

KEITH E. WHITTINGTON (1999) *Constitutional Construction: Divided Powers and Constitutional Meaning*. Cambridge, MA: Harvard University Press, 303 pp., \$52.50

KEITH E. WHITTINGTON (1999) *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Lawrence, KS: University Press of Kansas, 299 pp., \$39.95

Constitutional theory has a bad name, and it should. Much of what goes under that label is nothing more than its author's political agenda dressed up with some fancy terminology or other form of intellectual pretension. But Keith Whittington has written two books that are theoretical in the sense in which that is a term of praise, and that are about the American Constitution and the constitutional system organized around it. One of them, *Constitutional Construction*, is superb and the other, *Constitutional Interpretation*, is very good.

In *Constitutional Construction* Professor Whittington accomplishes what most scholars merely dream about doing. He identifies a phenomenon of fundamental importance that seems obvious once he has named it. His insight rests first on the observation that constitutional rules are defined, not by their importance or their persistence over time, but by their stickiness: they are resistant to change, more resistant to change than ordinary law. If tomorrow a majority in Congress and the President decided to double the income tax rate, they could do it. But they could not double the term of Representatives. That would require a constitutional amendment.

Sophisticated observers of the American constitutional system know that like many seeming dichotomies, this one is really a spectrum. Some constitutional rules are harder to change than others. Judicial gloss is sticky but it is not super-glue; it can change as the Court changes. What even sophisticates do not realize, or did not realize until they read Whittington, is that similar mid-level constitutional settlements are reached outside the judiciary. Whittington calls such settlements constructions. They resolve contested constitutional issues by choosing one among competing, plausible answers. A construction in his sense is defined as a settlement that sticks, that resists change even when there is sentiment to change it that would be strong enough to change an ordinary policy. Constructions thus serve for a time as foundations for political action and frameworks upon which more mutable rules are hung. But constructions are not as sticky as clear text. They can be changed through major political upheavals short of formal amendments under Article V.

As a student of constitutional history, I found Whittington's examples so fascinating that the book would have been worth reading just for them. He describes a construction that arose from the Jeffersonian impeachment of Justice Samuel Chase in 1804. Chase had delivered politically unpopular decisions, had engaged in some actual misconduct that probably did not amount to a high crime or misdemeanor, and had engaged in overt political activity while on and indeed from the bench, political activity that we would find shocking today but that was not unheard of in the early 19th century. It is a commonplace that Chase's acquittal set the precedent that federal judges are not to be removed because the House and Senate disagree with their judgments; the court of impeachment does not have appellate jurisdiction over the Article III judiciary. But as Whittington points out, there was another side to that settlement, one that made it a compromise between Federalists and Jeffersonians rather than a simple failure by the latter. After Chase's brush

with removal, federal (and Federalist) judges removed themselves from the public political arena. Chase's grand jury charges, like those of many of his contemporaries, were exhortations that sometimes amounted to political stump speeches. Grand jury charges today, when delivered at all, are tedious legal documents rather than discourses on public virtue and sound policy.

Although most of Whittington's examples come from the 19th century, he devotes a chapter to the Nixon presidency, during which several long-simmering struggles about Congress and the President came to a boil. One involved Nixon's attempt to extend executive power over spending—the heart of domestic policy—through refusals to spend appropriated funds (called impoundments). After the kind of genial, deliberative reconsideration that Nixon generally inspired, Congress adopted the Budget Act of 1974. That statute specifically addressed impoundment, but more broadly it responded to the executive challenge. Nixon's main argument for presidential primacy was that Congress was institutionally incontinent when it came to spending, able to see only localist forests but blind to national trees. In response, Congress provided that early in each budget cycle the two houses together would establish overall guidelines that would be implemented by the committees and subcommittees with more specific responsibility. The many subsequent struggles over congressional spending have taken place within that framework.

As a student of constitutional theory, I hope Whittington returns to this topic, because there is more to say. His category of constructions gives us another angle on the fundamental problem of stickiness. It thus invites this question: what makes constructions stick? Why do some political struggles produce settlements that are more resistant to change than others? Why did it take a major upheaval (the Civil War) to undo the construction against protective tariffs (another of Whittington's examples)? Know that, and we will be a lot closer to understanding how our constitutional system works.

Even though *Constitutional Constructions* is very impressive, a reasonable reader could be only guardedly optimistic going in to *Constitutional Interpretation*, in which Whittington elaborates and defends a theory of the topic in his title. Even someone of Whittington's talent and intellectual integrity could be defeated by the Augean stables of normative constitutional writing. I found *Constitutional Interpretation* a valuable book and a qualified, but only a qualified, success. Whittington provides the most systematic account to date of originalism as a method of applying the Constitution, clarifying its meaning and seeking to justify it normatively.

He argues in favor of originalism at two levels. First, he maintains that it is the only form of interpretation worthy of the name: "'Interpretation,' if it is to have any meaning at all, is the effort to discover the author's intentions embedded in the text" (p. 99). The authors of the Constitution and its amendments are particular people at particular times, and their intentions of course existed at those times, so original intent is the only kind of intent there is. If intent is what matters, originalism follows as a matter of course. Whittington is not bothered by the problem of collective intent, and he is unimpressed by arguments that divide texts from their authors.

