Review Essay

A Fine Romance: Keith Whittington's Originalism and the Drama of U.S. Constitutional Theory

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Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning*. Cambridge: Harvard University Press, 1999. ix + 303 pages.

Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Lawrence: University Press of Kansas, 1999. xi + 299 pages.

Introduction

Political Scientist Keith Whittington offers his theory of the U.S. Constitution in two volumes, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, and *Constitutional Construction: Divided Powers and Constitutional Meaning*. In *Constitutional Interpretation* (CI) Whittington presents an originalist constitutional theory with a focus on the power of judicial review, including an energetic and often biting critique of selected cases, such as *Griswold v. Connecticut*. In *Constitutional Construction* (CC) Whittington offers four detailed case studies of constitutional readings originating from congressional, executive, and state sources, supported by a briefer theoretical grounding for nonjudicial constitutional readings.

Taking a cue from scholars who have argued that various (meta) narratives shape the literatures of their disciplines, I suggest that Whittington's constitutional theory is best understood as a romantic narrative—complete with all the possibilities and problems that romance entails (see, e.g., White 1973, 1987; Schafer 1970). Romantic narratives are typically characterized by a grand and often mystical quest that harkens back to an original and idealized Golden Age. The hero of this story often feels

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alienated from his true self and must battle several formidable adversaries who would prevent him from attaining the ultimate goal, a return to the Edenic natural state, which allows for ample self-expression. Several tensions characterize romantic work. Although the hero seeks ultimately to defeat his adversaries, he also needs them to maintain the narrative and his centrality in it. The objective status of the Edenic period is in tension with the desire for subjective self-expression in a contemporary context, as reason competes with imagination. In this sense, the grand quest can be understood as a desire for true but imaginative self-expression, perhaps as a kind of emancipation from the particularity of history and the conflict of politics.

I argue that Whittington's theory follows the romantic form in several ways. His work is strongly nostalgic regarding the founding. He identifies his central adversary as the overreaching judiciary, arguing that the judiciary preempts popular constitutional expression in contemporary politics by failing to follow the founders. Whittington's goal is to offer a constitutional theory that reins in judicial power, thus clearing the way for the people (through their agents in the popular branches) to follow the founders' example of regular constitutional expression. This leads to a tension in Whittington's work between the objective status he accords to the founding and the subjective expression that characterizes popular constitutional construction. I conclude the essay by discussing the promises and pitfalls of the romantic narrative, suggesting that it may be enriched by the addition of tragic, ironic, and comic voices, which can be found in critical race theory and queer theory.

A Summary of Whittington's Work: Objective and Subjective Constitutional Expression

Whittington's constitutional theory is structured around a tension between a desire to remain true to the founders' objective constitutional expression and a desire to foster subjective expression in popular constitutional construction. In Whittington's view, judicial interpretation should be strictly limited by framers' intent, which takes on an objective status in his work, while constitutional construction in the popular branches is the appropriate venue for subjective constitutional expression unlimited by framers' intent.

For Whittington, originalism is the only permissible mode of judicial constitutional interpretation. He argues that "not only is there a right answer to the construction of an interpretive standard, but also that that answer is fixed in the essential forms of the Constitution and does not change" (CI:15). Like other originalists, Whittington contends that the Supreme Court should be limited to exercising judicial review only in cases

where original intent is clear. This original meaning is discoverable through the founders' documents, records of drafting conventions, popular debates during ratification, and other relevant contemporaneous commentary. He asserts that the founders' intentions "serve as an objective source of law independent of the judicial will" that can be discovered and applied objectively (43). He asserts that "[t]he judiciary gains its authority by objectively applying those principles to which the people consented at the founding. Abandoning originalism allows the judiciary to impose value choices that have not been authorized by democratic action" (112). Conversely, fidelity to the founding fosters the continued expression of the popular will by facilitating constitutional construction outside of the judiciary. He argues, "Our inheritance from the founders is not just a law, but the power to make law. The judicial adoption of originalism ensures that we do not squander that inheritance" (217).

