



We the People

of the United States, in order to form a more perfect Union, establish domestic Tranquillity, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do hereby constitute and establish this Constitution for the United States of America.

Article 1

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States...

Keith E. Whittington

and each State shall have at least one Representative, and each such Representative, together with such Members as the States may think proper to add, shall have the same Qualifications as the Members of the most numerous Branch of the State Legislature.

When vacancies happen in the Representation from any State, the Electors in that State shall choose in their stead.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years...

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes...

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations...

Section 5. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member...

Constitutional Construction

DIVIDED POWERS AND
CONSTITUTIONAL MEANING

CONSTITUTIONAL CONSTRUCTION

*Divided Powers and
Constitutional Meaning*

Keith E. Whittington

Harvard University Press

Cambridge, Massachusetts, and London, England

Copyright © 1999 by the President and Fellows of Harvard College
All rights reserved
Printed in the United States of America

First Harvard University Press paperback edition, 2001

Library of Congress Cataloging-in-Publication Data

Whittington, Keith E.

Constitutional construction : divided powers and constitutional
meaning / Keith E. Whittington.

p. cm.

Includes index.

ISBN 0-674-16541-1 (cloth)

ISBN 0-674-00583-X (pbk.)

1. Constitutional law—United States. 2. Separation of powers—
United States. 3. Law and politics.

KF4552.W48 1999

342.73'02—dc21

98-42668

**CONSTITUTIONAL
CONSTRUCTION**

For Tracey

PREFACE

The Constitution has a multifaceted nature. Constitutional theory, however, has too often focused on a single facet to the exclusion of the rest. By recapturing the complexity of the Constitution, we can bring all its parts into better focus and demonstrate how they interact to produce a total governing document that both controls and informs American politics. Most scholarly work focuses on the aspect of the Constitution that produces constitutional law. Specifically, such work explores how the Constitution is designed to limit governmental actions and how the judiciary is to enforce those constraints.

This book is concerned with another facet of the Constitution, one that is not primarily legal but political. In this context, the document does not provide external constraints on governmental action to be imposed by a neutral enforcer of the constitutional will. Rather, the political Constitution operates within politics to empower and to bind political actors in the very process of making government policy. Operating in this dimension, the Constitution is dependent on political actors, whether government officials or active citizens, both to formulate authoritative constitutional requirements and to enforce those fundamental settlements in the future. Constitutional meaning is shaped within politics at the same time that politics is shaped by the Constitution. The result is not simply the elimination of the Constitution as a binding force, but rather is a recognition of the changing nature of constitutional meaning. Political actors can be expected to bring a different set of concerns and interests to bear on the Constitution, leading to a much more contested and rather different process of constitutional deliberation than a simple reliance on judicial interpretation would allow. The political constitution is not the same as the legal constitution, either in substantive content or in practical operation. Constitutional meaning, in this sense, is dynamic. When relatively closed,

the Constitution prevents certain government actions from being considered or adopted through a structuring of the ideological and institutional environment of governmental decisionmaking. When relatively open, political actors must determine for themselves what the Constitution will mean, and in doing so they engage in the elemental task of politics and take on the highest responsibilities of self-governance. Constitutional meaning is not simply the province of the courts.

Many scholars have responded helpfully to the ideas presented in this book. In particular, I thank Herman Belz, Terri Bimes, J. Budziszewski, Robby George, Howard Gillman, Marissa Golden, Mark Graber, Sandy Levinson, Joe Mink, Walter Murphy, Karen Orren, Corey Robin, Tracey Storey, and Jeff Tulis.

I owe a special debt of gratitude to David Mayhew, Stephen Skowronek, and Rogers Smith for their untiring efforts to correct my errors and to encourage further thought. David Mayhew's immediate understanding of my project was invaluable to the articulation of my overarching theory of how the Constitution is given meaning. My understanding of American politics and the relationship between history and politics would be radically different if not for Stephen Skowronek's example and teaching. He confirmed my belief that the understanding of history is critical to the understanding of politics and convinced me that American politics is a field worth studying. Rogers Smith generously dedicated more time and effort to me and to this manuscript than any student could expect or deserve. His knowledge of American politics, constitutional law, and political theory are reflected throughout this work in points large and small.

