Approaching the Constitution

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Approaching the Constitution*

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These are sumptuously produced, oversized volumes: one pictures them, as I suspect some shrewd accountant at the press did, decorating the shelves of lawyers’ offices. Their pages are crammed full of primary texts, two columns on each page, in an alarmingly small but somehow readable typeface. Some texts are bare snippets; others wind on luxuriantly for many pages. The editors have set a cutoff point: no text from after 1835 appears. Like much else about these volumes, that decision reflects a set of theoretical commitments about the Constitution that I want to question.

Not that these volumes are explicitly cast as a tract or even an argument of any sort. Quite the contrary: they are cast, unassumingly, as a reference work. After an opening volume canvassing some “major themes,” the selections are organized around the text of the Constitution itself. Pretty much one clause at a time, the editors march through the text and present an array of documents designed to shed light on its meaning. So one can look up, say, Article 2, Section 1, Clause 1 (“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows”) and read twenty-three accompanying selections. But even reference works have their theoretical commitments.

Included are some all too familiar texts. The great bulk of the Federalist Papers are reprinted somewhere or other. So are lots of the Antifederalist Papers made familiar by Storing’s collection: all sixteen of Brutus’s papers show up. One can count on finding the relevant discussions from the Records of the Constitutional Convention, and Joseph Story’s 1833 Commentaries. Jefferson and Madison rehearse once again their celebrated exchange on rewriting constitutions in light of the liberal maxim that the earth belongs to the living (1:68–71). Abigail Adams once again implores husband John to “Remember the Ladies” and extend them the franchise; John once again produces the routine but incongruous comeback that “in Practice you know We are the subjects” (1:518–19). Indeed some selections appear more than once. This policy is an inexplicable waste of space, and I wish the editors had stuck consistently to their more sensible alternative policy of listing only the title of repeat entries and identifying where the actual text might be found.


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Happily, though, there are less familiar—and less readily available—texts, enough to make these volumes a treat for those interested in American political thought. John Adams also tells Mercy Warren, “Pray Madam, are you for an American Monarchy or Republic? Monarchy is the genteelest and most fashionable Government, and I don’t know why the Ladies ought not to consult Elegance and the Fashion as well in Government as Gowns, Bureaus or Chariots” (1:669). There’s an explosive exchange between Hamilton and Madison over Washington’s Proclamation of Neutrality. Writing as Helvidius, Madison stingingly attacks Hamilton’s Pacificus, urging that “principles are advanced which strike at the vitals of [the] constitution” (4:66). Best of all, there are dozens of legal cases, not just such famous ones as *Marbury v. Madison* and *Martin v. Hunter’s Lessee*. And a few other selections apparently have never been reprinted before.

No one doubts that such resources are useful to historians. But there is a residual skepticism about their making any difference to political theorists. Some will think that theorists can explore the substantive issues of constitutional theory without being encumbered by the burdensome weight of history. They can, I suppose—I’d hardly claim that all interesting work must be historical. But I want to sketch a strategy for making these sorts of historical materials do theoretical work for us.

* * *

First, though, a reluctant word on the editing of these volumes. One can always bicker about the selection of individual texts. Surprisingly, Thomas Hutchinson, royalist governor of Massachusetts, does not make it into this anthology, though Burke, Montesquieu, and even Machiavelli do. And some of the introductory material is peppered with contentious judgments. That “popular consent and responsibility had become a truth that dripped from everyone’s lips” (1:40) isn’t only execrable prose; it’s also false. No one should need reminding that many Americans were drawn to very different concepts and categories, to a civic humanist vocabulary centering on virtue and corruption, or a biblical one on sin and redemption. Then there are Straussian formulas that will please some, irritate others, and mystify all too many. There are references, for instance, to Locke’s “bold thought and cautious speech” or to his “reformulation of Hobbes” (1:76, 496), references allowing the editors to wink at Straussian readers. But such references are tiresome; they are intrusions that do nothing to assist the reader in coming to terms with the texts. Throughout, there is a complacently Whiggish assurance that the perfections of the Constitution flowed from the intentions of heroic and brilliant Founders. In other fields, historians have realized that this sort of thing will not do. But somehow it is still routine in the history of political thought. There are also some weirdly anachronistic touches, as when we learn that Jefferson’s commentary on the Bill for the More General Diffusion of Knowledge “shows in detail [his] understanding of the maxim, ‘from each according to his abilities, to each according to his needs’” (1:657).

