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CONSTITUTIONAL LAW

INTRODUCTORY REMARKS: THE RELATIONSHIP OF LAW AND MORALITY IN RESPECT TO CONSTITUTIONAL LAW

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The topic for this panel of our symposium is billed as "The Relationship of Law and Morality in Respect to Constitutional Law." Our panelists are assuredly suitably credentialed to provide new perspectives on this deeply vexed topic.[1]

And it is "deeply vexed," I say, if just because while some slippage between "law" and "morality" might quite fairly be expected to characterize more mundane areas of the law,[2] it would seem to be much more disturbing if one were to find any equivalent voids in the Constitution itself—gaps between what sound principles of a moral nature would appear to require, on the one hand, and what even our highest law ("the *supreme Law of the Land*"[3]) aspires to do.

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1. Larry Alexander, Warren Distinguished Professor of Law, University of San Diego Law School; Kent Greenawalt, Professor, Columbia Law School; Fred Schauer, Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University. Each has published more than seventy-five articles in various learned journals, in jurisprudence and in constitutional law.

2. For example, within "the law of torts," or within "the law of contracts," or (even far more obviously?) "the law of taxation," one might not expect anything like a seamless fit—between the "moral" and "the legal"—in these and many other topics of law. The idea of an "amoral" Constitution, on the other hand, may well seem to be quite a different matter, indeed.

3. We are, of course, but quoting, albeit with emphasis, from the salient provision in Article VI of the Constitution which declares its *own* provisions to be "the supreme Law of the Land," and then at once provides further that all state—as well as all federal—judges are commanded "to support *this* Constitution." U.S. CONST. art. VI (emphasis added). Note, if just for possible future reference, that it is not merely "*the*" Constitution but, indeed, just "*this*"

Even significant "gaps" between what ordinary law may permit, albeit what morality may condemn, may be found within the thick layers of ordinary law—those many layers of law, each of which, however, is also more readily amenable to change than anything found in the Constitution. In the latter case, it may be less bearable to believe—after two centuries of struggle and refinement—that any truly similarly significant "gaps" remain at large within the Constitution itself. "*Here, surely, within our own supreme law as it is laid out in the Constitution,*" one might hope to be able to say, "*we do not expect to find such gaps*!"

And, indeed, virtually as an unspoken corollary of that understanding, many doubtless expect our judges—and certainly those who sit astride the Supreme Court itself—to take care to assure us by the force and virtue of their decisions that in fact there *are* no such gaps, or, at the very least, none of a genuinely egregious sort.[4] Correspondingly, in terms of *our own* obligations (that is, our own obligations as moral citizens), it would seem to fall to us in turn to resolve that, insofar as particular judges may fail in their duty to us *so* to construe and *so* to understand "*our*" Constitution, the truly moral obligation that we have is to see to their succession by judges firmly committed to our own higher ideals such as they are. This proposition strongly suggests itself—it speaks to us, one might say, even as in the words of the Declaration of Independence, virtually as a "self-evident truth."[5]

Yet, what if it should happen that the Constitution itself is *not* especially "moral" in one or another of its many features?[6] Then what *is* one to do? Or, rather, what does one want of a judge who is aware of the difference such as it may be? Ignore it or acknowledge it? Note it or declaim that "it doesn't exist?" In short, what is a "moral" *judge* to do?

Constitution (that is, the Constitution "as is") that the judges take an oath to support.

4. And indeed, they can find some evident support for that proposition in the writings of notable scholars. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953) ("It's a perfectly good Constitution *if we know how to interpret it.*" (emphasis added)).

5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

6. Is this possible? Come to think of it, it surely is. Indeed, it is the opposite proposition that would seem utterly unlikely, namely, that the Constitution is already just (about) perfect as is!

This difficulty, of reconciling public demands (or expectations) with the judge's own particular oath[7] was, I think, probably never better captured than it was in the passing observation Justice Hugo Black offered nearly four decades ago. In the course of an informal interview held in his Supreme Court office in 1968 with Eric Sevareid and Martin Agronsky, commemorating his thirtieth year on the Supreme Court, Justice Black offered the following reflection: "I think most [Americans] do not [understand the Constitution].... It's all because each one of them believes that the Constitution prohibits that which they think should be prohibited, and it permits that which they think should be permitted."[8]

In so declaring what "most [Americans] do not understand" about the Constitution, Justice Black said nothing different in kind from what an experienced radiologist might similarly offer as a passing observation particular to his or her own field of study, that is, supposing that most people may believe that radiology can cure most forms of cancer, radiologists themselves may well be unable to share that view. It is *not* by way of casting any aspersion on what "most" Americans may "believe" (whether in the one case, about the Constitution, or in the other case, about radiology), but simply an observation from a Justice who had been on the Court for three decades, reflecting on what he himself had learned, and sharing his observation, candidly, as he thought it merely appropriate to do.

