

America's Cold Civil War

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Six years ago I wrote a book about Barack Obama in which I predicted that modern American liberalism, under pressures both fiscal and philosophical, would either go out of business or be forced to radicalize. If it chose the latter, I predicted, it could radicalize along two lines: towards socialism or towards an increasingly post-modern form of leadership. Today it is doing both. As we saw in Bernie Sander's campaign, the youngest generation of liberals is embracing socialism openly – something that would have been unheard of during the Cold War. At the same time, identity politics is on the ascendant, with its quasi-Nietzschean faith in race, sex, and power as the keys to being and meaning. In the #MeToo movement, for example – as we saw recently in Justice Kavanaugh's confirmation battle – the credo is, "Believe the woman." In other words, truth will emerge not from an adversarial process weighing evidence and testimony before the bar of reason, but from yielding to the will of the more politically correct. "Her truth" is stronger than any objective or disinterested truth.

In the *Claremont Review of Books*, we have described our current political scene as a cold civil war. A cold civil war is better than a hot civil war, but it is not a good situation for a country to be in. Underlying our cold civil war is the fact that America is torn increasingly between two rival constitutions, two cultures, two ways of life.

Political scientists sometimes distinguish between normal politics and regime politics. Normal politics takes place within a political and constitutional order and concerns means, not ends. In other words, the ends or principles are agreed upon; debate is simply over means. By contrast, regime politics is about who rules and for what ends or principles. It questions the nature of the political system itself. Who has rights? Who gets to vote? What do we honor or revere together as a people? I fear America may be leaving the world of normal politics and entering the dangerous world of regime politics – a politics in which our political loyalties diverge more and more, as they did in the 1850s, between two contrary visions of the country.

One vision is based on the original Constitution as amended. This is the Constitution grounded in the natural rights of the Declaration of Independence, the Constitution written in 1787 and ratified in 1788. It has been transmitted to us with significant Amendments – some improvements and some not – but it is recognizable still as the original Constitution. To simplify matters we may call this "the conservative Constitution" – with the caveat that conservatives have never agreed perfectly on its meaning and that many non-conservatives remain loyal to it.

The other vision is based on what progressives and liberals, for 100 years now, have called "the living Constitution." This term implies that the original Constitution is dead – or at least on life support – and that in order to remain relevant to our national life, the original Constitution must be infused with new meaning and new ends and therefore with new duties, rights, and powers. To cite an important example, new administrative agencies must be created to circumvent the structural limitations that the original Constitution imposed on government.

As a doctrine, the living Constitution originated in America's new departments of political and social science in the late nineteenth century – but it was soon at the very forefront of progressive politics. One of the doctrine's prime formulators, Woodrow Wilson, had contemplated as a young scholar a series of constitutional amendments to reform America's national government into a kind of parliamentary system – a system able to facilitate faster political change. But he quickly realized that his plan to amend the Constitution was going nowhere. Plan B was the living constitution. While keeping the outward forms of the old Constitution, the idea of a living Constitution would change utterly the spirit in which the Constitution was understood.

The resulting Constitution – let us call it "the liberal Constitution" – is not a constitution of natural rights or individual human rights, but of historical or evolutionary right. Wilson called the spirit of the old Constitution Newtonian, after Isaac Newton, and that of the new Constitution Darwinian, after Charles Darwin. By Darwinian, Wilson meant that instead of being difficult to amend, the liberal Constitution would be easily amenable to experimentation and adjustment. To paraphrase the late Walter Berns, the point of the old Constitution was to keep the times in tune with the Constitution; the purpose of the new is to keep the Constitution in tune with the times.

Until the 1960s, most liberals believed it was inevitable that their living Constitution would replace the conservative Constitution through a kind of slow-motion evolution. But during the sixties, the so-called New Left abandoned evolution for revolution, and partly in reaction to that, defenders of the old Constitution began not merely to fight back, but to call for a return to America's first principles. By seeking to revolve back to the starting point, conservatives proved to be Newtonians after all – and also, in a way, revolutionaries, since the original meaning of revolution is to return to where you began, as a celestial body revolves in the heavens.

