

Good Constitutional Citizenship: Shmooze Ticket, March 2008

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Aristotle defines a citizen in functional terms: one who has a right to participate in the deliberative and judicial functions of the state and, by exercising these rights, rules and is ruled in turn. Aristotle says also that eligibility for citizenship in a democracy is predicated in some way on birth. In the early days of Athenian democracy, males were citizens if their fathers were citizens; later, they also had to be born of mothers whose fathers were citizens. Aristotle also recognizes naturalization as a way to citizenship. The Fourteenth Amendment's more liberal version of this ancient conception is to make one's own birth on American soil a sufficient condition for citizenship. The Constitution says nothing about *good* citizenship, however. Congress started to answer this question when it established requirements for naturalization. These requirements include, as one would expect, a willingness to swear allegiance to the U.S. above all other nations and to take an oath to "support and defend the Constitution . . . against all enemies, foreign and domestic."

Though a willingness to support and defend the Constitution seems an obvious element of good citizenship under the Constitution, the oath has its problems. Is the Constitution clear enough for anyone to say with confidence what the oath to support and defend means in practice? Nullifiers and even secessionists thought they were supporting and defending the Constitution. Was their reading of the document wrong beyond reasonable question? Does a good constitutional citizen act the part when paying taxes that fund foreign and domestic policies that dismantle the socio-economic preconditions of constitutional government, like a fair distribution of the nation's wealth and equal

economic opportunity? Do citizens support and defend the Constitution when taking the official Pledge of Allegiance, the pledge that situates the nation “under God” instead of the Constitution? How many Americans could knowingly swear fidelity to a constitution that subordinated religion to secular authority, as the Constitution appears to do? Given the implicit atheism of this ordering, would such an “oath” be meaningful? Does this ordering make sense as a matter of policy at a time when the nation’s high-tech vulnerabilities confront suicidal warriors of God? Does this ordering make sense philosophically if, absent religious conviction, the maxims of “human dignity” that ground our politics are arbitrary? (Dworkin prefers “axiomatic” to “arbitrary.”) Can’t virtuous and talented persons want to live in this country and contribute to its well-being yet still have compelling reasons to believe that the Constitution has constituted an unfolding disaster? Should we tell applicants for citizenship that to avoid perjury (or returning home) they should postpone reading Levinson until after they take the oath? Is it fair to require an oath at the moment of citizenship that no fully informed person could honestly recite again? Is it coherent to require an oath to a constitutional document that can be amended or even peacefully overthrown under precedents that mark our proudest national moments – including the ratification of the Constitution itself by unauthorized and therewith, arguably, unlawful procedures? Who but a few school kids and law schools celebrate Constitution Day? Who doesn’t celebrate Independence Day?

So the oath has its problems. But let’s (try to) put these problems aside and accept the oath as a first approximation of what a good constitutional citizen is: one who is willing to support and defend the constitution. The question now is what is it that a good constitutional citizen is willing to support and defend.

Because no one would say that a good citizen can't join a campaign to amend the constitutional document, we can't equate the constitution to be supported and defended with the constitutional document as it might appear at any given historical moment. Yet since the constitution to be amended is the one that exists in some temporal present, we can't equate the constitution to be supported and defended with the constitution in front of us, the apparent constitution, the one that appears in historical time. This poses a problem: Does the Constitution's amendability make the oath meaningless? Maybe we can avoid this problem by hypothesizing that the oath is at bottom a promise to abide by Article V. But two considerations defeat this hypothesis. No one, to begin with, would commit in advance to anything and everything that the nation might process through Article V. In addition, Article V is not a free floating norm. Article V is explicitly a part (an "article") of the Constitution; it is the part that provides for making other parts, "amendments" that will be "part of this constitution." So Article V presupposes a whole of some sort, and whatever normative force or attractiveness the article might have would depend partly on the normative force or attractiveness of the whole.¹ We therefore need a theory of the whole before describing good constitutional citizenship.

The Preamble seems a reasonable place to begin our reflections on the nature of the whole. The Preamble reveals that the Constitution is formally an instrumental norm, an ends-oriented establishment that declares ends and prescribes institutions for pursuing them. From what we know of political rhetoric generally and the moral psychology of

¹ I leave aside the soundness of this presupposition and therewith the possibility that there is no "whole" beyond some "bundle of compromises" whose "parts" (hard to avoid this term) are to be interpreted in clause-bound ways depending on what interpreters think they can get away with politically. I leave this possibility aside for two reasons. First, even if I assume its truth, no one is willing to live by this truth -- witness the strength of the rule-of-law myths that displace this truth. And second, I accept the Socratic rule that in dialogic inquiry about how to live, a proposition that no one can live with is false. The prescriptive expression of this epistemic rule is: mean what you say.

