Introducing Constitutional Text Units (And Related Issues)

Peter J. Aschenbrenner, Purdue University
ABSTRACT.

An alternative presentation of constitutional text on the page is proposed. OCL offers to locate constitutional text in a format which correctly represents the temporal dimension, that is, the format marks the time each passage (‘Constitutional Text Unit’) was adopted. A new numbering system obviates the annoyance of brackets, asterisks, footnotes and other punctuography of modern presentations of the Early Constitution. OCL also investigates a logically embarrassing problem the convention was unable to resolve.

KEY WORDS. constitutional text, citation systems

A. INTRODUCTION. Article I, Section 2, Clause 1 cites the reader to the following words:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Assume now that one wants to the reader to find “the first and fourth Clauses in the Ninth Section of the first Article … .” These clauses – not marked as clauses in the said Article I – can be found by counting clauses, even if the clauses are not marked as such. OCL will show a similar geography at work in use of the term ‘paragraph’ in the Twelfth Amendment.

B. WHY DO WE HAVE WORDS IN THE FIRST PLACE? John Marshall denigrated the value of text, assigning text to its weakest reason for existence: aide memoire. “The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written.” Marbury v. Madison, 5 U.S. 137, 176 (1803).

Was Marshall right? Perhaps the reason we write text down is so that we can resolve disputes based on differing recollections. But once it’s written down, then we can find it, by using the physical or actual page as a guide to the seeker.

C. ANOTHER TAKE. Go back about six hundred years before the federal convention crafted the constitutional text in question. Indian mathematicians deployed ‘zero’ as something other than nothing. They discovered that the page supplied dimensions that could be exploited so that symbols on paper acquired meaning based on their relationship to the page, or, more obviously, to each other.

“The nine Indian figures are: 9 8 7 6 5 4 3 2 1. With these nine figures, and with the sign 0 ... any number may be written.” [1]

Take this instance.

0

There is space to the left and the right of the ‘0’. We can put any natural number there:

10

The zero turns out to be a marker on the page, which in turn makes the ‘1’ a count of how many ‘tens’ we should mark off in our count. In short ‘1’ acquires ten-fold power based on its place on the page, in relation to the ‘0.’ Hence, symbols on the page mark out a starting point, an intersection of X and Y axes.

For example,

0

informs us that if we put a ‘2’ in front of the zero, that we have ‘20’ or ‘twenty,’ if we prefer words to numbers.

Of course,
doesn’t actually say that. But it’s implicit from the order on the page that arises if you look for it. ‘It’ being white – therefore available – space to the left of the zero. When we have words-on-page, rather than assuming that the words dictate instructions to us, we are obliged to look to the logic of the virtual page.

D. IMAGINING THE BLANK PAGE. Try this:

□□□□□□□□□□□□□

That provides the framework for OCL’s example:

W e t h e p e o p l e

Now imagine a single row of squares starting at some virtual ‘left’ margin and continuing on to a virtual (but not infinitely distant) ‘right’ margin. Now imagine more than the 14 ‘squares’ OCL has selected from MS. Word’s symbol-set to put on the page. We can accommodate not just the first three words of the Philadelphia constitution but rather all of the 24,558 characters in said constitution, each character occupying one such ‘square.’

In our mind experiment, we are imagining the 4,321 words of the Philadelphia constitution inserted as follows: each character to a square and each typographic/pictographic space being occupied by (at least) one but only one such character. In short, we have broken down the entire virtual page into mini-pages, each a square.

This enables writing the text of 4,321 words with spaces annexed (they’re not ‘nothing’ either) into the 24,558 squares.

Now address this problem: Assume that some text must be added to the 4,321 words. Or in another version of the problem, some text must be subtracted from some of the 24,558 squares. Or, in a third version, some text must be deleted from some squares and some added in its place. Try to delete ‘the’ from ‘we the people’ for example,

Take out squares four, five and six. But square 7 also has content. It is a square holding a space which MS. Word properly counts as a character, or gives you a choice of counting, which is the same thing. Since we don’t need two spaces in a row, one can be dispensed with.

Now we have translated the process of amending text into a process of addressing symbols in squares: in short, we have engaged in a process of managing space/s which OCL represents by manipulating squares. This brings us back to the place where the Indian mathematicians discovered spatial management and refined it into a science.

E. THE QUESTION NOW RESOLVES TO THIS: Take the two procedures, adding and deleting, that’s (a) and (b). Now take (c) a third procedure: look at the number of characters you wish to delete; look at the number the characters you wish to insert.

If the former is greater than the latter, delete characters from squares, add your new characters into the just-empty squares and then delete all the empty squares above the one space-in-a-square permitted/required by typographic convention.

If the latter is greater – you have more characters to add than the number of about-to-be-empty squares you will acquire by deletion – then add empty squares to even up the count; now delete characters and add characters to the existing just-emptied squares and then add characters to the newly minted empty squares and you’re done.

