Fordham Law Review

Volume 65 | Issue 4 Article 23

1997

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A FEW THOUGHTS ON CONSTITUTIONALISM, TEXTUALISM, AND POPULISM

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HERE is a confession. I am not a theorist, I am not a philosopher. From time to time, I think about and write about the Constitution. I suppose if someone asked me, "What is your constitutional philosophy?" I might say that I am a constitutionalist, a textualist, and a populist. Now, I am, from time to time, more than those things, but let me explain those three words and their triangular interrelation.

Let's start with constitutionalism and textualism. In ordinary language we talk about *the* Constitution, that's what it says here on the cover of my handy-dandy pocket copy. It is a text with four proverbial corners. It actually uses words like "this Constitution" to describe itself as a document. I don't want to suggest that's all that constitutionalism is, but I think one important part of constitutionalism is this text, both in ordinary language and legal language. It is, of course, more than that. It is an act, a doing, an ordainment and establishment, a constitut*ing*, a constitut*ion*.

I think this connects to the linkage between constitutionalism and populism, the second leg of this triangle. The Constitution as an act is a dramatically populist act. Judged by philosophical standards, we look back and we are embarrassed, when we see the exclusion of slaves, when we see the exclusion of free blacks in some places, when we see the exclusion of women, when we see property qualifications in some states.

Judged by the standard of history, however, the ratification of the federal Constitution was the most populist act in the history of the world up to that point. As Jed Rubenfeld has reminded us, ancient democracies had theories of democracy, but not of constitution-making. Instead, you had some great man claiming a pipeline to God: Solon, Lycurgus, Moses on Sinai. You did not have the act of constitution-making as involving this populist participation. You didn't have that with most of the state constitutions. You didn't have that with the Articles of Confederation. You didn't have that in most of the societies around the world that had been governed by immemorial custom or the lord of the manor or some strong military figure who just happened to be there. So, as an act of ordainment and establishment, it seems that there is an obvious connection between constitutionalism and populism.

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When we look at the subsequent acts involving later generations of "We the People," expanding the definitions of "the People" to include blacks, to include women, to include people who can't pay poll taxes, it seems to me that all of this is a continuous enactment of populism. When we look at the text, it starts with "We the People do ordain and establish this Constitution," which is a performative utterance. It ends with Article VII, which tells us *how* to ordain and establish—through these ratifying conventions of the people. Also, the Republican Form of Government Clause is a dramatic reaffirmation of the centrality of popular self-rule. You look at the Bill of Rights, for example, and five of the first ten amendments have this word, the "people," in them. So there is a connection between constitutionalism and populism. Put a different way, I don't think any account of the Constitution is really ultimately persuasive unless it comes to grips with issues of popular sovereignty and self-government over time.

Finally, we come to the third leg of our triangle, the link between textualism and populism: What is the connection there? Well, one thing about the document is it is a shared text that all Americans have. It is short, and I think that is nice not just because that liberates judges, but because it is written in a kind of compact, lapidary way, as Larry Sager pointed out. I think it is nice for ordinary citizens that it has that feature, because I think constitutionalism occurs outside the courts. This textual document offers a vocabulary and grammar of argumentation for people whose parents and grandparents came from all different parts of the world. This is one of the things—in an eighth-grade civics way of thinking—that we Americans have in common, one of the things that *constitute* us as Americans. And I think it is, perhaps, a superior form of constituting us as Americans than the fact that we all watch *Seinfeld* and *Friends* on Thursday night.

There is in this society perhaps a connection to Protestantism and, as Sandy Levinson has pointed out, in a Protestant culture there is an emphasis on text. I don't want to affirm the idea of *sola scriptura*, that it's text only, but it seems to me that text does matter in this culture. This helps account for the brute textuality of the thing. The fact is, dormant clauses from time to time can resurface because they just happen to be here and they are printed in everyone's document. So, you never know when the Tenth Amendment will rise from the dead. (Consider also Sandy Levinson's favorite Second Amendment, which is talked about a lot outside of courts and law school classrooms.)

Thus, it is an important fact that there is that word equal in the Fourteenth Amendment in a way that the word wasn't in the South African pre-apartheid constitution. That word may have slumbered for many years, but it too had the possibility of reawakening because of this brute textuality.