Constitutional construction in the popular branches "result[s] when originalist interpretation breaks down" (CI:13). According to Whittington, the judiciary should refrain from acting and allow constitutional construction to occur among the political branches when there are gaps left by the founders, when the founding text does not clearly apply to contemporary circumstances, and when judicial decrees fail to resolve issues (CC:226). While constitutional construction may reference the text and the framers, it is probable and permissible that such debates will move into nonoriginalist territory. Compared with the way that judicial interpretation is strictly limited by founders' intent, constitutional construction in the popular branches seems particularly subjective. Thus, Whittington states, "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" (7).

The four case studies in *Constitutional Construction* explore subjective constitutional expression through a detailed examination of the construction of judicial power in the Chase impeachment, the construction of federalism during the nullification crisis, the rise of congressional power around the time of the Johnson impeachment, and the affirmation of executive power with limited congressional participation in the Nixon era. Whittington argues that each case of constitutional construction is noteworthy not for its particular political outcome but rather for its long-range effect on institutional development. In this sense, each case illustrates that "the Constitution empowers political actors to alter their social and institutional environment," and "demonstrate[s] how political action becomes constitutive of the political order, reshaping how political problems are conceptualized and restructuring what government actions are possible,"

and "provide[s] an important vehicle for constitutional development and change" (CC:18, 16, 208).

The qualities that characterize (objective) interpretation and (subjective) construction seem to be polar opposites. While constitutional interpretation calls for the Supreme Court to discover constitutional meaning through technical legal skills, constitutional construction is said to rely on the imaginative creation and political development of constitutional meaning by the political branches. As Whittington asserts, "If construction employs the 'imaginative vision' of politics, interpretation is limited to the 'discerning wit' or primarily judicial judgment" (CC:6). Although the interpreted Constitution is a set of objective rules that are binding and unchangeable short of amendment or revolution, the constructed Constitution is a set of norms and foundations that offers guidance but also allows for ample subjective expression. Though this type of interpretation supports legal stability and the maintenance of law established at the founding, this construction promotes constitutional development and the ability to adapt to changing political circumstances (ix).

The Founders as First Love

The founders are Whittington's first love, and, as is the wont of romantics, Whittington idealizes his first love, presenting it as objective, authentic, and flawless, particularly in comparison with contemporary constitutional politics. As far as I can tell, Whittington's work contains no direct criticism of the founding, and no indication of why he supports the founders' substantive political choices. He does, however, indicate why he favors their choices at the level of process: The institutional structures they constructed provide an ongoing venue for authentic democratic expression. Imitation being the highest form of flattery, Whittington's work is characterized by a deep desire to repeat the democratic expression of the founding. Whittington argues that the people must affirm the creation of the founders' power in order to claim the power of self-governance in contemporary politics. Thus, he asserts, "We can replicate the fundamental political act of the founders only if we are willing to recognize the reality of their act. Stripping them of their right to constitute a government would likewise strip us of our own" (CI:133).

Whittington's narrative of popular sovereignty and democratic expression has a mystical bent that is somewhat reminiscent of Rousseau's romantic discussion of the composition of the general will in the *Social Contract*.[1] Whittington argues that a sov-

[1] It should be noted that Whittington may not be quite as romantic as Rousseau when it comes to the issue of participatory democracy. Whittington advocates allowing agents of the people to represent them, whereas Rousseau refers to the election of representatives as a sign of the degeneration of civil society.

ereign, unified people were brought into existence in a revolutionary act "through a singular act of will" at the founding, which bridged "[t]he gap between chaos and order" at which point "the people created itself and designated its instrument [i.e., the Constitution] for serving the public good" (CI:216). In his view, the constitutional text created the rhetorical basis for a common people while empowering and limiting the people's agents in the legislative, executive, and judicial branches. These limits, applied to the other branches through judicial review and imposed upon the courts through the discipline of originalism, uphold the principle that the people, rather than any one branch, are ultimately sovereign. Although the limitations are clearly restrictive at one level, Whittington claims that they are also radical in the sense that upholding the ultimate authority of the people preserves the possibility of ongoing constitutional development, and of recreating the founding through revolution. Thus, Whittington advocates the regular practice of constitutional construction by the popular branches as a means of empowering the people, through their agents, to continue to develop the Constitution—at least that part of the Constitution that is not fixed by original intent—in the context of contemporary political needs and circumstances.

