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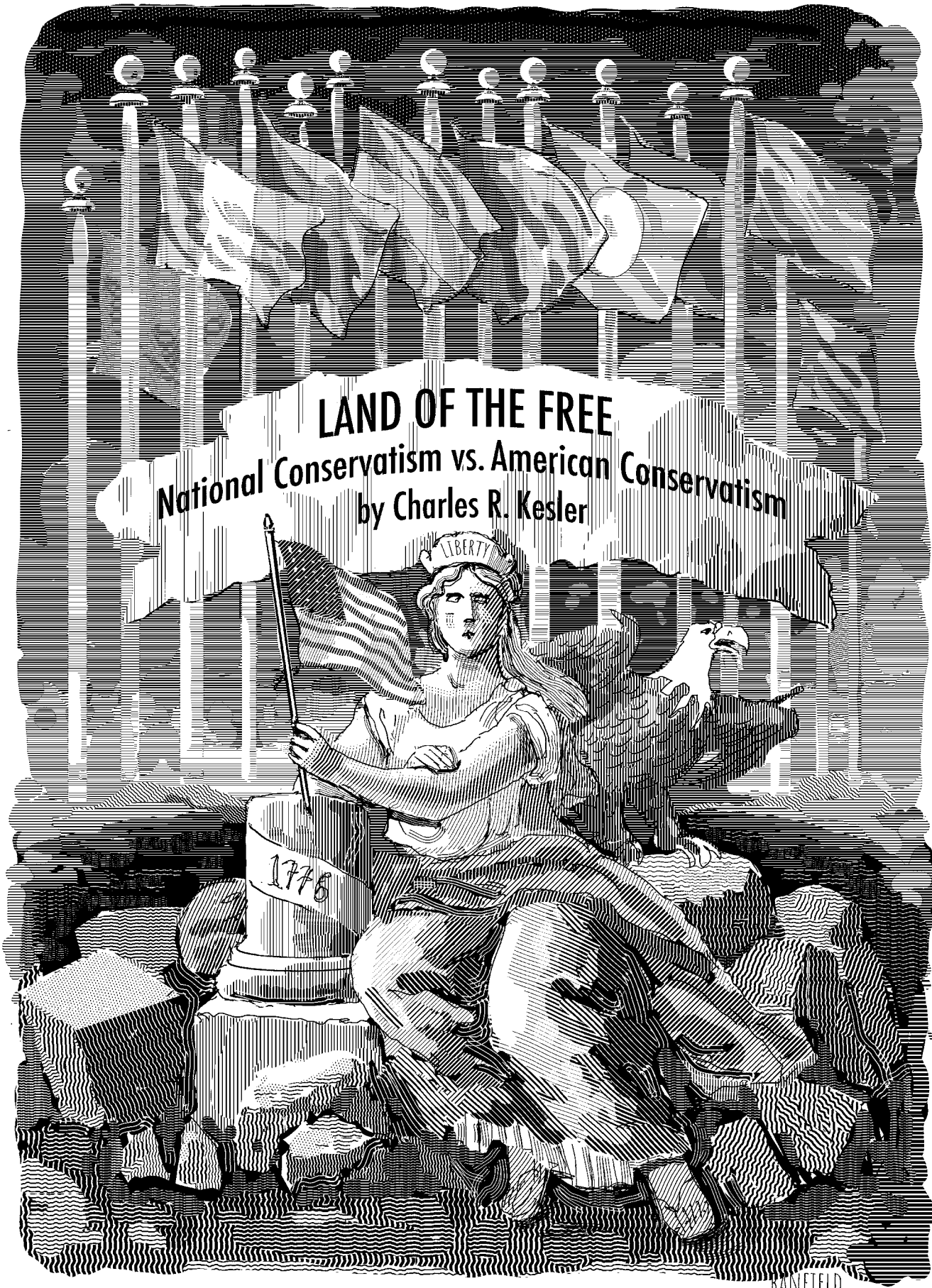
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Book Review by Joseph M. Bessette

AFTER THE DELUGE

Conservative Thought and American Constitutionalism Since the New Deal, by Johnathan O'Neill.
Johns Hopkins University Press, 398 pages, \$64.95



SOME YEARS AGO, WHEN CO-AUTHORING a textbook on American government, I calculated the rise in federal spending between 1932, the year before Franklin Roosevelt launched his New Deal, and 2012. Over these eight decades, total federal spending rose from just over \$5 billion to \$3.8 trillion. Domestic expenditures rose from \$2.3 billion to \$2.8 trillion. Adjusted for inflation (that is, using constant dollars), total federal spending in 2012 was about 45 times higher than in 1932, and domestic spending was 73 times higher. (During these years, the nation's population grew by about two and a half times.) Though I was hardly surprised by the massive increase in spending, I was, frankly, shocked at the sheer size of it. I checked my calcula-

tions over and over, and kept coming up with the same results. For those keeping score, between 2012 and 2022, total federal spending increased another 70%, from \$3.8 trillion to \$6.5 trillion.

