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CONSTITUTIONAL INTERPRETATION: JUST POLITICS OR FIDELITY TO THE PAST?

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H. Jefferson Powell’s book, A Community Built on Words: The Constitution in History and Politics, can be read on at least two levels. On the one hand, it can be read as an interesting and illuminating account of a series of important constitutional issues and debates in American legal history. In this regard, Powell takes up a substantial number of issues, including Thomas Jefferson’s 1790 opinion concerning the question whether the president or the Senate has the power to choose the grade of diplomatic representation the United States will use in any particular foreign nation, the dispute between Jefferson and Hamilton over the constitutionality of the national bank, the conflict between the Federalists and the Jeffersonian Republicans over the constitutionality of the Alien and Sedition Act, and many others. On the other hand, the book can also be read as an argument for a certain method of constitutional interpretation. I shall focus primarily upon this latter dimension of the book.

Powell begins with a characterization of an account of constitutional interpretation he deems popular but mistaken. He does not give it a specific name, but for convenience I shall refer to it as the “ideological” account. This is the view that “the justices of the Supreme Court regularly vote in accordance with their preferences rather than on the basis of precedent or some other supposedly apolitical metric for decision.”¹ According to this theory of constitutional interpretation, the fundamental explanation for

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¹ H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 3 (Univ. of Chicago Press 2002).
any particular justice’s constitutional interpretations is her or his political philosophy. It is true that members of the Court often write opinions that explicitly invoke the constitutional text and the alleged historical intentions that support and explain that text, but such conventional appeals are nothing but superficial masks for underlying ideological agendas. One way of characterizing this account of constitutional interpretation is to say that the Constitution is not so much a text, or even a set of principles embodied in a text, as it is a set of nine unelected and life-tenured persons who have been handed the legal power to impose their own political ideologies upon the rest of us. Alternatively, if one prefers to talk in terms of “principles” rather than “persons,” one might say that the Constitution is simply whatever set of principles of political morality a majority of the Supreme Court happens to currently accept.

Powell concedes the existence of evidence that appears to support the “ideological” account. He acknowledges that “[m]uch as many legal scholars dislike admitting it, the evening news is only slightly oversimplifying when it talks in terms of liberal and conservative wings on the Court.” He also agrees that there is a sense in which constitutional law is a “thoroughly historical phenomenon.” As he puts it, “[t]he sort of issues taken seriously, the range of views seriously in play on those issues, the relative weights of legal argument and policy preferences in the decisions of judges and other actors, the extent of consensus and, conversely, serious discord on constitutional matters... these are all demonstrably related to the era about which one is thinking.” Powell observes that this fact that constitutional law appears to be historically conditioned causes intellectual anxiety for many: “The historicity of constitutional law suggests the possibility that at the heart of the Republic, behind the trappings of representative democracy and the rule of law, we in fact will find a judicial oligarchy ruling great areas of our common life by fiat.”

Powell goes on to identify two major alternative responses to the “ideological” account. The first he calls the “fall from virtue” theory. This is the view that, although contemporary
constitutional interpretation is historically conditioned, this need not be, and was not always, the case. There was some particular historical point (which point tends to vary with different proponents of the view) at which the Court interpreted the Constitution on the basis of its “true meaning,” without recourse to “contestable political judgments.” What we must do is return to those “days of virtue” and begin once again to interpret the Constitution in accordance with its genuine intent. Powell’s objection to this theory is that there never were any such days of virtue.

The second response to the “ideological” account is the creation of a “sophisticated theory” about constitutional law. “At various times, including today, constitutional law has gone astray to a greater or lesser degree by neglecting its true theory, but that can be solved if judges and others will simply heed its principles . . . as interpreted by the theorist.” I am not certain what sorts of views Powell has in mind here, but perhaps he is thinking of proposals to interpret the Constitution in some uniform way by invoking one or another all-inclusive theoretical principle or set of principles. For example, someone might propose to interpret every provision of the Constitution in a way that maximizes economic efficiency, or in a way most consistent with the principles of John Rawls, or in a way most consistent with the principles of Milton Friedman, or in a way most consistent with the best version of social choice theory, and so on.