If you want to get really fancy you could say deleting itself consists of two steps. One: delete the symbols inside the squares and the other is you delete the squares.

If one sought symmetry, that is a four-count of procedures: one adds squares which are null and adds characters inside the squares for two procedures and then deletes the characters in squares and deletes the squares themselves in a separate step for a total of four analogous procedures.

OCL’s three procedures are themselves features of this working table, which now consists of 24,558 squares. This is consistent with how the Indian mathematicians dealt with zero: there was a difference between a null square and a square with no content.

A square with ‘zero’ for content says something about the square before it and the square after it, but the square with null content doesn’t say anything about anything and can be dropped out of the analysis at any time, just like the second of two squares, both with spaces inside or one that is empty.
F. So What Do You Do With NEW/EXTRA/BETTER Text? Did the convention do a good job of managing space as a work area in which to visualize (a) addition, (b) deletion, and (c) deletion and addition of text? When Congress didn’t like the election of 1800, it wanted to rewrite the third clause of Article II, Section 1.

So how does Congress go about saying that the ‘old’ text comes out and the ‘new’ text goes in? Don’t bother reading the official ‘text’ of the Twelfth Amendment. The text lacks the answer to the question OCL has posed.

But there is a preamble supplied by the adopting resolution. Here’s the preamble to the Twelfth Amendment:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of both Houses concurring, That, in lieu of the third paragraph of the first section of the second article of the constitution of the United States the following be proposed as an amendment to the constitution of the United States, which when ratified shall be when ratified by three-fourths of the legislatures of the several states, shall be to all intents and purposes, as part of the said constitution, to wit: [2]

The wording of this resolution does not appear in the Congressionally sponsored compilations of its public and private laws and resolutions (1845 and 1855). This is an important point. What was ineluctable is still incomprehensible. OCL has suggested that incomplete attention has been focused on these adopting resolutions.

The Eleventh Amendment’s adopting resolution does not deploy ‘in lieu’ or otherwise (at least) attempt to address the logical issues posed by changing what’s been written. [3] In short, the 1794/5 stab at changing text did not address deleting, just adding. As another instance: (c) [deleting and then adding (or inserting)] is not even hinted at in the text of the Eleventh Amendment or in its adopting resolution. But of course you have to take out the text infected by the Chisholm decision. Chisholm v. Georgia, 2 U.S. 419 (1793). So, by convention, out it comes.

Moreover, the text of the resolution quoted in the footnote is not even quoted in the discussion of the adoption of this amendment in The Documentary History of the Supreme Court of the United States, 1789-1800 5:600-601.

The convention didn’t get it right in the 18th century, Congress didn’t get in the 19th century and the professoriat didn’t get in the 20th century. The logic of the virtual page exists whether or not anyone takes notice; more importantly, teasing the logic into view allows marking the encounters between experience and logic that inform our constitutional history. Semantics doesn’t claim to do that.

G. Conclusions. What’s our take-away here? The convention didn’t understand that when existing text is to be changed, the choice of procedures don’t include writing new constitutional text which ‘explains’ the existing text (the Eleventh Amendment at work) or writing new text that needs a preamble to direct traffic (the Twelfth Amendment).

Saying that the new text ‘shall be valid to all Intents and Purposes, as Part of this Constitution’ (the confused elocution supplied by Article V) doesn’t even address the challenge of the virtual page. Talk about the squares (with content) imagined in a row (existing or virtual) or talk nonsense.

If there are to be procedures annexed to the row of squares filled with content, which procedures explain addition, deletion and insertion, then what is the source which dignifies these procedures? Here’s the answer: If these procedures are necessary – see failed stabs at getting new text in and old text out in 1794/95 and 1803/4 – then these procedures must have the dignity that spatial logic confers and the logic of the virtual page must be regarded as worthy as any other constitutional logic.

If old text is to be deleted, say so; if new text is then to be inserted ‘in lieu,’ say so in the text itself. If the preamble is as good as the text, then publish it. If there is some other procedure (to be written in 1787) that directs future text-writers in the job of managing space on the virtual page, then the convention should have committed itself. If there are procedures discovered along the way, then publish them, embrace them and don’t apologize by silence.

By the way, saying that new text is as valid as old text leads to risible results when newer text repeals (once new) text. Example: Is the Eighteenth
Amendment valid? Go ahead: Ask the average constitutional historian, ‘how many amendments are there to the federal constitution’? Twenty-six is the constitutionally correct answer (twenty-seven minus one) and the reader will be a long time searching for the honest person who can/will answer that question. The Philadelphians bobbled what the Indians, Arabs and Italians thoroughly explored.

H. REFERENCES.


[3] The preamble to the resolution proposing the Eleventh Amendment reads:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of both Houses concurring, That the following article be proposed to the legislatures of the several states as an amendment to the constitution of the United States; which, when ratified by three-fourths of the said legislatures, shall be valid as part of the said constitution, to wit:

Senate Legislative Journal, Third Congress, First Session, January 14, 1794 at 20.

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