

## Intermittent Comparative Constitutional Law

Patrick O. Gudridge  
University of Miami School of Law  
United States

Is it possible to describe in some useful way a version of comparative constitutional law that expresses itself only intermittently, but also across wide swathes of space and time, but which, when expressed (often, anyway) appears to possess considerable importance?

A.

*Oedipus at Colonus*, written by Sophocles shortly before his death in 406-05 B.C., and first performed in Athens in 401 B.C., is – among many other things – a complex meditation on politics and protection. Blind, aged, and disgraced, Oedipus comes to Colonus, on the outskirts of Athens, seeking a place to die. Initially rejected by local government, Oedipus is welcomed by Theseus, the Athenian king. Creon, the current king of Thebes (and brother of Jocasta, mother and wife of Oedipus) appears and attempts to take Oedipus back to Thebes so he might die and be buried there (if not literally within the city, at least nearby). Creon captures Antigone and Ismene, the daughters (also sisters) of Oedipus, and attempts to seize Oedipus himself. Theseus rescues Antigone and Ismene, and drives off Creon. Polynices, the son (brother) of Oedipus arrives, seeking the support of Oedipus for Polynices' plan to attack Thebes (Polynices is in exile in Argos) and drive off or kill Eteocles (his younger brother) and reclaim the Theban throne. After cursing Polynices, Oedipus dies happily in the midst of a spectacular thunderstorm.

Why would it be important to Theseus and Creon where Oedipus died? Or rather, why would Athenian theater-goers, who knew Oedipus and his family as figures associated with an earlier, very different (pre-modern, we would say) period in Greek history, think that the question of where Oedipus died was an important matter for government officials to decide then, and still (years later) an important matter for them? The answer, at one level, is this: The city within whose jurisdiction Oedipus would die and lie buried would be protected from its enemies. This conclusion, it seemed, followed from long-standing Greek religious beliefs and the significance of “heroic” individuals like Oedipus (and also Theseus, another stock figure) within the religious scheme. Did Athenian theater-goers in 401 B.C. uncritically accept old religious thinking? It may be more helpful to note a second context within which the tragedy played out. Tragedy was, as Charles Nagy has named it, “Athenian state theater.” The plays were performed at an annual festival at a huge open-air theater near the hill where participants in Athenian democracy gathered to legislate, and near the area where – from among the population of those participants – juries were selected to resolve disputes and bring to bear Athenian law. The audience at the festival consisted (once again) of the participants in democratic legislative and adjudicative processes. Tragedy, it is easy to think, was a medium of political education, a way to underscore and explore fundamental questions or commitments

implicated in democratic decisions or processes. Tragedy, we might suppose, served a purpose something like constitutional law.

*Oedipus at Colonus*, it becomes evident, poses important constitutional questions. Oedipus offers Athens protection – a significant public good. The democratic processes of the Colonus local government (also the democratic processes of Athens at the time of the play's performance) are unable to come to a conclusion about whether or not to welcome Oedipus, to offer him protection in turn. He is too scandalous, his life too horrible for public opinion to ignore. It is only Theseus, as king of Athens, who is able to focus on public good, act decisively, and personally commit himself (and therefore Athens) to securing Oedipus and supporting his plan to be buried – in unusual fashion contrary to ordinary custom – at Colonus. But the virtues of persons possessed of decisive authority are not left unchallenged either. Creon too is a king, equally committed to Theban public good. He would return Oedipus to the vicinity of Thebes. But he proceeds counterproductively, dwelling on the Oedipal scandal, seeking to shame and diminish Oedipus in order to secure his surrender, asserting Theban prerogative within Athenian jurisdiction, forcefully capturing Oedipus's daughters, seeking to take Oedipus himself. Creon, it seems, is unrestrained, willing to speak falsely, to exploit emotions, to deploy violence unpredictably. In all this, interestingly, he is also cousin to Oedipus, overly insistent that he was not responsible for his infamous acts, verbally violent in his response to Polynices, caught always in a confusion of roles, not only within family life, but as between family and public obligations. Polynices and Antigone show the same confusion.

Sophocles stages a meditation on the question of whether personal feeling – strongest within family dynamics, but infusing also public opinion at large and individual reactions in complex circumstances – poses enough public danger to warrant reconsideration of institutional arrangements (individual, not democratic authority). This was already an old question (it is enough to recall the century-old (or so) Cleisthenic reforms structuring Athenian democracy.<sup>1</sup>) If *Oedipus at Colonus* put the issue especially pressingly, it did so because Sophocles associated public processes with protection not only of Athens as a whole, but in service of that end protection of individuals. Oedipus – this is, of course, the great achievement of the play – becomes a representative figure notwithstanding his uniqueness, his scandal, his irascibility, all the conflicts he brings with him: as eligible therefore as any citizen to seek government attention and care.<sup>2</sup> Because Theseus (and thus Athens) responds to his requests, Oedipus realizes (however mysteriously) the opportunity to contribute to public good, in the end reversing the course of his disastrous life.

