

The Constitution's Pocket Part

Author : Paul Horwitz

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Michael Stokes Paulsen, *Our Perfect, Perfect Constitution*, **Constitutional Commentary** (forthcoming 2011), available at [SSRN](#).

At the AALS conference this year, I was stung by a criticism a friend launched at Jotwell. Our mission, of course, is to bring the attention of busy readers to articles that the editors think are well worth the time. Well and good—but, this critic observed, most Jotwell reviewers pick articles they not only *like*, but *agree with*. They amount to statements that an article is good because it agrees with the reviewer's own priors.

This is a natural human tendency, of course, but it's still an apt criticism. A journal devoted to "Things We Like (Lots)" will be more interesting if the "Thing We Like" turns out to be something other than "Myself." Suitably chastened, I have found my work for Jotwell significantly hampered. I would hate to be accused of writing these reviews as a form of *amour propre*. Vast numbers of articles that I have enjoyed in recent weeks have been rejected as review subjects because they have the unfortunate tendency to conform to my own (utterly sound) views on constitutional law. I have been searching for just the right piece: one that is enjoyable, interesting, and wrong. Thankfully, Michael Stokes Paulsen has come to my rescue.

Paulsen's short and biting piece, *Our Perfect, Perfect Constitution*, is a model of its genre: constitutional scholarship as satire. (It is quite possible that *most* constitutional scholarship falls into this genre, although usually unwittingly.) Paulsen writes that he, like most constitutional scholars, has fallen into "a peculiar and aggressive strain of Stockholm Syndrome." (P. 1.) After decades of criticizing the work of the courts, he writes, "I have, finally, succumbed. *I now believe that everything in the U.S. Constitution is perfect*. More than that, I have come around to the understanding that *every Supreme Court interpretation of the Constitution is perfect as well*." (P. 1.) His job, then, is not to rewrite the Constitution as such, but to "update" it "to reflect, perfectly, the Supreme Court's perfect interpretations of it." (P. 1.) And so he does, in what he labels a "pocket part" that includes "not only what the Constitution says but also what it really means" according to the Supreme Court. (P. 1.)

Paulsen's conforming amendments are generally well-chosen and amusing, if a little sour. Here are some examples. He writes: "Article I, Section 1, Clause 1 is amended to delete the words 'herein granted.' It shall hereafter read: "*All legislative powers shall be vested in a Congress of the United States*." (P. 2.) He adds: "The Tenth Article of Amendment to this Constitution is repealed." (P. 2.) And: "The doctrine of stare decisis being fundamental to the rule of law, to public perceptions of the integrity of the Supreme Court, and to stability, predictability and reliability, [the] Supreme Court shall always adhere to its prior constitutional decisions, except when it decides not to do so." (P. 5.) He clarifies the Free Exercise Clause: "Government may destroy Native American traditional religious holy sites in America, without thereby burdening the free exercise of site-specific Native American religious observance, because we stole their land fair and square." (P. 7.) And the Establishment Clause: "This Constitution shall be construed to forbid the display on government property of Christmas nativity scene displays depicting the birth of Jesus, unless the display includes elves and a talking wishing well." (P. 8.)

Constitutional scholars and law students alike will recognize these and other examples, which of course are not so much a list of amendments as a bill of particulars. Like many constitutional law teachers, I devote at least one class early in the semester to a detailed examination of the text of the Constitution; and like most of my colleagues, I tell my students that this will be virtually the last time we devote much attention to the text, as opposed to the centuries of glosses the Supreme Court has put on the text. Paulsen's short article is a lovely illustration of this phenomenon. It

would be excellent assigned reading at the end of the semester, to remind students (and professors) of just how much of their time has been devoted to the Supreme Court Reports, and how little to the constitutional text itself. The pungency with which Paulsen's satire offers this reminder is ample reason to recommend it.

That's not to say I agree with it. In demonstrating how little the Constitution, as we understand it today, has to do with what he apparently sees as its barer and simpler meaning, Paulsen evidently means to suggest to readers that the only question left is whether to laugh or cry. I don't see why either is required. One hardly need believe that either the Constitution or the Supreme Court's glosses on it are perfect to think it unexceptional, even banal, that the document must be interpreted, and that those interpretations will involve a mix of history, tradition, policy, and politics. Only a naïf would be shocked—shocked!—to learn that constitutional law, like war, is politics by other means. The voice of the naïf—Paulsen's voice, in this piece—is, of course, the voice of satire. But satire is the beginning of wisdom, not its end.

And at times it is difficult to discern what lies beneath the satire. If ours is neither a "perfect" nor a "perfect, perfect Constitution," what does Paulsen think the *proper* interpretation of the text demands? It is, as far as I can tell, sometimes textualist, sometimes originalist, sometimes policy-driven, and sometimes none of the above. Paulsen mocks the Supreme Court's decision in *Employment Division v. Smith* for permitting laws penalizing the exercise of religion provided that "they are cast in facially neutral terms"—a criticism I share—but without demonstrating that the Free Exercise Clause means, or is meant to mean, something else. He derides free speech jurisprudence for protecting flag burning while permitting the enjoining of protests outside abortion clinics, but doesn't say which understanding is better as a matter of text or history. He criticizes the Supreme Court's Equal Protection Clause jurisprudence for not categorically banning race-based distinctions, but without any acknowledgment of the historical pedigree supporting ameliorative race-based distinctions. He thinks the Court is wrong *not to enforce* broad semi-textual postulates like those of limited and enumerated congressional power and reserved state power, but equally wrong to *enforce* broad semi-textual postulates like "liberty." And he is selective in his examples. A satire on constitutional interpretation that devotes hundreds of words to abortion and not one to the Eleventh Amendment is an oddly unbalanced one.

I am struck by one last irony. The view implied in this satirical piece seems to be that the Supreme Court, with our complicity, has rendered our Constitution ridiculous by offering endless glosses intended to make it "perfect," when we could have either remained loyal to the text or amended it by duly authorized means. But Paulsen has written elsewhere that the Constitution ought to be interpreted according to a "meta-rule of construction," vested in the Executive Branch with some judicial oversight, that is intended to preserve "the nation whose Constitution it is, for the sake of preserving constitutional government over the long haul, *even at the expense of specific constitutional provisions.*" Michael Stokes Paulson, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1257-58 (2004). There "simply *must*," he has written, "be power in the national government to preserve the constitutional order; it is *inconceivable* that the Framers would have neglected such considerations." *Id.* (Fans of *The Princess Bride* will doubtless remember what was said there about the word "inconceivable.") So it is apparently ridiculous to think our Constitution is perfect, except when it isn't; ridiculous to think we couldn't use Article V to improve the Constitution, except when we needn't bother; and ridiculous to give one constitutional actor primary responsibility for seeing to the Constitution's perfectability, unless that actor is the President. Like most of us, Paulsen hates "perfect" constitutions—sometimes.

Don't get me wrong: I *do* like this article. I'm grateful to Paulsen for a witty, if bitter, reminder of just how much of a potential gulf there is between our Constitution and our constitutional law, and for the reminder that whatever else we might call this process, "perfect" is the wrong word. I'm doubly grateful to him for helping Jotwell to stymie its critics. It *is* possible to like an article while thinking it is wrong—lots.

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