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PRESERVING THE INTEGRITY OF THE CONSTITUTION: AN EXAMINATION OF DECONSTRUCTION AND OTHER HERMENEUTICAL THEORIES

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The last fifteen years or so has witnessed a remarkable discovery by American academic lawyers: literary theory, especially in its hermeneutical aspects. Of course it is not that the legal community had never been interested in interpretive theory. To the contrary, the legal world, from the time of the Roman law system to the present, has always been one of texts--wills, contracts, deeds, court decrees, statutes, regulations, and constitutions--that carry the necessity of interpretation. Moreover, the word "hermeneutics" entered American legal discourse as far back as 1839 when Francis Lieber, a German immigrant, published *Legal and Political Hermeneutics or Principles of Interpretation and Construction in Law and Politics with Remarks on Precedents and Authorities*.¹ Yet the real work in hermeneutics has been done in the latter half of the twentieth century by literary theorists. Sanford Levinson, writing in 1988, observed that "increasingly within the last forty years, literary studies as a discipline has devoted more and more attention to the problematics of literary theory, and it is fair to say that the sophistication of the analyses has far surpassed anything that had previously occurred in the legal academy."² It is this body of work in hermeneutics described by Levinson that academic lawyers have only recently discovered and have sought to draw from in wrestling with interpretive problems in legal texts.

In the discussion of the interpretation of legal texts, no text takes on more importance than the United States Constitution. William Gladstone, the great British statesman and prime minister, once described the American Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man."³ Americans cannot but be pleased by this tribute, and it is accepted by most as an accurate assessment of what has been regarded as, since

the time of the American founding, a sacred text. Certainly, the importance of the Constitution in American life cannot be minimized. The Constitution is the national charter of the United States. It is the binding framework of law and public policy for the nation. It is the starting place for a people committed to the rule of law in a civilized society. Therefore, its meanings, to the extent they are ascertainable, necessarily govern its interpreters.

The Constitution's meanings, however, are not always easily determined. American legal scholars have debated the subject of constitutional interpretation since the Constitution's adoption at Philadelphia in 1787. The debate has become especially heated in the last two decades, with the lines drawn between "interpretivists" and "noninterpretivists," "originalists" and "nonoriginalists," "strict" and "liberal" constructionists, "textualists" and "nontextualists." While the labels are varied, the controversy in the debate remains the same. Should the Constitution be the sole source of law for purposes of judicial review, or should judges supplement the text with an unwritten constitution that is implicit in precedent, practice, and conventional morality? That is, do we have a "static" Constitution, or a "living" one? Or, stated another way, must the United States Supreme Court confine itself to norms clearly stated in the text of the Constitution, or may the Court protect norms not mentioned in the Constitution? The debate is important because at stake is the question of how much power a set of nonelected judges should have in setting moral norms and formulating major governmental policy for the nation.

Why has the legal academy suddenly begun to look to literary theory in the debate over how to interpret the Constitution? There are several possibilities. Stanley Fish has suggested that perhaps too many people with literary backgrounds have infiltrated the law schools.⁴ Another theory is that academic lawyers now realize how little social science (fashionable in its applications to jurisprudence in the first half of the twentieth century) has to offer to interpretational problems and are impressed by literary theory as a new and heady slant on the hermeneutical debate.⁵ The best explanation, however, is that constitutional hermeneutics, in the 1980s when its own debate seemed hopelessly unsolvable, found room for literary theories, themselves scarcely a few decades old, in the hope that it had discovered a new wellspring of

data to resolve the debate. The outcome, though, has not so far been what those involved in the field of constitutional hermeneutics had hoped for. The claim to textual autonomy--the claim that a text can somehow escape subjective readings--has been challenged. Deconstructionist and reader-response terminology has infiltrated the legal literature. And as Richard Weisberg has noted, interjected now is the unsettling view that interpreters stand outside of the text, that the Constitution itself exists independently of the readers who talk and write about it, and, indeed, the enormously disquieting view that there are *no* meanings in the Constitution to be discovered.⁶

Thoughtful traditionalists such as Owen Fiss have described the new merger of constitutional hermeneutics and literary theory as "nihilistic,"⁷ and other more "objectivist" theorists, such as Raoul Berger, as downright "distorted."⁸ Even commentators sympathetic to the deconstructionist view that language is infinitely variable, and legal interpretation virtually unconstrained, have recognized the potentially radical effect of the new synthesis for the American political structure. As one writer put it: "If the trend toward literary lawyers and lawyerly critics gains further momentum, I can imagine a senate confirmation hearing in the near future where a Supreme Court nominee is asked: Are you a strict constructionist or a deconstructionist?"⁹ In short, many scholars are concerned with the potentially destructive effects of the new thinking upon the integrity of the Constitution.

The most popular and influential contemporary approach to literary analysis is deconstruction. The popularity of deconstruction has spilled over into legal writings, although it is still strange territory for most legal academics who are accustomed to reading only what other lawyers have said about textual interpretation. The Frenchman, Jacques Derrida, is the leading deconstructionist and has won a large following in America. Derrida's dominant idea concerning the literary text is that, since language is a chain of signifiers that does not point to independently existing signifieds, texts do not portray a real world that exists independent of language.¹⁰ Thus we have Derrida's best known aphorism, "there is nothing outside of the text."¹¹ Consequently, the world as we know it is only a world of representation, and representations and representations, *ad infinitum*. Every signified is actually a signifier in disguise.

It is easy to see how Derrida's critique can be viewed as nihilistic because it appears to deny the existence of objective truth. In fact, deconstructionists often argue that texts have *no* determinative meanings. Many critics have been bitter in their criticisms of a form of analysis that leaves them with no "truth" and no determinative meanings. As one writer has said, "Derrida's deconstructive readings are, at one level, a remarkably far-reaching attempt to loosen the moorings of virtually every intellectual tradition in Western thought."¹² On this interpretation, deconstruction is, at bottom, the fashionable, modern version of nihilism.