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<sup>1</sup> [cites]

<sup>2</sup> The question of whether Theseus makes Oedipus a citizen of Athens, or instead accords him a kind of resident alien status, is a matter of scholarly controversy. [cites]

B.

Edward Bates – Abraham Lincoln’s Attorney General – issued an opinion on November 29, 1862, addressing “the question whether or not *colored men* can be citizens of the United States.”<sup>3</sup> *Dred Scott* notwithstanding,<sup>4</sup> Bates responded affirmatively:

In my opinion, the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other. And I have no knowledge of any other kind of political citizenship, higher or lower, statal or national, or of any other sense in which the word has been used in the Constitution, or can be used properly in the laws of the United States. The phrase, “a citizen of the United States,” without addition or qualification, means neither more nor less than a member of the nation. And all such are, politically and legally, equal – the child in the cradle and its father in the Senate, are equally citizens of the United States. And it needs no argument to prove that every citizen of a State is necessarily a citizen of the United States; and to me it is equally clear that every citizen of the United States is a citizen of the particular State in which he is domiciled.<sup>5</sup>

Contemporaries noted how readily the Bates characterization coexisted with a conservative account of the concomitant rights of citizens, excluding in Bates’s own account, for example, the right to vote.<sup>6</sup> In this regard, his analysis obviously alluded to the cautious argument of Montgomery Blair, representing *Dred Scott* before the Supreme Court.<sup>7</sup> Thomas Cooley depicted Bates’s understanding of citizenship as implicit in the Fourteenth Amendment,<sup>8</sup> and (foreshadowing the *Slaughterhouse Cases*<sup>9</sup>) identified a wide range of individual rights as pretty much artifacts of state law rather than directly constitutional

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<sup>3</sup> *Citizenship*, 10 Ops. Atty. Gen. 382, 382 (1862)(Bates, A.J.)(emphasis in original). The question had been put by Secretary of the Treasury Chase, ostensibly to determine whether African Americans might captain ships required by law to be commanded by American citizens.

<sup>4</sup> [cite]

<sup>5</sup> *Citizenship, supra*, 10 Ops. Atty. Gen. at 388.

<sup>6</sup> See EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, pp.7-8 (1990); ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* 290-93 (1970).

<sup>7</sup> “The qualifications required for electors, representatives, jurors, witnesses, are, as they purport to be, tests of fitness for the several duties required, not tests of citizenship. Property, age, sex, religious belief, or the want of it, and a variety of circumstances, besides color, determine these qualifications in this country and in England without affecting the question of citizenship. ... [T]he essence of citizenship is the right of protection of life and liberty, to acquire and enjoy property, and equal taxation.” Montgomery Blair, Brief for Plaintiff in Error, *Scott v. Sandford*, U.S. Supreme Court, October Term, 1856, pp. 6-7, reprinted in 3 PHILIP B. KURLAND & GERHARD CASPER, *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 184-85 (1978).

<sup>8</sup> “The word citizen is employed in the law in different senses under different circumstances. As generally employed, however, it may be said to mean, a person owing allegiance to the government, and entitled to protection from it. Such, doubtless, is the meaning of the word as here used.” 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 654 (4th ed. 1873)(notes and additions by Thomas M. Cooley)

<sup>9</sup> [cite]

specifications of the meaning of citizenship as such.<sup>10</sup> It is important, however, to note that there was a radical potential also implicit in the Bates discussion. Given allegiance, he supposes, protection becomes an obligation. The first sentence of section 1 of the Fourteenth Amendment, we can readily see, itself resolves the question of allegiance, itself identifying citizens of the United States and the states. The second sentence just as obviously itself imposes – constitutionalizes – the obligation of protection and in the process fixes the criterion determining whether states meet that obligation (“equal protection of the laws”).<sup>11</sup> John Mercer Langston, in his well-known Oberlin lecture in 1874, praised Bates as “bold and sagacious.” “These propositions have all passed, through the 14<sup>th</sup> amendment, into the Constitution of the United States, and are sustained by a wise and well-defined public judgment.” “With freedom decreed by law, citizenship sanctioned and sustained thereby, the duty of allegiance on the one part and the right of protection on the other recognized and enforced, even if considerations of public necessity had not intervened, the gift of the ballot to the colored American could not have been long delayed.” “[I]n the progress of legal development in our country, consequent upon the triumph of the abolition movement, its coming was inevitable.”<sup>12</sup> Langston, we know, was too optimistic. A year later, in *United States v. Cruikshank* – overturning federal prosecutions in the aftermath of the Colfax massacre – Chief Justice Waite both recognized the Bates reciprocal and effectively read it out of the Constitution as an independent proposition. “The duty of a government to afford protection is limited always by the power it possesses for that purpose.”<sup>13</sup> Chief Justice Rehnquist and his followers – *DeShaney* and *Morrison* (and later *Castle Rock*) – stand in the wings: We readily recognize Waite in *Cruikshank* as introducing us to our own contemporary Supreme Court.

