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Constitutional Fidelity

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As we are reminded with each inauguration, when the President-elect places one hand on the Bible and raises the other before the Chief Justice of the United States, Article II requires the President "to solemnly swear" that he will "preserve, protect and defend the Constitution of the United States."[3] Indeed, a similar sworn duty is a universal feature of government service: Article VI of the Constitution requires all governmental officers, state and federal, to take an oath to "support th[e] Constitution."[4] Thursday, January 7, 1999, provided a moment of especially high Constitutional drama as Chief Justice William Rehnquist asked each Senator to swear, before God Almighty, to "do impartial justice according to the Constitution."[5]

How does one discharge such a solemn obligation[6] and demonstrate fidelity to her oath and to the Constitution? The first step, naturally, is to determine what the Constitution *means*, often a matter of great complexity — and great practical importance, too. In taking the oath, does one swear fidelity to a Constitution that embraces our status as the world's only military superpower or one that presupposes no standing army?[7] One that allows the dollar to serve as the world's currency or one that bans paper money?[8] One that guarantees the liberty to worship or one that countenances State control of religion?[9]

My thesis is that any serious effort towards fidelity requires the interpreter to give the Constitution its best meaning after thoughtfully considering the full range of interpretive possibilities. To do this, all six sources for Constitutional interpretation must be brought to bear: arguments based on Constitutional text; relevant history — notably including the intent of the framers; precedent — judicial and otherwise; the structure of our Constitutional government — especially the implications of federalism and separation of powers; the political and economic consequences of a given interpretation; and our American commitment to liberty.[10] These six sources of Constitutional interpretation date to the founding.

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3. *See* U.S. CONST. art. II, § 1, cl. 8.

4. *See* U.S. CONST. art. VI, cl. 3.

5. *See* Rule XXIV, *Rules and Manual of the Senate*, S. Res. 479, 99-2 (1986).

6. The impeachment of President Clinton surely teaches that oath-taking is neither a trivial nor a purely symbolic matter. Both Articles of Impeachment lodged against him centered around dishonest conduct in the face of a sworn duty to tell the truth.

7. *See* U.S. CONST. art. I, § 8, cls. 12, 13 (contemplating that Congress shall have occasion, from time to time, to "raise and support armies," as opposed to permanently "provide and maintain a Navy").

8. *See* U.S. CONST. art. 1, § 8, cl. 5 (granting Congress the power merely to "coin" money).

9. *See infra* notes 22-24.

10. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

They have been used from 1787 to the present day, from the Chief Justiceship of John Marshall to that of William Rehnquist. In fact, they are organic, embedded features of the interpretive process.[11] To attempt to answer complex Constitutional questions by, instead, ignoring this reality and considering only a narrow range of interpretive sources is frequently impossible and, indeed, absurd.

The Senate impeachment trial of President Clinton illustrates how the text and the intent of the framers are necessary — but ultimately insufficient — interpretative sources. The Senate has the "sole power" to convict and remove the President from office[12] for "Treason, Bribery, or other high Crimes and Misdemeanors."[13] Does perjury or obstruction of justice regarding an extramarital sexual affair (if proven) meet this standard? If we look *only* to the text or the framers' understanding, we simply cannot answer the question. Valid arguments can certainly be made either way.

First, resort to history is absolutely necessary to understand the clause at all. It is apparent that "misdemeanor" cannot have been used in the modern sense of trivial crime. Otherwise, the clause would nonsensically read "Treason, Bribery, or other high Crimes or Trivial Matters."

Indeed, consideration of the text initially leads to the conclusion that treason and bribery involve betrayal of the powers and duties of the Presidency almost *categorically* different than lying about or attempting to thwart an investigation into an extramarital affair. There seems to be no evidence that President Clinton abused his official powers to retard the investigation (as by ordering the IRS or FBI to harass his accusers).

On the other hand, the language seems purposely elastic. Surely the Senate is meant to have discretion in interpreting the clause. Accordingly, it is entirely conceivable that purely personal resistance to lawful authority could, in some circumstances, be so inconsistent with the President's sworn duty to faithfully execute the law that a reasonable Senate might legitimately remove him.[14] But such a conclusion must *necessarily* rest on considerations other than the text or the framers' understanding of it. The Senate must also consider the structure of our Constitutional government, the political or economic consequences of a decision to convict or acquit, and the effect of a conviction or acquittal on our American commitment to liberty.