Past the first volume, though, the editors are ruthlessly silent. They do not offer the kind of assistance that is imperative in putting such anthologies together: that is, they do not drop footnotes to identify contingent and obscure references. A letter from Madison to Jefferson begins, “The little pamphlet herewith inclosed will give you a collective view of the alterations which have been proposed for the new Constitution. Various and numerous as they appear they certainly omit many of the true grounds of opposition” (1:477). One wonders what the little
pamphlet was, and what it contains, but the editors do not say. Or consider the following snippet, the whole of a selection from Madison to Monroe:

These considerations remind me of the attempts in the Convention to vest in the Judiciary Dept. a qualified negative on Legislative bills. Such a Controll, restricted to Constitutional points, besides giving greater stability & system to the rules of expounding the Instrument, would have precluded the question of a Judiciary annulment of Legislative Acts. [4:323]

What considerations? There is apparently an important distinction between bills and acts, but what is it? One will not find out here. (My best guess, hanging on the text of Articles I and IV, is that a proposal is a bill while it is being considered, an act once it becomes law. But the text is hardly self-explanatory, and plenty of readers will find this selection baffling.) I take this ruthless silence to renege on the fundamental duties of editorship. 1

Less space devoted to such readily available texts as the Federalist Papers, less to the editors' general theoretical perspective, and more to identifying contingent references and technical legal terms: that would have improved these volumes immeasurably. But again, the real question is this: how might a political theorist use them?

* * *

One possibility is this: perhaps the historical materials provide problems that are quaint and distant enough that our deliberations about them needn't be wholly entangled in the zeal of party. General Thompson rose in the Massachusetts ratifying convention to excoriate George Washington as a hypocrite: “Shall it be said that, after we have established our own independence and freedom, we make slaves of others? O! Washington, what a name he has had! How he has immortalized himself! But he holds those in slavery who have as good a right to be free as he has. He is still for self; and, in my opinion, his character has sunk fifty per cent” (3:288). Washington's character may sink, but do his political qualifications? Just what sort of character traits are relevant in assessing the merits of a political candidate? Our recent (and eerily replayed) debate about Gary Hart and adultery may be shrill and partisan. Considering trusty George may allow us to be more disinterested, to hammer out principles we can apply more confidently to our own predicaments.

Another possibility: one might scour the texts for what we can immediately recognize as good ideas. There have been historical changes since 1835, of course. But, one might say, it is the same Constitution after all, and these people thought about it very hard. It is only an accident that “William Penn” published in 1788, if we approvingly grasp his point that “it has always been the favorite maxim of

1. The little pamphlet is identified in the current ongoing edition of The Papers of James Madison, ed. William T. Hutchinson et al. (Chicago: University of Chicago Press, 1962–77), vols. 1–10 (Charlottesville: University Press of Virginia, 1977), vol. 11, p. 300, n. 2, as The Ratifications of the New Federal Constitution, Together with the Amendments, Proposed by the Several States (Richmond, 1788); those editors also say where it can be found. The other snippet is from the turn-of-the-century edition of The Writings a/James Madison, ed. Gaillard Hunt, 9 vols. (New York: G. P. Putnam's Sons, 1900–1910), vol. 8, pp. 406–7, and one finds no more help there than one does here. The modern scholarly apparatus may be cumbersome, but it is indispensable, and it is a shame to see here a reversion to the older, lax standards.
princes, to divide the people, in order to govern them; it is now time that the people should avail themselves of the same maxim, and divide power among their rulers, in order to prevent their abusing it" (1:324). Or, against the familiar platitude that liberalism is a theory of limited government, we might exploit Washington's complaints about the Articles of Confederation (1:161), complaints that suggest that liberalism must also be a theory of state building. (In early modern Europe, liberals could applaud state building as a strategy for breaking the backs of the nobility, whose private armies and dissolute ways had oppressed ordinary people. In America, they could press to strengthen the Articles in order to realize such quintessentially liberal goals as national security, precarious when no state wants to foot the bill and no state can be forced to.) Even dead men (and women, though precious few of them appear here) can have good ideas.