That there might well be a similar large gap between what "most Americans" might "believe" (because they *want* to believe it) about the curative values of radiology as such and the vastly more qualified understanding of what radiologists *know* to be the case (that its "curative values" may well have been oversold) is utterly likely. If so, it would seem to be the very mark of a conscientious

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7. *See supra* note 3 (quoting the requirement of Article VI respecting what it is that each judge swears to do, namely, to "support *this* Constitution"—that is, the Constitution as *is* ... and not merely as one might *like* it to be).

8. *Interview by Eric Sevareid and Martin Agronsky with Hugo Black, Associate Justice, United States Supreme Court* (CBS television broadcast Dec. 9, 1968), *reprinted in Newsmakers, Objection Overruled*, NEWSWEEK, Dec. 9, 1968, at 52. For a still-unsurpassed article reflecting on these matters, see generally Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). *See also* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

radiologist who will truthfully report the fact, for such is the stuff of conscientious radiology itself. And so, too, here as well, as I think Justice Black was merely affirming for himself, in his own quiet and quite unassuming fashion, in his candid reflections from thirty years experience on the Supreme Court. If the Constitution be defective, one need not ignore the matter—those "defects," such as one may think they may be. *Neither, on the other hand, will one pretend they are not there.*

Rather, one might well consider that the Constitution is quite possibly still a work in progress, even as I think Justice Black implied. One may also, in this regard, heed the advice given by Carl Schurz more than a century ago, in his famous statement on the Senate floor, in 1872.[9] Speaking to his colleagues on the great matter of patriotism, the immigrant Senator offered a thoughtful amendment to an oft-quoted patriotic toast Stephan Decatur had proposed to mark the end of hostilities with the Barbary Pirates, decades earlier, in 1816.[10] The toast by Stephan Decatur was this: "Our country! In her intercourse with foreign nations, may she always be in the right; but our country, right or wrong."[11] Carl Schurz added a qualifying thought of his own: "My country, right or wrong; if right, to be kept right; and if wrong, *to be set right.*"[12]

If one agrees with Carl Schurz's best point (as I think most Americans will want to do) and also with Hugo Black, the question, then, is not *whether* there may be even significant gaps between what our "highest" law may now condone or forbid and what it perhaps ought *not* so condone or forbid (thus the "morality gap"). There assuredly may well be such gaps (it would be surprising were there none), even as Hugo Black gently acknowledged on his own behalf. Rather, the better question is, supposing it to be true, *how best to "set right"* what we may frankly admit not now to *be* "right," and whether, all things considered, one works to amend the Constitution to bring the necessary change about to make it "right" or whether we proceed instead by making ourselves mere cheerlead-

9. CONG. GLOBE, 42d Cong., 2d Sess. 1287 (1872).

10. ALEXANDER SLIDELL MACKENZIE, LIFE OF STEPHEN DECATUR, A COMMODORE IN THE NAVY OF THE UNITED STATES 295 (1846).

11. *Id.* This toast was given at an April 1816 banquet in Norfolk, Virginia.

12. CONG. GLOBE, 42d Cong., 2d Sess. 1287 (1872) (emphasis added).

ers within the fable of the clever tailors ... and the oft-told tale of *The Emperor's New Clothes.*[13]

In the latter case, then we will simply engage in praising those who will even now declare that the emperor (that is, the Constitution) needs no additional garments: indeed, declare he is already splendidly dressed up just as he is and as he parades through our streets. Rather (or so we shall *say*), he merely *looks* a bit naked to those who, like Hugo Black (or like a sweet uncorrupted child), cannot see for themselves how utterly well caparisoned the emperor's tailors have already made him appear, outfitted in his fine wardrobe to which *nothing* needs to be added to make him utterly magnificent! "The trouble," in this view, "is merely that you and some children—like Hugo Black—simply have no adequate *imagination*, that is, no adequate 'interpretive' gifts, and certainly none as highly developed as our own!" The *truly* "morally enlightened" majority[14] merely needs to take care that none of the morally bereft get elevated to the Supreme Court. What we need, in brief, are *more tailors* who, like those once upon a time in Copenhagen, will unfailingly find no gaps in the clothing of the nation—no missing threads in its constitution—or, upon finding them, will promptly weave new threads providing a perfect seamless garment and an elegant match of the "is" with the "ought."