Powell rejects this second response as well. “The problem with this cure is not that it is intellectually bankrupt . . . some of the theorists are extraordinarily gifted scholars . . . but that each theorist prescribes a different nostrum, and the courts generally pay little or no attention to any of them.” As with the “fall from virtue” theory, this approach is an “evasion, not an explanation, of constitutional law’s close connection with political and cultural history.” Neither response “provides a sure foundation for thinking that there is anything to ‘constitutional’ law beyond the historical contingencies of changing judiciaries and shifting

7. *Id.* at 5.
8. *Id.* at 4.
9. *Id.* at 5.
10. *Id.*
11. *Id.*
12. *Id.*
political climates.”\textsuperscript{13} Both are “evasions of the history-bound nature of American constitutional law.”\textsuperscript{14}

At this point it is clear that Powell rejects the “ideological” account and both of the responses to that account he distinguishes. But what precisely is his own account of constitutional interpretation? He calls it the “historicist” interpretation.\textsuperscript{15} The basic claim of this interpretation seems to be that constitutional law is an “historically extended tradition of argument, a means (indeed, a central means) by which this political society has debated an ever-shifting set of political issues.”\textsuperscript{16} On the one hand, Powell asserts that this tradition of argument openly encourages legal and political actors to invoke their own personal philosophies and ideologies in interpreting the Constitution. However, on the other hand, he claims that this tradition simultaneously imposes a “constraint” upon such ideological actors and their ideological interpretations.\textsuperscript{17} The Constitution specifies a normative “vocabulary” in whose terms American legal and political actors are expected to debate ideological issues: “The formulation of issues, the range of considerations that can be considered or at least openly acknowledged, even one’s own thinking about which political outcomes are best, are shaped by the constraint of fitting them within whatever terms and concepts currently are counted as constitutional . . . .”\textsuperscript{18} Powell denies that this constraint upon the vocabulary or terms of constitutional debate remains constant over time; it changes in unpredictable ways with the shifting ideological moods of the Court and the nation. “Some issues that were debatable at an earlier point cease to be arguable . . . .”\textsuperscript{19} Indeed, even the very forms of acceptable constitutional argument themselves can, and often do, change in accordance with changes in ideological developments.\textsuperscript{20}

According to Powell, this “historicist” interpretation of constitutional law, if generally accepted, would result in a “more modest vision” of constitutional interpretation than do “more
The “historicist” account views constitutional interpretation as a “servant” of American politics rather than as its “master.” It rejects the kind of sharp distinction between “law and politics” that many other theories of constitutional law offer. It “accords more constitutional significance to the actions of elected officials and sees less that is unique about judicial decisions.” If judges were to accept the “historicist” approach they would take a “more modest approach to their role . . . .” On the other hand, if the rest of the nation were to accept this approach, then “politicians and citizens alike” would have to acknowledge their own “responsibilities in maintaining a constitutional order that is open to and inclusive of all.”

Powell makes an unusual, but interesting, argument for his formulation of the “historicist” account of constitutional law. Instead of offering general or abstract arguments for his proposal he turns to the examination of a series of constitutional issues and debates in American legal and political history in the hope of thereby persuading readers that his account of constitutional interpretation is the correct account. In particular he hopes to convince readers through historical expositions “that constitutional law is thoroughly historical, dependent throughout on the contingencies of time and political circumstance, and that it is a coherent tradition of argument.” What should we make of all this? I shall offer just a few brief comments.

It seems to me that his characterizations of what he calls the “two main responses” to the “ideological” account of constitutional law are inadequate. I assume that by the “fall from virtue” theories he intends to refer to what are usually described as “originalist” theories of constitutional interpretation, that is, theories which maintain that the only justifiable methods of constitutional interpretation are those that seek to identify and articulate the original intended meaning of the constitutional text. What I find questionable in Powell’s too brief characterization of originalism is his argument that it cannot be correct since there