In addition, I must extend my appreciation to the faculty and staff of Yale University, Bowling Green State University, and Catholic University of America, who have made my research and writing much easier. Completion of this manuscript was made possible by financial and administrative support from the Social Philosophy and Policy Center, Bowling Green State University. Delay in the completion of this manuscript was engineered by my wife, who continually persuaded me that there is more to life than constitutional theory.

An earlier version of Chapter 2 appeared in *Studies in American Political Development* 9:1 (Spring 1995): 55–116. Parts of Chapter 3 appeared in *Publius: The Journal of Federalism* 26 (Spring 1996): 1–24. Material from those journals is used here by permission.

**We may rest assured it is no less true in politics than in theology,
that the power which creates can alone preserve—and that
preservation is perpetual creation.**

—JOHN C. CALHOUN, “SOUTH CAROLINA EXPOSITION”

CONTENTS

Preface	<i>ix</i>
1	The Political Constitution <i>1</i>
2	The Chase Impeachment and Shaping the Federal Judiciary <i>20</i>
3	The Nullification Crisis and the Limits of National Power <i>72</i>
4	Andrew Johnson and Executive Construction <i>113</i>
5	Richard Nixon and the Leadership of the Modern State <i>158</i>
6	Building the American Constitution <i>207</i>
Notes	<i>231</i>
Index	<i>297</i>

The Political Constitution

The Constitution is a governing document. It defines and constrains the way government operates and politics is conducted in the United States. The process by which the Constitution does this, however, is not entirely clear. There is a tendency to regard the Constitution as primarily a legal document: constitutional law substitutes for the Constitution, and the exercise of judicial review is regarded as tantamount to constitutionalism itself; the Constitution is considered relevant to politics as a consequence of and only to the extent that the judiciary is willing to enforce its terms and block the actions of government officials. This image, though dominant, obscures too much.¹ The Constitution penetrates politics, shaping it from the inside and altering the outcomes. Along the way, the Constitution is also made subject to politics.

Constitutional construction is the method of elaborating constitutional meaning in this political realm. Constitutional meaning can be partially determined by relatively technical and traditional interpretive instruments, such as text and structure, framers' intent, and precedent. But such "modalities" elucidate only a portion of the Constitution's meaning.² Additional meaning cannot be discovered in the text through more skillful application of legal tools; it must be constructed from the political melding of the document with external interests and principles. This essentially creative task does not expose a failing in the constitutional design; it represents a working constitutional system.

After a long period of almost exclusive concern with the normative questions of judicial review, constitutional scholars are beginning to recognize the importance of nonjudicial actors for construing constitutional meaning. Although scholars such as Stephen Griffin, Bruce Ackerman, and Wayne Moore are deeply concerned with the judicial elaboration of constitutional law, they also recognize that nonjudicial actors are likely to bring

2 Constitutional Construction

different concerns and perspectives to bear on the Constitution and the problems of determining its meaning.³ These nonjudicial actors struggle to reconfigure, challenge, or depart from judicial efforts to define constitutional meaning.

This book is concerned with clarifying the concept of constitutional construction, how constructions have worked in American history, and their importance to American politics. Scrutiny of the concept of construction will illuminate how the Constitution operates in practice and how constitutional meaning changes. Although the history and practice of judicial review have obviously influenced the effect of the Constitution on politics, the Constitution also operates more directly on political actors, without the mediation of the courts or the creation of amendments. The jurisprudential model of constitutional interpretation not only has drawn our attention to the legal arena; it also has shaped the assumptions that we bring to our examination of judicial review. We cannot fully understand the Court itself without better analytical tools that can recognize the political aspects of the judiciary's work without abandoning its genuine concern with the constitutional. Not everything that courts do is consistent with the ideal of interpretation. Not everything that elaborates constitutional meaning is interpretation.