Yet Derrida himself has said that deconstruction only means "undoing," not "destroying."¹³ And some commentators like J.M. Balkin have been more sympathetic to Derrida's project, arguing that deconstruction is a useful "tool of analysis" and that it does not deny the existence of objective truth as much as it affirms the interpretive character of our attempts to comprehend truth.¹⁴

Several questions, then, can be asked about deconstruction. Is it destructive or constructive? Does deconstruction make any difference? Can it aid those who are investigating the field of constitutional hermeneutics? Will it help resolve the current debate over how the Constitution should be interpreted? Are there moral consequences to a deconstructed Constitution? These and related questions are addressed in this essay by focusing on two areas of discussion. First, a brief description of the current debate on constitutional interpretation is presented. The debate is discussed in language typically employed by legal academics, that is, language free from the influence (or awareness) of literary theory. Seeing the debate in this context will make it easier to see how legal academics have rushed, rightly or wrongly, to literary theory with its greater sophistication and its own erudite verbiage, in search of help for resolution of the debate. Second, deconstruction is discussed, with particular attention being given to the implications of a deconstructive approach to constitutional hermeneutics. The goal is to determine whether deconstruction can help to solve the contemporary debate on constitutional interpretation and to identify identify the moral implications of a deconstructed Constitution.

The Contemporary Debate On Constitutional Hermeneutics

There are two basic responses to the question of the beliefs on which a judge should rely in making constitutional decisions. As already noted, the nomenclature for these two responses vary, but the terms used here will be "originalism" and "nonoriginalism,"¹⁵ only because they seem best to capture the central focus of the debate: the degree that modern interpretation should be guided by the "original" intentions of the Constitution's framers and ratifiers.

Originalism holds that a judge, in deciding whether public policy regarding some matter is constitutionally valid, should rely upon "original" beliefs, motives, and intentions of those who were responsible for drafting and ratifying the Constitution. This view at first seems overly rigid; after all, how can the beliefs of the framers and the ratifiers ever be completely determined, especially when one considers the scarcity of written records of the Constitutional Convention and the state ratifying conventions. It also tends to minimize the significant disagreements that prevailed over the final wording of the Constitution. Originalists hold, however, that the wording of the Constitution itself is clear evidence of the intentions of the framers and ratifiers, and because the Constitution in its final wording was passed in democratic course, original disagreements on its content are to be disregarded, except to the extent that those disagreements can illumine the reasons for the approval of the final language. Moreover, they argue, the constitutional text anticipates the need to depart from its original provisions by providing a process for amendment. The original intentions, then, are the rudder of the nation; remove the rudder and the nation will drift aimlessly, ultimately to be ruled (and ruined) by nine nonelected judges who can make whatever laws they want.

A common misconception of originalism is that it requires judges to answer a question the way the framers/ratifiers would have answered it in our day, if they were living. However, there is no way a judge can know how the framers would have answered a constitutional question--the abortion question, say--in our day, were they still living. The originalist project is not to speculate about what the framers' beliefs would have been in our day, were they still living, and then to decide the case on the basis of those beliefs. Rather, the originalist project is to discover

what beliefs the framers "constitutionalized," and then to decide the case on the basis of those beliefs.¹⁶ As Robert Bork, a prominent originalist, has written: "The objection that we can never know what the Framers would have done about specific modern situations is entirely beside the point. The originalist attempts to discern the principles the Framers enacted, the values they sought to protect."¹⁷

Yet, "discern[ing] the principles the Framers enacted, the values they sought to protect," is not an easy assignment. It requires, according to Michael Perry, entering into a hypothetical conversation with the framers in an effort to discern which principle *they* likely would have chosen, that is, selecting from among the various candidate principles, the one that best captures the purpose or point or meaning of what they said in the Constitution.¹⁸ Even Bork understands that this leaves room for self-serving conclusions: "Enforcing the Framers' intentions is not a mechanical process and... even a judge purporting to be an... [originalist] can manipulate the levels of generality at which he states the Framers' principles."¹⁹

Originalism, then, even in its most sophisticated form, readily acknowledges that the judge can never retrieve the actual "original understanding" any more than one can come to see the world through another person's eye. The sophisticated originalist is fully aware that the best the judge can do is construct an imagined "original understanding" by means of a hypothetical conversation that is sensitive to the available historical materials. But, for the originalist, the best the judge can do is quite good enough--far better, at least, than a nonoriginalist approach, uncommitted, fundamentally, to original intent.²⁰

To the nonoriginalist, unlike the originalist, what the Constitution means is not merely what it originally meant. As Michael Perry has said, the Constitution may mean original beliefs, but it may also mean the aspirations or ideals or principles signified by the Constitution. The best examples of provisions bearing constitutional aspirations are the First Amendment, signifying the aspiration of freedom of speech, press, and religion; the Fifth Amendment, signifying the aspiration to due process of law; and the Fourteenth Amendment, signifying the aspiration to due process of law and to equal protection of the laws.²¹

Constitutional provisions signifying constitutional aspirations are usually vague, the nonoriginalist claims. When the framers were vague or ambiguous, the likely reason is that they meant to be. The nonoriginalist assumes that the framers intended their vagueness and ambiguity to be pregnant with meaning for unborn generations, rather than be restricted to whatever meaning then existed. Thus, a wide open term like "freedom of speech" was chosen by the framers deliberately, leaving room for the widest possible interpretation.²² The framers could have given a comprehensive definition of freedom of speech, but they chose not to. They meant, then, that the aspirational meaning of freedom of speech would emerge over time--in the course of constitutional adjudication and political discourse. As a progressive generalization of the original meaning, the aspirational meaning of freedom of speech is not inconsistent with, but indeed includes, the narrow original meaning.²³

The "fundamental aspiration" approach to constitutional interpretation has traditionally been practiced by the Supreme Court's more liberal members. Former Associate Justice William Brennan often expounded the fundamental aspirations theme. For example, he once wrote that "the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being... [W]e are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations."²⁴ Moreover, Brennan frequently found justification for the fundamental aspirations approach in the ambiguity of certain provisions of the Constitution. According to Brennan, the "majestic generalities and ennobling pronouncements [of the Constitution] are both luminous and obscure. The ambiguity of course calls forth interpretation, the interaction of reader and text."²⁵ It should be made clear that not every provision of the Constitution signifies a fundamental aspiration. Some provisions of the Constitution, after all, pertain only to mundane yet essential matters. In Article I, Section 3, for example, it is provided that "The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided." Unambiguous provisions like this one do not preclude an originalist approach, even for the nonoriginalist.