political life (from Homer's time to the present, including the time of the American founding) people who take political things seriously conceive ends like the Constitution's ends as real things in some sense. Real ends are desirable, not just desired. Ends that are desired but not desirable are apparent ends, not real ends. Yet real ends emerge as prospectively existing things only through the clash of apparent ends. For this very reason one can wonder whether real ends exist.² If they do exist, then our conceptions of them can be wrong and their attractiveness to us exerts a normative pull to which we respond by claiming to be right and thus by *trying* to be right. So when we say "the war is wrong" we're not saying "I don't like the war"; we're saying "you shouldn't like the war either." This last proposition would typically occur in a context where disagreement is likely. The context would also have to be one where disagreement is appropriate. If Almighty God told us the war was right, that would be the end of it. In appropriate contexts of disagreement my proposition about what you shouldn't like becomes a *claim*, a proposition that calls for support in the form of reasons, like reasons why everyone should condemn the war. By making this claim as a claim I not only have to offer reasons, I implicitly submit my reasons to a process that can falsify them. By claiming instead of merely asserting I acknowledge my fallibility and numerous corollary obligations associated with truth-seeking, like trying to see things as they appear to the other side, appealing to shared experiences, putting my mouth only where I'm willing to

² I distinguish wonder from doubt, allowing that 'wonder' can be silent wonder and reserving 'doubt' for articulate doubt. Doubting (out loud) that, say, real justice exists is an act that, like all acts (unequivocally so-called), can be explained only by connecting it to what both the actor and the observer can understand as some apparent good. But because an apparent good is something that appears good, talk of an apparent good presupposes a real good. The presumed real good involved in doubting that justice exists could, depending on the context, be truth – i.e., about justice.

put my money, using words in their ordinary signification, obeying the rules of logic and sound argumentation, suspending final judgment, and so forth.

As it turns out, therefore, the Preamble implicitly assumes that the good constitutional citizen will value a process of giving and exchanging reasons with others about what to believe about ends like justice and how to pursue them in changing circumstances. The 1st Federalist assumes substantively the same when it imputes to its readers a desire to show the world that “societies of men” can rise above “accident and force” and “establish[] good government from reflection and choice.”

From what I’ve said so far, the good constitutional citizen looks a tad more like Sandy Levinson than Tom DeLay, and that presents two problems: Is my version of the good citizen ideologically biased? And can a good constitutional citizen share Levinson’s negative attitude toward hard-wired constitutional institutions, which are, after all, parts of the Constitution? Because the second problem is the easiest, I’ll start with it.

The hard-wired provisions are indeed parts of the Constitution, but preserving them can’t be an object of the oath, for the hard-wired provisions are amendable and therewith eliminable. Does the same apply to Article V? Strictly speaking, all parts of Article V are amendable. Levinson shows how to get around the guarantee of equal state representation in the Senate, and the rest of Article V can be amended through the processes of Article V itself. But let’s assume what is in fact practically the case: that Article V is virtually unamendable. Let’s assume further that Ackermanian amendments aren’t real amendments *and* that an unamendable Article V could prove fatal to hopes for progress toward any reasonable version of the ends of government. Would a good constitutional citizen stand by Article V under those circumstances? I say no, for several

related reasons. The Constitution itself owes its existence to the nation's abandoning the amendment process prescribed by Article XIII of the Articles of Confederation. This decision of the founding generation is available to all generations of Americans as a morally defensible precedent because it flows from background principles regarding legitimacy, law, and practical reason.

Madison states these principles clearly and forcefully in Federalist 40. Regarding legitimacy, he says, quoting the Declaration of Independence: “. . . in all great changes of established government, forms ought to give way to substance . . . [for] . . . a rigid adherence in such cases to the former would render nominal and nugatory, the transcendent and precious right of the people to ‘abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.’” To this he adds that “since it is impossible for the people spontaneously and universally, to move towards their object . . . it is therefore essential, that such changes be instituted by some *informal an unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens.” (his emphasis) Regarding law and practical reason, he cites “two rules of construction dictated by plain reason, as well as founded on legal axioms . . . [first] that every part of . . . [a legal] expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end . . . [and, second, that] that where the several parts cannot be made to coincide, the less important should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means.” Because our good constitutional citizens could easily find themselves among the respectable and patriotic citizens that Madison pictures, they have no firm commitment to Article V or to any other formal process.

“Formal,” that is, in the legal sense of “formal.” They would be committed to some other formal processes, especially the processes of logic and sound argument. Good constitutional citizens would be committed to these processes because (1) good constitutional citizens are attracted to the truth about the real ends of the Preamble; (2) they assume that a true opinion of any of these ends corresponds to the nature of the end; (3) they think the truth about any of these ends is pursued through debating different conceptions of them -- they assume, that is, that different beliefs about x can converge toward the truth about x; and (4) they have found through long experience that the least questionable propositions are those achieved through what they believe to be the principles of logic and sound argumentation.