One can imagine explicitly antihistorical glosses of the maxim that dead men can have good ideas. If we deliberately read them out of context, if we force them to address problems that they did not foresee, even problems they could not have foreseen, they may still turn out to say interesting things. Though we are not always self-conscious about it, we actually do this in political theory all the time: our standard account of Hobbes as portraying a prisoner's dilemma among egoists in the state of nature, I would argue, is a classic case of a wildly antihistorical reading. Quentin Skinner, John Dunn, J. G. A. Pocock, and others have savaged political theorists for offering antihistorical readings. But this seems a bit prissy. Those offering antihistorical readings can simply concede that that's what they are doing and unabashedly forge ahead. Good ideas are hard to come by. We ought to be opportunistic about their sources and not always worry about whether we have respected the demands of historical fidelity.

Still, we needn't be cavalier about using history. One well-entrenched strategy for taking history seriously is, broadly speaking, an intentionalist one. Suppose that the various Founders articulated general principles that we can apply to our own problems. Lurking "behind" their particular texts and actions, one might argue, are a series of intentions about the ordering of the American polity. Our job as constitutional interpreters is to recover and apply these intentions. Legal precedent, and more broadly the way in which our practices unfold, may perhaps gain independent weight. But they can never be finally authoritative in the way that appeals to intentions are.

Some such view seems to be adopted by the editors in their introduction to these volumes. "By immersing ourselves in seventeenth- and eighteenth-century documents and arguments," they write, "we are in effect seeking to recover an 'original understanding' of those who agitated for, proposed, argued over, and ultimately voted for or against the Constitution of 1787" (1:xi). They foresee objections to this strategy: maybe we cannot recover the intentions of the dead, or maybe they were not unified or principled enough to have any intentions, or maybe their intentions will turn out to be irrelevant to our problems. Maybe, they agree, but in fact not. Or so they think.

Such technical objections to intentionalism often hang on indefensible background views. Skepticism about learning others' intentions, for instance, generally rests on some crudely Cartesian picture of intentions as private objects on the mental stage, transparent to their owners by immediate introspection, but for outsiders locked away in opaque skulls. For familiar reasons, this will not do. I can learn about your intentions by listening to what you say, watching what you do, and so on. Indeed I can gain a better knowledge of your intentions than you
have. No doubt things are a bit more complicated with the Founders: we cannot
observe their facial expressions or their verbal intonations, and we have to learn
the linguistic conventions of their day to understand the particular moves they
make. Still, we have reams and reams of relevant evidence. In principle there is
no reason we cannot grasp their intentions.

But why should we care? Why should we be interested in the framers' intentions? I do not mean to ask another aridly skeptical question here. Indeed
my own view is that the intentions of the framers do not matter at all. Intentionalist
accounts of interpretation and jurisprudence are of course quite popular. Yet
no finally persuasive defense of them has been offered. Perhaps the problem is
that intentionalism turns out to be a number of independent theses. Among
them: a Gricean theory of meaning, which in enticingly complicated ways defends
the root intuition that the meaning of what they wrote is necessarily bound up
in their intentions; a moral or political view that argues we are obliged to follow
what they intended; a claim that as a matter of fact—what Hart would describe
as a rule of recognition—judges do finally defer to the framers' intentions, and
we are better off not changing that rule, since sticking to it provides security of
expectations and changes would probably make us worse off.

I must be baldly summary in sketching rejoinders. On the Gricean view: this
view is best considered as an analysis of speech acts that go felicitously, that
communicate what one wants to. But often things go less happily: one conveys
more or less than one intended to. Suppose that I inadvertently insult you:
intending nothing but the best, consciously and unconsciously, I slip up and say,
"I haven't seen you looking so good in years." Then you may well blanch, and
I will owe you an apology. I can say that I did not intend to insult you, but I
would be remarkably graceless if I said that since I did not intend to I did not
in fact do it, that the "real" meaning of my comment was not insulting at all.

On the claim of obligation: Jefferson and Paine’s strictures on the rule of the
dead are on the mark here. The veneration that Madison hoped would surround
the Constitution is nothing but ancestor worship, the sort of thing one expects
to find in traditional and feudal societies, not brashly modern liberal democracies.
Indeed Jeffersonian strictures make intentionalism self-defeating. For if we try
to defer to Jefferson's intentions, we will discover that he intends us not to do
that at all. Whatever else we go on to do will only nominally count as intentionalist.
On the rule of recognition: it is simply not true that that's what our judges do.
True, they sometimes invoke framers' intentions. But they sometimes invoke
very different sources, such as economic efficiency, broad principles of justice,
social science data, law review articles, and more.