Unlike most originalists, Whittington acknowledges that constitutional theory is grounded in narrative. He provides two related standards upon which to judge his narrative. First, he argues that "[t]he persuasiveness or compelling quality of the story derives from both how desirable the normative goal is and how well it comports with our experience of actual politics" (CI:142). Second, he hopes to provide a narrative that will move constitutional theory beyond the impasse created by the majoritarian dilemma "originally proposed by Bickel nearly forty years ago" (34). According to Bickel and his successors in mainstream U.S. constitutional theory, judicial review presents a dilemma to majoritarianism because it appears illegitimate: It is practiced by electorally unaccountable judges and appears to lack a widely accepted standard or uncontroversial constitutional grounding upon which decisions might be based. Although scholars have offered various groundings, each has been met with "general dissatisfaction," and has yet to result in a theory of judicial review that is "fully persuasive" to the field (213). Whittington intends for his originalist narrative to move the field beyond this impasse.

Whittington characterizes popular sovereignty as a "metaphor for our constitutional order," like a myth, a fiction, or "a label for a story we tell about ourselves, indicating both how we think our system functions and how we think it ought to function" (CI:142). Following this guideline, he finds that the story of popular sovereignty isn't "literally true, but it is true enough that we can adopt it as our regulative ideal" and as a justification for

the political system, "as long as the separation between the idea and the reality does not become too great" (142). The fact that "the Americans were not really one united people is of less importance than the fact that they could think of themselves as such" (144). To be recognized as legitimate, the sovereign must in some way "represent the whole of the people" through majority rule, with limits as specified by the people at the founding, such that "membership is real and significant" (145, 142). This membership includes the minority who, according to Whittington, are "embraced within the sovereign through the deliberative quality of the constitutional decision" (147).

The problem is, not everyone shares Whittington's devotion to the founders. While the goal of self-government may be desirable to majority and minority alike, recent work in critical race theory and feminist legal theory makes it clear that there is substantial doubt as to whether, to use Whittington's words, that goal "comports well with the actual experience of politics" at the founding, to say nothing of contemporary society. They argue that various groups were deliberately excluded from the political process at the founding and that discrimination that obstructs full participation continues to this day. In other words, Whittington's originalist narrative appears to be contested. Although he doesn't acknowledge these particular literatures, to his credit Whittington does concede that his narrative is theoretically contestable, even though he also asserts that, despite contestation, there is one true narrative and that it is his. Thus he asserts, "Though this construction, like all constructions, must be contended for in the political sphere in order to be made good, the arguments presented here indicate the results to which the outcome of that political debate should conform" (CI:15). But why should Whittington's narrative be compelling to those who don't necessarily think of themselves as part of "the people" at the founding or now? Whittington does not address this question. Thus it seems unlikely that nonoriginalists of various stripes will find it persuasive or that it will overcome the impasse that has characterized mainstream U.S. constitutional theory, at least since Bickel's time. On both counts, Whittington's narrative seems to speak largely to true believers and thus falls short of his own standards.

Of course, these difficulties are not unique to Whittington, or even to originalism, so it seems problematic to simply fault Whittington for failing to solve them and to leave it at that. Rather than continuing to focus on directly resolving Bickel's majoritarian dilemma, it might be interesting to try to better understand the way that Whittington's narrative may inadvertently strengthen the impasse that has hamstrung mainstream U.S. constitutional theory for several generations.

