Constitution under direct attack

cnav.news/2022/08/24/foundation/constitution/constitution-under-direct-attack/

By Terry A. Hurlbut August 24, 2022

Ever since the Supreme Court closed its remarkable 2021 Term, the enemies of ordered liberty have wailed like banshees. When they contemplate the cases the Court will take up *next* term, they caterwaul even louder. Now two Ivy League law professors have proposed a direct, frontal attack on the Constitution. In the name of social and environmental justice, and equity for their favorite victim groups, society must abolish the Constitution, or at least strip it of all its meaning and power to ensure the rule of law. They seek openly to establish a government, not of law, but of the mob. Or perhaps they *covertly* seek to establish rule by themselves, or by oligarchs who would take their advice.

Definition

A *banshee* is an otherworldly creature, traditionally female, who wails to give warning that someone is about to die. Usually that someone is a member of the family of the person(s) to whom she directs her wailing warning. A man can act like a banshee, too – and that's how these two professors are acting.

Who are these assailants against the Constitution?

> Who is this that darkens counsel
>
> By words without knowledge?
>
> Now gird up your loins like a man,
>
> And I will ask you, and you instruct Me!
>
> *Job 38:2-3*

Ryan D. Doerfler and Samuel Moyn are law professors, Doerfler from Harvard and Moyn from Yale. These two have collaborated before. Their separate resumes detail their leftist credentials. We do not say *solid*. *Solid* is an inappropriate word for one who, like these two, founds his argument not on rock, but on sand. But they are *consistently* leftist in their outlook on the law, and how the law should read.

Look at where Prof. Doerfler has published his work: *Atlantic*, *Jacobin*, *The Nation*, *The New Republic*, and *The Washington Post*. Prof. Moyn has published in similar venues, and also *The Wall Street Journal* (who perhaps should re-examine their guest-column policies). Now look at this title by Moyn: *Not Enough: Human Rights in an Unequal World.* In other words, these two men (at least they're still men) are woke. And, being woke, they want to destroy ordered liberty, because that liberty lets people do things they do not like.

They also have come to the logical endgame of attacks on ordered liberty and a Constitutional republic. A *republic* governs itself and its citizens and lawful residents by rule of law. But that does not satisfy these two professors. They know, of course, that arguing the Constitution won't make recent Supreme Court decisions any less valid. So now they attack the Constitution.

How they attack the Constitution

On August 19, 2022, Profs. Doerfler and Moyn published this piece in *The New York Times*:

> The Constitution is broken and should not be reclaimed.

"Reclamation," in this case, would mean repeating the decades-long campaign that gave us a Supreme Court that produced so many of the precedents they love. Those include, of course, the precedents the *current* Supreme Court overruled. The professors cite *Roe v. Wade*, of course. Oddly enough they cited an obscure 1918 case that weakened State child labor laws. (*Hammer v. Dagenhart,* 247 U.S. 251, 1918.) But they refer also to "other disasters" in the 2021 Term. *CNAV* can guess what these might be:

- *New York State Rifle and Pistol Association v. Bruen*
- *Carson v. Makin*
- *Kennedy v. Bremerton School District*

- *West Virginia v. Environmental Protection Agency*

And they *definitely* cited, though not by name, two forthcoming cases that *Students for Fair Admissions* have brought. They didn't cite *Moore v. Harper,* the North Carolina redistricting and elections case, but they might as well have done.

Having laid out their complaint against the Supreme Court, they tacitly acknowledge that the Court simply obeyed the Constitution. *That*, they say, is the problem! The "centuries-old text" of the Constitution binds society to the past, and to that they object. In other words, all law can and should change, to whatever the mob of the present moment thinks is fair.

They leave clues in their links

Doerfler and Moyn cagily avoid telling us what form our governing institutions should take. They do plump for:

- Abortion "rights," presumably to abortion on demand for any reason or no reason,
- Forbidding any child to work for extra money if said child so desires, and
- Discriminating against meritorious individuals who are members of groups they think have "privilege."