The intentionalist agenda explains how these volumes were assembled, what
is included and what is not. Nothing after 1835, since by then the original
Founders were dead and could no longer offer allegedly authoritative accounts
of what they had intended. (So for instance in 1820, Madison fumed that he was
"truly astonished at some of the doctrines and deliberations to which the Missouri
question has led," doctrines that he thought no one framing or ratifying the
Constitution in 1787 could have intended [3:301]. One might simply respond,
"We don't care what you intended, we care what you did, and the language of
the document will support the doctrines we're offering." The response underlines
the intuitive limits of intentionalism.) Generous dollops of the Federalist Papers,
of the letters of Madison, and of speeches at the Convention, since those are our
best sources for Founders' intentions. Very little indeed written by blacks, women,
the poor, and other such marginal groups, since whatever one might wish now, their intentions played little role in the creation of the Constitution. And above all, texts, texts, and more texts: the actual unfolding of American politics enters only indirectly, only as it is incorporated into texts. But maybe texts are not enough.

* * *

I want to sketch a different but genuinely historical approach—call it a pragmatist one—that a political theorist might take in these matters.\(^2\) Consider some of the slogans pragmatists have wielded: our knowledge is a web of beliefs, without foundations in Cartesian axioms or incorrigible sense data; we can at any time doubt any part of the web, but it makes no sense to try to doubt all of our beliefs at once; we always confront anomalies, puzzles, and outright contradictions which create strains, pushing us to revise and innovate, to articulate new beliefs that will solve our problems; we are then epistemic sailors rebuilding our boats as we sail. Perhaps these slogans have not aged well, and perhaps they are not precise enough to qualify as analytic philosophy. Still, I take them to be quite right as far as they go. They provide the most incisive picture we have of justification and the growth of knowledge.

Consider now one modification. Political scientists may think of themselves as wholly detached observers of the political scene, juggling their beliefs to try to model more accurately what happens. Political actors are in a different position. They scrutinize and revise not just their theories but also their practices. So I want to broaden the traditional web pragmatist appeal to, to think of it as a web of beliefs and practices. In politics, we confront anomalies within our beliefs, anomalies within our practices, and, most important, anomalies between beliefs and practices. Sometimes we take our practices as relatively fixed and modify our beliefs to bring them into line with what we have learned. So for instance we might give up on the belief that regulating wages and prices will correct market maladjustments. But sometimes we cling to our beliefs instead and work hard at revising our practices. If for instance the labor market turns out not to be the home of the color-blind and gender-neutral practices that some of its champions argue it must already be, we may try to reform it in the name of equality. There are no mechanical rules for deciding what to hang on to and what to change, any more than there are such rules for generating scientific progress. Yet it hardly follows that changes in politics are arbitrary, any more than they are in the development of science.

Hasty and barebones though it be, this summary suggests an approach to thinking about the Constitution, one that would place less emphasis on the magical moment of the Founding, less yet on the intentions of the Founders. (This was *The Founders’ Constitution*, but now it’s ours.) The Constitution itself was an effort to solve a series of problems, chief among them the keenly felt inadequacies of the Articles of Confederation. It solved many of those problems, but inevitably it faced new and unpredictable ones. Some of those came not from clever counterarguments but from social change. The urbanization of America;

\(^2\) I should note that the view I sketch here is sharply different from the “pragmatism” that Ronald Dworkin assaults in his *Law’s Empire* (Cambridge, Mass.: Belknap Press, Harvard University Press, 1986), chap. 5. Indeed I take my version of pragmatism to be in large part compatible with Dworkin’s own latest view.
the rise of the modern corporation, of the social welfare state, of administrative agencies that make law, of environmental pollution; the emergence of an international economy; floods of illegal immigrants and needy refugees; and on and on: these were and are in part Constitutional problems, strains on the existing structure that forced Americans continually to reinterpret or amend the text, continually to struggle to bring their practices back into line with their Constitution.

One can then imagine a particular sort of Constitutional history that would be theoretically illuminating. It would show both our unfolding understanding of the Constitution and our unfolding political practices, and it would explore the interconnections between the two. The very meaning of the Constitution, in this account, would inescapably have a historical dimension. It would not be fixed, once and for all, by its writing at the Constitutional Convention, or by its ratification. Nor would formal amendments to the text be the only changes worth noting. Old clauses can and do take on new meaning in new contexts. (Some may grumble when they do, thinking that we have forsaken the intentions of the Founders.) And people learn from their mistakes. For what it’s worth, such classically pragmatist themes happen to be invoked here by John Jay and Joseph Story (4:161, 584).