That's my own approach. Let me now try to engage Jack Rakove's account of originalism. For my purposes I want to focus on two points

that he makes. One, that the Constitution basically is not ratified clause by clause, but *in toto*. Second, that there is an indeterminacy problem for originalists of a certain stripe.

I agree with those two points. I think the first point emphasizes the importance of looking at the Constitution as a whole, because what was ratified was the document, not individual clauses. The clause is not the unit, or at least the only unit of analysis, as Jed Rubenfeld at times might seem to be suggesting. The generation is not the only unit of constitutional analysis, as Bruce Ackerman might have been misheard to say. At the very least, the document as a whole is an important unit of analysis. This is not a revolutionary idea. This is what John Marshall meant when he said, "It is a constitution we are expounding."[1] It is not a clause, not a generation, but a Constitution.

So, even before we have the problem of synthesis across generations, which Bruce rightly reminds us of, we had, even at the founding, this difficulty of synthesis across seven articles and ten amendments. It seems to me that this requires what Charles Black would call structural analysis to see connections, what Ronald Dworkin might call integrity—the idea of something that coheres together as one law that does not contradict itself, but rather whose parts harmoniously fit together into a whole. This is what Mike McConnell, I think, was trying to suggest when he talked about the perspective of the Constitution itself—the document having an entirety, a vision, a purpose, a theory.

Jack's second point is that history can sometimes help identify particularly snug constitutional interpretations. History is not the only source of this, or the ultimate source, but it may help us distinguish between the genuine architecture of the thing and mere accidents of it. Or help distinguish between generally good readings and overreadings, as we seek to discover the Constitution's *own* theory. Here the vision is of history, not just as a handmaiden to pure justice on the justice-seeking account, as Chris Eisgruber might have suggested, but history as a handmaiden to snug interpretation, a particularly well-fitting, aesthetically pleasing, illuminating interpretation.

Since I am not a fancy theorist, I am just going to have to give you three or four examples of what I mean so you can try to see the thing in action. Let's begin with a really easy one. The Constitution doesn't say "separation of powers" in so many words, it doesn't say "federalism" in so many words. I think a particularly useful way of interpreting the document is to say that there is an architecture to Articles I, II, and III. It seems that there may even be some important implications about the order. Lawmaking typically occurs before adjudication. As you look at these three separate articles, you might think there is a theory of co-ordinacy, although perhaps the legislature, in some ways, is *primus inter pares*, first among equals. You might look at that and

1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

try to develop a theory of legislation as general and prospective behind a suitably impersonal veil of ignorance, whereas adjudication is specific and retrospective, since judges know who the parties are. That might be supported by textual references to case and controversy in Article III, or Bill of Attainder and *ex post facto* bans in Article I. So, you begin to see a general theory of the rule of law.

When you derive this theory from the architecture of the thing, it seems helpful to read historical accounts because you realize you are not making it all up. You realize that this theory actually was part of the meaning of the document—what it was trying to do, but not in so many words in any given clause. Thus, we should aspire to account for all the different provisions, dealing with allocation of power between center and periphery, to come up with a theory of federalism. Thus, we see how federalism, like separation of powers, was designed to achieve certain purposes of checking and balancing power. History here actually turns out to be helpful in coming up with the best account of this document as a whole.

Let me give another example, a structural example, since we are here at Fordham. I have been very influenced by the work of the great Dean here on issues of presidential succession,[2] so here is a question for you. Is Newt Gingrich really next in line after Al Gore? There is a congressional statute that says he is. I am not so sure that statute is constitutional. Narrowly, there is a textual argument about what the word "officer" means in the Succession Clause. Congress can designate officers who are eligible to succeed to a vacant presidency.

In order to really understand the issue you need to have a global structural account of the Constitution. For example, we must see the ways in which a presidential model is different from a parliamentary one, and how legislatures picking their own leaders as prime ministers to occupy executive officers is one of the things that our Constitution repudiated in many different clauses. If Newt Gingrich is an officer because he is Speaker of the House, were he to take up the presidency, he would have to step down from the speakership. But then he would no longer be the officer that was the basis for his ascension. Now, that's because of a clause of the Constitution—the Incompatibility Clause—and the deep structure behind it. You can't basically be at both ends of Pennsylvania Avenue at once. You can in England but not America. There is a deep theory behind that.

