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Newt's constitutional confusions

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If the tea party stood for anything when it upset conventional politics a year ago, it was to revive debate about restoring limited constitutional government. Newt Gingrich seems to be tapping into that effort, but the tea party folks better look more closely before they buy what Newt is selling. In his voluminous *21st Century Contract with America*, he has a long section entitled "Bringing the Courts Back Under the Constitution." A mass of constitutional confusions, laced with several good points, it's a throwback to some of the worst elements of Nixonian conservatism. And if its proposals were implemented, far from limiting government, they'd do just the opposite.

In fact, the most striking feature of Newt's manifesto is its failure even to notice that. Its focus is on what he sees as an out-of-control judiciary that's frustrating the popular will, which he'd remedy with everything from judicial impeachments to abolishing whole circuits. Yet as his first example of what he calls "judicial supremacy" — the power of the court to say what the law is, which *Marbury v. Madison* made explicit in 1803 — he offers the Supreme Court's 2005 decision in *Kelo v. New London*, which upheld, as a "public use," the city's transfer of Ms. Kelo's home to a private developer. Mistaken as the court's reading of the Constitution's Takings Clause was in that case, the decision hardly frustrated popular government. Indeed, it upheld the city's actions.

But the confusion doesn't end there. In fact, here's how Gingrich states his point broadly: "Since the New Deal of the 1930s the power of the American judiciary has increased exponentially at the expense of elected representatives of the people in the other two branches." Really? To be sure, during Franklin Roosevelt's first term the court found several New Deal schemes to be unconstitutional, based on an understanding of the Constitution stretching back to the founding. But after Roosevelt's infamous 1937 threat to pack the court with six new justices, the court caved and the modern welfare state poured through. That's the Leviathan that gave rise to the tea party. Yet there's Newt, praising Roosevelt for intimidating the court.

And as he refines his thesis, it only gets worse. Since *Cooper v. Aaron* in 1958, he claims, the political branches "have largely acted as if the Constitution empowered the Supreme

Court with final decision making authority about the meaning of the Constitution." *Cooper v. Aaron*, recall, was the Little Rock school desegregation case — federal troops and all — where a unanimous court told state officials they couldn't "nullify" Supreme Court rulings. Yet here again, that's what Newt is calling for.

Nor does he rest his case against the courts on that decision alone, which he treats simply as the font of the modern problem. Ever the historian, he reaches back for other examples of popular resistance to the Supreme Court's "finality," landing especially on some of Thomas Jefferson's more intemperate attacks on the court. Here again, however, his contention that Jefferson faced "a judicial branch that exceeded its authority" is utterly confused. The Federalists opposing Jefferson's rise, he writes, "had used the federal judiciary to enforce the Alien and Sedition Acts of 1798 to imprison Jeffersonian activists." Well yes, they had: that's how the infamous acts, like all statutes, were enforced. How, then, had the judiciary "exceeded its authority"? To the contrary, if anything the courts had *shirked* their authority — their power to find the acts unconstitutional. As in *Kelo*, they bowed to the political branches, which in passing the acts had *themselves* exceeded their authority.

We come, then, to the heart of the problem with Gingrich's thesis: Nowhere, not once in his entire discussion about the courts, do we find him recognizing even the problem of overweening government, much less the source of that problem in the *political* branches. The Supreme Court didn't give us the New Deal; Congress and the Roosevelt administration did. Nor did it give us the Great Society — or Obamacare. Gingrich is stuck in the era when conservatives, decades ago, were reacting to the admitted excesses of the Warren and Burger Courts with cries of "judicial activism."

We've since come to have a more sophisticated view of these matters. The irony is that to support his attack, Gingrich cites contemporary critics of the conservative Rehnquist Court like Dean Larry Kramer at Stanford and Professor Mark Tushnet at Harvard, men of the left who've opposed the court's modest recent efforts to revive enumerated powers federalism — the idea that Congress's powers are limited, especially its commerce power through which it enacted Obamacare. In the challenge to that act now before the court, would Newt urge judicial deference to Congress? That's not what the tea party stands for.

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