This sort of history would be theoretically illuminating, in part because it could not be merely descriptive. To describe events as problems and proposed solutions is already to do significant conceptual work. More important, such an account would enable us critically to assess particular developments. We can ask if proposed solutions made any sense, if better ones were available, if people did the best they could or failed in ways that make them culpable. And we can have robust arguments about whether they did well. Sometimes pragmatists are accused—it is a damning if unhappily vague charge—of being relativists. Whether or not they are, I would argue, depends on what one takes relativism to be. But there is nothing here that means we must suspend critical judgment once we are confronted with the brute facts of an accepted social practice. Quite the contrary.

* * *

All this is unhappily abstract; the way to give it shape is to use it to try to illuminate particular Constitutional episodes. These volumes are not designed for this project, though occasionally the editors’ comments suggest it. Still, they offer resources that lend themselves nicely to the project. Here is a schematic example.

Consider sovereignty, surely a major Constitutional theme. (The editors do not single it out by name, but their opening volume’s sections on “Deficiencies of the Confederation,” “Union,” and “Federal v. Consolidated Government” obviously contain much of interest.) The classic theory, the sort of thing one finds in Bodin and Hobbes, holds that the exercise of authority in any political system must have an unlimited, indivisible locus. That theory is a weapon in the hands of state builders, a perfect tool for societies overcome by the centrifugal forces of chaos, by religious civil wars or fractious nobles. But it becomes a threat once there is a well-consolidated state. Then one wants to limit sovereign power—just as Locke does in articulating a case against James II.

In the decades before the American Revolution, English and Americans alike agreed that sovereign power, while limited, must be indivisible. The informal practice of allowing colonial legislatures to make decisions was anomalous, and
once it came under critical scrutiny from England the great theme of sovereignty was bound to reemerge. Lord North insisted on maintaining a penny tax on tea, and some of the colonists insisted on rebelling against even that slight an intrusion, in the name of sovereignty: the tax mattered not for the paltry financial stakes, but for its symbolic claim that England was indeed sovereign. The reigning theory of sovereignty made an amicable agreement intractably difficult. If, as Hutchinson urged from the start, sovereignty had to be vested either in England or in the colonies, then, many decided, it should be the colonies.

Yet the theory immediately became an obstacle in the debate over the new Constitution. The Antifederalists' strongest argument was an appeal to the same theory of indivisible sovereignty Americans had just fought over: if the new national legislature was to have sovereign power, they feared, the state governments would necessarily become mere ciphers, and citizens would be at the mercy of remote politicians. Their desire to protect the states led them to assault the deliberately chosen phrase, "We the people"—and led James Wilson to throw up his hands in disgust and spit out, "I know very well all the commonplace rant of State sovereignties" (2:3). Now the theory of sovereignty became a problem. In a dazzling display of conceptual agility, Publius reworked the reigning theory to argue that of course sovereignty could be divided: after all, it had been in plenty of historical cases. One wonders what might have happened had his understanding been available twenty years earlier. One wonders, too, how much of the theory of sovereignty is left after "unlimited" and "indivisible" have both been given up: so with surgical precision Hart dismembers the theory in his *Concept of Law*. Our own lingering appeals to popular sovereignty have more to do with the lines of authorization in a theory of political justification: but that's another matter.

If one asks, What is sovereignty? the best answer, I'd suggest, just is this sort of history, fleshed out conceptually and empirically. I would not want to affirm or deny that there is some timeless truth about sovereignty: I don't understand the formulation well enough to have a view about it. I would want to deny that Madison's understanding, brilliant as it is, must somehow be finally authoritative. His understanding and the theory of dual citizenship it animates still solve some of our problems. But we may well come to face new problems that will require conceptual innovation.

If as abstract a concept as sovereignty can be illuminated in this way, so much more readily can the concrete provisions of the Constitution. Again, these volumes were not designed with any such project in mind. One would need to add to the texts plenty of crassly empirical facts; there would be no particularly good reason to stop at 1835; and when it came to critically assessing particular decisions, one would very much like to know more about those shut out from the decision-making process. Opportunists that they are, though, pragmatists will happily ignore the editors' intentions and make the best of what they find here.