Indeed, and toward that very end, many academics (and many judges) have proposed all manner of forensic means for weaving better clothes ("*clothing* the morality gaps" one might say). One way of doing so is to tout a jurisprudence of "nonoriginal interpretivism,"[15] the basic idea of which is that we—and the judges—should make no pretense of anchoring the manner in which a given clause is to be given content in anything it—the clause in question—was originally understood to enclose or *not* enclose. After all, for moral people, even assuming one could determine such a thing, in the end, *who cares, what does it matter*, and why? Perhaps a few historians might care, but beyond that, it is just a moot

13. HANS CHRISTIAN ANDERSEN, *The Emperor's New Clothes, in* ANDERSEN'S FAIRY TALES 82 (1963).

14. Perhaps we might call them "the moral majority" (but then, again, perhaps not).

15. *See generally* Michael J. Perry, *Normative Indeterminacy and the Problem of Judicial Role*, 19 HARV. J.L. & PUB. POL'Y 375 (1996).

point—or may surely be treated as though it were (that is, by "moral people"). And why "moot"? Because, obviously, it is for "us" (the *living*) rather than for "them" (the *dead*) to declare today's authoritative description of each phrase or clause in "*our*" Constitution. And so much being true (as well as obvious), if *we* say it means "X" (rather than "not X"), then X it is (save, perhaps, for small children standing puzzled alongside the street).

Moreover, to follow up on this very thought, if what is required (to close the gaps) would seem to stretch constitutional language beyond even a plausible claim of "interpretation" per se ("nonoriginal," "unoriginal," or otherwise), one may merely move over one farther step to embrace the notion of "*non*interpretivism" itself as a way out of the morass.[16] If even *this* is not enough, then one may turn to the discovery of structural *Ackerman amendments* to do the job, that is, to propositions "we" say are now entitled to recognition by the Supreme Court as propositions which, though never reduced to any text (because never proposed, much less adopted, as amendments pursuant to any of the provisions of Article V), nevertheless received (in our view) such concentrated and sustained political endorsement "by the people" acting *outside* of Article V, as to be equal in stature—for purposes of judicial application in concrete cases—to those that do.[17] But I forbear from

16. *See generally* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Michael J. Perry, *Interpreting the Constitution*, 1987 BYU L. REV. 1157; Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981). The school of "*non*interpretivism" may seem to be unlikely to attract many to its banner (declaring what it *is* solely by declaring what it is *not* seems to make it a strange sort of beast). It might even be seen as a kind of oxymoron, albeit of a most peculiar kind. I once asked of a colleague which clauses in the Constitution he was currently "*non*interpreting." Strangely, perhaps, he was not amused. (Not many months later, in his subsequent writings, however, I noticed that he had shifted locutions. No longer was it "noninterpretivism." Now, it was "nonoriginal interpretivism." *Plus ca change* ...?)

17. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1055 (1984) ("Rather than acting under the explicit procedures established by Article V, however, We the People of the United States expressed its will through a higher lawmaking process that relied primarily upon the structural interpretation of Articles I, II and III of the Constitution."); *see also* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457 (1994) ("We the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V.").

proliferating further examples.[18] They would merely come eventually to the same end.

Endlessly vexed by the "morality gap" one otherwise despairs of attempting to close by the onerous requirements of meeting the Constitution's own provisions for "improvements" (such as they might be thought to be) by actual, written amendment, our modern tailors are forever busy, weaving a magical cloth to present to the judges ... and to all of us as well.

Fortunately (or unfortunately—I suppose it depends upon your point of view—but for me it *is* fortunate), our distinguished panelists have decided not to revisit the relationship of law and morality in respect to constitutional law at this level of conflict. Rather, the first essay, by Larry Alexander and Fred Schauer, offers a number of provocative observations regarding "the settlement function" of the law as a moral principle quite worthy of respect in its own right.[19] And the second essay, by Kent Greenawalt, responds ably to the following concern, namely, "whether the law should ever treat moral judgments based on religious conviction differently from moral judgments that lack such a basis."[20] Each essay speaks well for itself, as the reader will readily see. So much being the case, all that remains for me to do is to invite the reader to the intellectual treat of these fine essays, and now, at once, to step aside.

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18. *See generally* Ackerman, *supra* note 17; Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Grey, *supra* note 16; Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986-1987); Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698 (1999).

19. Larry Alexander & Fred Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579 (2007).

20. Kent Greenawalt, *Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy*, 48 WM. & MARY L. REV. 1605 (2007).