NO POLITICAL DEVELOPMENT IN THE United States in the 20th century rivals in importance the growth of a massive social welfare state. It is perhaps not too simple to define an American political conservative as anyone—citizen, public official, or intellectual—who opposed, or opposes, this development, however unsuccessfully. As Johnathan O'Neill, a professor of history at Georgia Southern University, shows in the excellent *Conservative Thought and Ameri-*

can Constitutionalism Since the New Deal, the growth of the American welfare state was accompanied by four large changes to the "American constitutional order." One was the creation of the "administrative state" in which regulatory bureaucracies exercised "legal governing authority, delegated by Congress, over the liberty, property, and myriad social interactions of nearly all citizens and businesses." A second was the "erosion of federalism," as politics and policy became increasingly centralized in the federal government. A third was the growth in "the power and influence of the presidency...as a result of the New Deal, World War II, and the Cold War." And fourth was the development of "modern judicial review," whereby the Supreme Court vali-



dated these other trends, created an array of new private rights, and assumed the position of supreme interpreter of the U.S. Constitution. O'Neill's book is an intellectual history of how "different kinds of conservatives deployed their respective core principles to criticize the new order and to defend those aspects of American constitutionalism they most valued."

Refreshingly, O'Neill "strives to understand thinkers as they understood themselves." He rejects the notion that ideas can be explained by "subpolitical urges" or by the environment in which they developed. His focus is "on how conservative thinkers understood [and often opposed] the institutional arrangements of the New Deal order." Conservatism, he insists, has been "woven into American history" and should not be dismissed as a "mere 'backlash' against inevitable liberal 'progress.'" Although his study of several hundred conservative thinkers' arguments and ideas is almost entirely descriptive (rather than prescriptive), the author himself clearly embraces many of the views he so carefully traces.

O'NEILL DIVIDES CONSERVATIVES INTO four main types and shows how representatives of each responded to the four key changes to the American constitutional order in the 20th century.

First are the "traditionalists" (sometimes called "paleoconservatives"): authors such as Russell Kirk, Willmoore Kendall, James Burnham, George Carey, and M.E. Bradford, who took their inspiration from Edmund Burke and opposed government intrusion into the "families, churches, and communities [that] could foster the good life according to inherited conceptions of morality, virtue, and justice." In general, traditionalists "reject[ed]... the claim that natural rights and human equality were the definitive American ends that the Constitution was meant to secure." They feared that the focus on equality, "especially since Abraham Lincoln,...unleashed a messianic, ideological politics of individualism and egalitarianism that had all but effaced the proper understanding of American constitutionalism."

Second are the "libertarians," including Ludwig von Mises and Friedrich A. Hayek, who aimed "always to maximize individual liberty and support the uncoerced 'spontaneous order' of society rather than state control." They "advocated the minimal state." While "[r]adical libertarian[s] tended toward anarchism," "[m]oderate libertarians accepted a small range of 'public goods' as legitimate subjects of state provision or regulation." For all libertarians, "[p]olitics was always about 'lib-

erty versus power' and 'man versus the state.'" In O'Neill's view, "[t]his understanding distanced early forms of libertarianism from American constitutionalism."

Third are the "Straussians": the students—or students of students—of Leo Strauss and others influenced by him. Strauss was a "German Jewish émigré scholar of the history of political thought and a central figure in post-World War II conservative intellectual history." He rehabilitated ancient political thought, especially "the ancient idea of natural right" found in such thinkers as Plato and Aristotle, and used it to criticize the modern embrace of "historicism, positivism, and nihilism." Straussians come in two flavors: "West Coast' Straussians, led by Harry V. Jaffa...[who] defended the philosophy of natural rights and social contract as America's definitive political basis" and who held that the American Founders saw John Locke's teachings as "compatible with Aristotle and Christianity"; and "East Coast' Straussians, once led by Allan Bloom...[who] were more intransigently Platonic in doubting that any appeal to nature in politics ultimately could be justified by reason." Members of the latter group "intervened less directly in political affairs," and some "inclined toward a detached philosophical contemplation that quietly accepted its tension with all claims of moral virtue or political right."