21. Id.
22. Id.
23. Id.
24. Id. at 6-7.
25. Id. at 7.
26. Id.
27. Id.
28. Id. at 4.
never were any “days of virtue” in which judges, or anyone else for that matter, resolved constitutional issues without making “contestable political judgments.” Why he thinks that sophisticated originalists would be logically committed to the claim that there ever was (or ever could be) a time in which anyone pursued the project of identifying the intended meaning of the constitutional text without making “contestable political judgments” is something I fail to understand. It seems obvious that any claim to have correctly ascertained the original intended meaning of a constitutional provision is bound to be regarded by those who disagree as a “contestable political judgment.” In short, any assertion about constitutional interpretation is inevitably “contestable.” Why would any sane originalist deny that? Perhaps Powell has in mind some narrower understanding of the phrase “contestable political judgment.” If so, it would be nice to have it.

Powell’s characterization of the second main response to the “ideological” account (a “theoretical” account) is even less adequate. He devotes just one brief paragraph to the topic, without mentioning any names and without offering any details about the nature of the accounts he is targeting. I assume that the typical reader is baffled at this point, lacking even a preliminary and sketchy understanding of the sorts of constitutional theories Powell rejects and seeks to distinguish from his own.

This last observation suggests a more general one. Powell’s book addresses an issue (legal interpretation) that has been extensively and illuminatingly discussed by many important jurisprudential writers. One immediately thinks of writers such as H.L.A. Hart, Ronald Dworkin, Joseph Raz, and many others. So far as I can see, except for one brief and obscure reference to Dworkin, there is a total absence of any effort to join issue with any of the leading contemporary proponents of theories of legal interpretation. In my view this is a substantial deficiency of the book. Presumably, informed readers would like to know precisely how Powell distinguishes his account of legal interpretation from, for example, the much discussed account offered by Ronald Dworkin, at least for the reason that doing so would help to clarify and illuminate Powell’s own theory. Perhaps Powell thinks that theories of legal interpretation propounded by writers such as Hart

29. *Id.* at 5.
30. *Id.* at 50.
and Dworkin are so clearly misguided that no commentary is necessary. Perhaps he thinks that such alternative theories are directed at issues and concerns totally distinct from those he is pursuing. Undoubtedly there are other possible explanations for his reticence. But that reticence, if that is what it is, seems unjustifiable. Why should fair-minded readers not expect at the very least some explanation of Powell’s decision to make no effort to relate his theory of constitutional law to any of the prominent contenders?

What should we make of Powell’s own account in its own right? What exactly does it come to? I have just noted the difficulty of answering that question with any high degree of confidence. But if I had to offer a tentative interpretation I would describe his account in two alternative ways. First, focusing upon constitutional law understood as a communal practice, I would say that, for Powell, it is a communal practice of debate and argument whose vocabulary, concepts, issues, and admissible forms of argument are shared by the participants in that practice. Alternatively, focusing upon that part of the work product of this communal practice, which at any given time is legally controlling, I would say that for Powell the Constitution is a temporal entity whose content, at any given historical point, is the set of principles of political morality currently adopted by at least five members of the Supreme Court. There is a sense in which this communal practice is tied to the past, in particular, to the actual document of the Constitution. But the practice has no particular organic temporal continuity, other than the brute temporal continuity resulting from the contingent and unpredictable historical replacement of one vocabulary and set of concepts, issues, and forms of acceptable arguments by such vocabulary and the latter, in turn, by another, and so on, indefinitely.

Assuming that I am correct about the nature of his account, what should be said? It seems to me that one of the first things to say is that it is unclear whether there is any significant difference between Powell’s own theory of constitutional law and the one he says he is fundamentally opposing, namely, what I have called the “ideological” account. As we have seen, he criticizes the “ideological” account for its failure to take history seriously and for its failure to impose any kind of meaningful constraints upon the terms and forms of constitutional debate. The terms and forms of the debate are set by whatever ideological passions happen to be in
legal and political conflict at any particular stage of American history.

