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Author

Winkler, Adam

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RUNNING ON THE CONSTITUTION

by

ADAM WINKLER

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Book Review

Running on the Constitution

Adam Winkler

Andrew E. Busch, *The Constitution on the Campaign Trail: The Surprising Political Career of America's Founding Document*. New York: Rowman & Littlefield, 2007, 331 pp., \$75.00 (cloth), \$28.95 (paperback).

SPEAKING BEFORE a raucous crowd at the 2008 Republican National Convention, Senator John McCain echoed a sentiment about American constitutional law that had become commonplace among his party's recent presidential nominees. "We believe in . . . judges who dispense justice impartially and don't legislate from the bench,"¹ McCain announced. At the Democratic Party convention the week before, Senator Barack Obama's acceptance speech raised the constitutional issues of abortion, gun rights, and same-sex marriage, calling for compromise to resolve these hot-button controversies.² Although the 2008 presidential election was dominated by pragmatic policy issues of economic growth and financial stability, McCain and Obama still found time to use the Constitution and related principles to help define themselves to the American voters.

"The Constitution on the Campaign Trail" is the title of Andrew Busch's new study of how presidential candidates invoke the Constitution in political rhetoric. When election lawyers think about the relationship of the Constitution to presidential campaigns, their first thought might be of how the Constitution constrains

and shapes regulation of the electoral process: who is guaranteed the vote, what the electoral college mandates, or how First Amendment speech rights limit campaign finance reform. But Busch, a professor of government at Claremont McKenna College, is interested instead in how the Constitution is featured in the campaign rhetoric presidential candidates use. His study provides an extremely thorough accounting of presidential campaign speech dating back to 1840.

The clear strength of the study is its comprehensiveness. Busch collects data from every presidential election from 1840 to 2006, analyzing the content of a large number and variety of the most significant forms of campaign rhetoric, including party platforms, public messages, presidential debates, and television advertisements. He includes every major party candidate and every important minor party candidate. He also breaks down the collected data in numerous different and insightful ways, showing how particular constitutional issues—e.g., "federalism," "separation of powers," "judicial appointments," "individual rights"—have been invoked through the years.

Much of what Busch discovers is exactly what any informed student of American history would expect. It will hardly come as a sur-

Adam Winkler is Professor of Law at UCLA School of Law.

¹ Acceptance Speech of Senator John McCain at the 2008 Republican National Convention, available at <<http://portal.gopconvention2008.com/speech/details.aspx?id=84>>.

² Acceptance Speech of Senator Barack Obama at the 2008 Democratic National Convention, available at <<http://www.demconvention.com/barack-obama>>.

prise to discover that the rhetoric in period surrounding the Civil War focused on rights and federalism, or that New Deal era rhetoric centered on the proper boundaries of the federal government's power. Busch finds that individual rights has been the most durable constitutional topic over the years, while issues like separation of powers, federalism, and constitutional amendments ebb and flow with the era. Over the last half-century, judicial appointment has been a consistent feature of the constitutional speeches of presidential candidates. Even if many of these findings only confirm common historical understandings about constitutional politics, Busch does the hard work of providing detailed empirical proof.

Those who have witnessed contemporary campaign battles over abortion, gun rights, and affirmative action may nevertheless be surprised by Busch's primary finding: rhetorical invocations of the Constitution have been in steady decline for over a century. Contrary to the complaint that today's presidential candidates politicize constitutional questions, Busch concludes that the Constitution and its principles are mentioned much less prominently in today's presidential campaign rhetoric than in the nineteenth century. "Deconstitutionalization" (Busch's term) of campaign rhetoric began with the end of Reconstruction as presidential candidates, like other major political actors of the day, shied away from the heated constitutional battles of the Civil War era to focus on economic and international matters. Despite occasional elections in which constitutional rhetoric spiked, such as the 1936 Roosevelt-Landon contest in the midst of the New Deal, the downward trend continued steadily until bottoming out around 1960. Since then, Busch finds that constitutional rhetoric has enjoyed "a bit of a comeback"³ but still "the weight of constitutional rhetoric in American politics is considerably lower than it once was."⁴

To Busch, the demise of presidential campaign rhetoric about the Constitution is an ominous sign. As he states in his opening chapter, "more constitutional rhetoric is better than less."⁵ How the Constitution is invoked on the campaign trail is a measure of the "well-being of the American republic,"⁶ a test of the health of our political and constitutional culture. If

"the strength of constitutionalism in American politics can be gauged at least partly by the vigor of campaign conversation about the Constitution,"⁷ America today fares poorly.

