


CONSTITUTIONAL ETHOS

LIBERAL EQUALITY *for the* COMMON GOOD

ALEXANDER TSESIS


Constitutional Ethos

Liberal Equality for the Common Good

ALEXANDER TSESIS

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

Cataloging-In-Publication Data is on file at the Library of Congress
ISBN 978–0–19–935984–4

1 3 5 7 9 8 6 4 2

Printed by Edwards Brothers Malloy, United States of America

ACKNOWLEDGMENTS

Every book is a journey consisting of physical and intellectual excursions. On the physical side, the author must travel to brick-and-mortar libraries or virtual repositories of information. On the intellectual side, many hours must be spent alone, pondering collected research, evaluating existing arguments, working out stylistic puzzles, developing reasoning, and so forth. Fortunately, the journey is not entirely undertaken alone. Each author benefits from the wise counsel of mentors, friends, relatives, and even chance acquaintances.

In the investigation, writing, and editing of this book, I have been blessed by the abundant support of great constitutional law scholars. Their substantive guidance has been as important as their organizational advice. Where this work fails to achieve the standards they set, the fault is entirely mine.

I began receiving advice on the project when it was only a kernel of an idea during a remarkably productive dinner with Lawrence Solum and Randy Barnett. Once I put pen to paper—or more accurately fingers to keyboard—Mark Graber, Mark Tushnet, Jack Balkin, Louis Michael Seidman, Laura Underkuffler, and James Fleming gave me helpful advice on the proposal that sustained me throughout the project. Andrew Koppelman, Jeff Powell, and Insa Blanke provided me with feedback on early versions of the introduction.

I had the honor of presenting the book at the Cornell Law School, the Duke Law School, and the University of Iowa College of Law. The hospitality I received was exceptional and the penetrating insights were even better. While I am grateful to all those who engaged with me at those events, I most benefitted from the feedback of Joseph Blocher, James Boyle, Curtis Bradley, Michael Dorf, Odette Lienau, Darrell Miller, Jens Ohlin, Todd Pettys, Aziz Rana, Neil Siegel, Gregg Strauss, Bradley Wendell, and Ernest Young. They provided profoundly important reactions, analyses, and suggestions.

One thing that never ceases to amaze me about academia is how many scholars are incredibly generous with their time. Many extremely busy people have

so graciously given me the gift of their time, their feedback, their competence, and their expertise. Amy Barrett, Caroline Mala Corbin, and Timothy Zick read, commented, and guided me toward improving various versions of chapters. Several other scholars were so considerate as to read the entire manuscript. They provided me with bird's-eye views on how to improve the project as a whole. Alan Chen, Katie Eyer, Randy Kozel, and Sharmila Sohoni commented on the complete monograph at various stages of its development. I owe a special debt to William Araiza who read an early draft of the book and helped me restructure several chapters to create a more compelling and cohesive argument.

I first explored this book's conception of constitutional theory, albeit in different formats, in *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609 and *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679 (2009).

My family is the greatest anchor of my life. Alexandra Roginsky Tsesis, my wife, is effervescently inspirational. She and our children, Ruthie and Ari, have for years been kind enough to listen, inquire, and engage in this book's construction and argument.

CONTENTS

Introduction

Over the last two-and-a-half centuries, the founding commitment of the US Declaration of Independence to preserve the inalienable rights to life, liberty, and the pursuit of happiness has influenced the development of law and culture. The Preamble to the Constitution set a framework for carrying out the national mission to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty." Constitutional law provides aspirational goals, sovereign mandates, and structural mechanisms for ordinary people to hold government accountable for fair treatment and the betterment of the national community.

This book develops a theory of constitutional law structured on the public duty to protect individual rights for the general welfare. The maxim of constitutional governance synthesizes the protection of individual and public rights. The ideal is neither solely theoretical nor customary but tied to a firm foundation that the people then build upon by lobbying elected officials and petitioning appointed judges. Representative government has an interlinked obligation to the individual and to the general welfare. This paradigm for responsible governance sets the baseline against which citizens can hold policy makers accountable to the structural and normative commitments of the Constitution. A pluralistic system must respect human dignity and govern for the betterment of the body politic. This ideal is objective in the sense that it is independent of any extant judicial opinions or contemporary social mores that justify injustices, such as slavery, Indian Removal, or the exclusion of non-whites from citizenship. The premise is not only one that embraces human uniqueness but also the need for government offices to function in the interests of citizens. The Declaration and Constitution codify the fundamental social ethos of human equality and set the basic structure of governance.

