same intent of controlling itself. This intent is stated best in The Federalist, the most authoritative, yet unofficial, commentary on the Constitution. Its authors assume that any American government will be popular; therefore, the fundamental distinction to be established is between the two forms of popular governments: republic (good) and democracy (bad).

Republican governments old and new

A republic is based on the presumption that the problem of popular government comes from within the regime—from factions and tyrannical majorities. So it provides a constitution through which the people chooses to limit itself not by preventing the majority from ruling as in oligarchy, nor by retaining a privileged class to rule with the majority as in "mixed government," but by constructing the majority so that it will not be factious and tyrannical. This
new kind of republic is contrasted (in *Federalist* Nos. 9, 10, and 14) to the old kind found in the republican tradition, which is given the pejorative label "democracy." In democracy, the presumption is that the danger comes from outside the regime—from monarchy and oligarchy. So the popular spirit must be aroused and kept in a state of vigilance against its enemies; and instead of a constitution providing self-chosen limited government, the main requirement is to cultivate this vigilant spirit in republican virtue. Republican virtue, in turn, requires a homogeneous people and a small territory so that citizens can know and trust each other. The Anti-Federalist opponents of the Constitution promoted this combination in what has been called the "small-republic argument," a considerably modified version of the classical republicanism that has its source in the ancients.

Both kinds of popular government are by choice, it was thought. For whatever may be said in favor of the rule of the wise or of the few most virtuous, monarchy and oligarchy in practice come down to hereditary rule. The alternative, then, appeared to be between government the people choose and government imposed by chance through heredity: To be republican was to opt for choice. Since choice is a certain activity of the soul, republicanism was the choice to establish and protect that activity in the soul. Its claim was not to make a people richer or more secure but to make it free—and free not in the sense of more mobile or more capricious, but in the sense of free to choose.

Yet how free to choose can a people be? This was the issue between *The Federalist* and the Anti-Federalists. A people would not choose to limit itself in a constitution if there were no difficulties in its choosing. Classical or primitive republicanism, with its dependence on a small territory, homogeneous people, and cultivated virtues, exaggerates the extent of human choice. But the new constitutional republicanism takes account of things in nature and by chance that cannot be chosen and joins them to things that can be chosen. A republic might prefer to live by itself, under a homogeneous majority, and with virtues to keep it moderate. But a regard to the necessities of international relations and of human nature will reveal that these desirable things are beyond the power of human choice. Taught by the new political science of *The Federalist*, a republic will not choose what is, abstractly, most choiceworthy, but will be content with, or indeed make the best of, a large territory, a diverse people, and a spirit of interest and ambition. It is characteristic of the American Constitution, by contrast with republican tradition,
to *constitutionalize* necessities. Those necessities limiting our choice, which we would like to wish away, are brought into the Constitution so that the people, through its government, can choose how to deal with them after having anticipated the necessity of dealing with them. The difference between republic and "democracy"—or in our terms, between constitutional democracy and pure democracy (or classical republicanism)—is made by a constitution that constitutionalizes the necessities limiting political choice. Whereas a pure democracy is small, homogeneous, and (it hopes) virtuous, a constitutional democracy is large, diverse, and ambitious, and represents those necessities in its constitution.

Necessities represented in the Constitution must also be represented in the souls of American citizens. The warmth of their republican genius must somehow be cooled; the confidence in their own sovereignty, which is responsible for the factiousness of democratic majorities, must be restrained. The Constitution is designed to make reason paramount over the passions: It is "the reason, alone, of the public that ought to control and regulate the government. The passions ought to be controlled and regulated by the government" (*Federalist* No. 49). Control of the people by government must be control of the passions by reason, by the public's reason since this is not an aristocracy of the wise. The "cool and deliberate sense of the community" must be found (*Federalist* No. 63). This is the job of the Constitution, which has been made with the aid of a new political science. The new political science, based on constitutionalists such as Locke, Hume, and Montesquieu, but more republican than they, will teach republicans to put government at arm's length, out of immediate control, instead of within their grasp, as in classical republicanism. The public's reason will then be enabled to rise above the passion or interest of a temporary majority, and the horrifying alternation between anarchy and tyranny that has characterized heretofore the histories of republics will be avoided.

**The scientific concept of "interest"**

It has become quite usual, on the right as well as the left, to misunderstand the cooling or sobering effect of the Constitution as an innovation that makes it unnecessary to worry about souls. It is believed that the Framers meant to replace the difficult and disputable notion of soul with a scientific concept of "interest." Woodrow Wilson, the first president to criticize the Constitution, blamed it for being based on an obsolete eighteenth-century version of Newtonian mechanics. Others in our day have praised it for anticipating
the magic of cybernetics, for being "the machine that would work of itself." One prominent conservative, George Will, has denied that the Constitution is an exercise in "soulcraft." Behind these views is the opinion that the limits to choice introduced by the Constitution to cool the republican consciousness extend to the elimination of choice, so far as possible.