The Judiciary as Adversary

Romantic narratives typically feature a strong adversary that obstructs a return to or a re-creation of the idealized past. Whittington's story is no exception. Contemporary politics is said to be dominated by an overreaching judiciary that obstructs the re-creation of a politics that is more true to the founding ideal of continued popular expression in contemporary politics. Thus, Whittington constructs the Supreme Court as a dangerous and powerful adversary. According to Whittington, "the Court's willingness to advance progressive or politically unpopular goals was a short-lived anomaly in the nation's history. More often, the Court has facilitated popular evils through constitutional error." Adding that "[t]he history of the American judiciary is not encouraging," he supports his argument with the examples of slavery, segregation, fear of "radical subversives," and "government emasculation of private property" (CI:139). In his view, errors made by the Court "should serve as a warning of the political possibilities once an unwavering focus on the Constitution's terms and purposes is lost" (174). East of Eden, "the judiciary is a thin reed upon which to rest one's hopes for political salvation in a corrupt world" (140). He suggests that even though the Court has fallen away from the true path (and enticed others to follow), it can redeem itself by embracing the limits of originalism. Thus, Whittington asserts, "If the Court has corrupted us by seducing us into looking to it rather than to the Constitution, it can also play a role in reversing some of that damage" (213). To reverse the damage it has wrought and to prevent further incursions, the Court must return to the founding vision, and "rededicate itself to its function as the interpreter of the law" through "[t]he discipline of originalism [that] promises to protect the Court from itself, and in so doing, to protect us from the Court" (213, 218–19). While he (sarcastically) concedes that "[a]dmittedly, originalist jurisprudence has little to offer those who hope to achieve social change through judicial fiat" (174) he adds that "[s]uch progressive optimism must be tempered with a historical informed skepticism" (174).

Whittington's skepticism does not extend to the popular branches. He often seems to favor the political branches over the judiciary. Thus, according to Whittington, "Despite the failures of constitutional theory adequately to take into account the elaboration of constitutional meaning outside the courts, political practice bears witness to a continuing effort to resist the judicial monopolization of the Constitution and its meaning"(CC:207). Whittington hopes for the neutralization of such resistance and the development of a greater understanding that constitutional construction is a means by which we might recover a greater connection to the Constitution. Accordingly, he argues that

"[c]onstitutional theory must recognize the multifaceted nature of the Constitution and the importance of divided power for realizing its meaning. In doing so, we can begin to recapture some of the richness of the Constitution and to understand the complexity of constitutional government" (228). Constitutional construction should increase, thus disempowering the courts: "Judicial review should become less relevant to our political life over time, not more" (CI:210).

One might wonder whether the political branches have consistently fared better than the judiciary on the previously mentioned issues. One might also wonder whether favoring the popular branches as more virtuous than the judiciary is consistent with the (Federalist) framers' skepticism about human nature and institutional power—particularly since Whittington characterizes political actors as especially ambitious and often largely unaware of the constitutional dimensions of their arguments. "Ambitious political actors will ultimately turn to the text in order to find support for their own political interests and will construct a vision of constitutional meaning that enshrines their own values and interests" (CC:207). He adds that "those engaged in constructive efforts display none of the objectivity valued in the jurisprudential model. Constructions are made by explicit advocates, not by disinterested arbiters" (210). This apparent ambivalence makes more sense in the context of considering Whittington's work as fundamentally romantic. Presenting the Court as a powerful and dangerous adversary provides a foil against which the popular branches can be situated as flawed, but valiant, protagonists attempting to withstand judicial incursion.