Finally, there are the "neoconservatives," who are "notoriously difficult to define." "Neoconservatism," O'Neill writes, "originated among anticommunist liberals...who accepted the central regulatory-welfare tenets of the New Deal" but balked at the "Great Society reformism" of the 1960s. "Led by Irving Kristol at *The Public Interest* and Norman Podhoretz at *Commentary*," neoconservatives held that "centrally administered social engineering by the federal government often foundered on the realities of human nature, culture, and local circumstance." To put it most simply, "[m]odern American government was overloaded with quasi-utopian tasks it could not perform."

CONSERVATIVE THOUGHT AND AMERICAN Constitutionalism Since the New Deal is organized into four parts, one for each of four major changes to the constitutional order. Each part is preceded by a brief and highly useful overview of the following chapters. Where we might expect one chapter in each part for each of the four schools of conservative thought, O'Neill instead groups conservatives thematically, based on the constitutional change at issue. For example, in Part I on the administrative state, the first

chapter covers traditionalists, neoconservatives, and libertarians, while the second chapter covers Straussians. In Part III on the modern presidency, traditionalists get a chapter of their own, with the next chapter grouping Straussians, neoconservatives, and libertarians. The book begins with a succinct introduction and ends with a short conclusion that focuses on Congress. (Full disclosure: in his conclusion O'Neill discusses my work on deliberation in Congress, and in earlier chapters on other topics he cites two of my co-authored articles and several books that I edited or co-edited.)

It is impossible in a review of this sort to do justice to the richness and comprehensiveness of O'Neill's intellectual history. Because there is no bibliography, it is no easy task to count up all the distinct authors and sources he covers. Yet in chapter 7 alone, on "Straussians, Neoconservatives, Libertarians, and the Modern Presidency"—a topic I know well—O'Neill cites more than six dozen authors. And in doing so, he is scrupulously fair and accurate throughout, traits that characterize the entire book.

AFRUSTRATION IN REVIEWING A volume of this sort is that there is so much within its pages that is interesting and important. Space limitations allow for only a very selective treatment, and different readers will find some parts of this intellectual history more interesting or surprising than other parts. Here, I detail some of the things that struck me as I worked my way through this superb work. In the process I offer one quibble with O'Neill's analysis of how the framers addressed emergency powers.

O'Neill's succinct summaries of early attacks on the rise of the administrative or social welfare state by scholars like Russell Kirk, Robert Nisbet, and James Burnham remind us how insightful and penetrating they were in diagnosing some of the deepest problems with the centralization and expansion of political power in the United States, and its threat to the intermediary institutions and associations that sustain the traditional values that make self-government possible.

Many conservative critics have had to come to terms with the fact that Americans like big government. As O'Neill writes about George Carey's lament for the demise of federalism, "[he] did not shy away from concluding that the old federal order had passed and that American life was the worse for it. Nor did he deny that on some level the polity had chosen or at least accepted this change." Edward Banfield was more blunt. There was, he wrote, "an antagonism, amounting to an incompat-

ibility, between popular government—meaning government in accordance with the will of the people—and the maintenance of limits on the sphere of government.” In O’Neill’s words, “Government by popular will would deliver what the people demanded or acquiesced to, and the concept of constitutionally limited government ultimately would give way. Banfield concluded arrestingly that ‘nothing of importance can be done to stop the spread of federal power.’” Public choice theorists, whose roots are in libertarian political thought, explained that policymakers were able to hide “the true cost of government,” with the result that “[g]overnment became larger and more expensive than what people were willing to pay for it.”

THIS LINE OF ANALYSIS SUGGESTS THAT the problem with the growth of the administrative/social welfare state is not that the people have too little control and bureaucrats too much, but that the people have, as it were, too much control. As President Dwight Eisenhower wrote in a letter in 1954 (not included in the book), “Should any political party attempt to abolish social security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history.” One might call this the conservative dilemma: the American people want much more government than conservative intellectuals of all stripes believe is good for them.