The question of whether the Senate should remove President Clinton from office demonstrates that complex Constitutional questions simply cannot be answered without consulting the full range of interpretive sources. Nonetheless, many have tried to adopt an interpretive approach more limited than one which considers all arguments, those based on text, *and* history, *and* precedent, *and* structure, *and* economic and political consequences, *and* our American commitment to liberty. The most common limiting method is to try and confine the

11. *See id.*
12. *See* U.S. CONST. art. I, § 3, cls. 6, 7.
13. *See* U.S. CONST. art. II, § 4.
14. *See* CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (1974).

interpretive inquiry to a conversation about what the framers took or may have taken Constitutional text to mean. But doing so risks error, and even absurdity.

Consider Chief Justice Taney's opinion in the *Dred Scott* case, which invalidated the Missouri Compromise, pushed the country toward the brink of Civil War, and concluded that persons of African decent were not and could never be citizens of the United States.[15] In reaching this final conclusion, Taney reasoned:

> No one, we presume, supposes that any change in public opinion or feeling . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted . . . . It is not only the same in words, but the same in meaning . . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.[16]

Thus, in Taney's view, the only legitimate insights are those drawn from the text, as originally understood. Yet, Taney's justification for this conclusion is based on neither the text of the Constitution nor the intent of those who framed and ratified it. The text says nothing about how it should be read, and there is little evidence that the framers thought that their expectations would govern.[17] Rather, it proceeds from structural concerns: Taney's conception of the role of the judiciary. A fuller consideration of structural or prudential matters, though, might have led Taney to an attitude of restraint, instead of activism, which might have led to a happier place in history. As Justice Scalia has observed:

> There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case – its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation – burning on his mind.[18]

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15. Dred Scott v. Sanford, 60 U.S. 393 (1857).
16. *Id.* at 426.
17. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).
18. Planned Parenthood v. Casey, 505 U.S. 833, 1001-02 (1992) (Scalia, J., dissenting).

When your only tool is a hammer, everything looks like a nail. Indeed, the desire for a limited approach to Constitutional interpretation led former Attorney General Edwin Meese to explain *Brown v. Board of Education* in the following way in an address to the Federalist Society:

> When the Supreme Court, in *Brown*, sounded the death knell for official segregation in the country, it earned all the plaudits it received. But the Supreme Court in that case was not giving new life to old words, or adapting a "living," "flexible" Constitution to new reality. It was restoring the original principle of the Constitution to constitutional law. The *Brown* Court was correcting the damage done 50 years earlier, when in *Plessy* an earlier Supreme Court had disregarded the *clear intent of the Framers of the civil war amendments to eliminate the legal degradation of blacks*, and had contrived a theory of the Constitution to support the charade of "separate but equal"' discrimination.[19]

Meese's extraordinary assertion is that *Brown* can be explained by simple reference to the intent of the framers of the 14th Amendment: in Meese's view, *Plessy* wrongly read the framers' intent and allowed segregation; *Brown* correctly read the framers' intent and forbade it. But, of course, it is not that easy. The *Brown* court itself found the historical record "inconclusive,"[20] and, surely, the very *easiest* opinion for the *Brown* Court to write would be one which rested the outcome on text and history, one which said that *Plessy* simply misunderstood the historical record. What, then, would lead Meese to make such a claim? The concurrence of two things: (1) a desire to uphold the result in *Brown*; and (2) an unbending commitment to justify *Brown* and all other Constitutional conclusions only by reference to the framers' understanding of the text.

A close look at *Brown* and *Plessy* paints a different picture. In setting out the doctrine of separate but equal, the *Plessy* Court reasoned that:

> If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals . . . . Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.[21]

By the time *Brown* was decided, our nation had embraced a very different, very activist view of government. How could a government of minimum wage laws, child labor laws, social security, and countless other social welfare measures be completely incapable of addressing the problem of segregation.[22] The *Brown* Court realized this. They wrote:

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19. THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (1986) 36-38 (1986) (speech to the Washington, D.C. Federalist Society) (emphasis added).

