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[pp. 119-126]

CONSTITUTIONAL CHANGE 1: FORTY˙ACRES AND A MULE

Sometimes constitutional change comes from explicit constitutional amendments, and this is the place to begin. After the Civil War, the Constitution was significantly altered. Originally the bill of rights applied 'only to the federal government. As far as the national Constitution was concerned, the states were free to suppress dissent, punish religious beliefs, or take property without just compensation. The framers sought to discipline the national government rather than the states—believing that political controls at the state level, alongside state constitutions, would protect against abuse by state governments. With the experience of slavery, this understanding shifted dramatically.

The states seemed a potential source of oppression and tyranny, and the national government a source of protection against state power. The principal result was the Civil War amendments, which are now understood to apply the bill of rights to state governments. The Civil War amendments also prohibit slavery or "involuntary servitude." They ban states from depriving any person of life, liberty, or property "without due process of law." And they prohibit states from denying any person "the equal protection of the laws" and thus forbid discrimination on the basis of race, sex, and other illicit grounds.

The Civil War amendments do not explicitly contain social and economic rights of the kind that Roosevelt sought. In a way this presents its own puzzle, for the question of economic rights was hotly debated at the time. The South had more than 4 million newly freed slaves who lacked land and shelter. It was frequently argued, Roosevelt-style, that without economic freedom, the political freedom of the newly freed slaves would be meaningless. The Radical Republicans in Congress sought to confiscate parts of Southern plantations and give them to the freedmen. Thaddeus

Stevens, a Republican leader, urged that the freedman be given a small percentage of white-owned lands. Speaking before the Republican convention in September 1865, he contended that the government should seize 400 million acres belonging to the wealthiest 10 percent of Southerners, and transfer forty acres to each adult freedman, with the remaining (about 90 percent of the total) being sold "to the highest bidder" in plots no larger than 500 acres.

Some of the confiscated land had already been donated to newly freed slaves under the general rubric of "forty acres and a mule"—an unmistakable precursor of modern thinking about economic rights. In 1865 General William T Sherman and Secretary of War Edwin M. Stanton met with twenty African American community leaders of Savannah, Georgia. According to Garrison Frazier, a Baptist preacher and former slave, "freedom required" that the former slaves "have land, and turn and till it by our labor . . . and we can soon maintain ourselves." As a result of the discussion, Sherman issued a special field order, under which freedmen would have the forty-acre homesteads "where by faithful industry they can readily achieve an independence." In South Carolina and Georgia, forty-acre plots were given to more than 40,000 freedmen; in Davis Bend, Mississippi, large tracts of confiscated land were given to 1,800 former slaves. On a national level, jurisdiction over this and other land was given to the Freedmen's Bureau, which sought to provide land and schools to the newly freed slaves, not simply legal protection. Shortly thereafter, however, President Johnson issued special pardons, returning the property to the ex-Confederates.

In the Reconstruction Congress, there was a great deal of discussion of land reform in the South but insufficient support for any specific proposals. The idea of "forty acres and a mule" was challenged as a violation of property rights and as unnecessary in light of the political liberties granted by the new amendments: the right to vote, hold office, own property, and the like. African Americans were divided, with many arguing that education, the vote, and equal civil rights would be adequate to ensure freedom and citizenship. Others disagreed, saying "we want Homesteads; we were promised Homesteads by the government."

In short, the Civil War era saw much discussion of the relationship between freedom and a social minimum; many people insisted that citizenship and liberty required a certain level of material goods. But there was no serious interest, after the Civil War, in amending the Constitution to include social and economic rights. No one suggested that any such rights should be included in the Civil War amendments. A chronological point is relevant here as well: In the Anglo-American world of the late nineteenth century, social and economic rights were generally unfamiliar. Perhaps this fact supports the chronological explanation. But there are other problems.

CONSTITUTIONAL CHANGE 2: THE NEW DEAL AND BEYOND

What about the New Deal? Was the Constitution changed in that period? In an obvious sense, the answer is no. The New Deal did not alter one word of the founding document. But we have seen that by 1940, the *meaning* of the Constitution was fundamentally different from what it was in 1930. At the state level, constitutional amendments endorsing aspects of the second bill of rights were indeed ratified. Several states now offer social and economic rights. The New York constitution, for example, provides that "the aid, care, and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner, and by such means, as the legislature may from time to time determine." As we shall see, the claim that America is exceptional as a *cultural* matter is complicated not only by Roosevelt's plea for a second bill of rights but also by considerable constitutional innovation at the state level—activity that has not made much difference in the actual lives of poor people.

Crucially, the New Dealers did not pursue constitutional reform. Their approach was fully consistent with their general strategy, which was to avoid official amendments entirely and use political processes and constitutional interpretation to move law and politics in the directions they sought. The New Deal was not the only twentieth-century effort to ensure freedom from desperate conditions. President Johnson's Great Society included the War on Poverty, featuring a range of steps to provide opportunities and resources to those without them. During the 1960s and 1970s,

various social groups showed a great deal of interest in aspects of the second bill, such as housing rights and welfare rights. Their interest notwithstanding, there was no significant discussion of adding social and economic rights to the American Constitution. Here is my central objection: The chronological explanation, emphasizing that such rights were foreign to the founders, cannot explain constitutional inaction in the twentieth century.

CONSTITUTIONAL CHANGE 3: INTERPRETATION

The chronological explanation faces an even more serious problem. Constitutional change is often a product not of textual amendment but of judicial interpretation, leading to new understandings of old provisions. Throughout American history, the meaning of the Constitution is often very different from what it was even two decades before. Even if the eighteenth-century constitution did not contain social and economic rights, the American Constitution might have been interpreted to do so. In fact this could still happen. There is nothing in widely accepted methods of interpretation that rules out this possibility.