The conservative campaign against the inevitable victory of the living Constitution gained steam as a campaign against the gradual or sudden disappearance of limited government and of republican virtue in our political life. And when it became clear, by the late 1970s and 1980s, that the conservatives weren't going away, the cold war was on.

Confronted by sharper, deeper, and more compelling accounts of the conservative Constitution, the liberals had to sharpen – that is, radicalize – their own alternative, following the paths paved by the New Left. As a result, the gap between the liberal and conservative Constitutions became a gulf, to the extent that today we are two countries – or we are fast on the road to becoming two countries – each constituted differently.

Consider a few of the contrasts. The prevailing liberal doctrine of rights traces individual rights to membership in various groups – racial, ethnic, gender, class-based, etc. – which are undergoing a continual process of consciousness-raising and empowerment. This was already a prominent feature of Progressivism well over a century ago, though the groups have changed since then. Before Woodrow Wilson became a politician, he wrote a political science textbook, and the book opened by asking which races should be studied. Wilson answered: we'll study the Aryan race, because the Aryan race is the one that has mastered the world. The countries of Europe and the Anglophone countries are the conquerors and colonizers of the other continents. They are the countries with the most advanced armaments, arts, and sciences.

Wilson was perhaps not a racist in the full sense of the term, because he expected the less advanced races over time to catch up with the Aryan race. But his emphasis was on group identity – an emphasis that liberals today retain, the only difference being that the winning and losing sides have been scrambled. Today the white race and European civilization are the enemy – “dead white males” is a favorite pejorative on American campuses – and the races and groups that were oppressed in the past are the ones that today need compensation, privileges, and power.

Conservatives, by contrast, regard the individual as the quintessential endangered minority. They trace individual rights to human nature, which lacks a race. Human nature also lacks ethnicity, gender, and class. Conservatives trace the idea of rights to the essence of an individual as a human being. We have rights because we're human beings with souls, with reason, distinct from other animals and from God. We're not beasts, but we're not God – we're the in-between being. Conservatives trace the idea of rights to the essence of an individual as a human being. Conservatives seek to vindicate human equality and liberty – the basis for majority rule in politics – against the liberal Constitution's alternative, in which everything is increasingly based on group identity.

There is also today a vast divergence between the liberal and conservative understandings of the First Amendment. Liberals are interested in transforming free speech into what they call equal speech, ensuring that no one gets more than his fair share. They favor a redistribution of speech rights via limits on campaign contributions, repealing the Supreme Court's *Citizens United*¹ decision, and narrowing the First Amendment² for the sake of redistribution of speech rights from the rich to the poor. Not surprisingly, the Democratic Party's 2016 platform called for amending the First Amendment!

¹ *Citizens United v. Federal Election Commission*. Holding: Political spending is a form of protected speech under the First Amendment, and the government may not keep corporations or unions from spending money to support or denounce individual candidates in elections.

² First Amendment - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

There is, of course, also a big difference between the liberal Constitution's freedom from religion and the conservative Constitution's freedom of religion. And needless to say, the liberal Constitution has no Second Amendment.³

In terms of government structure, the liberal Constitution is designed to overcome the separation of powers and most other checks and balances. Liberals consistently support the increased ability to coordinate, concentrate, and enhance government power – as opposed to dividing, restricting, or checking it. This is to the detriment of popular control of government. In recent decades, government power has flowed mainly through the hands of unelected administrators and judges – to the point that elected members of Congress find themselves increasingly dispirited and unable to legislate. As the *Financial Times* put it recently, “Congress is a sausage factory that has forgotten how to make sausages.”

If one thinks about how America's cold civil war could be resolved, there seem to be only five possibilities.

One would be to change the political subject. Ronald Reagan used to say that when the little green men arrive from outer space, all of our political differences will be transcended and humanity will unite for the first time in human history. Similarly, if some jarring event intervenes – a major war or a huge natural calamity – it might reset our politics.

A second possibility, if we can't change the subject, is that we could change our minds. Persuasion, or some combination of persuasion and moderation, might allow us to end or endure our great political division. Perhaps one party or side will persuade a significant majority of the electorate to embrace its Constitution, and thus win at the polling booth and in the legislature. For generations, Republicans have longed for a realigning election that would turn the GOP into America's majority party. This remains possible, but seems unlikely. Only two presidents in the twentieth century were able to effect enduring changes in American public opinion and voting patterns – Franklin Roosevelt and Ronald Reagan. FDR inspired a political realignment that lasted for a generation or so and lifted the Democratic Party to majority status. Ronald Reagan inspired a realignment of public policy, but wasn't able to make the GOP the majority party.

