Introduction

THE WRITTEN UNITED States Constitution is old, short and difficult to amend. Adopted in 1789 and amended only 27 times since, the Constitution and its amendments do not reach 6,000 words in length. Age, brevity and near-unamendability combine to produce a central but generally overlooked feature of the operative US constitution: Typically offered as a paradigm of a nation with a written constitution, the United States actually operates with a constitution that is more similar to than different from the paradigmatic unwritten constitution of the United Kingdom. Like the UK constitution, the 'efficient' constitution of the United States, to adopt Walter Bagehot's term, can be found in various written forms, but the document called the US Constitution is only one, and not the most important, of them.

The reason for the difference between the canonical and the efficient constitution is clear: the written Constitution's words must somehow be adapted to deal with problems of governance that have arisen since 1789, and the provisions for formal amendment are too cumbersome to serve as the primary mechanism for adaptation. Time produces changes in technology, values and (therefore) the problems people seek to solve through government. A recent case asked the Supreme Court to decide whether the use by the police of devices able to sense the presence of unusually high levels of heat within a home were 'searches' within the meaning of the Fourth Amendment.[1] Whatever the answer—the Court said they were—it seems clear that the problems of privacy posed by heat-sensing and similar modern technologies are different in kind from the problems of intrusive searches with which the framers were familiar. In nations with more recent constitutions, constitutional provisions address

[1] See *Kyllo v United States* 533 US 27 (2001).

modern problems of privacy directly. The United States must do so in some other way.

Another example comes from the constitutional law of government structure. The modern state grew by expanding the objects of its regulation. This growth made it impossible for legislatures to specify the details of the regulations the nation's people desired. Instead, the national legislature delegated the authority to develop regulations to administrative agencies, and controlled those agencies in part by reviewing what how they performed. For example, the national legislature created the Occupational Safety and Health Administration (OSHA) and charged it with responsibility for developing rules designed to reduce the incidence of accidents and injuries at the workplace. But, when OSHA proposed a rule aimed at reducing muscle injuries resulting from repetitive tasks such as typing at a computer, Congress enacted a statute denying OSHA the power to adopt the rule. One tool of review was the 'legislative veto'. In its pristine form, the legislative veto allowed one house of the national legislature to deny legal effect to a regulatory choice made by an administrative agency, if that house concluded that the choice was inconsistent with the public policy the house thought the agency should promote.

After many years of use, the legislative veto succumbed to constitutional challenge. The difficulty was that the agency's regulatory choice, if left unvetoed, would have the force of law. Ordinarily, the legal status quo can be changed only by an action that had the support of both legislative houses and the President. As the Supreme Court saw it, the legislative veto allowed one house to change the legal status quo—understood as the situation prevailing after the agency acted—without getting that agreement.[2] In striking down the legislative veto, Chief Justice Warren Burger wrote for the Supreme Court that '[t]he choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable'.[3] Yet, any stable government

[2] This analysis overlooked the possibility that the status quo should have been defined as that which existed until the time for all the actions authorized by law—including the legislative veto—had been completed.

[3] *INS v Chadha* 462 US 919 (1983).

must be workable. If the canonical Constitution makes government unworkable in some important respect, something will be done to repair the defect. The need of the modern state for agencies that could indeed make regulatory choices subject to supervision by the legislature persisted. With amendment impossible, even after the Supreme Court's decision Congress continued to enact statutes containing provisions authorizing legislative vetoes, although everyone understood that such provisions were unconstitutional. Other tools filled the gap—oversight hearings in which regulators were asked to explain their choices, controls exercised through the agency's budget, closer scrutiny of appointments to the agencies, and many more. These tools were political rather than legal, but were part of the efficient constitution nonetheless. The reason is that the efficient constitution had to accommodate changes in the demand for regulation—had to be 'workable'—even though the canonical Constitution (the 'choices made at the Constitutional Convention') remained unaltered.

These examples illustrate the two mechanisms through which the United States updates its efficient constitution without amending the canonical Constitution: decisions by the Supreme Court 'interpreting' the canonical Constitution, and the ordinary operation of politics mediated through competition between the nation's two major political parties.