Whittington's ambivalence about judicial power also makes better sense when it is understood as part and parcel of the tension that typically characterizes romantic narratives. Despite his desire to reduce judicial power, and his embrace of many individual tenets of judicial restraint (e.g., the Court should not operate as a source of fundamental change; the Court should presume legislative action constitutional unless the text or intent clearly indicate otherwise), Whittington nevertheless seems to buttress judicial power by calling for "activism in the name of the text plus historical evidence," and stating that "when the Constitution is knowable, the Court must act vigorously to enforce the limits it places on governmental action" (CI:167, 36). Sidestepping Bickel's majoritarian dilemma, Whittington claims that activism is rooted in popular sovereignty: "Originalism advances democratic values not through a majoritarian endorsement of judicial restraint . . . but through the maintenance of popular sovereignty as a governing idea" (153). Thus, he argues that originalist judicial activism moves gradually toward "correctly grounded doctrine" (170). Accordingly, Whittington approves of the Court striking down the federal criminalization of guns near public

schools in *U.S. v. Lopez*, because, in his view, the law was "clearly so marginal to the commerce power" that it did not threaten federal power to regulate manufacturing, which he concedes "would have been far more traumatic to the stability of law and of governmental and economic institutions" (171). In addition, *Griswold v. Connecticut* would not be good law under his theory, as "there is general originalist agreement that the broad right to privacy developed by Justice William Douglas in *Griswold* to allow the purchase of contraceptives is unjustified by the discoverable Constitution" (37). Following the lead of two icons of originalism, Robert Bork and Raoul Berger, Whittington adopts a method of moving "stepwise . . . from a narrow to a broader reading" of the Fourteenth Amendment's due process clause, discovering that it would protect privacy, but not sexual autonomy (36).

Of course, Whittington knows that many are quite concerned about such outcomes, due to their implications for racial and abortion politics. Rather than engaging these concerns seriously, as, for example, Leslie Goldstein does in her thoughtful book *In Defense of the Text* (1991), Whittington seems to parody them: "[I]n an originalist America, would not the government engage in flogging and branding of criminals, forced sterilization, white supremacy, electronic eavesdropping, silencing of evolutionary teachings and so on" (CI:173)? He concedes that an originalist judiciary would not prevent such evils, but adds that "it would not impose them, either" (173). Continuing in this peculiar tone, he asserts that "[s]uch positive government action requires decisions by political representative, not by judges, and thus the charge really turns on the willingness of legislatures to issue appropriations for branding irons" (173). Conceding that the judiciary did have a positive role in halting at least some discrimination, he is careful to add that while "some of these practices were finally halted by judicial action, many were not" (173). In any case, he asserts that practices such as white supremacy are no longer followed and concludes that this has more to do with constitutional construction than with constitutional interpretation. "It is the continuing vitality of the political construction of the equal protection clause that ensures that white supremacy is not on the legislative agenda. . . . The adoption of appropriate interpretive standards can only do so much. The rest is politics, and always has been" (173).

While Whittington's advocacy of originalist judicial activism may fit quite well with his romantic view of the founding, his embrace of judicial finality is perhaps more surprising. "Although the judicial obligation to engage in constitutional interpretation is not unique to the courts, since each branch is bound by the sovereign will, the judiciary nonetheless is functionally elevated above the other branches in terms of its specialized capacity to

interpret that will" (CI:153, 113). Ironically, this seems to leave judicial power unchallengeable by other branches, suggesting that the checks and balances afforded by the separation of powers will not apply in full force to the judiciary. Judges appear to have the power to make final pronouncements about what the framers intended the Constitution to mean. In addition, the judiciary appears to have the final say over the meaning of the sovereign will, which theoretically serves to limit all the branches of government, including the judiciary. But, how can that be, if the judiciary has the final say?

When the Romance Is Over

There is much to recommend in Keith Whittington's work. His theory is far more theoretically and politically sophisticated than the standard originalist fare that can be found in the work of Robert Bork (1990, 1996) or Raoul Berger (1977), for example. His form of originalism offers a theory of popular sovereignty and constitutional construction that moves beyond the typically flat equation of the legislature with the majority and the judiciary with the minority that one finds in much of mainstream U.S. constitutional theory. And, after all is said and done, who doesn't love a good romance?

