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THE CONSTITUTION AS TEXT AND RULE

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I.

It is a commonplace, no less important for the frequency of its repetition, that the framers of the Constitution were a strikingly homogeneous group. They were all white, they were all Protestant, they were all comparatively well-off property owners, and they were all men. But even within this homogeneous collection of fifty-five men, substantial philosophical and political differences were reflected in divergent views of what the new Constitution ought to do and how it ought to do it. As Professor Ferguson ably demonstrates, the historical context of the framing is hardly an embodiment of intellectually congenial unanimity.¹

From the perspective of such divergence of aims, the bare constitutional text, unsupplemented by historical reflection, appears more unanimous than the historical record warrants. The document's simplicity, confidence, and boldness all speak of a framing characterized by agreement. Yet the actual facts tell us otherwise. The history of the framing is a history of faction, of radically diverse goals, and even of varying degrees of enthusiasm for the entire enterprise.

Professor Levinson, in his contribution to this Symposium,² celebrates this diversity, and celebrates a Constitution sufficiently plastic and porous that a wide range of different meanings can be attached to the constitutional text. Although his point is not dependent on the existence of differences among the framers themselves, it is obviously enhanced by it. In one important way, Levinson's celebration of multiple meaning is consistent with the theme of Professor Ferguson's analysis of the Constitution and its forma-

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1. Ferguson, *"We Do Ordain and Establish": The Constitution as Literary Text*, 29 WM. & MARY L. REV. 3 (1987).

2. Levinson, *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113 (1987).

tion. For Ferguson, the Constitution's simplicity, boldness, and apparent unanimity are a lie, masking the diversity of approach among its creators.³ The Constitution therefore is a document that, instead of celebrating or even reflecting this diversity, quite simply suppresses it.

Ferguson repeatedly hints that this suppression of diversity is hardly something of which we should be unqualifiedly proud, and thus he appears to seek the same end as Levinson: the recapture of diversity. Ferguson, for example, refers to the "apparent unanimity" of the document as a "subterfuge," a "fiction," a "myth."⁴ By referring to the "presumed" unanimity, he asks us to consider that the reality is something else, and that the appearances of the document result from a process of "manipulat[ion]" of "mystifi[cation]" in an attempt to create a "seal" between the document and the reality, thus making it harder to see that the document is in fact a "contrivance," a "metaphoric" rather than a real "projection of competence and accomplishment."⁵

Ferguson's Constitution, therefore, seems distinct from the bald text of the document that most Americans commonly call the Constitution, and if there is a normative point in his analysis, it is that the real Constitution, with all its diversity, should be released from the artificial shackles imposed by a text that masks rather than furthers our understanding of the historical events that comprise part of his Constitution. To Ferguson, historical analysis, combined with the vagueness and ambiguity of the document itself, allows us to recapture and preserve the underlying diversity and controversy that is part of the Constitution of this nation. For to him, this diversity is not something of which we should be ashamed. Instead, the diversity is, as it is for Levinson, a reminder that ours is not a Constitution of constraint, but is instead a Constitution of possibility, a Constitution of opportunity.

3. See Ferguson, *supra* note 1.

4. *Id.* at 6 (quoting Franklin in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 643 (M. Farrand, rev. ed. 1966)).

5. *Id.* at 8-13.

II.

I want to present an alternative vision of the relationship between the Constitution and its history. This will also be an alternative vision of the relationship between a text that seems to speak with one confident voice and a process of creation that we know involved many voices often speaking against rather than with each other. To introduce this alternative vision, it might be useful to imagine an example far removed from the historical foundations of the Constitution.

Suppose two people are negotiating about the price of a used car. Smith, the seller, thinks the car is worth \$3000. Jones, the buyer, believes it is worth only \$1000. After engaging in the normal rituals of bargaining, they agree on a price of \$2000 and sign a contract to that effect. Jones takes the car and, pursuant to the contract, promises to send Smith a check within five days. Five days come and go, Jones does not pay, and Smith sues. There is no dispute that Jones has the car and Smith has no money. Jones argues to the judge that the car is worth only \$1000 and proceeds to present expert and other testimony to support that contention. Smith, however, argues in court that the car is worth \$3000, and he also supports that claim with evidence. The judge, presented with this wide range of opinion, rules that in her view the car is worth \$2500 and orders Jones to pay that amount to Smith.