Does it seem impossible to imagine a Supreme Court ruling that some or all of the second bill is protected by the Constitution that America now has? I will return to the question in Chapter 9. But consider some analogies.

- In 1900, it was clear that the Constitution permitted racial segregation. By 1970, it was universally agreed that racial segregation was forbidden.
- In 1960, the Constitution permitted sex discrimination. By 1990, it was clear that sex discrimination was almost always forbidden.
- In 1930, the Constitution allowed government to suppress political dissent if it had a bad or dangerous tendency. By 1970, it was clear that the government could almost never suppress political dissent.

- In 1910, the Constitution prohibited maximum hour and minimum wage laws. By 1940, it was clear that the Constitution permitted maximum hour and minimum wage laws.

- In 1960, it was clear that the Constitution allowed government to regulate commercial speech, which was not protected by the free speech principle. By 2000, it was clear that the Constitution generally did not allow government to regulate commercial speech unless it was false or misleading.

- In 1970, it would have been preposterous to argue that the Constitution protected the right to engage in homosexual sodomy. In 1987, it was well settled that the Constitution did not protect that right. By 2004, it was clear that the Constitution did protect the right to engage in homosexual sodomy.

All of these changes occurred without the slightest change in the text of the Constitution. And this is just the tip of the iceberg; there are countless other examples.

Does this mean that America lacks a stable Constitution? That the Constitution is meaningless? That it means whatever the judges say that it means? These would be silly conclusions. The Constitution is meaningful and relatively stable, and it doesn't mean whatever judges say that it means. But constitutional law does not consist of staring at constitutional text and history and announcing the document's meaning. Many of the key provisions of the Constitution are general and ambiguous. What counts as "the freedom of speech"? What does "due process" require? What does it mean to deny someone "equal protection of the laws"? We might want to answer these questions by asking how these terms were understood by the people who originally ratified them. Some Supreme Court justices, notably Justices Antonin Scalia and Clarence Thomas, have argued that the "original understanding" is the only legitimate basis for constitutional law. But the Court has not accepted their view, and the original understanding leaves many gaps and uncertainties (as Justices Scalia and Thomas acknowledge). Hence the meaning of the document changes over time, and these changes usually arise from alterations in social values.

The Supreme Court is often portrayed as a "countermajoritarian" or undemocratic force in American government—as setting itself against the will of democratically elected branches of government. This portrayal is grossly exaggerated. Shifts in the Court's understandings typically follow, and do not lead, public opinion. We might linger over Mr. Dooley's century-old comment that "no matter whether th' constitution follows th' flag or not, th' supreme court follows th 'ilection returns." Does the Court really follow the election returns? The suggestion makes a lot of sense if we understand it to mean that the Court is unlikely to depart from a firm national consensus. Many of the Court's most celebrated decisions, even those striking down legislation, reflected the views of current political majorities. For example, the origins of the modern right to privacy lie in *Griswold v. Connecticut,* in which the Court invalidated a law forbidding married people to use contraceptives. This was an aggressive decision. But Connecticut was one of only two states with such a ban, and the Court was vindicating, not opposing, widely held commitments within the nation as a whole. *Brown v. Board of Education,* invalidating school segregation and creating a large-scale controversy about the role of the Court, actually reflected the view of the nation's majority. Most Americans opposed school segregation. Decided in 1954, *Brown* received regional criticism but widespread national support, which would not have been the case in 1900, 1910, or 1920. It is most revealing that the Court was unwilling to oppose segregation until the citizenry did.

When the Court began to invalidate sex discrimination in the 1970s and 1980s, it was not making a revolution on its own. On the contrary, it was following a mounting social consensus to the effect that sex discrimination was illegitimate. Perhaps *Roe v. Wade,* protecting the right to choose abortion, is difficult to fit into this framework. Many Americans reject the notion of a right to choose abortion. But even here, the Court's decision almost certainly fit with the convictions of the nation's majority. It would be a mistake to portray the Court as imposing moral judgments that lack strong support from the nation's citizens. Note that I am not attempting to defend the Court's decisions. I am simply remarking the fact that they are far less countermajoritarian than is often claimed.

In our constitutional tradition, the Constitution's meaning is settled through case-by-case judgments, building from precedents in a way that allows evolution over time. Theoretically it would have been possible for this process to have produced something like a second bill of rights. The absence of social and economic rights from our constitutional understandings therefore cannot possibly be explained by pointing to the fact that the Constitution was ratified in the eighteenth century.

If this seems fanciful, return to the question of sex discrimination. Most modern constitutions explicitly ban sex discrimination. The American Constitution doesn't. Why is the American constitution so different? A chronological account offers part of an answer: When the bill of rights was ratified, sex discrimination was not thought to be a problem. But this explanation is ludicrously incomplete. The Equal Rights Amendment, expressly forbidding sex discrimination and heavily debated in the 1970s and 1980s, might have been ratified but wasn't. Why not? Here is part of the answer: Sex discrimination is a problem all over the world, but there is nothing in American culture that is particularly opposed to sex equality. In fact America is more committed to equality on the basis of sex than are many countries that guarantee it in their constitutions. The Equal Rights Amendment failed partly *because it was widely seen as unnecessary.* As a result of dramatic post-1970s changes in judicial interpretation of the equal protection clause, the American constitution now has something very much like a constitutional ban on sex discrimination—not because of the original understanding of its text but because of new judicial interpretations. If this has happened in the context of sex equality, why hasn't it happened for social and economic rights as well?

The chronological explanation offers no answer. We have to look elsewhere.

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