There has been a dramatic shift, too, in how conservatives have thought about presidential power. Early conservative critics of the New Deal defended the constitutional preeminence of Congress against the growing power of a personalized and plebiscitary presidency. As James Burnham wrote in *Congress and the American Tradition* (1959), this development “link[ed] a huge pervasive governmental bureaucracy with a Caesarism-tending political leadership sanctioned by mass plebiscites.” O’Neill summarizes Burnham’s lament that “[t]he fall of Congress in the face of the modern presidency and the bureaucratic new class likely spelled the end of American constitutionalism’s ability to limit and balance power for the sake of human liberty.” Burnham predicted that once the public accepted the president as a “plebiscitary leader, who embodies the true general will,” the “breakdown of constitutional government” would surely follow.

Yet, by the Reagan presidency of the 1980s, conservatives were on the front lines defending presidential power from a newly aggressive Democratic majority in Congress that sought to restrain executive control over war powers, foreign affairs, and the agencies and bureaus of

the administrative state. O’Neill uses the now familiar term “unitary executive” to describe this developing theory of presidential power; yet, as he notes, many conservative defenders of a strong presidency did not themselves use the term. A new generation of conservatives, many of whom worked in the Reagan Administration, saw that the president could be “a standard-bearer for the conservative causes of smaller government and separation of powers.” This was a radical departure “from older, traditionalist and libertarian criticisms of the New Deal order that remained suspicious of the presidency.”

THE DEVELOPMENT OF THE CONSERVATIVE case for a strong presidency followed two independent tracks. One was the work primarily of lawyers in Reagan’s Department of Justice, especially its Office of Legal Counsel, who recurred to “the Article II Vesting Clause, the commander in chief power, and the Take Care Clause” to argue for presidential independence and discretion over foreign affairs and national security. The second track emerged from a kind of rediscovery of the constitutional and philosophical foundations of a strong presidency among political scientists, especially Herbert J. Storing, who taught for two decades at the University of Chicago before his untimely death in 1977 (just after moving to the University of Virginia), and Harvey C. Mansfield, who recently completed a long career teaching at Harvard University. Storing, Mansfield, their students, and others influenced by them produced a large body of work that argued that a powerful, energetic, and unified executive was necessary for the success of American democracy. But with its necessity also came its danger. The presidency, as constructed by the framers, had the ability to meet emergencies and defend the nation. Yet such an independent and energetic office could slip the bonds of law to confront imagined, or exaggerated, emergencies, thereby undermining the rule of law and American constitutionalism.

Here O’Neill, who understands the issue of “executive prerogative” (Locke’s term) well, fails to explain the two alternative interpretations—embraced by leading founders as well as modern scholars—of how prerogative power relates to the U.S. Constitution. O’Neill says of Alexander Hamilton that he “defended a broad interpretation of ‘executive power’ as conveying inherent authority beyond the text of the Constitution.” But this is not quite right. The “executive power,” vested in the president in the first words of Article II, is itself part of “the text of the Constitution.” Hamilton’s broader argument, perhaps best

expressed in *The Federalist* Nos. 23 and 25, is that the Constitution drafted in Philadelphia in 1787 conveyed to the national government sufficient power to meet all necessities that might arise. Had it not, rulers would ignore it when circumstances demanded, thereby “impair[ing]” the “sacred reverence” that they ought to have for the Constitution. Such actions would also create “a precedent for other breaches” when there was no necessity at all or the need for emergency action was “less urgent and palpable.”

Thomas Jefferson, by contrast, took the opposite view. In an 1803 letter, written during his first term as president, he held that “our peculiar security is in possession of a written constitution. Let us not make it a blank paper by construction [or, as we might say, by a loose interpretation].” As he elaborated in another letter, written after he left the presidency, leaders should not shy away from exercising extra-constitutional powers if necessary to “sav[e] our country when in danger.” Preserving the nation was a higher duty than “[a] strict observance of the written laws.” One might say that in Hamilton’s view, the framers were able to constitutionalize prerogative. For Jefferson, the problem of conforming necessary acts to law could never be solved, and attempting to do so by, in effect, calling the exercise of extraordinary powers constitutional simply undermined the constraining effect of a written constitution.