The possibility of constitutional construction indicates that not all changes in effective constitutional meaning should be regarded as analogous to textual amendments. Bruce Ackerman, in his effort to integrate constitutional theory with American political development, has posited the existence of informal constitutional amendments. In Ackerman's view, "constitutional moments" have two primary characteristics: they are legitimated by sustained electoral support, and they are enforced by judicial review.⁴ Although both characteristics are consistent with an amendment-based theory of constitutional change, neither is consistent with the cases of constitutive politics examined here. These constructions were never directly put before the voters, and their success, substantive development, and legitimacy did not depend on subsequent "ratifying" elections. Elections were more likely to serve as catalysts for political change than to determine or legitimate particular outcomes.⁵ Nor do these constructions depend on judicial review for their enforcement. The constructions considered here altered constitutional practices but barely affected judicial doctrine.

The notion of construction also elucidates the relationship of political agents to the Constitution. Too often, judges are assumed to possess a

monopoly on constitutional understanding and deliberative capacity. Other government officials are seen as irrelevant to constitutional development at best and as threats to the constitutional order at worst.⁶ But the practice of construction is held in common by the various branches of government, and its recognition allows for empirical analysis of the constitutional deliberations of political actors without unduly weighting the scales in favor of the prerogatives and practices of the judiciary. Uncritical acceptance of the jurisprudential model often leads to regarding political actors as responsible constitutional interpreters only to the extent that they adequately engage in a rationalistic dialogue over constitutional meaning and refrain from immoderate rhetoric, institutional and partisan bickering, or emotional appeals.⁷ Similarly, the Constitution is “real” within the legislative arena only to the extent that political actors regard it as a fixed, external constraint on their actions.⁸ But all parts of the government are crucial to the realization of the promise of the Constitution. Examination of political efforts to construct constitutional meaning reveals that the governing Constitution is a synthesis of legal doctrines, institutional practices, and political norms.⁹ Constitutional constructions capture this second dimension of constitutional elaboration, showing the degree to which the Constitution operates through and with elected representatives and their actions.

Interpreting Constructions

Constitutional construction is one mechanism by which constitutional meaning is elaborated. It supplements other methods of determining constitutional meaning and provides a more complete and workable governing instrument. Clarification of this practice help us better understand how our Constitution operates.

Deliberation on constitutions can be analyzed in terms of the extent to which constitutional structures and principles are considered and modified. At one extreme, the constitution may be written anew. Two forms of such constitutional transformation are possible: revolution and creation. (See Table 1.1) A constitutional revolution abandons the old text *in toto* in order to replace it with a new one. The authority for such a radical revision of the old order must necessarily be external to the old constitution, since none of the old constitution survives the revolution. In substance, however, constitutional revolutions need not be radical. The United States Constitution of 1787 supplanted the Articles of Confedera-

4 Constitutional Construction

Table 1.1. Levels of constitutional deliberation

Level of deliberation	Characteristics
Policymaking	Assumes consensus on fundamental principle Settles only immediate political action Specifies individuals and actions of governance
Interpretation	Allows “dialogue” between judiciary and other branches Searches for discoverable meaning Develops in evolutionary fashion Relies on legal norms Assumes ratification by judicial recognition of results Specifies rules for government action
Construction	Considers fundamental political principles Structures future political practice Occurs at moments of unsettled understanding Develops in interstices of discoverable textual meaning Provides standards for political conduct
Creation	Specifies new political principles Alters of current textual requirements Authorizes final judicial action Stabilizes constitutional meaning
Revolution	Abandons existing constitutional text Establishes new constitution Depends on authority external to existing constitution

tion, but retained a basic commitment to the British common law inheritance. Nonetheless, the new constitution abandoned its predecessor as irredeemably flawed, and brought forth a new government that did not simply build upon the old. Less radically, constitutional creation involves the addition of new text; the old constitution is not rejected, but simply amended. Moreover, the authority to amend flows from original constitution itself, and the supplement is as authoritative as the original, joining with the old text to form a new whole.¹⁰ In either case the founders who draft the new text stand in a unique position in the history of the polity, as their decisions are authoritative.

