



## Conservative Constitutionalism Called Vague, Arrogant

It will probably come as no surprise to readers of The New American that the views upheld by constitutional conservatives are not widely respected in the circles of the media elite. From the scorn heaped upon The John Birch Society from its inception to the loathing lavished on “Tea Party” activists in the past two years, having the audacity to propose that our elected representatives actually conduct themselves according to the rule of law may be rejected as a form of naïveté or (ironically) as a threat to the nation.



Consider, for example, Cass Sunstein, who currently serves as the Administrator of the White House Office of Information and Regulatory Affairs. Mr. Sunstein [appeared](#) on C-SPAN on November 13, 2005 and [proclaimed](#),

Some conservative legal thinkers like Justice Scalia and Justice Thomas think that the Constitution means what it originally meant. That means we should understand the document by going into a kind of “Time Machine” and capturing the public understanding of the public that ratified the document a century or more than a century ago.

It is not surprising that a purported constitutional scholar such as Mr. Obama found a place in his administration for a man who appears to view strict constructionism as some sort of nearly-medieval worldview. And it would appear that constitutional conservatism is now to be designated as the new bugbear to be hunted down by progressive intellectuals.

Actually, Lincoln Caplan, [writing in an Op/Ed](#) for *The New York Times*, goes further than Sunstein, who settled for merely labeling Constitutionalists as, in essence, old fashioned. Instead, Caplan declares the ‘slogan’ of a return to the rule of law under the U.S. Constitution to be “vague” and “arrogant.” Caplan begins by setting forth several examples of conservative constitutionalism which seem to stick in his craw:

John Boehner, the next House speaker, expresses the message of constitutional conservatism in calling for every bill to identify the part of the Constitution it rests on. Sarah Palin used the phrase to campaign for limited government. Tea Party members call themselves constitutional conservatives. It is the new mantle in which Republican politicians are wrapping themselves.

The challenge lies in understanding what, if anything, it actually means.

The phrase is used mainly in opposition: against health care reform; against the General Motors bailout; against President Obama’s policies. A year ago, conservatives focused on the gravity of economic problems. This election, their concern shifted to the danger represented by solutions.

Given that many constitutional conservatives view themselves as conservatives first, and members of any given political party as a secondary concern, Caplan is hardly off to a good start. In point of fact, much of the Republican leadership seems little more trustful of constitutional conservatives than



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Caplan is, since virtually the entire beltway elite is addicted to the appropriations and regulations that consume much of the time of the executive and legislative branches of government, and yet are largely undertaken in violation of the letter of the law in the U.S. Constitution. Thus the polite fiction of justifying an ever-increasing portion of the federal budget — and deficit — on the interstate commerce clause has long passed the point of credibility. Adherence to the Constitution means standing in opposition to much of what the federal government now imagines to be its *raison d'être*, so it is hardly a surprise that the constitutionalist agenda often finds it quite easy to articulate those things which it opposes.

Caplan's polemic is relatively short on specifics, but he does seem to take umbrage with the [Mount Vernon Statement](#):

A polemic called the Mount Vernon Statement used the phrase last winter to rally an expanded Republican Party. The statement noted five principles: limited government; individual liberty; free enterprise; advancing freedom, opposing tyranny; and defending family, neighborhood, community and faith....

But the statement is a vague, highly selective catchall.

It makes no mention of "We the people," of forming "a more perfect union" or pursuing "the general welfare" — of equality arm in arm with liberty. It seems based on nostalgia for an inadequate version of the country's past. Like many slogans, it doesn't bear close examination. Which Americans don't want liberty, or support tyranny?

Of course, those who identify themselves as constitutional conservatives may be divided in their assessment of documents such as the Mount Vernon Statement. Bob Adelman's [assessment](#) of the statement for *The New American* concluded with the words of Michelle Malkin, who pointed to the U.S. Constitution and declared, "Anyway, isn't the document featured here the only statement of guiding principles we need?"

But apart from any inadequacies with the Mount Vernon Statement, one might have once thought Caplan could clearly identify which Americans "don't want liberty, or support tyranny" when he wrote about the Bush administration.

Only a few years ago, Mr. Caplan was engaging in rhetoric of the type which he now denounces. In an article entitled "[Who Cares About Executive Supremacy?](#)" Caplan took the Bush administration to task for his conduct of the invasion of Iraq, treatment of Guantanamo prisoners, and what Mr. Caplan appears to view as unconstitutional extensions of federal power that have taken place since September 11, 2001. (In point of fact, many of the criticisms of growing executive power which Mr. Caplan voiced regarding the Bush administration were also consistently expressed by paleoconservatives and libertarians throughout the Bush years, and many of those critics — apparently unlike Mr. Caplan — remain concerned about such developments, regardless of who happens to live at 1600 Pennsylvania Avenue at any given time.)

In his article, Caplan maintained President Bush continued the Nixon administration's grab for executive power:

...Richard Nixon claimed that his power was unlimited, especially when it came to national security, and that his position gave him the privilege of refusing to turn over tape recordings made in the Oval Office. The Burger Court declared that, while the president of the United States is due "a high degree of respect," he isn't "above the law," and it unanimously ruled against him.



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Sixteen days later Nixon resigned in disgrace. The ruling illustrated a crucial purpose for the separation of powers, and for the checks and balances it was devised to provide.

The sweeping authority that Nixon claimed in theory, George W. Bush has acted on again and again.

In tones reminiscent of a Tea Party rally, Caplan opined:

The most urgent legal and political issue of our time might as well not exist. Since 9/11 our democracy has functioned like an autocracy. In making one significant choice after another, the Bush administration has repeatedly done what Nixon only threatened to. But this is a nonissue in the current presidential race. That is so even though what's at stake is a fundamental judgment about the nature of the presidency and, therefore, of the Republic.

The Republic is at stake? Well, Mr. Caplan, that might sound rather "vague" and "arrogant" to some people. Especially when Mr. Bush's successor in office has continued many of the same policies that you found reprehensible only a few years ago, and yet now you lash out at the very people who use terms you once employed.

Now, however, Mr. Caplan seems to dismiss the concerns of those who worry about the fate of the U.S. Constitution. But while he may dismiss the concern, he does not dismiss those who express such concerns:

The anger felt by those who favor constitutional conservatism is potent. Call the slogan vague. Call it arrogant. It would be shortsighted to dismiss this increasingly used rallying cry.

No, Mr. Caplan, constitutional conservatism is not driven by anger, nor is it arrogant. If a return to the rule of law seems vague, well, that may be a measure of the degree to which our nation has departed from such governance by law, rather than by men. The appeal to return *ad fontes* in the realm of law is no mere rally cry. It is a standard on the field of conflict for the future of this nation.

*Photo of the next House speaker, John Boehner: AP Images*



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