Books interpreting the Constitution of the United States often separate these two factors: Libertarians believe that the individual should be left free to pursue a vision of the good life without government interference, while communitarians tend to find mutual obligation that must be fulfilled to further some

collective well-being. Too often lines are drawn between these theories without recognizing a synthetic perspective for enforcing institutional mechanisms that are conducive to equality and freedom.

The state is a means of optimizing the well-being of individuals. Human productivity can best flourish in a society of equals, where talents can be brought to bear in the betterment of self and other members of the community. In the United States, the Declaration and Constitution are the highest textual sources of normative law, granting limited powers for the augmentation of well-being. The Supreme Court of the United States recently recognized that the Declaration and Preamble are interlinked guarantees of the people's representative sovereignty over representative governance.[1] The realm of human initiative is expanded by cooperation in an open political society. As essential to a representative democracy as are deliberation, sharing, and collective will, the constitutional principle of liberal equality for the common good cannot be legally gainsaid, even by supermajorities.

The aspirational limits of representative democracy cannot, however, be realized by strictly adhering to the text of those two formative documents. They provide the initial framework of governance; clear, albeit limited, list of rights; and a federal structure. Yet neither the Constitution nor Declaration of Independence make any mention of some of the most important issues of our day: healthcare, economic welfare, gay marriage, abortion, drone strikes, education, childrearing, right to die, and so on are not even hinted at. Even the power to print paper money is nowhere directly referred to in the text, nor are free speech and the exercise of religion explicitly guaranteed against states' infringements. Understanding the documents must therefore begin with the written clauses but take seriously both deductive and inductive reasoning filtered through the ethos of dignity and community interests.

My argument is that constitutional interpretation should aim to secure the people's right to enjoy their autonomy. The constitutional community shares correlative rights by virtue of their humanity. The Declaration and Preamble are statements of the people's public charges to their governments. These documents propound the standards and rules that federal, state, and local governments—within their separate spheres of authority—are duty-bound to fulfill in the enforcement of policies that are likely to conduce to the public good. To stay true to the central premise of the Constitution, public policy must be developed that allows individuals to pursue their goals while placing limits as well as creating programs crafted for the entire community to share in the boons of liberty. Each person is free to set his or her trajectory for life but also obligated to respect the interests of others. The Constitution creates limited governmental powers for running public programs that benefit individuals while placing necessary safety limits for the good of society. Civic cooperation through representative

institutions facilitates the enjoyment of mutual human rights by creating legally enforceable standards of behavior—in the form or statutes, regulations, executive orders, and judicial interpretation—for the flourishing of individuals in a community of equals.

The Constitution does not create rights but protects those universal ideals of representative democracy first set out in the Declaration of Independence. It further grants authority to political institutions for the enforcement of policies and concrete laws for the betterment of society or some relevant segment of it. Many scholars with legal realist and process theory leanings believe that the authority of government is a social construct created by popular majorities, while I believe no law, even those enacted by popular majorities, to be authoritative unless it is in accord with a central maxim of constitutionalism, which is the protection of individual rights for the common good. I use the terms "constitutional maxim" or simply "maxim" throughout this book to refer to the overarching goal of government, which sets limits on power and holds the obligation to act for the public benefit. In some cases, constitutional maxim is interchangeable with constitutional principle, but I prefer the former to refer to the legal ethos that is not only aspirational but mandatory on all government institutions. The term refers to a synthetic principle and mandate for governance that is derived from the Declaration of Independence and the US Constitution.

I will seek to demonstrate that the Declaration of Independence and the Preamble to the Constitution are substantive statements that should bear significant weight on constitutional decision making. Unfortunately nearly all constitutional scholars—with the exception of a handful of prominent constitutional experts like Jack Balkin, Mark Tushnet, and Sanford Levinson—exclude them from discussion of interpretation, deeming them too nebulously general to be of any value for understanding specific clauses of the Constitution. To the contrary, both assert the central purpose of constitutional law: establishing stable, egalitarian norms for the creation of government institutions; placing obligations on their functions; and contributing to deliberative popular dialogue about representational self-government.

The Declaration and Preamble jointly establish the framework for deliberative discourse, containing normative principles that cannot be violated by other laws. Together they describe the purpose of government, the sovereign role of the people, ideals of the United States, and political representation. They render certain motives for laws—prejudices, hatred, bigotry, viewpoint suppression, and the like—illegitimate.