When choice has been eliminated, human behavior becomes predictable with exactness, not merely as a trend or a tendency. In this condition, it does not matter what citizens have in their souls that may prompt them to act constitutionally, or in such manner as to make the Constitution work properly. Instead of looking into their souls—surely a difficult and dubious enterprise—one may simply consult their self-interest. Any departure from self-interest becomes quickly or visibly evident to an observer, and, except in the case of stupidity or stubbornness, also to the person concerned. The Constitution so understood works automatically. It may have flaws because the interactions of self-interest have been miscalculated, but these can be corrected by knowledgeable, state-of-the-art political scientists. These political scientists may disagree in their diagnoses, but only temporarily, for their studies will accumulate and converge on an ascertainable standard, the self-interest of a rational actor. If one adds the intention of the Framers to this convergence, then the machine has an identifiable manufacturer.

As between those who approve of such a system and those who deplore it, it is hard not to side with the latter. They are correct to say that the Constitution so understood bears a strong resemblance to the disease of the soul from which we began—the dependency discerned variously by Tocqueville and critics today. A system of interests, indeed, is nothing other than the rigorous definition of a nation of dependents. To be independent, one must choose; but it is often expensive to choose and easier—less costly, annoying, or dangerous—to let someone else choose for you. "Interest" is the concept that allows someone else to do this because you do not choose your interest, and it can be imputed to you as a "rational actor." In the literature of rational actors, it is notorious that no justification can be found for the act of voting: Since your absence at the polls will not be noticed, it is rational for you to stay home and be a "free rider." Here is the fundamental act of constitutional sovereignty found foolish, and the come-to-me apathy of the consumer in a service economy and entitlements policy pronounced reasonable. A system of interests wants to know for sure how you will behave. It cannot tolerate the indeterminacy of hoping for the chance that you may
act according to the virtue in your soul. So it proceeds as if that virtue were unnecessary and, in doing so, makes it unnecessary. Citizens have nothing to live up to, nothing to sacrifice for, no sense of honor, no pride. All they have is their interest, rather, their separate interests, to which their freedom is a hindrance and the state of their souls an irrelevance.

Fortunately, it seems clear that the Founders did not foist such a system of interests on us. The description of the Constitution in *The Federalist* does not sustain this interpretation, not even the analyses in *Federalist* Nos. 10 and 51, which are the main reliances of the automatic or mechanical view. In *Federalist* No. 10, one does indeed find an argument for representative as opposed to direct popular government, and for an extensive rather than a small republic; and to control majority faction, it is said, an increased variety of parties and sects will succeed where moral and religious motives alone will not. But citizens are expected to desire liberty as well as promote their interests, to form parties to advance their opinions as well as protect their property, and to elect “fit characters” as well as check the sinister influence of dominant majorities.

Not only are the people expected to be virtuous but also those who run for office. The famous phrase in *Federalist* No. 51—“Ambition must be made to counteract ambition”—is often cited as proof of the self-interested character of the Constitution. But the “rational actor,” we have seen, is more likely to be a free rider than an ambitious man. He will let someone else do the work, take the risk, and suffer the indignity of running for office. And, in fact, if the system of ambition counteracting itself works, no personal gains in office can be hoped for. The ambition allowed, even encouraged, in the working of the Constitution is surely a departure from the suspicion of one-man rule characteristic of republics previous to this one. It is a sober accommodation to the desire for self-promotion in human nature. But it does not forget the pride in achievement also to be found in human nature. Adam Smith distinguished between the “sober undertaking” characteristic of the self-interested and the “spirited undertaking” in which a glory-seeker will waste his substance. But the Framers of the Constitution, with better understanding of politics, hence of human nature, recognized that it was sobriety to take care of the spirited desire to choose, in the people, and to succeed, in the ambitious. Instead of establishing a government that requires and cultivates republican virtue, the Constitution calls it forth. The virtue called forth in our constitutional republic is less martial and less egalitarian than in the direct democ-
racies and mixed republics that Federalist No. 10 blames for "instability, injustice and confusion." But since sobriety and love of honor are not automatically produced, they remain virtues. If they are consistent with each other and with human nature, and so altogether more reliable as republican virtue than the classical version, this does not make them dispensable or detract from them as virtues.