At the other extreme of constitutional deliberation is policymaking. Policy may fulfill the promise of a constitution in governmental practice, yet it does not extend the meaning of the constitution itself. Policy initiatives may help solidify constitutional understandings and stability or help destabilize inherited constitutional arrangements by hastening fundamen-

tal crisis, but they elaborate on constitutional forms only indirectly. Policy decisions determine the specific personnel of government office and the particular actions of an operating government, yet they assume an underlying consensus on what offices exist and which actions the government may take. Not all important political decisions are constitutional in nature; policy changes may cause severe alterations in the existing distribution of social resources, benefiting some social interests at the expense of others, elevating some claims over others. Normal politics need not be uneventful.¹¹ Nonetheless, policy concerns are eminently contemporary, setting a particular course that will undoubtedly have implications for the future but without claiming any authority over it. Later policymakers have as much, and as little, authority to determine the actions of government as their predecessors.

Between these extremes, in which the constitution is either produced or assumed, lie efforts to elaborate the inherited text. Currently the only analytical model for this activity is jurisprudential and focuses on interpretation. Interpretation, however, covers a range of quite different activities and biases the analysis of constitutional meaning toward accepted legal forms.¹² The jurisprudential model needs to be supplemented with a more explicitly political one that describes a distinct effort to understand and rework the meaning of a received constitutional text. That more political model is one of constitutional construction. Both interpretation and construction assume a fidelity to the existing text. Both seek to elaborate a meaning somehow already present in the text, making constitutional meaning more explicit without altering the terms of the text itself. As such, both methods of constitutional elaboration are subordinate to the text, which is understood as prior and more fundamental.¹³ Interpretations and constructions can be abandoned without abandoning the text, and if a correct understanding of the text is seen as being in conflict with prior efforts at interpretation or construction, it is the earlier elaborations that must give way.

Unlike jurisprudential interpretation, construction provides for an element of creativity in construing constitutional meaning.¹⁴ Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules. In such cases, the interpretive task is to limit the possibilities of textual meaning, even as some indeterminacies remain.

6 Constitutional Construction

It is a necessary and essentially political task, regardless of the particular institution exercising that function, to construct a determinate constitutional meaning to guide government practice. Something external to the text—whether political principle, social interest, or partisan consideration—must be alloyed with it in order for the text to have a determinate and controlling meaning within a given governing context. As a result, constitutional constructions are often made in the context of political debate, but to the degree that they are successful they constrain future political debate. As the jurisprudential model emphasizes, interpretation is understood to be a more technical activity, concerned with employing a set of analytical tools to unearth the meaning inherent in the constitutional text. Although constitutional interpretation may be more of a craft than a science, and its practitioners lawyers not machines, its results are immediately justified in terms that are internal to the Constitution itself. The tools of interpretation may not be limited to the “four corners” of the document itself, but such aids as precedent, history, and constitutional structure are meant to illuminate the text, not to alter or add to it.¹⁵ If construction employs the “imaginative vision” of politics, interpretation is limited to the “discerning wit” of primarily judicial judgment.¹⁶

Allowing for both interpretation and construction expands the field of constitutional elaboration without shrinking the range of interpretation. One need not accept an overly confining view of interpretation in order to accept a supplemental category of construction. Addressing hard cases—questions for which the legal constitution does not seem to provide answers—is a deeply political activity.¹⁷ It transcends the widely accepted but narrow “analogy between a constitution and ordinary law,”²¹ which provides disproportionate support for the practice of judicial review, and relieves us of the dubious burden of “defin[ing] the difference between the Constitution and politics as the difference between law and politics.”¹⁸ The cases examined in the following chapters demonstrate that government officials have sought to gain political mileage by portraying their understandings as “legal” and “technical” interpretations of the constitutional text. Drawing a distinction between interpretation and construction addresses the political dimension of American constitutionalism, while maintaining our ability to analyze our historic experience of a legalistic constitution.