In a society of free and equal citizens, different priorities are inevitable. Therefore, the Preamble to the Constitution directed those holding the reins of power to seek the people's general welfare, a statement that required the Union to safeguard liberties and to create institutions to maintain safety and happiness.

The Declaration and Constitution provide legal stability in a pluralistic nation, where each person has a different conception of the pursuit of happiness. They set the general terms for a collective ethos, one that should empower individuals and guide politicians setting policies for the collective good.

This joint concept of individual rights and public welfare constitutes a unified mandate of government to maintain, refine, and advance a system by and for the people seeking their personal goods and exercising their collective judgments through elective franchise and deliberation on the means for achieving social goods. Succeeding generations have defined and redefined the meaning of those documents through social movements, statutes, and judicial opinions.

The terms of the Declaration and Preamble restrain decision makers and render them answerable to the people as a whole rather than a constituency that happens to be powerful enough to pass popular laws that violate the rights of certain classes of the population. Together they require public actors to effectuate civic values in accordance with the principles of nondiscrimination, mutuality, and the public good. The Declaration and Preamble proclaim a unified maxim of public civility that the people can identify and use to analyze, debate, and criticize all incompatible uses of authority. Thus any contemporary issues—including the most contentious on minimum wage, public assistance, public health plans, abortion, campaign financing, business regulations, and so on—should be treated through the prism of constitutional maxim found in those documents.

A. Constitution and Theory

The US Constitution, like constitutions throughout the world, establishes a system of governance with structural, procedural, and substantive norms. Its terms are broad enough to facilitate legal development without having to regularly ratify a new version to meet the changing demands of modernity. In combination with the Declaration of Independence's statement of norms, the Constitution provides the structural provisions along with additional proclamations on the rights retained by the people. The dual normative and institutional structure that they create sets the mandatory framework for a stable government that is not as easily modified as by statutes. Understanding their underlying purpose empowers citizens to determine the legitimacy of specific policies and laws, empowers legislatures to pass laws to safeguard rights and to advance the general welfare, blocks the presidency from becoming an autocracy, and provides judicially reviewable provisions and standards to prevent government overreaching. Reformers' efforts are bolstered by a clear understanding of the shortcomings of existing institutions.

The United States Constitution and Declaration are ancient documents; indeed, the national constitution is the oldest in the world. Their clauses were composed at a time when the art of constitution making and popular sovereignty were little understood. Inevitably, they are chock-full of ambiguities. What precisely does "due process" mean? And what is the "pursuit of happiness"? How specifically shall the federal government provide for the people's "safety and happiness"? What are the "privileges and immunities" of national citizenship? What acts constitute "high crimes and misdemeanors," and what about "good behaviour"? At what stage of negotiating a treaty with foreign envoys must a president seek the advice and consent of the Senate? By what metric should "general [w]elfare" be measured and which branch(es) of government should measure it? How literal should translation of the Constitution be? What rights are unenumerated? How should the people exercise their sovereignty? What forms of commerce may Congress regulate? What matters can Congress keep secret without publishing its deliberations in official journals of debates? Which of the president's functions are reviewable? Who should have the final say in the interpretation of the Constitution? Did the Declaration retain interpretive value after ratification of the Constitution? These and a host of other questions do not lend themselves to easy, textual, much less irrefutable answers. The Constitution's open-ended clauses and the Declaration's aspirational-sounding statements about human rights make them ripe for deliberations and analyses. In the end, we are left with supreme legal authorities that remain stable but set out methods for amendment; contain protections for political, civil, and procedural rights; provide the basic structure of governance; and set written mandates but cannot resolve all disputes without reference to norms.

Constitutional theory should contain a framework for holding officials accountable to ordinary people, each with his or her unique family, friends, social circles, likes, and anxieties. A normatively grounded and pluralistic approach to theory should not merely be a compilation of empirical, epistemological, and normative insights but rooted in the human will to act as an autonomous, social being. Yet the unconstrained exercise of power, without the restraint of national norms, carries the danger of unconscionable abuse by self-aggrandizing ruling elites or charismatic autocrats. That is, in turn, likely to lead to favoritism for select groups rather than evenhandedness and to suppression of outsiders' abilities to partake in a greater social community. A comprehensive constitutional theory must explain the reasons why some public actions are just and others unjust, going beyond positivistic explanations and assessing the fairness of outcomes; hence, theory should be more than a study of whether the government has followed existing rules or judges have relied on existing modes of interpretation. A deeper question is whether public officials have met their duty of trust to the people or, to the contrary, engaged in discriminatory conduct, suppressed

democratic speech, or malapportioned the electoral system. In philosophical terms, in this book I propose a theory of constitutional law that integrates deontology and consequentialism.