Here is another exemplification of that deep theory. When the Vice President ascends to the presidency, he is no longer the President of the Senate. There is a specific provision about the vice presidency, and there is a theory behind it.

2. John D. Feerick, The Twenty-Fifth Amendment: Its Complete History and Earliest Applications (1976).

Another deep principle is that a person is not supposed to be a judge in his own case. When you have a presidential, as opposed to a parliamentary, system of government, the idea is that the President is in power unless removed by impeachment in a judicial proceeding, focusing on high crimes and misdemeanors. You can't just have a simple no-confidence vote of Parliament. Impeachment is a judicial proceeding, but the problem is if the foreman of the Grand Jury that indicts, which is the House of Representatives, is the next in line, he has a conflict of interest in the impeachment process. He is not really acting very judicially.

Now, we might wonder whether we are just attributing the issue to our own sense of judicial ethics and propriety. Then, actually, history is very relevant here, as is text. There is a specific provision of the Constitution that says the Chief Justice presides in presidential impeachments. Why is that? Because otherwise the presiding officer would ordinarily be the Vice President, who is *ex officio* President of the Senate and he should not be presiding in a trial that could vault him into the oval office. The theory of that clause has implications for the word officer in the Succession Clause. It can't be about legislative officers. It is about folks that the President picked to be in his cabinet as his would-be successors.

There are other clauses that I could invoke. All I want to say is that, in doing some of that, I reassured myself that I wasn't making all this up. I looked to six different clauses to try to piece together an electoral college model, as opposed to a parliamentary prime minster model. I was reassured when it turned out that, lo and behold, James Madison said every single one of those things 200 years ago in the First Congress. So, history can sometimes help us come up with particularly comprehensive accounts of the document as a whole.

Let me give one final example. I have given you some structural examples, but let me take an illustration involving rights. It connects to Professor Kaczorowski's own work about incorporation and the Bill of Rights. Does the Fourteenth Amendment make applicable against the states things like freedom of speech and of the press? That is a hugely important question in constitutional law. If my mother were to ask me that question, I would say, "Mom, look at the Fourteenth Amendment, here is what it says: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'" Now, what do you think the privileges and immunities of citizens of the United States are? I think most ordinary citizens say things like freedom of speech and of the press and the right to petition. A lot of them would say the right to keep and bear arms, I should remind you all. But it happens to be a particularly happy textual feature that the clause resonates in ordinary language in ways that the folks can understand. Here is a more lawyerly reading of the clause. That clause contains no less than five textual cross ref-

erences to other parts of the Constitution. "No state shall" borrows from Article I, Section 10. "Make or enforce any law which shall abridge" takes language from the First Amendment. "The privileges and immunities" is a phrase you see in Article IV. "Of citizens of the United States" is a paraphrase of the preambulatory "We the People of the United States," and *Dred Scott*,[3] of course, equates "We the People" with citizens. Then you have the Due Process Clause, which is *in haec verba* with the Fifth Amendment.

As a lawyerly way of looking at the thing, you might say this clause read carefully is basically telling us to look to the rest of the Constitution. Its very textual referentiality seems to be giving us strong hints about where to look, at least as a starting place, perhaps not as the ending point, for the privilege and immunities of citizens of the United States. If you were wondering whether I am just overreading all of that, I am reassured when I read the accounts of historians like Bob Kaczorowski, who actually say, "John Bingham said all of that, that's what early courts interpreting the Fourteenth Amendment, pre-*Slaughter-House*,[4] said."

To conclude, I think that history can help support these nifty interpretations of the Constitution—nifty and fitting interpretations of the Constitution. I don't want to say that is all there is, but it seems to me, whatever else your theory is, history is a starting point. That is the first step, perhaps in a multi-step Lessigian translation, to understand the document as a whole.

It helps us see paradigms beyond clausal paradigms in Jed Rubenfeld's model. Paradigms like the presidential model. Or with a justice-seeking account, a la Larry Sager or Chris Eisgruber, it may actually help us see exactly how much we lose in fit if we deviate from this starting point in order to do something even more directly justice-seeking. On Larry Kramer's account, if we want to consider the role of subsequent precedent and practice as very important, at least we can see how far we have to deviate from the best interpretation, the most aesthetically pleasing interpretation, of the document as a whole in order to accommodate these things. So, I don't want to say that history is everything. I just want to suggest it is something.

3. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
4. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).