More prominent in scholarly writing on constitutional law but probably less important generally, the Supreme Court 'interprets' the Constitution's terms, and in doing so adapts it to contemporary circumstances. Here, the efficient constitution is indeed written, but in hundreds of judicial opinions rather than in a single document. And, notably, the Supreme Court's opinions often make only passing reference to the Constitution's text. Operating in what has been described as a 'common law' manner,[4] the Court takes its own prior decisions as the central texts to be interpreted. A decision rendered today may cite a constitutional provision, but most of the Court's

[4] D Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877.

opinion will be devoted to analyzing its previous decisions.[5] These citations can be tracked back until at the outset of a line of decisions one finds the Constitution's text playing a much larger role. But, for the present-day reader, the Constitution's text has almost disappeared from view.

For all the attention the Supreme Court's decisions attract from the public and in academic writing, another mechanism for updating the Constitution is almost certainly more important. That mechanism is the system of political parties. The Constitution's framers were quite skeptical about the benefits of nationally organized political parties, which they pejoratively called 'factions'. Some of the original Constitution's provisions—most notably, its use of an indirect method of electing the President—make sense only on the assumption that elections would not consist of campaigns organized by political parties on a national basis.[6] The development of such parties transformed the nation's basic structure from one of separation of powers to what has been called separation of parties.[7] Contention between the nation's parties is the structure through which the updating of the nation's governing structure occurs.

Political parties too are almost invisible in the Constitution. In the late twentieth century the Supreme Court invoked the First Amendment's protection of freedom of speech, and a collateral freedom of association, to provide some constitutional footing for political parties. Its decisions dealt with matters on the periphery of the parties' operations, and, notably, assumed that the Constitution allowed legislatures to protect the existing party system, and to some extent encouraged them to do so.[8] The United States has been dominated by

[5] In contrast to practice in some other constitutional courts, the US Supreme Court attempts to render a judgment accompanied by a single opinion the reasoning of which is expressly endorsed by a majority of the Court's justices. After about a decade in which the justices rendered their opinions *seriatim*, Chief Justice John Marshall, who took office in 1801, shifted the Court's practice to one in which the decision was embodied in an 'opinion of the Court'. (Justices can and do author dissenting opinions, and they may in addition concur only in part of a majority's opinion.)

[6] See ch 1.

[7] D Levinson and R Pildes, 'Separation of Parties, Not Powers' (2006) 119 *Harvard Law Review* 2311.

[8] See ch 2.

a two-party political system for most of its existence. Again notably, the Constitution contains no provisions even encouraging the development of a two-party system. Political scientists agree that electing representatives from single-member districts with only a plurality required for victory pushes strongly in the direction of a two-party system. Elections in the United States take precisely that form, but nothing in the Constitution requires it: A federal *statute* requires that members of the House of Representatives be elected from single-member districts but, as a matter of *constitutional* law, elections could be held on a proportional basis with voters in each state casting their ballots for party lists. Under the original Constitution, members of the Senate—the upper house of the national legislature, which has a full legislative role—were chosen by state legislatures, again indicating the framers' anticipation that there would not be nationally organized political parties. The Seventeenth Amendment, adopted in 1913, replaced that with direct elections by the voters. Here, each state is a single electoral district, which provides some mild encouragement for the development of a two-party system within each state. The stronger encouragement provided by plurality election is not constitutionally mandated. Nor is there any encouragement in the Constitution for the parties that emerge in one state to be organized on the national level as well. For all the Constitution has to say about it, locally organized political parties could come together in shifting and temporary coalitions in presidential elections.

And yet: one can understand how the US government actually operates—that is, the efficient constitution—only by seeing it as a government fundamentally structured around the existence of two nationally organized political parties. For example, persistent questions in the twentieth century and today arise from the possibilities presented by the existence of divided and unified government. Divided government exists when one or both of the branches of the national legislature are under the effective control of one political party and the presidency is controlled by the other. Divided government means that important legislation advances, in general, only with significant support from both parties and, perhaps more important for constitutional purposes, that legislative oversight of the administration will be reasonably intense. In contrast, a unified government is

more like the ones characteristic of a parliamentary system with only a few parties: There truly is a governing party, which can achieve its political goals with relative ease. And the executive administration may be able to have its way without much opposition from the legislature, particularly—as has become increasingly the case in the United States—when the party controlling the government as a whole is committed to a set of core political principles.