20. Brown v. Board of Education, 347 U.S. 483, 489 (1954).

21. Plessy v. Ferguson, 163 U.S. 537, 544, 551-552 (1896).

22. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

> In approaching the problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation . . . .
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> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[23]

It was not the Court's understanding of the framers' intent that had changed. It was not the reality of segregation that had changed. It was not even the Court's moral resolve that explains the change. Rather, it was the Court's changed conception of what government could do about segregation that made the difference: the *Plessy* Court viewed government as powerless concerning racial attitudes, while the *Brown* Court viewed government as a principal instrument for inculcating cultural values.

The *Wallace v. Jaffree* case provides what may be the paradigmatic example of the absurd Constitutional universe inhabited by those with interpretive tunnel vision. *Wallace v. Jaffree* involved a challenge in federal court to three Alabama school prayer laws. At a hearing on the plaintiff's request for a preliminary injunction, Chief Judge William Brevard Hand found the "moment of silence" statute constitutional, but entered a preliminary injunction against the other two statutes. While the trial on the merits did not change Judge Hand's understanding of the statutes, what he considered newly discovered historical evidence convinced him that the First Amendment did not apply to Alabama *at all* and, thus, the State could establish an official religion if it should so choose.[24] The Supreme Court reversed, naturally, holding that Alabama, no less than the Congress, must respect the religious liberty of its citizens.[25]

For my present purposes, most interesting is Judge Hand's opinion, where he confronted the fidelity question head on. A section of Judge Hand's opinion, entitled "proper interpretive perspective," sets forth his thesis.

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23. *Brown*, 347 U.S. at 492-93.

24. Jaffree v. Board of School Commissioners of Mobile County, 554 F. Supp. 1104, 1128 (1983).

25. Wallace v. Jaffree, 472 U.S. 38 (1985). Quoting Justice Jackson's famous words, the Court held that Alabama, no less than the Congress, must respect the basic truth that "'[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Id.* at 55 (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943)).

> The interpretation of the Constitution can be approached from two vantages. First, the Court can attempt to ascertain the intent of the adopters, and after ascertaining that attempt apply the Constitution as the adopters intended it to be applied. Second, the Court can treat the Constitution as a living document, chameleon-like in its complexion, which changes to suit the needs of the times and the whims of the interpreters. In the opinion of this Court, the only proper approach is to interpret the Constitution as its drafters and adopters intended . . . .
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> What is a court to do when faced with a direct challenge to settled precedent? . . . [A] rigid adherence to stare decisis "would leave the resolution of every issue in constitutional law permanently at the mercy of the first Court to face the issue . . . ."
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> This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate.[26]

Judge Hand's lack of institutional and historical perspective is apparent. It is a paradoxical notion of judicial restraint that drives a district judge to ignore decades of Supreme Court precedent against the settled expectations of nearly all Americans. At a doctrinal level, *stare decisis* addresses the deference a court owes its own decisions, not the binding effect of long settled Supreme Court precedent on a District Court.[27] More fundamentally, the complex question of the meaning of the 14th Amendment simply cannot be settled by reference to its famously vague and broad text[28] or the ambiguous and conflicting historical record surrounding it. Rather, one must draw on our nation's nearly one hundred and thirty years of experience since the ratification of the reconstruction Amendments, and the full range of interpretive sources. Judge Hand's interpretive straight-jacket precluded any chance that he could properly situate his task in relation to other Constitutional actors, contemporary and historic, with a role in defining our nation's commitment to religious freedom. His interpretive approach literally foreclosed any evaluation of the Constitutional achievements of Americans since reconstruction.