FINALLY, O’NEILL SHOWS HOW “[E]ACH variety [of conservatism] gravitated to originalism while finding its own path and emphasis amid the terrain of modern judicial review.” This embrace of looking to the Constitution’s original public meaning largely overtook the old dichotomy between judicial activism (favored by liberals) and judicial restraint (favored by conservatives). On some occasions, an originalist approach would argue for the Supreme Court to defer to legislatures and executives. But on other occasions, a proper understanding of the Constitution and its subsequent amendments would require the Court to strike down unconstitutional arrogations of power by elected or appointed public officials. More and more conservatives came to see that the preservation of American constitutional democracy and the personal liberties it was designed to secure might well demand a rather active judiciary to keep the other branches in their proper constitutional place.

Perhaps the most interesting part of this story is O’Neill’s account of how libertarians came to embrace a robust notion of judicial review, to which he devotes a full chapter. He writes that a “distinctly libertarian analysis



of judicial review” began to coalesce in the 1970s. It looked particularly to the original meaning, or initial public understanding, of the Ninth Amendment, which affirmed that the people retained rights not enumerated in the Constitution; of the Privileges and Immunities Clause of the 14th Amendment, which prohibited the states from “abridg[ing] the privileges or immunities of the citizens of the United States”; and of the Takings Clause of the Fifth Amendment, which required that if “private property...[were] taken for public use,” the owner must be given “just compensation.” The Constitution, wrote Roger Pilon of the Cato Institute, “is rich enough to enable the judge to discover the rights that are there to be discovered.” Clint Bolick, co-founder of the Institute for Justice, wrote that judges “should see themselves as what they were intended to be: fearless guardians of individual liberty.”

TO AVOID THE NEGATIVE CONNOTATIONS of the term “judicial activism,” some libertarians began to speak instead of “judicial engagement.” The Institute of Justice even created a Center for Judicial Engagement. Earlier, legal scholars of a conservative bent had been “limited to filing *amicus curiae* briefs” to nudge the judiciary in their preferred direction. But more recently, conservative law firms have “directly sponsored cases and represented clients in the attempt to establish new precedents.” As O’Neill summarizes, “conservatives and libertarians sued on behalf of the right to property, the right of

free speech, the right to equal protection, the right to life, and the right to free association.”

How much impact has all this conservative scholarship and constitutional/legal activity had on the growth of big, expensive, and intrusive government in the United States? Viewed from 30,000 feet, not much. As O’Neill concludes: “It is clear that the New Deal and then the Great Society pulled the nation’s political spectrum permanently to the Left in a way that conservatives could bemoan but not reverse.” Yet there have been some small victories. Here he mentions how conservative scholars, for example, have contributed to the Supreme Court’s rejuvenation of federalism and the doctrine of enumerated powers to constrain the reach of congressional authority. More importantly, conservatives have “advanced a discourse of constitutional maintenance or preservation.” “A self-governing people,” O’Neill writes, “will always need this dialogue about its constitutional principles and their concrete expression in politics, and should always welcome it.”

O’Neill devotes his final pages to the one institution that “has the constitutional authority to address” “the developments traced in this book”—i.e., the Congress. Traditionalists long defended its presumed central place in a more moderate and locally oriented national politics and government. Yet Congress failed to withstand the centralizing and plebiscitary forces that dominated American politics in the 20th century. As one traditionalist noted in the late 1990s, Congress “no longer checks and balances the executive branch and

in fact has become largely an extension of it.” Libertarians, especially theorists of the “public choice” school, often “dismissed as fantasy any notion of the public good or shared deliberation, let alone national interest.” The nation’s legislature, many argued, “was merely a forum for ‘rent-seeking,’ the use of government’s rule-making power to benefit favored officials, constituencies, or businesses.” Straussians, by contrast, took seriously Congress’s deliberative functions and purposes. As O’Neill summarizes their argument, “Congress...was designed for—and could achieve—reasoned deliberation about the public good.” Its “aim was to elevate democratic will through deliberation.” “In sum,” writes O’Neill, “Straussians argued that Congress was more overextended and misunderstood than broken. A revitalization of the original constitutional design, not its rejection, was the proper remedy.”

On his final page, Johnathan O’Neill urges conservative intellectuals to “give more sustained attention to Congress and how it might be improved.” And he urges conservative activists to “put in the grassroots work required to change political opinions and win elections.” Ultimately, he concludes, nothing less is required than “the revitalization of authentic civic education and the engaged citizenship it promotes. Constitutionalism, republican self-government, and human liberty hang in the balance—as they always have.”

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