The nonoriginalist, then, is free to consult original beliefs, but is also free to search for the ideals and aspirations behind certain provisions of the Constitution. It is a process of being true to the original text, but acknowledging that there is room for play in the joints to keep the Constitution "up to date" and reflective of modern values. Alexander Bickel has summarized the key factor that constrains the nonoriginalist to look beyond original intent:

[A]s time passes, fewer and fewer relevantly decisive choices are to be divined out of the tradition of our founding. Our problems have grown radically different from those known to the Framers, and we have had to make value choices that are effectively new, while maintaining continuity with tradition.²⁶

Thus there are two competing paradigms of constitutional decision making: originalism and nonoriginalism. The contemporary debate has been spurred, no doubt, by political and judicial conservatives who, arguing for originalism, are vitally concerned about the wave of liberal decisions that the Supreme Court has handed down in the last fifty years, especially since the Warren Court began in 1954. And of course, virtually every decision of the Court since that time, until the Rehnquist Court began in 1987, reflects a nonoriginalist methodology. Many examples can be cited. The ambiguous language of the Equal Protection Clause did not compel the Court to end school desegregation in *Brown v. Board of Education*.²⁷ The Constitution does not require the exclusion of evidence obtained in violation of the Fourth, Fifth, and Sixth Amendments.²⁸ The right to a fair trial embodied in the Sixth Amendment does not necessarily mean that the government has the duty to provide free legal counsel to indigents; in fact, the Court had previously held that no such requirement exists.²⁹ State sanctioned prayers in public schools and financial aid to sectarian schools are not explicitly forbidden by the First Amendment.³⁰ Nothing in the Constitution's text prevents a state from prohibiting the use of contraceptives or forbidding abortion.³¹ In fact, the Constitution does not even state that the Bill of Rights must apply to the states.³²

Strong disagreement with decisions like these that protect rights not stated or implied in the Constitution has compelled conservative critics to mount an attack on the nonoriginalist methodology of constitutional interpretation. The foundational argument of conservatives is that

the principle of majority rule is violated if judicial decisions are based upon values not clearly stated or implied in the Constitution. They contend that democracy requires unelected judges to defer to the decisions of elected officials unless there is a clear violation of the rights protected by the text of the Constitution.³³

The most common nonoriginalist counterargument to this claim is that it is wrong to define democracy solely as majority rule. Erwin Chemerinsky, for example, argues not only that a description of democracy as majority rule is not what the framers of the Constitution intended, but also that it is impractical to reject nonmajoritarian elements in a scheme of democratic government. James Madison, he points out, who was particularly influential in the drafting and ratification of the Constitution, was especially distrustful of majorities and wanted to create a "republic," not a purely majoritarian democracy. A "republic," in Madison's view, would have features that would guarantee the liberties of certain minorities from the tyranny of majorities. Few would dispute, moreover, that the republican form of government under which the United States has operated for more than 200 years has functioned quite well. The clearest example of the nonmajoritarian dimension of the American "republic," Chemerinsky argues, is the power of the judiciary. Since *Marbury v. Madison* in 1803, the Supreme Court has had the power to invalidate legislative acts. This power is not explicitly in the Constitution, yet it has been accepted as a wise and necessary check on legislative acts. Moreover, the *Marbury* decision itself established the nonoriginalist mode of review in protecting rights not stated or implied in the Constitution. These are important points, says Chemerinsky, because they reveal that from the earliest days of the Republic, our society has not required that all decisions be made by electorally accountable officials.³⁴

The originalist could argue, of course, that the kind of evidence cited by Chemerinsky--that an independent judiciary has functioned since the early days of the Republic--is the source of the problem. Yet even when the opposition to the Supreme Court was at its height in the 1930s, the institution retained its credibility. In the midst of a depression, the Court was striking down statutes thought to be necessary to economic recovery. President Franklin D. Roosevelt, irate

over the Court's rejection of recovery measures that he had initiated, sought to alter the Court's power by increasing its membership. Roosevelt's "court packing" proposal received little support. The Senate Judiciary Committee rejected the proposal and strongly reaffirmed the need for an independent judiciary:

Let us now set a salutary precedent that will never be violated. Let us, the Seventy-fifth Congress, declare that we would rather have an independent judiciary, a fearless Court, that will dare to announce its honest opinions in what it believes to be a defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power of factional passion, approves any measure we may enact.³⁵

The Committee's statement is a powerful affirmation of the legitimacy of the Court's independent status.

The Supreme Court decision that has most incensed originalists, and that perhaps best illustrates the competing paradigms of originalism and nonoriginalism, is the 1973 case of *Roe v. Wade*.³⁶ In that case the Supreme Court ruled that no state may prohibit abortions that take place prior to viability of the fetus. The originalist critique is not merely that the Court wrongly decided *Roe*; it is that the Court was wrong to wrest from the states the question of what public policy should be for abortions.