Since 1968, the norm in America has been divided government: the people have more often preferred to split control of the national government between the Democrats and the Republicans rather than entrust it to one party. This had not previously been the pattern in American politics. Prior to 1968, Americans would almost always (the exceptions proved the rule) entrust the Senate, the House of Representatives, and the Presidency to the same party in each election. They would occasionally change the party, but still they would vote for a party to run the government. Not so for the last fifty years. And neither President Obama nor President Trump, so far, has persuaded the American electorate to embrace his party as their national representative, worth of long-term patriotic allegiance.

Trump, of course, is new to this, and his party in Congress is basically pre-Trumpian. He did not win the 2016 election by a very large margin, and he was not able to bring many new Republicans into the House or the Senate. Nonetheless, he has the opportunity now to put his mark on the party. In trying to do so, his populism – which is not a word he uses – will not be enough. He will have to reach out to the existing Republican Party as he has done, adopt some of its agenda, adopt its electoral supporters, and gradually bring them around to his “America first” conservatism if he is to have any chance of achieving a political realignment. And the odds remain against him at this point.

As for moderating our disagreements and learning to live with them more or less permanently, that too seems unlikely given the fundamental nature and the embittered trajectory of our politics over the last two decades.

So if we won't change our minds, and if we can't change the subject, we are left with only three other ways out of the cold civil war. The happiest of the three would be a vastly invigorated federalism. One of the original reasons for constitutional federalism was that the states had a variety of interests and views that clashed with one another and

³ Second Amendment - A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

could not be pursued in common. If we had a re-flowering of federalism, some of the differences between blue states and red states could be handled discreetly by the states themselves. The most disruptive issues could be denationalized. The problem is, having abandoned so much of traditional federalism, it is hard to see how federalism could be revived at this late juncture.

That leaves two possibilities. One, alas, is secession, which is a danger to any federal system – something about which James Madison⁴ wrote at great length in *The Federalist Papers*. With any federal system, there is the possibility that some states will try to leave it. The Czech Republic and Slovakia have gone their separate ways peacefully, just within the last generation. But America is much better at expansion than contraction. And George Washington’s admonitions to preserve the union, I think, still miraculously somehow linger in our ears. So secession would be extremely difficult for many reasons, not the least of which is that it could lead, as we Americans know from experience, to the fifth and worst possibility: hot civil war.

Under present circumstances, the American constitutional future seems to be approaching some kind of crisis – a crisis of the two Constitutions. Let us pray that we and our countrymen will find a way to reason together and to compromise, allowing us to avoid the worst of these dire scenarios – that we will find, that is, the better angels of our nature⁵.

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⁴ James Madison and some founding fathers feared the influence and power of the states and sought to maintain a union administered by a central government, not weak, but not burdened by heavy taxes, central banks, or a standing army – all things representative of the monarchical patterns of European governments. Historian Gordon S. Wood wrote,

“For him the weaknesses of the Confederation, which nearly everyone seemed to acknowledge, seemed secondary to the vices within the several states. Not only did the self-interested behavior of the states weaken the Union, but more important, popular politics within the states threatened the revolutionary experiment in self-government. Ever since independence, said Madison, the states had passed a host of laws whose “multiplicity, mutability”, and “injustice” called “into question the fundamental principle of republican government, that the majority who rule in such governments, are the safest guardians both of public good and private rights.” Wood, *Revolutionary Characters*, Penguin Press, New York, 2006

Europeans watched with great interest and were, and still are, waiting in the wings, anticipating the dissolution of the States and the ultimate failure of such a forward thinking government, fraught with issues and weaknesses. Their intent was to recover lost opportunity and take advantage of a land filled with resources and energy. A reviewer of another of Woods works described the United States as a “too anxious and angry, partisan, polarized and paralyzed nation.”

⁵ Abraham Lincoln, First Inaugural Address