But they leave clues to the kind of society they want to build, in their hyperlinks. So when they speak of a quest for "real freedom," they link to a four-year-old piece touting socialism. Likewise when they (perhaps temporarily) want the Constitution to be "more amend-able," they link to this page proposing three particular leftist amendment proposals. Some of these amendments use very general language, which makes discerning the desired social reforms difficult. But as nearly as *CNAV* can infer, three law professors at Yale, Cornell, and Boston University, respectively, propose:

1. A "democratic political economy," most probably socialistic, with free hospitals, clinics, etc., and primacy of environment over personal convenience.
2. To propose Constitutional amendments by *either* a two-thirds vote of both chambers of Congress, *or* by simple majorities on two successive "readings." Such amendments would go directly to the people for ratification by national popular vote, coincident with Midterms or Presidential elections.
3. Direct and immediate national initiative and referendum.

Where they really want to head

Then Doerfler and Moyn admit – or avow – where they really want to head.

> In a second stage, though, Americans could learn simply to do politics through ordinary statute rather than staging constant wars over who controls the heavy weaponry of constitutional law from the past. If legislatures just passed rules and protected values majorities believe in, the distinction between "higher law" and everyday politics effectively disappears.

To arrive at their utopia, they would do one better than those wanting to "pack the Court." They propose "packing the Union." In other words, admit new States. But how to create them? This method appeared in the *Harvard Law Review* in 2020.First they propose shrinking the Federal District to the National Mall and "essential" federal buildings. (What, they don't say.) Second, create as many new States as necessary *out of the territory thus renounced from Congressional exclusive control.* (See Article I Section 8 Clause 17.) The authors set no limit on the number of States to create, nor any minimum territorial size. So that could mean creating a plethora of new States, each no bigger than a city block!

And how then do they propose amending the Constitution? By:

1. Transferring the powers of the Senate, either to the House of Representatives or to "a fairly apportioned body,"
2. Expanding the House,
3. Electing Presidents by direct national popular vote, and
4. Amending Article V so that the ratification by those States encompassing a majority or supermajority of the population, would suffice.

Or in the alternative, defy the Constitution directly

Failing all of that, Doerfler and Moyn actually propose that Congress itself, by statute, revise the way it does business. Presumably that means transferring the Senate's powers to the House and making the Senate no more than an advisory body. It would function, in other words, like the British House of Lords or the Canadian Senate. The proposal these professors cite also includes enlarging the House to 600 members. And to make sure the Supreme Court couldn't interfere, strip the Supreme Court of its jurisdiction over how Congress works.

Doerfler and Moyn then mention again the kinds of new laws they want their new Congress to propose.

> Fundamental values like racial equality or environmental justice would be protected not by law that stands apart from politics but — as they typically are — by ordinary expressions of popular will. And the basic structure of government, like whether to elect the president by majority vote or to limit judges to fixed terms, would be decided by the present electorate, as opposed to one from some foggy past.

The only way to ensure that would be to strip the Court of its jurisdiction over *all* laws. Thus instantly the Bill of Rights is of no moment. Congress could legislate away its protections by a simple majority vote—of the House, not the Senate. And any President who stood in the way, would face removal by a single House vote. (For the House would inherit the Senate's power to try, not merely bring, impeachments.)

Who do they think they are?

In angry reply, Mr. Christopher Wright wrote, two days ago, that the Ivy League itself "is broken and should not be reclaimed." He was talking about the Doerfler and Moyn article in the *Times*, of course. Wright correctly observes that majorities could swing right as well as left. But he misses something. A leftist majority could and would protect itself by the method they are now using with their January 6 Committee. Which is to say, to propose bills of attainder and *ex post facto* laws against their conservative foes.