### C.

The idea that government owes individuals a duty of protection figures in American constitutional thought well before the Bates opinion and the adoption of the Fourteenth Amendment. In his instantly famous bank veto message, Andrew Jackson wrote: “In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law....”<sup>14</sup> Thomas Jefferson, glossing the Declaration of Independence, precisely invoked the reciprocal relationship of allegiance and protection.<sup>15</sup>

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<sup>10</sup> See 2 JOSEPH STORY, *supra*, at 656, 658-59.

<sup>11</sup> Both steps in this process are explicit insofar as state governments are concerned. The specification of United States citizenship also imposes a constitutional duty of protection on the United States government (within the terms of this logic) arguably acknowledged in the Fourteenth Amendment recognition of the privileges or immunities of national citizenship. [discuss Amar]

<sup>12</sup> John Mercer Langston, “Equality Before the Law” (May 17, 1874), in James Daley (editor), *Great Speeches by African Americans* 48-50 (2006).

<sup>13</sup> *United States v. Cruikshank*, 92 U.S. 542, 549 (1875).

<sup>14</sup> [cite]

<sup>15</sup>

That as to the king, we had been bound to him by allegiance, but that this bond was now dissolved by his assent to the late act of parliament, by which he declares us out of his protection, and by his levying war on us, a fact which had long ago proved us out of his

There is more, however. The echo of Thomas Hobbes is plain: Hobbes insisted that his Leviathan was simply an extended meditation on “the mutuall Relation between Protection and Obedience.”<sup>16</sup> Behind Hobbes stands Bacon:

[A] government uses its power for maintaining and enhancing the good of the people, and if this condition is violated, the people may rightly deprive the government of the power they have given it, and take it upon themselves. Nor is any law of any particular government as fundamental as that universal law of all governments that commands that the well-being of the people be protected as the greatest and most ancient right, and that all other laws incline to this one.<sup>17</sup>

Also Coke in *Calvin’s Case*:

But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject owed to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects, *regere et protegere subditos*: so as between the Sovereign and subject there is *duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad obededietiam, ita rex subdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in se duplex ligamen.*<sup>18</sup>

Coke, Bacon, and Hobbes are relative late-comers, however. More or less similar thinking recurs – scattered across centuries. This is the text, for example, of a seventh century Antrusian fidelity oath:

It is right that those who offer to us unbroken fidelity should be protected by our aid. And since such and such a faithful one of ours, by the favor of God, coming here in our palace with his arms, has seen fit to swear trust and fidelity to us in our hand, therefore we decree and command by the present precept that for the future such and such above mentioned be counted with the number of antrustions. And if anyone perchance should presume to kill him, let him know that he will be judged guilty of his wergild of 600 shillings.<sup>19</sup>

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protection; it being a certain position in law that allegiance and protection are reciprocal, the one ceasing when the other is withdrawn.

Thomas Jefferson, “Notes of Proceedings in the Continental Congress,” [June 7-Aug. 1, 1776], in 1 JULIAN P. BOYD ET AL., EDS., *THE PAPERS OF THOMAS JEFFERSON* 311 (1950)[

<sup>16</sup> THOMAS HOBBS, *LEVIATHAN* 560 (1651)(Barnes & Noble ed. 2004). See QUENTIN SKINNER, *Hobbes on the Proper Signification of Liberty*, in 3 *VISIONS OF POLITICS: HOBBS AND CIVIL SOCIETY* 209-37 (2002); NOEL MALCOM, *The Title Page of Leviathan, Seen in a Curious Perspective*, in *ASPECTS OF HOBBS* 200-34 (2002).

<sup>17</sup> Francis Bacon, “Aphorismi” (Aphorism 16) (manuscript) (1614?), quoted in DANIEL R. COQUILLETTE, *FRANCIS BACON* 242 (1992).

<sup>18</sup> *Calvin’s Case*, 7 Co. Rep. 1a (1608), reprinted in 77 Eng. Rep. 377, 382 (King’s Bench) (1907).

<sup>19</sup> E. P. Cheyney, trans, University of Pennsylvania. Dept. of History: *Translations and Reprints from the Original Sources of European history*, published for the Dept. of History of the University of Pennsylvania., Philadelphia, University of Pennsylvania Press [1898]. Vol IV, No: 3, 3-5.

D.

*Scattered:* I mean to call attention to an intermittent phenomenon, a sequence of manifestations in very different places and times, manifestations of what appears to be – at each appearance – a commonplace or cliché which is – at each appearance – nonetheless seemingly put to important use.