The central role of political parties and ordinary partisan contestation in the efficient constitution means that in an important sense nearly all of US constitutionalism is popular constitutionalism. Broadly speaking, constitutionalism is how a nation structures, coordinates and limits public power.[9] The written US Constitution sets up the nation's basic institutions, and in that sense serves constitutionalism's structuring function. Even here, though, politics has its role, because the written Constitution allows the national legislature to create the administrative agencies characteristic of the modern state but otherwise says almost nothing about those agencies. The blanks are filled in by legislative choice as it emerges from ordinary politics. Quotidian politics is also the nation's primary means of coordinating the actions of the nation's basic institutions, through unified or divided government.

The modern revival of interest in popular constitutionalism gives ordinary politics an important role in limiting exercises of public power as well.[10] At first glance this might seem either a conceptual or a political mistake. How can politics effectively limit the exercises of power accomplished through politics? The point of this aspect of constitutionalism, it might be thought, is precisely to place some limits on the ability of the people to use their political power. And, even if somehow a people deeply imbued with constitutional values *might* be able to refrain from abusing their power, how likely is it that they will? Does not US history show, one might ask, that popular constitutionalism is too often racist and fearful of dissent?

[9] And, by doing so, provides the mechanisms for structuring, coordinating and limiting private power, through the law of property, tort and contract, and through ordinary regulatory legislation.

[10] The best recent statement is LD Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, Oxford University Press, 2004).

Proponents of popular constitutionalism are more optimistic about the people's capacities, somewhat more optimistic in their reading of US history, and more skeptical about the possibility that something other than popular constitutionalism can effectively limit the abuses of political power, than these questions suggest. More important, popular constitutionalism is inevitable, in light of the important place politics has in the efficient constitution. Seen in its best light, popular constitutionalism allows the people to use the ordinary contention between political parties as the means by which they implement and limit the implementation of competing constitutional visions. A president may offer programs and policies animated by a constitutional vision that he and his party articulate; leaders of the opposing political party may offer modifications or a comprehensive alternative; and the people can choose between them as they cast their ballots in regular elections. The Supreme Court is a participant in this process as well. It too offers a constitutional vision that the people can accept or reject, by electing a president or Senators who will shape and reshape the Court through new appointments and by electing legislators who might use the other tools available to them to induce the Court to change its views and who might press the limits of the Court's constitutional doctrine to and beyond the breaking point.

For all the emphasis the writtenness of the US Constitution has received in constitutional theory and in accounts of US constitutionalism, any description of the US Constitution in context must pay a great deal of attention to ordinary politics. In turn, that implies that any such description must pay much less attention to the Supreme Court and its articulation of constitutional doctrine than is found in most introductory overviews of US constitutional law. These conclusions animate the description of the US Constitution that follows. Other overviews of the US Constitution begin by examining the powers held by the national government, and then turn to government structure and constitutional rights. The emphasis here on the role of politics in US constitutionalism generates a different approach. After a brief description of US constitutional history, we take up the structures of Congress, the national legislative branch and the Presidency, emphasizing the interaction between constitutional language and the politics it produces within each branch and between

them. Only with that understanding in hand can we deeply understand the way in which a government nominally of limited powers has become one of plenary power. Deferring discussion of the courts and particularly the Supreme Court flows as well from understanding that politics is at least as important as constitutional language in giving the United States the efficient constitution it has. The Constitution's rights provisions and their judicial enforcement cannot be ignored, of course, but here too our examination will demonstrate the connections between the political and judicial articulations of fundamental rights. The book concludes with an examination of the modes of constitutional change in the United States, where formal constitutional amendments have played a far smaller part than judicial interpretation and political practice.

FURTHER READINGS

Amar, AR, *America's Constitution: A Biography* (New York, Random House, 2005) (an idiosyncratic work that examines every provision in the Constitution).

Chemerinsky, E, *Constitutional Law: Principles and Policies* (3rd edn Riverwoods, Ill, Aspen Publishers, 2006) (providing an overview of US constitutional doctrine).

Tribe, L, *American Constitutional Law* (2nd edn New York, Foundation Press, 1990) (similar to Chemerinsky, but offering a more complex theoretical account; the first volume of a third edition is available, but Professor Tribe has suspended work on completing that edition).