Remember: a *bill of attainder* is a law declaring a particular person to be an outlaw. Literally it's what happens when the legislature singles out a person or persons for punishment. Trial in a bill of attainder case, if one can call it that, would take place in the House. The Judiciary Committee – or this January 6 Committee – would indict all conservative voters. The House would then confirm it. Thereafter the new Internal Security Forces (in German, *Schutzstaffel*) wold arrest and imprison all conservatives.

An *ex post facto* law prescribes punishment for conduct prior to its passage. By definition it is retroactive. Bingo! The House passes a law against something Donald Trump did, or allowed, and makes it retroactive. Again come the mass arrests.

What kind of Law Review is this?

Wright misses one other thing. *How does the Harvard Law Review select those who write for it?* What shall we make of any law school that admits the kind of immature children who write such screeds as the "Pack the Union" proposal and actually get it into the Law Review? How dare anyone propose to carve out States no larger than city blocks, just to ram through Constitutional amendments absolutely repugnant to the rule of law? How dare any institution, admitting such people, call itself a Law School? *Law?* Harvard *Mob Rule School,* they mean!

To add this consideration is to reinforce Christopher Wright's conclusion – the Ivy League is broken indeed. Reclamation might still be possible, but would take time. Better to include colleges and universities among the Parallel Structures Stephen Turley, Ph.D., and others have proposed. That might also have to include a parallel council on accreditation. So be it. Any council that continues to accredit a Law School that lets students publish that kind of goo and drivel in its Law Review, should lose its power.

The Constitution against the oligarchy

More broadly, any such proposal is a proposal for oligarchy. Five kinds of government, or states of society, exist: monarchy, oligarchy, democracy, anarchy – and the republic. *Monarchy* can be hereditary, or not, in which case people call it "dictatorship," which amounts to the same thing.

CNAV does not list those societal states by accident. In fact, of the first four, *oligarchy* is the stable form, and *all others tend toward it.* Even a king, queen, "field marshal," "president for life," or, more simply, "leader" governs by consent of a small body. That body could be secret or open. But when they find the leader a liability to them, they also find that leader expendable. We saw that happen to Emperor Nero of Rome, and to Nikita S. Khrushchev of the old Soviet Union. The only reason it didn't happen to Adolf Hitler is that the oligarchy's enemies arrived to arrest them all after Hitler killed himself.

Likewise, *democracy* survives, if at all, as an outward form only. An elite inevitably forms, to make sure "the people" vote "the right way." *Anarchy*, by definition, is never stable. Sooner or later a small group organizes troops of loyalists who enforce their governance.

But the *republic* is stable. It derives from the Latin *res publica* – the public thing. Law, and the rule of law, keep it stable.

The Constitution guarantees a republic. Doerfler and Moyn don't want that. They say they want democracy. They'll actually get oligarchy, which could be what they want.

How likely is anything like this to pass?

Already we have proposals to make the District of Columbia, as it now is, a new State. Some proposals cagily add shrinking the Federal District to the National Mall and a handful of departmental and other buildings. Then instead of retro-ceding the remaining land to Maryland, they propose recognizing that land as a State. From that to the Harvard Law Review proposal is a small step: make more than one State from that land.

Again, the Harvard Law Reviewers cagily avoided simply creating new States from the most populous States now existing. That requires the consent of the Congress *and* the legislature involved.

Why are we even seeing such a proposal get popular attention? Because *evil must advertise.* Evil doesn't have to advertise its plans *as* evil, and can still call itself good. But *evil must advertise.* God Himself surely decreed this. So evil can only effect such a plan after announcing it first.

The Doerfler and Moyn *New York Times* piece is an advertisement of and by evil. So was that Harvard Law Review piece, but people paid it scant attention.

Those who respect liberty and the republic must thank God that this *advertisement of evil* came this close to Midterms. We now know the real issue of Midterms. The enemies of freedom have put the republic on the line. All who would protect it, now know how they must vote, and for whom.