But is the rate of references to the Constitution in campaign speech really such a good sign of the vibrancy of our constitutional culture? Presidential campaigns often invoke constitutional issues to address the deepest social conflicts in the electorate. For example, Busch finds a huge seven-fold increase in references to the Constitution in candidate messages in the election of 1860, leading up to the Civil War. The spike in invocations of the Constitution was a consequence of the gravest national crisis the country ever faced. When Americans are deeply divided, the Constitution serves as a prism through which controversial issues of the day are portrayed. We see this today with battles over abortion and gay rights.

By contrast, a candidate is unlikely to invoke constitutional principles that are secure and widely respected because they do not serve to distinguish him from his opponent. Once the vast majority of Americans accepted the desegregation mandate of *Brown v. Board of Education*, presidential candidates no longer needed to announce their opposition to racially segregated schooling. The disappearance of presidential campaign rhetoric about racial segregation might be a reflection of the strength of our political and constitutional culture rather than of its weakness. Presumably, a constitutional culture in which the fundamental questions of individual rights and governmental power are settled is stronger than one in which those questions are contested. If so, then the demise of constitutional rhetoric on the presidential campaign trail might be a sign of our constitutional fortitude.

Busch's finding of long and steady decline in constitutional rhetoric cries out for an explanation and his concluding chapter points to "seven crucial inputs."⁸ These include "public

³ Busch at 11.

⁴ Busch at 200.

⁵ Busch at 8.

⁶ Busch at 197.

⁷ Busch at 8.

⁸ Busch at 208.

opinion," "the intellectual climate," "political parties," "the candidates," "interest groups," "media forms," and "media coverage."⁹ Yet these categories are phrased at too high a level of abstraction to be useful. Moreover, Busch never sorts out the relative weight of the different inputs, leading to an unsatisfying "kitchen sink" explanation of an important political phenomenon.

Moreover, not all of Busch's evidence convincingly supports his claim of "deconstitutionalization." Take his findings on constitutional references in party platforms. Although the rate of mentions per one thousand words has declined by over two-thirds, the absolute number of mentions has skyrocketed. Between 1840 and 1952, the two major party platforms averaged a bit less than 50 mentions of constitutional principles combined. More recent party platforms have averaged more than 150 mentions, with nearly 250 mentions in 1996. As a ratio of mentions to total words, the Constitution has suffered because today's platforms are much longer. But this may say more about the transformation of party platforms into laundry lists of policy positions catering to every conceivable interest group than it does about the vigor of our constitutional principles. Those principles are still frequently invoked by presidential candidates—by some measures more than ever before.

The findings are presented by mode of communication, with all but the introductory and concluding chapters centered on a particular type of presidential campaign speech. This is effective in underscoring the differences between party platforms ("consistently the most constitution-oriented"¹⁰) and television advertisements ("much less likely to contain constitutional references"¹¹), but otherwise interferes

with the larger developmental story about constitutional rhetoric. Examining the data by mode of communication leads to tiresome repetition; a given presidential candidate's stance on a constitutional dispute is described in the chapter on party platforms, only to be described over and over again in later chapters on candidate messages, presidential debates, television advertisements, and governing addresses. (Inclusion of the latter, which includes State of the Union and Inaugural speeches, was also odd because these are not traditionally viewed as campaign speech.) A more fluid story could have been told chronologically, which would have illuminated rather than obscured the larger pattern of decline over time that Busch observes.

The Constitution on the Campaign Trail nevertheless succeeds as a comprehensive, descriptive account of constitutional rhetoric in presidential elections. As a reference resource, the book is terrific. If you want to know exactly which constitutional questions featured in a given election, here is a thorough accounting that indicates not only the primary constitutional issues but also the secondary and tertiary ones.

Address correspondence to:
Adam Winkler

E-mail: winkler@law.ucla.edu

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⁹ Busch at 208–26.

¹⁰ Busch at 12.

¹¹ Busch at 107.