This brings me to the second objection raised above: that my version of the good constitutional citizen seems biased against Tom DeLay. I plead guilty only to part of this charge. I don't think my version of the good constitutional citizen is merely my version. I propose that it would be the version of anyone who can think aright about this question, and I'll demonstrate my good faith the instant someone shows flaws in my argument or appears with a stronger argument. I feel, accordingly, that my argument against Tom Delay is against any claim to good constitutional citizenship that might be made on his behalf (I don't know that he has or would make such a claim on his own behalf). I deny that my argument is *biased* against him, however, for I did not fabricate it in order to deny his good citizenship.

My reasons for rejecting DeLay's would-be claim to good citizenship would begin with the observation that the Constitution is not made for people with fundamentally different views. Many serious religionists of different faiths, not just

Islam, would find it impossible to accept the implicit secularism of the constitutional tradition's basic rule of evidence and the leading implication of that rule: that seeing is believing, and that eye witness testimony is better than hearsay. Since we know of the Creation only through hearsay, the Creation Story competes with what we know through experience that seems universally replicable. And though we post-empiricists (or anti-foundationalists) have reason to doubt that any experience is universally replicable, we doubt this on the basis of experience that seems universally replicable. (The theory-laden character of experience is itself confirmed by . . . (theory-laden?) experience!) We therefore seem stuck with reason and the rules of evidence even as we have our reasonable (evidence-backed) doubts about reason and even as we have (evidence-backed) reason to believe that evidence is never too much more than mere evidence.

Some of the believers whom I know see the rationalism that I've sketched as peculiar to liberalism and the paradoxes of liberal doubt about reason as evidence of liberal blindness and hypocrisy: blindness for liberalism's failure to recognize its own reliance on faith (unproved propositions accepted as axioms) and the hypocrisy in what amounts to a religion of secularism (subordination of admitted religions to scientific ways of thought that serve the social and psychological functions of religion). Because I think the only way to make sense of liberalism is to see it as an expression of the rationalism I have described, I agree that I've described liberal rationalism. But that I've described a rationalism that is peculiar to liberalism has to be proved. It can't just be asserted without begging the question against those liberals who claim, as Publius does, that humankind as such aspires to rise above accident and force and live by reflection and choice. That some (perhaps even all) cultures manifest no such desire is not enough to prove that the desire

is no part of their makeup or that it would control other parts in any fair contest with them. Claiming to reject liberal rationalism doesn't prove that one actually does. Only persons who have achieved consistency among all of their beliefs could even begin to claim to be infallible judges of what they really believe about anything at any given moment.³

Though many cases of liberal bigotry over the years support the charges of liberal blindness and hypocrisy, cases can prove only that liberal rationalists can abandon their principles, not that the principles themselves entail rationally indefensible actions or beliefs. True, human thought has to begin with undefended assumptions. But this fact does not entail axiomatic status for any one or even all assumptions; it simply means that one can't question all assumptions at the same time. So rationalism need not rest on blind faith. Nor are rationalists compelled to put blind faith in reason. Skepticism about reason has been a feature of the Western intellectual tradition since ancient times. Reliance on reason is more of a necessity than a choice because it's hard to say that one can choose to live without reason.⁴ Yet a life of reflection and choice is certainly compatible with doubting the wisdom of such a life for everyone and accommodating those who actively try to live differently (as long as the differences are reasonable differences). Evincing this fact is the (limited) extent to which liberal regimes tolerate anti-liberal groups whose teachings fall short of incitement to (what rationalists count as) violence. Though I'm far from sure about this, I don't think you can say the same for religious regimes:

³ These persons would have to claim not only consistency but also truth for their beliefs, since each of their first-order beliefs would be accompanied by the second-order belief that it is true.

⁴ You can live without reason (e.g., if you're insane) but you can't *choose* to do so because choice to be recognizable as such has to be for the sake of some recognizable good and something chosen for the sake of some good is chosen for a reason. Choosing to live without reason would be having a reason to live without reason. But if you had a reason to live without reason you'd not be living without reason; there would be method in your madness, so-to-speak.

questioning God's existence and/or providence seems irreligious to me. If so, secular or experiential rationalism doesn't constitute a religion; it must institutionalize self-doubt in ways that religion can't.

In any case, good constitutional citizens are committed to no more or less than a regime of public reasonableness -- giving and exchanging reasons with others, from an appreciation of their own fallibility and on the basis of replicable experiences, about the true meaning of the Preamble's ends and how to pursue them. These good citizens are committed to a politics where people generally respect each other's good faith pursuit of public purposes through conflicting conceptions of ends and means. I call this a healthy politics. Tom DeLay has worked for a different kind of politics.