Now, this is obviously a fictitious story, and not merely because Smith, Jones, the car, and the judge are fabrications. It is fictitious in a more fundamental sense because contract law simply does not work this way. However strongly Jones felt that \$1000 was the proper price, and however strongly Smith felt that \$3000 was correct, these diverse views were properly suppressed by the terms of the contract, and so too was the view of the judge. The process of entering into a contract bears legal significance, and the legal significance it bears is that it cuts off access to a range of diverse and arguably reasonable views that may have been held by the contracting parties prior to entering into the contract. These views may remain interesting even after the contract is formalized, and they may even be correct, but as far as the contract itself is concerned they are, in the normal case, irrelevant.

This example obviously suggests an alternative vision of the relationship between a constitutional text that says one thing and a

range of views of its authors that are in some cases divergent from what the document says. For just as it is most assuredly not the task of the judge in the contract case to try to release the underlying diversity from its textual shackles, so too can we imagine a parallel vision of a written constitution in which the negotiated and enacted text cuts off legally significant access to the range of views that might have preceded it.

Texts, including but not limited to the text of the Constitution, are artifacts, created by fallible human beings under circumstances often less than romantic. It is important, however, that we keep clear the distinction between the artifactual and the artificial. That legal texts are the creation of human beings, and that they usually represent the concretization of some more complex and subtle array of thoughts and interactions, does not make them any less real. The existence of the product of a process is not, once the process is completed, dependent on the nature of the process. Thus, although one cannot find in the constitutional text all or even much evidence of the diversity and controversy that accompanied its creation, this does not make the document in any sense artificial, except as history. But the Constitution is not history, and was not intended to be. It does not tell a story; it is its own story.

III.

The issue here is one that pervades legal theory. Is a text merely *evidence*, or is it in some way the ultimate object of reference? Is a legal text merely a description of or shorthand for some underlying normative reality, in which case the text, as text, has no autonomous legal significance? Or, on the other hand, is a legal text opaque rather than transparent, something more than a window through which to view a more fundamental reality lying behind it?

The former view, taking the text to be mere evidence of and therefore subservient to something else, has a diverse and distinguished heritage. Those who, in constitutional interpretation, would look to the text as merely the defeasible embodiment of the intentions of the framers have a view of the law that takes the framers as themselves the primary object of reference, with the text as but one piece of evidence from which we might determine what it is that the framers would have wanted done in the case at

hand.⁶ The same question surfaces even more frequently with respect to statutory interpretation. Recent Supreme Court interpretations of the Civil Rights Act of 1964,⁷ with its various amendments, have, over strong dissents, held that insofar as the language of that act commands such color-blindness that race-conscious affirmative action plans are unlawful, then that language must give way to the intent of Congress that such plans not be invalidated.⁸

Nor does this view, taking the text as defeasible evidence of a more paramount normative principle lying behind it, necessarily require reference to original legislative or framers' intent. Ronald Dworkin, for example, views the statutory formulation of a rule as distinct from the "real" rule.⁹ For him it is the task of the judge to construct the real rule from a host of sources, including but not

6. With respect to the relationship between original constitutional intent and the constitutional text, the questions I raise here are rarely presented in stark form. Because almost all currently contested constitutional questions surround the particularly vague provisions of the Constitution, contemporary and not so contemporary constitutional theorists who subscribe to the primacy of original intent, e.g. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 677-78 (1966) (Black, J., dissenting); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 374-87 (1981), need not deal with the question of stark conflict between text and original intent. Nor, *a fortiori*, do those of us who reject the guidance of original intent even for interpreting vague textual provisions have to worry about conflict between specific provisions and original intent. E.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 804-12 (1982). Nevertheless, thinking seriously about the Constitution as text requires confronting the question of what we would do if the text confounded the original intent. As should be apparent, I would take the text nevertheless to be paramount. The opposing view can be found in some of the eleventh amendment cases. E.g., Welch v. Texas State Dep't of Highways & Pub. Transp., 107 S. Ct. 2491 (1987); Monaco v. Mississippi, 292 U.S. 313 (1934); Hans v. Louisiana, 134 U.S. 1 (1890).

7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter Civil Rights Act].

8. Johnson v. Transportation Agency, 107 S. Ct. 1442, 1450 n.7 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979). See also California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 691 (1987) (same conclusion with respect to Pregnancy Disability Act of 1978, 42 U.S.C. § 2000e(k) (1982)). Commentators reach similar conclusions about the subservience of text to purpose in their discussions of statutory interpretation generally. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

9. R. DWORKIN, LAW'S EMPIRE 16-26 (1986).

limited to the statutory formulation. And Dworkin's views, in turn, have interesting connections with the views of both Lon Fuller¹⁰ and Karl Llewellyn,¹¹ each of whom saw the task of interpretation as necessarily involving a search for the "purpose" whose fulfillment was the job of the text.