The *Roe* decision was grounded in a "right to privacy" that the Court said was an aspect of the "liberty" guarantee of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment says, in part: "nor shall any State deprive any person of ... liberty ... without due process of law ..." The crucial words, of course, are "liberty" and "due process of law." The basic meaning of the provision is that a state may deprive a person of some part of his or her "liberty," but not without "due process of law." It is agreed by virtually all that the "liberty" guarantee of the Fourteenth Amendment, as one of the post Civil War amendments of 1868, was enacted primarily to ensure that black citizens would no longer be subjected to slavery. But does it mean more? By a process of interpretation at the hands of the Supreme Court, "liberty" has taken on increased judicial meaning. Many of the Bill of Rights--the guarantees of freedom of religion,

speech, and press, for example--have been construed to be "liberties" against which no state, not just the federal government, may deprive a citizen without due process of law.

But did the framers of the Bill of Rights or the Fourteenth Amendment intend to protect a right of privacy? No such right receives explicit mention in the Constitution. In the 1965 case of *Griswold v. Connecticut*,³⁷ however, the Court ruled that a married couple's right of privacy prevented the State of Connecticut from banning the use of contraceptives. The Court understood a right of privacy to exist as a result of various "penumbras" and "emanations" from several provisions of the Bill of Rights. The First Amendment's peripheral right to association entails a penumbra of privacy to be protected from government intrusion, the Court said. The Third Amendment ban on the quartering of soldiers in homes during peacetime without the owner's consent, the Court noted, is another facet of privacy. The Fourth Amendment's protection against unreasonable searches and seizures protects a right to privacy, as does the self incrimination clause of the Fifth Amendment. Finally, the Court said the Fourteenth Amendment's protection of "liberty" includes a right to privacy. On the basis of these "penumbras" of privacy, especially that arising out of the concept of "liberty" embodied in the Fourteenth Amendment, the Court in *Roe* held that a woman's right to have an abortion was protected by a constitutional right to privacy.

Robert Bork has ridiculed such reasoning about the right to privacy, which he denies that the Constitution protects. The Court, he says, "performed a miracle of transubstantiation" by reasoning that was "utterly specious: and constituted an "unprincipled decision."³⁸ Bork believes that nonenumerated rights do not exist and cannot be derived from the Constitution, because the judges who discover such rights are "enforcing their own morality upon us and calling it the Constitution."³⁹ For Bork and other originalists, democratic government requires that only the people, acting through their elected representatives, have the right to discover and protect such rights. If permanence is sought, the Constitution can be amended to enumerate the right.

Much more could be said about the debate, but it is not necessary here. The purpose of the foregoing discussion has been only to give an abbreviated summary of the basic issues. Before

proceeding to a consideration of what deconstructive theory might contribute to this ongoing controversy, however, it should be said, somewhat parenthetically, that wholly apart from redirectives that deconstruction or any other literary theory might supply, this writer is personally compelled to side with the nonoriginalist view of constitutional interpretation for the simple reason that the Constitution is an antimajoritarian document reflecting a distrust of government conducted entirely by majority rule. The Constitution protects substantive values from majoritarian pressures, and judicial review enhances democracy by safeguarding these values. To deny the Supreme Court the right to permit the Constitution to evolve over time to protect values not contemplated or specifically enumerated in the Constitution is to deny the Court the right to *interpret* the Constitution. If the Constitution is to serve its function of protecting fundamental values and unifying society, the Supreme Court should have substantial discretion in determining the meaning of specific constitutional provisions. This discretion should not be unlimited, however. The fundamental aspirations that a judge perceives in a particular provision of the Constitution should not merely be his or her own, but those of the framers. If judges can give a provision almost any meaning, why have a constitution at all? Accordingly, any judicial interpretation must retain this linkage to the constitutional text. And it is recognized, of course, that the exercise of discretion does not guarantee good results, and thus there always exists a risk of judicial discretion being used to frustrate political and social progress. Nonetheless, it is suggested here that, on balance, judicial discretion in constitutional interpretation is a good thing that is essential to the advancement of society.

In the foregoing discussion of the contemporary debate on constitutional hermeneutics, nothing has been said about the contribution that a deconstructive analysis of the Constitution might make to the debate. In proceeding, then, to a discussion of deconstruction, the central questions we ask are: How should meaning be given to the provisions of the Constitution? Can deconstruction help in this process? And, what are the moral implications of a deconstructed Constitution?

Deconstruction and the Constitution

Until 1950 or so, literary theory was fairly uncontroversial and of limited interest to anyone other than academics who studied literature as a life's work. Discussions about literature, whether in book reviews or on radio and television, were addressed to the ordinary reader. Most literary critics assumed that great literature was universal and expressed general truths about human life, and that readers therefore required no special knowledge or language. Critics believed they talked sensibly about the writer's personal experience, the social and historical background of the work, the human interest, and the beauty of literature. That is, criticism spoke about literature without disturbing our picture of the world or of ourselves as readers. Then, suddenly, things began to change.⁴⁰

In the last forty years or so students of literature have been troubled by a seemingly endless series of challenges to the consensus of common sense. A number of schools of literary theory have taken shape, all challenging the conventional thinking about literature. In reader-response criticism, for example, a work of literature is deemed to be the creation (not necessarily the same creation) of each reader. Intentionalism has combatted this approach, claiming that the purposes of the author are paramount: the author is assumed to have had a reason for everything in the work; to understand the work means to discover and understand those reasons. New Criticism has also developed, occupying a middle ground: literature inhabits its own space without reference to the reader or the author. Other schools have arisen--Feminist, Freudian, Nietzschean, Nuclear, Marxist, and others. But all of the new schools of criticism seem to have a common characteristic: they challenge what previously had been considered common sense understanding of the meaning of texts. Interpreting texts is no longer a simple enterprise; in some very serious ways, the ground of meaning for all texts has disappeared.

In 1966 deconstruction was introduced in America by the French philosopher and literary critic, Jacques Derrida.⁴¹ Deconstruction has since become the critical rage, and according to Richard Posner, is the critical method least understood by lawyers.⁴²What is deconstruction?