Virtue and interest

Still, one might object: How can a constitution that says nothing of education be concerned with souls? The answer is, indirectly. The Constitution, by implication, leaves education to the states. But it does so to encourage local communities in the states to provide education, not out of unconcern. The new federalism (as it was then) of the Constitution allows the people to use government without being awed by its size, and so to organize a common life without becoming prisoners of organization. And in the federal government, separation of powers has a similar effect and intent. At first it seems, as we have seen in Federalist No. 51, that the only reason for keeping powers separate is to enable them to check each other. But soon it becomes clear, as The Federalist goes on to explain and defend the three branches, that much more can be expected of officeholders than a stubborn insistence on having one's own way: virtue in congressmen (Federalist No. 55), character and moderation in senators (Federalist Nos. 62 and 63), energy in the president (Federalist No. 70), knowledge and judgment in the judiciary (Federalist No. 78). The extent to which these qualities can be expected varies with the office and finally remains uncertain. Altogether, one can speak only of an "aptitude and tendency" to produce them, which The Federalist argues comes not from the character of a certain class expected to hold the Constitution's offices (a propertied oligarchy or elite) but from the formal characteristics (term, mode of appointment, powers) of the offices. The Constitution cannot guarantee success in the discovery and election of persons with the requisite qualities to take advantage of the opportunities of these offices for the exercise of virtue. To provide such a guarantee, even if it were somehow possible, would detract from the voluntariness of choosing to seek office and of electing: Virtue cannot be guaranteed without losing its character as virtue. But the Constitution can improve the chances for virtue; it can set up a tendency to responsible government (Federalist No. 63) in a new sense of "responsible" now familiar to us as "choosing to be responsible for," rather than merely "responsive to," the people. Responsible government is responsive to the people,
but it also takes responsibility out of the hands of the people on their behalf.

In *The Federalist*'s interpretation of the Constitution, the voluntary rather than the habitual or cultivated side of virtue is stressed. To do this, a certain understatement is more effective and appropriate than exhortation. Virtue may go under the modest name of "interest," as when the long term of a president is said to put it in his "interest" to avoid "servile pliancy" to a prevailing current either in the people or in the legislature (*Federalist* No. 71). This is the "interest" of the kind of person who cannot live by his interest in the more usual, confined sense of the word, but insists instead on taking the risks necessary to be known as an energetic president. (And "energy" is another term, introduced by *The Federalist* and now ever so American, by which we mean virtue and say less.) In the same spirit of constitutionalized democracy, Americans today use a distinction between short-term and long-term interest to hide their virtue. "Short-term" interest is really your interest, and "long-term" interest is really your duty; but the choice between them sounds more voluntary, less demanded, if both options are kinds of "interest." A respectable journal would hesitate to use the name *Public Virtue*, but this does not mean that every consideration of interest belongs in the *Journal of Sordid Calculation*.

It is of course important that under the influence of our political science, the word "virtue" has largely been replaced by "interest"; but this does not imply that the qualities once designated as virtues or helpers of virtue are such no longer. They remain virtues, and (in a sense I have been arguing) all the more so for lacking the praise and splendor usually accorded the virtues. The vital question, however, is whether we continue to think, with the Founders, that virtue must be *self*-generated, or now believe that virtue will be *automatically* generated. The latter is destructive of virtue as voluntary, hence destructive of the independence of citizens. It seems that by the realism of not exhorting to virtue, we are attempting to add voluntariness to it because virtue not required is freer and even nobler. But virtue not required is also the essence of the "permissiveness" we deplore today, for the worst thing about permissiveness is not that everything is permitted, but that given this condition, *nothing interesting happens*.

**The realm of the soul**

How did it come about that virtue is not required but somehow expected under our Constitution? To explain our embarrassment
with the notion of "virtue," we must see why modern democracy is unhappy with the word "soul." For virtue was once thought to be the virtue of a soul directed or inclined to an end that is beyond the satisfaction of mere bodily appetites. What is this higher end? The classical political philosophers such as Plato and Aristotle tried to define it, but in practice, in politics, the higher end was defined by religion, and by each religion in an exclusive and contentious recipe for saving one's soul. The constitutionalist philosophers, above all John Locke, decided that this issue—the religious issue—could be solved if the human desire for seeking higher ends could be contained. This Locke attempted to do by establishing a distinction that is the basis of modern constitutionalism.

Modern constitutional government is limited government, as we have seen; and the limitation on government is expressed in the distinction between "state" and "society." The state, which is public, is in the service of society, which is private; and the state is limited to this service as a means is limited by its end. This is not the whole truth because we do speak of "the public" as having authority over merely private inclinations, and because constitutional formalities such as due process of law cannot be understood merely as means to an end. But the subordination of state to society is the main truth of constitutional government, which is shared by liberals, conservatives, and even radicals despite the various pet projects of intervention in others' liberties cherished by all three parties. That these projects are known as "intervention" sufficiently indicates the general expectation that government be limited.

The distinction between state and society, the basis of constitutionalism, has a basis itself, which was stated clearly by Locke in his A Letter Concerning Toleration: It is the further distinction between body and soul. The magistrate, Locke says, has jurisdiction only over "civil interests" such as "life, liberty, health and indolency of body," together with property, and his power "neither can nor ought in any manner to be extended to the salvation of souls." Society is the realm of the soul, or today what passes for the soul, the self.