But so far as I can see, Powell’s account is susceptible to precisely the same complaint. After all, how difficult can it be for competent lawyers to familiarize themselves with the currently fashionable constitutional “vocabulary” and the set of currently “admissible” concepts, issues, and forms of arguments? And once having familiarized themselves with this current coin of the constitutional trade, how difficult can it be to exchange any set of philosophical and ideological norms into that coin? If the perceived necessity of so translating one’s own ideological premises and conclusions into the terms of the current debate is what Powell means by a significant “constraint” upon constitutional interpretation then it seems to me that he is mistaken. In particular, it seems that the participants in Powell’s communal practice of argument and debate would be no more constrained than would be the participants in the communal practice contemplated by proponents of the “ideological” account. For he explicitly says that “most contributors to constitutional discussion plainly have found that the Constitution, as they understand it, generally ordains what they think best and forbids what they fear.” If that is true then it seems pretty clear that there is really no genuinely effective constraint upon the process of constitutional debate and resolution at all. Powell’s claim that “history” imposes a meaningful constraint looks empty, a mere gesture in the direction of American piety for the past for purposes of public consumption.

In this regard, Powell makes what seems to me a very self-revealing argument in the course of discussing Justice William Paterson’s reluctant conclusion in *Calder v. Bull.* Paterson reasoned that the *Ex Post Facto* clauses are limited to criminal laws, despite the fact that as a member of the Philadelphia Convention he had argued vigorously but unsuccessfully that the *Ex Post Facto* prohibition should include civil, as well as criminal, legislation. Powell observes that Paterson’s interpretation of the clauses “contradicted what he thought the Constitution should have
provided.\textsuperscript{35} But then Powell goes on to try to show how by using the very same constitutional vocabulary and acceptable forms of argument Paterson could have instead reached the opposite conclusion—the very conclusion Paterson preferred on ideological grounds. Powell concludes that there was no good reason why Paterson could not have justifiably concluded that “the Constitution means what in his view it ought to mean . . . .”\textsuperscript{36} It seems clear from the context that Powell regards Paterson’s situation as generalizable to any context calling for constitutional interpretation.

Thus, so far as I can see, Powell is committed to the universal proposition that it is always possible for skillful legal rhetoricians to manipulate whatever constitutional vocabulary and accepted forms of argument happen to be presently in vogue to reach any ideological conclusion they desire. According to this proposition, participants in the ongoing constitutional debates are ever willing to claim loyalty to historical factors that serve to constrain and limit their conclusions, but such claims are really nothing more than a facade designed to mislead the public and perhaps even their own intellectual consciences. Of course, given the critical things he says about the “ideological” account of constitutional law, Powell would not be willing to assert anything even close to the proposition expressed by the immediately preceding sentence, but it seems to me that such an unwillingness would be unjustifiable even on his own grounds. As has been often noted, the “ideological” account of constitutional law has it that judges who purport to “interpret” the constitutional text are really just “making it up as they go along” on the basis of their own ideological convictions.\textsuperscript{37} It seems to me that Powell’s “historicist” account entails the very same conclusion, despite Powell’s apparent belief to the contrary.

I shall conclude with a few brief comments, without any supporting arguments, about the project that I think an adequate constitutional theory would undertake. I agree with one of Powell’s basic intuitions, namely, the intuition that “ideological” accounts of constitutional law are inadequate. Of course, there are a great

\textsuperscript{35} Powell, supra note 1, at 46.

\textsuperscript{36} Id.

many lawyers, judges, and politicians who act and speak in the way described (and prescribed) by the “ideological” account. In addition, so far as I can see, the world of academic law is overwhelmingly tilted in favor of “ideological” accounts. However, I do not believe that all the participants in the ongoing process of constitutional discussion and debate practice the ideological approach. Thus, to the extent to which “ideological” accounts maintain that all such participants adhere to the “ideological” account, whether they consciously do so or not, I disagree. Further, putting aside the empirical question about the percentage of participants who practice the ideological method, I think it important to keep in mind the normative question, “What ought to be the approach to constitutional interpretation?”