By contrast, the alternative view of legal texts does not view the interpretive task as one of looking for something other than and superior to the text. Under this view, we look *at* texts and not *behind* or *through* them. This is not to say, of course, that the texts will always, or even, as in the case of the Constitution of the United States, frequently answer the interpretive questions we ask them. But it is possible that if we take texts as having independent interpretive force, we will at least stay with them longer before searching for something else. We will be inclined to wrestle with the text rather than abandon it. Our inclinations will tend more towards mining everything there is to be mined from the text before moving on.¹² Moreover, even when the process of struggling with the text yields no single answer, it may still rule out some otherwise eligible answers.¹³ Perhaps even more importantly, when we confront that range of possible answers that the text neither commands nor excludes, we will be able, with greater candor, to say that the law, narrowly and conventionally conceived, simply does not answer our question. We can then acknowledge that where we go from there is not to the law but to sources of guidance not traditionally taken to be law in a narrow sense. Having, therefore, a somewhat narrower notion of law assists in confronting the moral, economic, and political choices that are intrinsically part of constitutional decision making. If, on the other hand, we are inclined to define as "law," with all the baggage with which that word is now encumbered, an elusive reality lying behind or around

10. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958).

11. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 268-77 (1960).

12. I discuss this idea of the psychological rather than logical appeal of textual preoccupation in Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

13. *Id.*

the text,¹⁴ the extent of choice and the bases on which such choices are made are likely to be obscured.

Taking texts seriously does not come without a price, but it is the same price that any form of rule-governed decision making exacts. A rule set forth in a text makes concrete some generalization of the past, and then projects that generalization of a known past into and onto an unknown future. In some number of cases, therefore, the rule, crafted on the basis of the past, will generate a result inconsistent with what the rule was designed to do. This is the point of Fuller's example, in which a statue of a truck erected in a park as a war memorial conflicted with the "no vehicles in the park" rule.¹⁵ It is also the point of the majority opinion in *TVA v. Hill*,¹⁶ of *Riggs v. Palmer*,¹⁷ and of the issues surrounding the interpretation of the Civil Rights Act of 1964.¹⁸ In each of these cases some event, unforeseen and perhaps even unforeseeable at the time the rule was made, frustrates the purpose of the rule.

When such events arise, two courses of action are open to the decisionmaker. One is to follow Fuller, Dworkin, Llewellyn, and others in interpreting the written rule according to its purpose and not its specifics, thus avoiding the frustration of that purpose. Such a course of action is especially attractive with respect to the common law, where there is rarely a canonical textual constraint, and where it is in the nature of the process that the rules, such as they are, will be continuously modified as they are applied.¹⁹ But

14. Although I do not deal with the issue here, I take previous decisions to be legally important parts of the law, having a status analogous if not quite equal to that of the text. See generally Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMM. 123 (1985); Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467; Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979). For an even more general discussion, see Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

15. Fuller, *supra* note 10, at 663.

16. 437 U.S. 153 (1978).

17. 115 N.Y. 506, 22 N.E. 188 (1889) (featured in R. DWORKIN, *supra* note 9, at 15-20, and also in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 23 (1977)).

18. Civil Rights Act, *supra* note 7. See cases cited *supra* note 8.

19. On the tension between common-law decisionmaking and the idea of a rule, see Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77 (2d series, A. Simpson ed. 1973); Simpson, *The Common Law and Legal Theory*, in LEGAL THEORY AND COMMON LAW 8 (W. Twining ed. 1986) (revised version of original essay). Of course, this tension between the nature of the common law and many of the virtues often associated

making the rule fit the case, rather than the other way around, is not quite so appealing when the rule is not extracted from a series of cases, as it is with the common law, but is instead set forth in a fixed canonical form in an authoritative text. For if this kind of rule is also subject to modification in application, including modifications that do violence to the text itself, then the rule as set forth in the text becomes superfluous.²⁰ More accurately, the advantages of rules set forth in texts, including predictability, certainty, and related virtues, are lost if what seemed to be fixed is in fact malleable depending on the judge's determination of what the purpose of the rule *really* was.

The advantages of predictability, certainty, and constraints on the flexibility of decisionmakers are hardly universally transcendent. They conflict with remarkable frequency with the also-appealing goals of flexibility, adaptability to changing circumstances, empathy, and the other benefits of particularistic adjudication.²¹ Particularistic adjudication is optimally contextual, for it treats every relevant feature of the case at hand as properly part of the calculus in determining the final decision. Nothing is screened off, nothing is blocked from consideration, and the decisionmaker can, on the basis of all relevant evidence and in the full context of the situation, make the best decision.