As Whittington notes, the preceding argument is relevant only to those who accept the authority of the Constitution itself. That authority, however, is contested. Whittington's main response is to appeal to popular sovereignty, which he takes to have more normative

force today than the text all by itself. He argues that if sovereign power is in the people and not the government, which is merely the people's agent, then the only legitimate fundamental law is the most recent expression of the people's will, even if most recent means more than two centuries old. This follows, not from the authority today of the long-dead Americans who made most of the Constitution, but from the defect in any claim to ultimate authority by today's governmental agents. Those agents must accept limitations on their own power, found in the Constitution, in order to recognize what Whittington calls the "potential sovereignty" of the people alive today, the popular sovereign such as it is.

Along the way Whittington confronts the standard, and some not-so-standard, objections to originalism, to his intent-heavy form of originalism, and indeed to constitutionalism itself. Perhaps most remarkable is his engagement with the kind of interpretative theory that is associated more with literature than with law. A political scientist writing about a legal document, Whittington gamely takes on arguments for textual indeterminacy derived from structuralism (not the kind concerning with separation of powers), poststructuralism, reader-response theory, and hermeneutics. While I am qualified to evaluate Whittington's encounters with Ronald Dworkin and John Hart Ely but not Stanley Fish, if the latter are of the same quality as the former Whittington has shown considerable intellectual breadth.

*Constitutional Interpretation* seeks to be comprehensive and systematic, and in many ways it succeeds. Still, I thought that something important was missing, although Whittington tries to supply it: the enemy. As he explains, originalism is one way of interpreting the text. Therefore there must be such a thing as non-originalist interpretation. There must be a way of taking the text seriously, of treating it as the supreme law of the land that it claims to be, without understanding it according to its original intent. Originalist sought to see themselves as involved in a family quarrel with other textualists. Perhaps the most remarkable weakness of the debate over originalism that has dragged through the last few decades is the absence of a clearly described non-originalist textualism. If the text is the law but the text as originally understood is not, then what is?

Whittington discusses the "Non-originalist text" and makes progress, but I was still left unsatisfied. He identifies three forms of non-originalism. In one, the text functions as basic political referent for the people while becoming divorced from its original meaning. In the second, the document functions as a promissory note, as "the sacred text of a community of rational and moral individuals" (p. 65). In the third, the text is an indeterminate collection of marks on paper, its indeterminacy to be explained by literary theorists.

But the first two uses of the text do not fill the gap Whittington identifies and that I find so troubling, because they involve different functions than that performed by originalist interpretation. When a document operates as a political referent or a moral promissory note, it is not operating as a legal norm to be applied by legal actors, including courts. Although both uses may be non-originalist, neither is a form of non-originalist legal application because neither is a form of legal application. Using the Constitution politically is not a rival way of using it legally, it is another way of using it. As for poststructuralism and so forth, if those Literary turns are the only alternative to originalism, then originalism wins by default.

Whittington's idea of potential sovereignty also left me still wondering. In part I was just wondering what he was talking about. He says at one point that popular sovereignty is a

metaphor, a persuasive story that becomes real “precisely to the extent that we engage in the common enterprise of constitutionalism. As an expression of the sovereign will the Constitution is binding, not because we currently accept its particular terms in their entirety, but because we accept its project, its grammar” (p. 144, footnote omitted). What are a constitution’s project and grammar, what did we do to accept the Constitution’s project or grammar, and why does that acceptance bind us to anything? And what does that have to do with the fact that the “sovereign must be united in will not in being. The neo-Kantian construction of a singular representative of the polity is an atavistic return to the Hobbesian artificial person who can exercise sovereign discretion”? (p. 148). The discussion of potential sovereignty is the least accessible part of the book, and much of it was Greek to me.

It also may have been unnecessary. Whittington’s theory of potential sovereignty is apparently designed to show why the Constitution binds us, by which he seems to mean all of us. He also seems to mean that because of its connection to popular sovereignty, the Constitution is binding on individuals. The Constitution binds not simply because the existing law, whatever it is, has authority, but for reasons specific to a constitution like ours, a constitution that rests on identifiable super-political acts and is hierarchically superior to ordinary law. His arguments, if I understand him correctly, would not work for the unwritten, unentrenched British constitution. All this is by way of showing why people alive today are obliged to follow rules laid down long ago by people long dead.

But as Whittington sometimes recognizes, the important question is usually whether the Constitution binds “us” in the unfortunate sense in which that word is often used in law schools: meaning the judges, with whom the actual people in law schools are for some reason supposed to identify. The question is whether the judges may legitimately depart from the document. If the question is whether the Constitution binds the judges, the answer is pretty clearly yes, for a reason Whittington mentions almost in passing: their claim to power assumes the Constitution’s authority. If the Constitution is not law, then William Rehnquist and his colleagues are nine people wearing costumes. They were chosen in accordance with and exercise power pursuant to rules set out in the document, and have no other claim to legitimate authority, certainly not their status as well-known sages.

While I do not regard these questions and objections as quibbles, neither do I present them as any sort of refutation. *Constitutional Interpretation*, although in my view not a bolt of scholarly lightning like *Constitutional Construction*, does some real scouring of the con-theory stables. It is at least a good start.

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