Greatly simplified, deconstructive theory holds that we create from our perceptions concepts (for example, the concept that the ceiling in the room is high) that are outside of time and space and are also distinct from the perceptions out of which they are made. If I want to share this concept, I have to encode it in some physical form ("signifier," in Derrida's language)--a writing, a sound, a gesture, or some other communication. Upon hearing or seeing the signifier, some other person will mentally recreate the same concept (the "signified").⁴³

Of course, the process of conveying the concept in my mind to another person's mind may break down; the communication, Posner notes, is not free of "noise." For one thing, the link between signifier and signified is a matter of convention, and conventions are not universal. A ceiling is *ceiling* in English, *techo* in Spanish, *decke* in German. Another source of failure in conveying concepts relates to vagueness. There are different kinds of ceilings, different kinds of rooms, and different notions of high. Even though I may have had a very clear picture of these terms when I communicated them, the mind of the other person may obtain a vastly different picture. I may have been thinking of a frescoed ceiling in a rotunda; the person hearing or reading my statement may have pictured the bedroom ceiling at home. So translation is often problematic. Since conversation is a two-way exchange, the person to whom I am speaking can seek clarification of my utterance, but this course is unavailable if the signifiers are written instead of spoken or if the writer is dead or is otherwise unavailable for consultation.⁴⁴

One might normally assume that these kinds of impediments to conceptual transfer can be overcome because they are natural or are insignificant enough not to be essential to communication. But this is the point against which deconstruction mounts its assault: it insists that to regard those properties of signifiers that impede communication as secondary is not at all natural or insignificant. It is just as natural, deconstruction insists, to subordinate the communicative functions of discourse to the communication-impeding effects of the signifiers that the speaker or writer uses, and thus to attend to the "play of the signifiers" (Derrida's term), which is to say to the relations between the signifiers and the signified that there may be other concepts besides the one intended to be signified.⁴⁵

Thus, the deconstructionist project involves the reversal of hierarchical opposition. This establishes new priorities in the investigation of concepts and ideas, since the usual, typical, traditional, or "common sense" arrangement is reversed. For Derrida and other deconstructionists, hierarchies of thought are everywhere, and all are open to deconstructive reversal. For example, if A is the rule and B is the exception, then B might also be the rule and A the exception. If A is simple and B complex, then B might also be simple and A complex. If A is normal and B is abnormal, then B might also be normal and A abnormal. Deconstruction shows that the property we ascribe to A is true of B and the property we ascribe to B is true of A; the deconstruction shows that A's privileged status is an illusion, for A depends upon B as much as B depends upon A. We will discover, then, that B stands in relation to A much like we thought A stood in relation to B. Indeed, it is possible to find in the very reasons that A is privileged over B the reasons that B is privileged over A. Having reversed the hierarchy, we are able to see things about both A and B that we had never noticed before.⁴⁶

Any hierarchical opposition of ideas, no matter how trivial, can be deconstructed in this way. It is a means of intellectual discovery that operates by wrenching us from our accustomed modes of thought. In fact, Derrida was led to this practice of deconstruction by his dissatisfaction with Western philosophy and political practice from Plato's time to our own.⁴⁷

Nothing retains its privileged status when subjected to deconstructive analysis. The world in which we live is full of texts that can be deconstructed--objects, ideas, persons, or whatever. Nothing is sacred; any "text" can always be only a representation of something else, which in turn is only a representation of something else, ad infinitum. Every signified is actually a signifier in disguise. One never reaches a foundational basis upon which a "truth" can be affirmed. Indeed, it is Western foundational epistemology that deconstruction attacks. It is this endless chain of signifiers to which Derrida is referring when he says "there is nothing outside the text." It is a metaphor which proclaims that all understanding is merely metaphorical.⁴⁸ As Balkin says, "Deconstruction awakes us from our dogmatic slumber, and seeks to remind us that our 'truth' is only an interpretation."⁴⁹

Richard Weisberg provides an excellent example of how a very basic provision of the Constitution might be deconstructed. Article I, Section 7, provides that if a "Bill shall not be returned by the President within ten days (Sundays excepted)" then the bill shall become law.⁵⁰ Upon close examination, the parenthetical words "Sundays excepted," become problematic. Now this provision is not as provocative as, say, the Fourteenth which contains loaded terms like "liberty," "due process," and "equal protection," but nevertheless, it presents interpretive difficulties.⁵¹

The "plain meaning" of this provision eludes us because it could mean at least either of the following:

- 1) The president has only ten days to veto a bill, unless the bill was presented to him on Thursday, in which case he may take an extra day the very end of the period (which is a Sunday).
- 2) The president has eleven days in any event, and sometimes twelve.

The originalist who believes that intentions control meaning is relegated to saying that this provision carries the *meaning* intended by its authors, and even though the constitutional debates are silent on the point, the meaning is discoverable although possibly not without some subjective bias.⁵² The nonoriginalist might look for values or aspirations "constitutionalized" in this provision. He might, for example, "discover" that the framers assigned a religious significance to Sundays which would make the second option preferable.

It is important to note that the originalist and nonoriginalist methodologies both involve a privileging. There are several possible readings of the text, and these readings can take place in a multitude of different factual and legal contexts. However, the effect of the privileging that takes place is that some of those readings are correct or best, and others are incorrect or less than best. Therefore, the goal of interpretation under the traditional originalist and nonoriginalist methods is to separate the correct or best readings from the incorrect or less than best readings.

A deconstructive approach would look at the possible readings of the text, but refuse to assign any privileging. Deconstructing the provision will show that all readings are actually misreadings. Each reading is only partial, and therefore not "correct" because it depends on other possible readings. The first reading is deemed privileged because it is accepted in rejection of the second reading. The second reading is deemed privileged because it is accepted in rejection of the first reading. Therefore, neither is definitive. Moreover, because consideration may have been given by the framers to the heightened religious significance of Sundays if they intended the second reading, this automatically implies that its opposite--that the "Sundays excepted" carries a totally *secular* meaning--might have been in the minds of some of the framers. This reading would reflect the thinking of the framers that the constitutive group in particular needed a day of rest, not so much for religious as for "cooling off" or even private political purposes.⁵³ Each reading (the "signified") is only reflective of some other reading (the "signifier"); each value reflected in a reading is only reflective of some similar or contrary value.