I also think that proponents of “ideological” accounts are typically caught in a type of pragmatic incoherence with respect to the relations between the past, present, and future, an incoherence which I think is worth exploring. On the one hand, it seems customary for ideological proponents to insist upon the desirability, and indeed the necessity, of liberating themselves from the past. In particular, they tend to insist upon the desirability of liberating themselves from past communal normative judgments, including judgments linguistically expressed in the form of constitutional provisions. However, on the other hand, it also seems obvious that, once allowed to embody their own present ideological aims in a legally enforceable form (for example, in Supreme Court opinions), such proponents are especially concerned that future generations regard themselves as being bound by their past, as that past is embodied in the present normative judgments of the ideological proponents. Presumably the thought is something like this: “I certainly do not regard myself as being morally or legally bound by the past normative judgments of my community and it’s completely morally and legally justifiable that I do not. I (and like-minded others) need and deserve complete liberation from our communal legal past. But at the same time, I firmly believe that others who come after me are morally and legally obligated to regard themselves as morally and legally bound by my present normative judgments. For, my judgments are the correct judgments.” An argument can be

38. However, I think the same attitude manifests itself even with respect to past communal normative judgments as expressed in ordinary statutes.
formulated demonstrating the pragmatic incoherence of this line of reasoning.

Finally, I agree with another of Powell’s basic intuitions, the thought that an adequate account of constitutional interpretation should make room for two apparently conflicting themes—on the one hand, the desirability of legal interpreters regarding themselves as legally and morally bound by past communal normative judgments and, on the other, the desirability of those same interpreters acting as more than mere transcribers of past collective normative judgments, but also as active agents exercising their own normative intuitions and judgments. In short, the challenge is that of formulating a coherent account of legal interpretation that somehow synthesizes two apparently disparate elements—an attitude of loyalty to the past on the one hand and a willingness to presently exercise one’s normative creativity on the other. For the reasons I have indicated, I do not think that Powell has managed to successfully carry out this project, but I am convinced that the project itself is important, although difficult. Part of that difficulty lies in the natural temptation to jettison one of these two dimensions in favor of the other. However, both dimensions must be held together in order to render intelligible the very concept of a rule of law. One reason I think a coherent synthesis of these two dimensions is possible is the fact that certain religious traditions have apparently succeeded in doing just that with respect to their own theological and normative pasts. I suggest that it may prove useful to examine such traditions for the purpose of explicating and translating their conceptions of religiously legitimate interpretation into the context of legal interpretation.

In my view, any such account of legal interpretation should include discussions of at least the following questions. First, under what circumstances, if any, should anyone ever regard oneself as bound by the past normative judgments of oneself and one’s own legal community? In other words, why think that one should ever be loyal to the past at all, whether to one’s own normative past or to one’s own legal community’s normative past? Second, if there are such circumstances, how should one go about exercising that fidelity to the past? That is, what precisely is it to exercise loyalty to past normative judgments, whether those judgments were one’s own or judgment by one’s legal community?

I suspect that any even minimally adequate answer to these questions will necessarily involve an explication and clarification of
the concept of a normative principle. In particular, I think that it will necessarily involve a clarification of certain relationships: the relationship between normative principles and particular historical linguistic formulations of those principles, the relationship between normative principles and the subjective states of mind of those persons who accept those principles, and the relationship between normative principles and their implications, as drawn out and articulated by interpreters. With respect to this last relationship, it will be important to draw a systematic distinction between drawing out the logical implications of a normative principle on the one hand and replacing one normative principle with another. The former activity seemingly can be done while being faithful to the past, whereas the latter cannot.

I also suspect that no adequate explication of the concept of a normative principle will be compatible with the traditional empiricist posture of reductionism concerning propositions. Conceiving of propositions as ontologically reducible to linguistic entities, or even to linguistic entities plus individual mental states, necessarily precludes any adequate understanding of how normative propositions could have a content transcending any particular mental act of formulation or interpretation. I believe that it is this transcendence of any particular historical moment that makes it possible for normative propositions to provide the organic temporal unity necessary for any genuine rule of law.

My hope is that clarifying and resolving these (and certainly other) issues would make it possible to understand a constitution as a set of normative principles simultaneously possessing an historical origin and a potentially infinite set of normative implications, where such implications await being drawn out and clarified by legal interpreters simultaneously exhibiting both their fidelity to their communal normative past and to their present normative philosophical intuitions.