Francis Bacon offers us wonderful water imagery:

There is little doubt, meanwhile, but that there are certain fountains of natural equity from which spring and flow out the infinite variety of laws which individual legal systems have chosen from themselves. And as veins of water acquire diverse flavors and qualities according to the nature of the soil through which they flow and percolate, just so in these legal systems natural equity is tinged and stained by the accidental forms of circumstances, according to the nature and site of territories, the disposition of peoples, and the nature of commonwealths. It is worthwhile to open and draw out the purer fountains of equity, for from them all amendment of laws in any kingdom or commonwealth must be sought.<sup>20</sup>

Bacon, it seems, begs the crucial question: Is it simply a matter of choice, or perhaps jurisprudential capacity, that causes (say) Hobbes or Bates “to open and draw out the purer fountains of equity”? Or is there something in particular circumstances – say, civil war – that forces to the surface (as it were) the ideas that Bacon would associate with “natural equity”? Water imagery requires plate tectonics?

Explaining the curiously bilingual form of his *Maximes*, however, Bacon suggests a second model (one which also accounts for Coke’s similar presentation in *Calvin’s Case*):

[I] know very well it would have been more plausible and more current, if the rules with the expositions of them had been set down either in Latin or English, that the harshness of the language might not have disgraced the matter, and that civilians, statesmen, scholars, and other sensible men might not have been barred from them; yet I have forsaken that grace and ornament of them, and only taken this course: the rules themselves I have put in Latin (not purified further than the propriety of the terms of law would permit; but Latin); which language I chose, as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument: and for the exposition and distinctions, I have retained the peculiar language of the law, because it should not be singular among the books of the same science, and because it is most familiar to the students and professors thereof, and besides that it is most significant to express conceits of

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<sup>20</sup> I take this quotation from COQUILLETTE, *supra*, at page 239.

law; and to conclude, it is a language wherein a man shall not be enticed to hunt after words but matter.<sup>21</sup>

The reciprocal relationship of allegiance and protection is not part of “the peculiar language” of constitutional law per se. At bottom that was Chief Justice Waite’s point in *Cruikshank*. But it is, Bacon thought, the “universal law of all governments,” and therefore a “rule” to be stated in the form of a maxim, to be stated both briefly and authoritatively.<sup>22</sup> Maxims – the juxtaposition of Latin and English (really Law French) confirms this – are simultaneously outside and inside the “language of the law” as it immediately presents itself.

Is it possible to account for the appearance of maxims like the allegiance/protection formula not simply as occasional phenomena within the legal materials of any one particular jurisdiction (say, the United States), but instead as integral (even if also still occasional) to the construction of the materials themselves? If so, grounds emerge for criticizing Waite, for returning to the arguments of Bate, Cooley, and Langston – and perhaps for confronting (differently, now) Chief Justice Rehnquist and company.

Consider this model:

Constitutions are charged with a distinctive task. Whether individually or in the aggregate, other legal instruments (and thus the processes and norms that they posit) may be specific or general, interconnected sets of propositions or potentially inconsistent lists, decisive or highly qualified or utterly ambiguous. Constitutions might reveal combinations of these attributes as well. But if they are to succeed to any important extent in limiting variation in the content of other legal instruments, if constitutions are supposed to stabilize to some degree the rule of law, their form must somehow follow function. On this assumption, it may not be enough to define (within or alongside the constitution as such) institutional arrangements charging a particular government body—for example, a court—with routine responsibility for interpreting and applying constitutional terms to validate or invalidate and thus constrain the reach of other legal instruments. If the exercise of this responsibility is not entirely ad hoc, and thus relocate rather than address the underlying difficulty, interpreters must draw upon some means of stabilization deployed within their own efforts—organizing their own efforts and, as a result, organizing the efforts of other legal actors, even if only dialectically. There may be resources available that are extrinsic to the constitution as such that incorporate strong markers of orthodoxy and unorthodoxy—religious teachings, perhaps. Alternatively, interpreters themselves might formulate constitutional propositions in terms that restate constitutional language, but also figure as something very much like maxims, as seeming universals, as independent recurring elements within constitutional analysis — formulations therefore akin to index terms, introducing some measure of stability by organizing argument.<sup>23</sup>

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<sup>21</sup> FRANCIS BACON, MAXIMES (1597), quoted in COQUILLETTE, *supra* at page 36.

<sup>22</sup> On the idea of maxims as Bacon uses it, see the deep and provocative discussion in COQUILLETTE, *supra*, at 38-46.  
<sup>23</sup> The point of departure here, obviously, is Charles Fried’s idea of “doctrine.” See CHARLES FRIED, SAYING WHAT THE LAW IS 6–10 (2004).