The problem with this approach is that one is never able to get to the "true" meaning. In addition, as Jonathan Culler has demonstrated, my own deconstructive reading of the provision is done in a necessarily selective and ordered fashion. Therefore, my reading may be classified as a "misreading."⁵⁴ One is never able to arrive at a preferred reading; by definition, that is not the goal of deconstruction. The goal is merely to open up new possibilities of meaning.

It is not difficult then to see how deconstruction expands the possibilities of meaning for a particular text. In the Constitution, the more vague and obscure the text, the more expanded the possibilities of interpretive meaning become. So, is deconstruction of any help in interpreting the Constitution, or is it simply a nuisance device that confuses meaning? Many persons who use the word "deconstruction" regard it as no more than another expression for "trashing," that is, showing how legal texts, including the Constitution, are self-contradictory, ideologically biased, or indeterminate.⁵⁵ Some legal writers, however, have found deconstructive techniques to offer both a new kind of interpretative strategy and a critique of conventional interpretations of legal texts. J.M. Balkin, for example, explains the usefulness of deconstruction in the following way:

The purpose of the deconstruction is not to establish that any interpretation of a text is acceptable, but that the yearning for originary meaning...is incomplete and cannot serve as a foundation for interpretation....

Deconstruction by its very nature is an analytic tool and not a synthetic one. It can displace a hierarchy momentarily, it can shed light on otherwise hidden dependence of concepts, but it cannot propose new hierarchies of thought or substitute new foundations. These are by definition logocentric projects, which deconstruction defines itself against.⁵⁶

The Critical Legal Studies (CLS) movement has also flaunted the banner of deconstruction. CLS began in 1977 as an organized effort among many American lawyers to oppose the intellectual and political dominance of the liberal establishment. They seek to clear the ground for different and transformative ways of thinking about law and society. In its uncompromising assault on traditional legal theory, it holds that "legal reasoning consists of an endless and contradictory process of making, refining, reworking, collapsing, and rejecting doctrinal categories and distinctions."⁵⁷ Believing that contemporary law functions in a framework of bounded objectivity, CLS seeks to reveal the true state of indeterminacy that exists in political and judicial decisionmaking. Therefore, it explores new avenues of thought that will bring about a break from the trappings of modern liberalism. It is not surprising, then, that included in the eight hundred or so articles and books in print that can be grouped loosely under the rubric of CLS, many deal with modern literary theory, including deconstruction.⁵⁸

In assessing the usefulness of deconstruction in interpreting the Constitution, it is difficult not to be skeptical of its potential for positive contributions for two basic reasons. First, the Constitution is a hallowed and sacrosanct document in American society possessing a number of deeply imbedded meanings which defy the deconstructive notion that a text has no determinative meanings. If the interpretation of the Constitution depends upon a deconstruction of each of its provisions, authoritative meanings would vanish. Turning a text upside down can be done rather harmlessly, and even fruitfully, when we are dealing with a nonsacrosanct text. Literary theorists and legal academics drawing from the well of literary theory often forget to make the important distinction between sacrosanct texts which carry authority and nonsacrosanct texts which do not.

The sacrosanctity of religious texts, for instance, would not survive deconstructive readings. Such texts are deemed by many to carry *determinate* meanings.⁵⁹ In the same way, the Constitution, virtually from the moment of its ratification, has been considered a sacred text, the most potent emblem (along with the flag) of the nation itself. As Thomas Grey has demonstrated, in many ways the Bible and the Constitution are much alike. Just as Christians and Jews take the word of God as sovereign and the Bible as the word of God, so Americans take the will of the people as sovereign, at least in secular matters, and the Constitution as the most authoritative expression of that popular will.⁶⁰

In considering the special character of the Constitution, it is important to view it not only as an object of interpretation, but to realize that it is also an interpretation of what its authors considered fundamentally important. Constitutional concepts such as the separation of powers among three branches of government, a system of checks and balances to prevent tyranny, and the protection of individual freedoms from majoritarian reach were considered fundamentally important by the framers and are now virtually sacred concepts in American life. Although interpretation of concepts such as these is complex, it is their institutionalized sacredness that blocks their deconstruction. For the deconstructionist, it makes little difference whether a text is viewed as holding all meanings, some meanings, or no meanings. But the Constitution has never been regarded as merely a hierarchically superior statute whose privileged status can be reversed and made inferior to inferior statutes or ideas so that all possibilities of meaning may be explored. Rather, the Constitution is widely regarded as having definite meaning--specifically, that it embodies the fundamental public values of our society.⁶¹

Owen Fiss has given a second reason why a deconstruction of the Constitution will not succeed. It is that the rule of law in American society depends upon the foundational "truths" embodied in the Constitution.⁶² Interpretation of the Constitution, says Fiss, is constrained by rules that derive their authority from an interpretive community that is itself held together by the rule of law. Fiss is right. To hold otherwise, says Fiss, would mean this:

The great public text of modern America, the Constitution, would be drained of meaning. It would be debased. It would no longer be seen as embodying a public morality to be understood and expressed through rational processes like adjudication; it would be reduced to a mere instrument of political organization distributing political power and establishing the modes by which that power will be exercised. Public values would be defined only as those held by the current winners in the processes prescribed by the Constitution; beyond that, there would be only individual morality, or even worse, only individual interests.⁶³

In short, Fiss is saying that if deconstructive techniques reigned over the process of constitutional interpretation, America would be courting anarchy. I sometimes wonder, though, if this is not what some deconstructionists want--a new social order in which there are only individual interests and no public ones, only voluntary choices and no binding rules.