This is an appealing picture, but it is important that the positive emotive connotations of words like "context" and "sympathy" not blind us to the disadvantages of particularism, especially with respect to constitutional law. It is part of the context of the Skokie controversy that Frank Collin and his fellow Nazis were despicable human beings,²² it is part of the context of many criminal procedure cases that the defendant is guilty of the crime charged, and it

with rules in fixed verbal form was the basis for Bentham's objection to the common law. See generally G. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (1986).

20. I elaborate on the point that continuously malleable rules lose the central feature of ruleness in Schauer, *The Jurisprudence of Reasons* (Book Review), 85 MICH. L. REV. (1987) (forthcoming). See also Alexander, *Pursuing the Good - Indirectly*, 95 ETHICS 315, 321-23 (1985).

21. For a prominent example of the recent attraction of particularism, see Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). See also Henderson, *Empathy in Legal Reasoning*, 85 MICH. L. REV. (1987) (forthcoming).

22. See Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 286-87.

is part of the context of equal protection cases like *Palmore v. Sidoti*²³ that innocent children might be hurt in the service of the goals of racial equality. In all these cases the Constitution quite properly commands that decisionmakers ignore these aspects of the context, but that is precisely the point. In many respects the Constitution acts as a rule, rigidly demanding of decisionmakers that they exclude from consideration certain potentially morally and politically relevant features of the case before them. It does this because in many cases we are properly afraid that decisionmakers, judicial or otherwise, will overvalue these factors. We also recognize that certain long-term values are best served by denying officials and judges the power to engage in what they perceive to be optimization for the immediate case, and in some respects this is what the Constitution is all about.

IV.

I have traveled less distance from where I started than may at first appear. For the question whether we will view the constitutional text and constitutional decisions of courts as rules, cutting off consideration of even the potentially relevant and important, is intimately related to the question whether we will view the Constitutional text as having independent significance or merely as evidence of some deeper reality. If the text has independent significance, then its inclusions and exclusions are also independently important, even if those inclusions and exclusions, like the inclusions and exclusions of any rule, are likely as they confront experience to be both underinclusive and overinclusive.

The constitutional picture I paint may seem unattractive to some. It is not a picture that stresses a constitution of opportunity, of possibility, or of sensitivity. Nor is it a picture of a constitution that enables and empowers. Instead it is a picture of a constitution that disables and impedes. It substitutes frustration for opportunity.

Impeding, disabling, and frustrating may hardly seem attractive in the abstract, and may seem even less so when we realize that what is often impeded is the consideration of factors that are im-

23. 466 U.S. 429 (1984) (mother's interracial marriage not permissible consideration in custody determination regarding child of previous marriage).

portant and relevant for the situation at hand. But impediments and frustrations, which are likely to strike us frequently as formal or artificial barriers in the way of pursuing the Good, seem less unattractive when we consider the extent to which they also operate as barriers to the pursuit of the evil and dangerous. In an imperfect world, however, maximum fine tuning is not possible. It seems beyond human capacity to design a system of government that places no obstacles in the way of the Good, but stands vigilant against the encroachment of the Bad. Given human fallibility, therefore, governmental systems, of which constitutions are a part, must choose which of the potential errors is more dangerous. Those systems may choose to view the blocking of the pursuit of the Good to be the paramount error, and thus choose to minimize the occurrence of this error, even at the cost of tolerating a larger number of errors of the other variety; that is, they will fail to block the dangers that can come from those who pursue power rather than the Good. Conversely, other systems may view the abuse of power as the paramount evil, and thus choose to minimize the occasions on which the abuse of power is not blocked, even at the cost of tolerating a considerable number of cases of the opposite error; that is, they will choose to impede the pursuit of the Good.

It is arguably a central part of American constitutionalism that it chooses the latter of these two models over the former. It is willing to frustrate good projects of good governments and good governors if doing so will also help to frustrate the less good ends or means of evil, misguided, or simply confused holders of power. If this is so, then the appeal of a constitution of frustration and impediment, rather than one of opportunity and empowerment, becomes more pressing. Putting this into practice, however, is not simply a matter of saying it. It involves the inculcation of the view that what seems right or good or sympathetic or important to the decisionmaker might nevertheless be ruled out by the words of a text or a rule. But if decisionmakers, whether judicial, executive, or legislative, view texts and constitutional rules as mere summaries of the good, they are likely to view these texts and rules as defeasible in the service of that which *they perceive* to be the reasons behind the text or the rule. It is precisely to block such appeals that rules exist, and it is to block such appeals that we have a Constitution at all. At times the consequences of a Constitution that

frustrate us are, quite simply, frustrating. But the consequences of a Constitution that does not frustrate are likely to be quite a bit worse.