The concept of constitutional construction allows a full range of interpretive methods and also opens other areas of the Constitution. Notably, it allows us to abandon an exclusive focus on the Bill of Rights and to take

into account political institutions and public purposes. Additionally, the idea of construction makes way for new types of constitutional arguments and activities that were previously excluded as entirely outside the scope of constitutionalism. Constitutional arguments derived from abstract normative theory must somehow be reconciled and integrated with legalistic elements such as textual language or inherited precedent, and interpretations based on a national “ethos” must struggle with the appropriate level of abstraction in the moral theories that are recognized in the constitutional text.¹⁹ When political actors systematically make such arguments with little regard for balancing such textual components, it makes more sense to recognize that they are engaged in a different activity than to accuse them of making “bad” interpretations. We need a conceptual scheme that can account both for purely political arguments based on either moral theory or pragmatic calculation and for narrowly technical arguments based on precedent or historical intentions. Moreover, we need an analytical model that can incorporate political practices and not just judicial opinions. Political practice helps define what we understand the Constitution to mean, but it does not arise through anything like interpretive argument and does not exist in the form of constitutional law. The idea of construction helps us understand how constitutional meaning is elaborated even when government officials do not seem to be talking about the Constitution, or are not saying anything at all.

Interpretation and construction not only bear rather different relations to the constitutional text; they also take somewhat different approaches to the Constitution and produce different kinds of results. The model of interpretation has always been a somewhat idealized version of judicial practice, carrying with it a prescriptive standard as well as an element of description.²⁰ This model asserts that constitutional meaning should be understood through the rationalistic production of legally binding rules. Ideally interpreters set aside their own interests in the case at hand in order to pursue an objectively demonstrable, correct outcome; the interpretation emerges from a process of careful argumentation and incremental application. Although any given effort at interpretation may be flawed, interpretive results are largely evolutionary, with errors being exposed and corrected through extended analysis and new applications. A complementary model is needed to clarify an understanding of constitutional meaning through the political construction of authoritative norms and governing institutions. Government officeholders and constitutional commentators often find themselves engaged in constructing constitu-

8 Constitutional Construction

tional meaning from an indeterminate text. In this context, the Constitution is often understood less as a set of binding rules than as a source of authoritative norms of political behavior and as the foundation of governing institutions; it permeates the substance of political action, establishing not only the boundaries of permissible action but also the standards of action. The Constitution not only constrains; it also empowers. As a consequence of the indeterminacy of the constitutional text, the inherently compromised nature of a successful construction reflects not a flaw in the process, but rather the balancing and synthesis of competing social interests and external ideologies with the partial directives of the foundational document. The construction gains its authority less from its unassailable derivation from textual imperatives than from its capacity to give practical meaning to constitutional concerns.

Several factors are likely to lead even conscientious political actors to turn to construction to supplement their interpretive understandings of the Constitution.²¹ Traditional tools of interpretive analysis can be exhausted without providing a constitutional meaning that is sufficiently clear to guide government action.²² The text may specify a principle that is itself identifiable but is nonetheless indeterminate in its application to a particular situation. Either the principle itself may break down in a specific context, or the facts at issue may be deeply controversial.²³ Alternatively, the principle established by the text may be unclear: the text may contain contradictory requirements with little or no indication of how to weigh the different values at stake or how much force to give to particular, atypical requirements; there may not be sufficient information for an interpreter to arbitrate among contested meanings; or the text may be simply silent on issues that are nonetheless substantively constitutional.²⁴

Beyond such problems of textual ambiguity lies the complex nature of the Constitution itself. The jurisprudential model of interpretation largely assumes a legal text providing clear specifications of duties and rights, but the Constitution is also a political text. As such, the Constitution also expresses normative sensibilities. An act may be constitutionally permitted and still not be constitutionally appropriate.²⁵ The political construction of constitutional meaning helps close the gap between legal requirements and constitutional sensibilities, speaking with the authority of the Constitution even where the text does not seem determinative. Similarly, construction helps transform constitutional theory into constitutional practice. Constitutional mandates are often not self-enforcing, nor are the concrete instruments for their realization always readily at hand. Efforts to