It should also be remembered that judges who are called upon to interpret the Constitution are exercising social power. Literary theorists can espouse and practice interpretive techniques without doing real harm to anyone. The interpretive function of judges, however, affects lives very directly. Literary theorists need only interpret; judges must interpret and rule. Judges must make choices; but as Sam Setterlund has said, "one of the things deconstruction cannot do is to help with choices. Deconstruction can push right up against evaluation but never cross over."⁶⁴ Richard Posner, who has been described by one of his colleagues as the single most influential academic in the last thirty years,⁶⁵ and presently a judge serving on the U.S. Court of Appeals for the Seventh Circuit, also sees literary theory as impotent to aid judicial decision-making. "Law is a branch of government concerned with regulating behavior, and legal texts are tools in the government process," he said in a 1988 interview. "Literature, at least in present society, is primarily a form of superior entertainment, and texts are complex artifacts. Judges can command compliance; literary critics have no such power."⁶⁶

No one claims perfection for originalism or nonoriginalism as theories of constitutional interpretation. But they both at least represent attempts to provide real answers to real problems in a real world. As interpretive theories, they lack the urbane and recondite vocabularies of modern literary theories, but as theories built on common sense approaches to interpretation, they

both seek to give definitive meaning to the Constitution. Constitutional interpretation requires deciding upon *a* reading. Deconstruction does not, and maybe this is why deconstruction is inappropriate for constitutional analysis. David Couzens Hoy has said that "Deconstruction is a reasonable procedure as the practical attempt first to find the rhetorical devices that function to give the text the appearance of coherence, and then to show that since they are *rhetorical* devices there are other elements that disrupt this coherence."⁶⁷ Deconstruction may be well-intended in its desire to insure that the potential complexity of a text is not underestimated, but projecting it as a fundamental principle of understanding and interpretation is philosophical overkill--especially for a text like the Constitution whose interpreters must discover meanings, not disruptions.

If indeed Richard Posner is the single most influential legal academic in the last thirty years, we must hope that those who are now fleeing to literary theory in the hopes of finding assistance to interpret the Constitution will heed his advice:

The proposition that literary critics can point the way to solving the puzzles of statutory and constitutional interpretation is the falsest of the false hopes of the law and literature movement, while the antipodal proposition that deconstruction and other skeptical strains in contemporary literary criticism can demonstrate the futility, or the inescapable subjectivity, of statutory and constitutional interpretation is one of the hollower cries of the critical legal studies movement. The social function and the conditions of composition of literary texts are so different from those of legislative texts that the best interpretive methods to use on the one type are radically different from the best methods to use on the other.⁶⁸

In the end, deconstruction scoffs at the idea that the Constitution has any meaning. This form of thinking is thoroughly at odds with the most elemental reading of the Constitution and with more than two hundred years of constitutional history. Such thinking threatens the social existence of American citizens and the nature of public life as it is known in America.⁶⁹ Deconstruction, then, has its functional limits; it provides no interpretive answers. Literary theory generally, and deconstruction specifically, fail to add much that is useful in the debate over how best to interpret the Constitution.

The traditional categories of originalism and nonoriginalism offer as much as can be reasonably expected of interpretive theories to determine constitutional meaning. Like deconstruction, they both have their functional limitations, but nonoriginalism must be regarded as far more accommodating to the changing needs of American society. Originalism provides interpretive answers that are too simple and too rigid; nonoriginalism is more flexible, viewing the Constitution as a document serving a society forever changing and progressing. Both theories look backward to the constitutional founding but nonoriginalism possesses the added dimension of looking forward to the evolving needs and demands of society. Nonoriginalism has stood the test of time as a common sense means of constitutional interpretation and will continue to do so--without the aid of deconstructive techniques--for as long as America has a written constitution that demands interpretation.

Endnotes

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- ¹ See 3rd ed. (St. Louis: F.H. Thomas, 1880).
 - ² Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, Ill.: Northwestern University Press, 1988), xx.
 - ³ Quoted in Alfred H. Kelly and Winfred E. Harbison, *The American Constitution: Its Origins and Development*, 3rd ed. (New York: W.W. Norton, 1963), 205.
 - ⁴ Stanley Fish, "Pragmatism and Literary Theory," *Critical Inquiry* 11 (1985): 454.
 - ⁵ Robin West, "Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner," *Harvard Law Review* 99 (December 1985): 384.
 - ⁶ Richard H. Weisberg, "Text Into Theory: A Literary Approach to the Constitution," *Georgia Law Review* 20 (Summer 1986): 940. Weisberg is Professor of Law at the Benjamin N. Cardozo School of Law, Yeshiva University, and President of the Law and Humanities Institute.
 - ⁷ Owen Fiss, "Objectivity and Interpretation," in Levinson and Mailloux, eds., *Interpreting Law and Literature*, 230.
 - ⁸ Raoul Berger, "Paul Best's Brief for an Imperial Judiciary," *Maryland Law Review* 40 (1981): 36.
 - ⁹ Arnold Wishingrad, "Literary Lawyers and Lawyerly Critics," *New York Law Journal* 194 (1985), 1-2.
 - ¹⁰ Art Berman, *From the New Criticism to Deconstruction: The Reception of Structuralism and Post-Structuralism* (Chicago: University of Illinois Press, 1988), 208.
 - ¹¹ Jacques Derrida, *Of Grammatology*, trans. Gayatri Chakravorty Spivak (Baltimore: Johns Hopkins University Press, 1976), 158.
 - ¹² Raman Selden, *Practicing Theory and Reading Literature: An Introduction* (Lexington: University Press of Kentucky, 1989), 88.
 - ¹³ Jacques Derrida, "Deconstruction: A Trialogue in Jerusalem," *Mishkenot Sha'ananim Newsletter*, No. 7 (December 1986), 2; cited in Levinson and Mailloux, *Interpreting Law and Literature*, xx.

¹⁴ J.M. Balkin, "Deconstructive Practice and Legal Theory," *Yale Law Journal* 96 (1987): 761, 786.