Enforceable mechanisms—in the form of constitutional norms, statutes, judicial proceedings, executive orders, and administrative actions—are essential for guaranteeing individual rights for the whole body politic. Procedural constraints on conduct, most cogently explained by John Hart Ely,[2] are by themselves no guarantee against state overreaching by majoritarian oppression of less powerful groups. No doubt self-interest will win over many who hold the reins of authority, but a standard of legitimacy makes them accountable to the public through various channels of redress such as courts, elections, petitions, and public protests. The obligation (or put another way, the constitutional pledge) of public servants is to protect rights and to administer to the public good. Deontologists, who argue only for a rights protecting regime, miss the second part of the dual responsibility of governance. Rights cannot be absolute where the context of their exercise involves irresolvable conflict between rights holders. Take for instance free expression. United States citizens regard this to be a core entitlement. Alongside it are reasonable statutory or common law restrictions on defamation, disclosure of business secrets, trademark infringement, incitement to imminent violence, and false advertisement. These limits are predicated on social norms recognizing the simultaneous existence of conflicting claims that must be balanced against the interest of the speech rights holders. As a judge or legislator balances the relevant concerns, no absolute right to speech dictates the outcome. Some social concerns must come into play in balancing the claims of speakers and those who wish to prevent them from harms to reputation, intellectual property, and tranquility. Judgments, both in the formation of law and in the adjudication of cases, often raise public policy concerns that require resolutions about socio-constitutional issues about the nature of representative democracy and the equal freedom of the collective people, whom the Preamble to the Constitution recognizes as the real sovereigns, who make up its identity.

The US Constitution is a repository of ancient and modern values needed to resolve normative and pragmatic concerns of private and public concerns. It encompasses core provisions against autocracy, amendments guaranteeing rights, and its interpretation by courts reflects cultural sensibilities about contemporary debates. Constraints against tyranny, which run the gambit from tricameralism to the guaranteed privileges or immunities of citizenship, are not merely structure; rather they provide a format of government to retain representative sovereignty in the people's hands. All three branches of government are responsible to the public and obligated to pursue policies for its betterment. This, at least, is true in theory. In reality, partisanship and favoritism enter constitutional determinations and too often infuse irrelevant consideration into

decisions that should benefit people equally, but often result in inapposite treatment based on race and other suspect classifications.

B. Written Constitution and Norms

Stability of a pluralistic society requires a principle of justice to help maintain its multifaceted character and the flexibility to recognize each person's unobtrusive right to pursue personal preferences. Judgment must take into account constitutional text, historical background, and specific context from which a dispute arises. It is too limiting to look only at original perspectives of the Constitution or to focus solely on contemporary values. What is needed is a stable foundation, one that does not change with shifting politics, that permanently demonstrates respect for human dignity while recognizing the value of history and ethical advancements. This foundation must be clear enough to interpret constitutional ambiguities, such as the meaning of "due process" and "equal protection," but general enough to enable each generation to grow as a people in light of changed social circumstances. Systemic stability is not only a function of text. Any textualist approach would be too narrowly focused, too fixated on syntactic meaning to deal with the enumerable issues that arise in an evolving democracy.

Legal stability requires structure for the administration of law and limits on the use of state powers. In order to remain relevant to anyone engaged in public debate, a blueprint of government should avoid factionalism; constitutions create systems of checks, and, overall, prevent the unbridled abuse of power. Even provisions setting out functions of the three branches of government are incomplete and must be further elaborated while staying within the parameters of text. Like the United States, other democracies with written constitutions have found the need to establish adaptable policies. While statutes can be changed to reflect political preferences that emerge with each election, a written Constitution sets expectations that transcend the existing debates between political parties and among their leaders. Complex amendment procedures make amending constitutions more difficult than changing or altogether repealing ordinary laws. I should add, on the other hand, that the amendment device is only one way in which the meaning of the US Constitution has evolved from a period of slavery to one recognizing the abomination of that institution and involuntary servitude, its incidents, as well as many other equal protection and fundamental rights concerns.