Difficulties arise for the constitutional distinction between state and society, and for limited government, when (or because) the soul is not content with ruling itself but tries to rule other souls. When this happens, a part of society seeks to use the power of the state to rule the whole of society. It was to prevent such abuse in the form of religious intolerance that the constitutional distinction was established. When the soul seeks a higher principle than self-preservation, it is sure to find one that justifies rule of others besides yourself. Self-preservation as an end may be universal, but it is also quite per-
sonal to your own body and does not justify interference with others (this was its advantage to Locke). But salvation and virtue prompt devotion and sacrifice: And if these ends hurt me, why not you too? A higher principle that asks much of oneself may reasonably, must rationally, make demands on others. If others cannot or will not comply, they deserve compulsion or contempt, not tolerance.

Therefore, to contain the soul, one must diminish it. To keep one person's soul from claiming jurisdiction over others' souls so as to tell others what to do and how to live, it is necessary to reduce his capacity for ruling himself. To keep one person (or an aristocratic few) from choosing for others and becoming responsible for them, it is necessary to limit the scope of his choice and responsibility for himself. That is why, in the psychology of Locke and the thinkers who followed him, the notion of necessity begins to replace choice, and interest begins to replace virtue. If you have to act as you do because it is your necessity or your interest, you cannot blame others, and claim to rule them, because they do the same. Paradoxically, liberty can be advanced and secured to a degree never before seen in the world if only individuals can be convinced that each is less free to choose than it had previously been acceptable to believe.

**Ruling oneself . . . and others**

Constitutionalism then faces a dilemma that helps to explain the condition of democratic souls today. On the one hand, limited, constitutional government requires that the people and society be independent and distrustful of the state. For how can the state serve society if society craves the state? If government is to remain limited, individuals must be able to stand on their own feet and rule themselves, to a considerable extent at least. They must be able to feel that they control government rather than the reverse. But on the other hand, if the people feel themselves independent and capable of ruling themselves, what prevents them from extending their sense of responsibility, not merely to the behavior, but to the souls of others? For example, in the debate over abortion in America today, one sees the pro-choice party as eager to rule fellow citizens as is the apparently more prescriptive pro-life party. The pro-choice party wants the choice of abortion to be common and respectable, while the pro-life party wants it to be abhorred. Thus the pro-choice party chooses for others just as much, though in a contrary direction, as the pro-life party. From this one can infer that the desire to rule others derives from the desire to rule oneself, so that there is something dangerous to liberty in the responsible individual: It is
better, as we have seen, that he should stick to his interest and forget about his soul. But then, as we have also seen, your interest can make you the servant of whoever serves your interest, leaving you dependent and apathetic and suffering under the false consciousness that being a free rider is the same as being free. Constitutionalism demands a people that is independent, but not so much as to think itself capable of governing without a constitution; it needs a sense of responsibility that is aware of the limits to responsibility.

Modern constitutionalism began with a defense of the independence of the human soul against the claims of divine right. But the very measures taken to protect the soul have reduced its independence to the point where we are embarrassed to use the word. For us, to speak of "soul" smacks of religion, yet we cannot help feeling that the "self" is something much less noble than the soul, and when used (as it often is) in the sense of automatic, much less free. We should not be surprised, then, even from the standpoint of constitutionalism, let alone that of religion, that the demon of divine right still needs to be exorcised, and that the "lost soul" of Puritan America reappears in a revival of fundamentalist religion. For the fundamentalists are no more wrong than was Nietzsche to protest the flatness of our democratic souls.

For the most part, however, religion under our constitutionalism takes the form of religiosity, which is religion of the self rather than the soul, more concerned with being religious than with God. This religiosity can be associated with either one of two rival conceptions in our day that attempt to inspire independence in the souls of citizens: on the right, the work ethic; on the left, the doctrine of the creative self. Though the work ethic is much to be preferred, both conceptions are defective in what they attempt. The doctrine of creativity does not distinguish valuing from worth, does not identify the truly creative, and ends in flattering democratic vanity. The work ethic is superior because it asks for effort from citizens and requires them to stand up to be judged instead of merely confirming them in their dependence. But the work ethic does not clarify the relationship between the individual responsibility that brings success and the collective responsibility of self-government. Its proponents want to minimize or privatize the public, and they forget that although the public can be put on a regimen and a diet, it cannot be done away with. For the public comes from our desire to rule, a desire that can be ennobled or perverted but cannot be evaded or extinguished. The spirit of liberty that forms democratic souls must find ways of choosing together as well as protect our choosing apart. Combining them so as to do justice to both is the work of our Constitution.