¹⁵ Paul Brest apparently introduced the terminology. See Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980): 204.

¹⁶ Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* (New York: Oxford University Press, 1988), 126.

¹⁷ Robert H. Bork, "Original Intent and the Constitution," *Humanities* (February 1986), 26.

¹⁸ Perry, *Morality, Politics, and Law*, 127.

¹⁹ Robert H. Bork, Foreward to Gary McDowell, *The Constitution and Contemporary Constitutional Theory* (Cumberland, Va.: Center for Judicial Studies, 1985), xx.

²⁰ Perry, *Morality, Politics, and Law*, 127-28.

²¹ *Ibid.*, 133.

²² Leonard Levy, *Original Intent and the Framers' Constitution* (New York: MacMillan, 1988), 349.

²³ Perry, *Morality, Politics, and Law*, 133-34.

²⁴ William J. Brennan, "The Constitution of the United States: Contemporary Ratification," *South Texas Law Review* 27 (1986): 434.

²⁵ *Ibid.*

²⁶ Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1982), 39.

²⁷ 347 U.S. 483 (1954).

²⁸ See *Wolfe v. Colorado*, 338 U.S. 25 (1949) holding that the Constitution does not require the exclusion of illegally obtained evidence in state proceedings, but which was overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961), where the Court held that the exclusionary rule applies to states.

²⁹ See *Betts v. Brady*, 316 U.S. 455 (1942) where it was held that the Constitution does not require the provision of counsel to defendants in state proceedings, but which was overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁰ See *Engle v. Vitale*, 370 U.S. 421 (1962), where the Court invalidated public school prayers. But see *Lemon v. Kurtzman* 403 U.S. 602 (1971), articulating guidelines for when aid to sectarian schools violates the Establishment Clause.

³¹ See *Griswold v. Connecticut*, 381 U.S. 479 (1965), holding that the right to privacy includes a married couple's use of contraceptives; *Roe v. Wade*, 410 U.S. 413 (1973) (right to privacy includes a woman's right to terminate an abortion).

³² See Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding," *Stanford Law Review* 2 (1949): 5 (arguing that the framers of the Fourteenth Amendment did not intend to apply the Bill of Rights to the States).

³³ Erwin Chemerinsky, *Interpreting the Constitution* (New York: Praeger, 1987), 1.

³⁴ *Ibid.*, 6-11.

³⁵ Senate Judiciary Committee, S. 711, 75th Cong., 1st Session. 13-14 (1937); quoted in *ibid.*, 135.

³⁶ 410 U.S. 113 (1973).

³⁷ 381 U.S. 479 (1965).

³⁸ Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 6, 8-9.

³⁹ Robert H. Bork, "Original Intent and the Constitution," 26.

⁴⁰ Raman Selden, *Reader's Guide to Contemporary Literary Theory* (Lexington: University Press of Kentucky), 1.

⁴¹ G. Douglas Atkins, *Reading Deconstruction: Deconstructive Reading* (Lexington: University Press of Kentucky, 1983), 1.

⁴² Richard A. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard University Press, 1988), 211.

⁴³ *Ibid.*, 212.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Balkin, "Deconstructive Practice," 747.

⁴⁷ Derrida, *Of Grammatology*, 3, 10-18.

⁴⁸ *Ibid.*, 158.

- 49 Balkin, "Deconstructive Practice," 761.
- 50 U.S. Constitution, Art. 1, Sec. 7, clause 2.
- 51 Richard Weisberg, "On the Use and Abuse of Nietzsche for Modern Constitutional Theory," in Levinson and Mailloux, eds., *Interpreting Law and Literature*, 189,
- 52 Walter Benn Michaels, "Response to Perry and Simon," *Southern California Law Review* 58 (1985): 673-675.
- 53 One recent history of the Constitutional Convention makes clear that Sundays were often used to negotiate crucial compromises: See Christopher Collier and James Lincoln Collier, *Decision in Philadelphia* (New York: Random House, 1986): 94-95.
- 54 Jonathan Culler, *On Deconstruction: Theory and Criticism after Structuralism* (London: Routledge and Kegan Paul, 1983), 176.
- 55 For example, Girardeau A. Spann, "Deconstructing the Legislative Veto," *Minnesota Law Review* 68 (1984) 473, where the author associates deconstruction with the general project of demonstrating that legal reasoning is indeterminate.
- 56 Balkin, "Deconstructive Practice and Legal Theory," 785-86.
- 57 Alan C. Hutchinson, ed., *Critical Legal Studies* (Totowa, N.J.: Rowman and Littlefield), 4.
- 58 See, for example: Clare Dalton, "An Essay in the Deconstruction of Contrast Doctrine"; Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles"; and Catherine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence"; all reprinted in Hutchinson, *Critical Legal Studies*.
- 59 David Couzens Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," in Levinson and Mailloux, *Interpreting Law and Literature*, 331.
- 60 Thomas Grey, "The Constitution as Scripture," *Stanford Law Review* 37 (November 1984): 3.
- 61 Owen Fiss, "Objectivity and Interpretation," in Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature* (Evanston, Ill.: Northwestern University Press, 1988), 248.
- 62 Ibid.
- 63 Ibid.

⁶⁴ Sam Setterlund, "Deconstruction: Persistent, Pervasive, and Troubling," *Cimmarron Review* 92 (July 1990), 145.

⁶⁵ Karen J. Winkler, "Controversial Judge and Legal Theorist Jumps Into the Debate on Law and Literature," *The Chronicle of Higher Education* (December 7, 1988), A6.

⁶⁶ Ibid.

⁶⁷ Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," 332-33.

⁶⁸ Posner, *Law and Literature*, 17.

⁶⁹ Fiss, "Objectivity and Interpretation," 248-49. On the nihilistic tendencies of deconstruction generally, see Peter Shaw, "The Rise and Fall of Deconstruction," *Commentary* 92 (December 1991):50.