Provisions of the written Constitution only set a skeletal structure for efficient administration and for the protection of people's will to enjoy their rights on an equal basis without arbitrary restrictions. Constitutional provisions like the Unenumerated Rights Clause of the Ninth Amendment establish that an underlying ethos permeates the written text. While it stabilizes legal institutions,

the Constitution's wording is ambiguous enough to lend incompatible conclusions. For instance, the Supreme Court of the United States has both interpreted the Equal Protection Clause of the Fourteenth Amendment as a justification for racial segregation and as a statement prohibiting its practice. I will argue that underlying ethos of equality, liberty, and public good rendered the Court's acceptance of exclusionary practice in its decision in *Plessy v. Ferguson* the morally wrong interpretation of that Clause: Not simply wrong because it was an illogical way of reading the text, nor wrong only now but legitimate when it was decided. The holding in *Plessy* made no more sense then than it does today given the nation's fundamental commitments to justice that finally led to desegregation after *Brown v. Board of Education*. Those commitments include the rejection of racist state practices purporting to treat people of different races equally, while being grounded in racist assumptions. That sensibility derives in part from the post-Civil War Constitution's commitment, on national and state levels, to abide by the ideals of liberal equality. In theory, although certainly not in practice, the ideal had been a part of the Declaration of Independence and Constitution from the time of independence.

C. Theoretical Validity

Any theory of constitutional law must provide the norms of legal culture and the structured authority for following through on them. Since the Constitution is the highest law that no other laws can violate, no other branch of government can legitimately overturn it. Theories of constitutional legal doctrine, as the philosopher Robert Alexy points out, should include analytical, empirical, and normative dimensions.[3] Their breadth requires analytical considerations of procedural and substantive questions. That is not to say that the Constitution is pertinent for answering all legal questions. In the United States, judges typically resolve matters of child custody, questions about the alienation of property, and issues concerning contract formation without resorting to higher legal principles. But where those same questions contain elements of fairness that transcend the statutory or common law provisions that govern their adjudication, questions of normative constitutional law arise. For instance, in child custody cases the key question is about the best interest of the child. Resolution requires assessment of specific claims, but if the question is complicated by discrimination based on suspect classifications (such as race or nationality), then resolution of the claims transcends the facts of the case and raises constitutional questions. To take another example, if two people claim title to real estate or disagree about whether they have entered into a legally binding agreement, the case is context-specific and resolution

is predicated on ordinary laws made by courts or legislatures. But if a party raises racial or ethnic inequality claims, the question includes constitutional components of private rights and social morals. In the latter case, resolution should draw from the higher principle in dignity and social goods asserted in the Declaration and the Preamble.

I am only dealing here with constitutional inquiry where normative values are essential for definition. Along with a design of how federal government should function, the US Constitution is a statement of national ethos. Hence resolution of sex, racial, or ethnic state discrimination claims raise national, not simply local, normative questions. Disputes about core values cannot be resolved solely by reference to an extant law or social practice. Knowing that a law or custom exists does not resolve whether it is fair on its face or in its application.

Constitutional theory must provide normative answers, or at least tell us what normative questions to ask. The normative approach, which I commend to the reader, differs from the judicial supremacy of the United States, where only court opinions, especially those of the Supreme Court, are definitive interpretations of the Constitution. Nor is my approach like the British system where Parliament has the final say of the Constitution's meaning, even when that means gainsaying judicial opinion. Instead, I argue that rational evaluation of constitutional meaning is a project for both government actors and the people. The texts of the Constitution and Declaration of Independence place limits on that approach, but their open-ended language leaves room for an evolving public ethos in keeping with the central premise of US representative democracy.

The relevance and meaning of the general principles are always controversial because on their interpretation rest policy choices about subjects of such moment as school prayer, legal tender, commercial intercourse, and taxation. Without some core ideal these topics would become even more politicized than they already are. Given the significance of these topics to individuals and society as a whole, conflicts about their resolution are rarely free of rancor, but at least with a central constitutional norm nonsensical and harmful solutions can be ruled out. Debate can be better focused on core values rather than on personal and group interests.

The inevitable differences of public opinion make it necessary to have some means of achieving finality, providing definitive rules and standards. The Supreme Court has granted itself the power to resolve constitutional debates, and the other two branches have recognized that authority.[4] The Court's claim to interpretive finality, a power never explicitly granted by the Constitution, has largely gone unchallenged by the American public. But that has not stopped a few academics—most notably Mark Tushnet, Larry Kramer, and Jeremy Waldron—from taking on this premise. Through the