Yet, like most romances, Whittington's story lacks proportion and a sense of humor. Despite his best theoretical intentions, the narrative he has chosen seems to have backed him into mainstream constitutional theory's same old impasse. Whittington's idealization and attachment to the founding, and his overdrawing of the judiciary into a seemingly indefatigable adversary, obstruct his desire to replicate something like the ideal constitutional past in contemporary constitutional expression. At best, the popular branches appear to be locked into a seemingly unwinnable battle with the judiciary.

The seriousness with which he undertakes his quest leads him to idealize his first love and to overestimate the strength of his adversaries. In addition, he underestimates the ability of his protagonist to move beyond the dramatic impasse he has presented, and he does so without benefit of humor and distance.

What happens when the infatuation of romance fades? Lovers have to integrate their idealized romance into a more complex vision that is proportionate with the rest of the world. Either they must find a way to live with their lover, warts and all, or they must find a way to leave, if that is at all possible. Typically, those who stay must strike a balance between attachment and distance. A sense of humor helps.

Whittington could give up the fantasy of recovering an idyllic founding moment and move to a more complex and disturbing

understanding of the birth and development of the nation. An example of this can be found in the more tragic, and to my mind far more compelling, narratives of the founding offered by critical race theorists such as Derrick Bell (1987, 1992, 1996) and Patricia Williams (1991), who argue that racism has been a foundational and indestructible aspect of the U.S. constitutional dialogue since the nation's inception. In these narratives the tragic hero resists oppression. While small victories might result from battles here and there, thus providing some meaning through struggle, the war against racism will inevitably be lost, and the tragic hero knows it. If Whittington would be willing to consider such narratives he could still retain his goal of authentic contemporary constitutional expression, but the tragic limitations of these stories might alter the confidence and the substance of his expression.

Every dramatic form has its limitations, political and otherwise, and tragedy is no exception. By characterizing resistance to oppression as tragically heroic, critical race theorists (perhaps inadvertently) have reproduced the oppressed/oppressor or victim/victimizer binarisms, and that can lead to no good end. Think Romeo and Juliet.

The ironic narrative and camp stance of queer theory may help to complicate these binarisms and to dislodge the sense of inevitability that characterizes the tragic critical race narratives. Whereas in tragedy events seem to follow each other in an inevitable manner, camp may dislocate events and disrupt the seemingly natural laws (that are also so prevalent in Whittington's narrative), revealing the "other" side and creating freedom from usual patterns. Parody and drag reveal the irony of the search for the authentic self and the natural laws to which it would conform. In addition, liberatory forms of comedy, such as those found in Bakhtin's notion of carnival laughter, may also offer a potentially more disruptive and thus more politically transformative and perhaps more hopeful narrative frame. Carnival laughter aims to negate the hierarchy and privilege of the dominant authority through ridicule and shame. Such laughter may bring hierarchy down to the level of the people and affirm a renewal through rejoicing, thus creating a space for "a shift of authorities and truths, a shift of world orders" (Bakhtin 1984a:127). According to Bakhtin, "The serious aspects of class culture are official and authoritarian; they are combined with violence, prohibition, limitations, and always contain an element of fear and of intimidation. . . . Laughter, on the contrary, overcomes fear, for it knows no inhibitions, no limitations. Its idiom is never used by violence and authority" (Bakhtin 1984b:304). Because the old hierarchical structure and authority bases are suspended in carnival, disorder may result, and new modes of interrelationships between individuals and groups become possible. Bakhtin argues

that even if the victory through parody and laughter is temporary, it is nonetheless a victory over fear that can "open men's eyes on that which is new, on the future" (Bakhtin 1984b:307). Bakhtin's fearless recognition and parody of power offers, ironically, a sober yet potentially transformative basis for a more progressive politics. The problem is that disorder is typically frightening and disorienting for most. But for Bakhtin, dodging the reality of power is not really an option. And, I would argue, it is no longer really an option in U.S. mainstream constitutional theory. Still, looking toward the future with Bakhtin, whether we stay or go, couldn't we all use a good laugh?

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