Perhaps the most notable failure of the Taney-Meese-Hand method is that it precludes consideration of the Constitutional achievements of other actors, past

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26. *Jaffree*, 554 F. Supp. at 1126-28.
27. *Wallace*, 472 U.S. 45 at n.26.
28. *See* U.S. CONST. amend. XIV, § 1, which reads:
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and present, and thereby impoverishes our Constitutional history.[29] The amputation of history is precisely what is problematic with Justice Thomas's views on federal authority. Consider his concurring opinion in the case of *Lopez v. United States* (which, in 1995, for the first time in over 60 years, held that Congress exceeded its legislative power under the Commerce Clause). Justice Thomas argued that, beginning in the 1930s, the Supreme Court has strayed far from the framers' understanding of Congressional authority and that the Court ought to return to something approaching a 19th century view. In asking for others to heed his call, Thomas seemed eager to return to the original understanding, but noted that:

> Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years.[30]

Thus, Justice Thomas invites us not to evaluate the Constitutional achievements of this century, but to treat them as irrelevancies.

What might cause Justice Thomas to want to enforce a 19th century view of federal power and thereby stake out territory as a revolutionary infidel? It certainly cannot be a commitment to judicial restraint; leading a charge to dismantle the federal government does not come from a limited and restrained judiciary. Justice Thomas's interpretive methodology could well call into question the validity of our standing army, the dollar, the modern administrative state, the application of the Bill of Rights to the States, and laws on subjects ranging from child labor to sexual harassment. Perhaps it is a desire to simplify Constitutional questions and avoid the complex issues raised by our Constitutional history and practice. Perhaps it is simply ideology. But, fidelity to the full array of sources for Constitutional interpretation is often important precisely because it can help discipline the interpreter's biases and prejudices and promote proper institutional and historical perspective.

To be sure, faithful interpretation can be hard and personally distressing work. Justices O'Connor, Kennedy, and Souter recognized this as they decided whether to overrule *Roe v. Wade*. Whatever one thinks about the merit of their conclusion on the abortion question, they were manifestly committed to faithful process. Their joint opinion explained their duty in these terms:

> It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view.

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29. See BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).
30. United States v. Lopez, 514 U.S. 549, 601 at n.8 (1995) (Thomas, J., concurring)

> It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia.*
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> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.
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> Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter . . . .[31]
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> We do not need to say [how] each of us, had we been Members of the [*Roe*] Court . . . , would have [decided that case]. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.[32]

To return briefly to where I began, consider again the task before the Senate during the impeachment trial of President Clinton. Faithful execution of such a duty requires a lot of hard work and resort to all six sources of Constitutional interpretation.

First, Senators should engage the text. They should ask "how great or small is the similarity between the President's alleged misconduct and treason or bribery?"

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31. Planned Parenthood v. Casey, 505 U.S. 833, 847-50 (1992) (opinion of Justices O'Connor, Kennedy, and Souter).

32. *Id.* at 871.

Second, Senators should examine history. They should review the federalist papers and other evidence of the framers' intent and ask "is the President's alleged misconduct like the kind of official malfeasance the framers considered impeachable?"

Third, Senators should evaluate precedent. With regard to the precedent for impeaching a President, they should ask "whether removing President Clinton from office would be like the failed, and essentially political, effort to remove President Andrew Johnson?" In regard to the precedent for impeaching federal judges, they should ask "should the Senate be more or less reluctant to remove the President than a federal judge?" "Does the fact that Article III states that judges serve 'during good behavior' provide a different standard?" "Does it matter that judges are appointed for life, not elected for a term, and the President will leave office in two years anyway?"

Fourth, Senators should consider the effects of a decision to convict or acquit on the structure of our Constitutional system of government. They should ask "would removing the president by a strongly partisan vote move us undesirably closer to a parliamentary system?" Conversely, "will failing to remove President Clinton intolerably damage the office of President?"

Fifth, Senators must account for the political and economic consequences of their decision. They should ask "does the continued, strong, popular support for the President make impeachment a usurpation of democratic principles?" Or, alternatively, "would accounting for the polls undermine the republican, representative responsibilities of the Senate?"

Sixth, and finally, given that President Clinton is accused of dishonesty concerning consensual sexual conduct, Senators should consider the effect of the Independent Counsel's investigation and the impeachment proceedings on our historic commitment to liberty. They should ask "do the methods of the office of independent counsel threaten the private realm of family life which the state cannot enter?"

Failure to consider all interpretive sources means that fidelity to the Constitution is replaced with fidelity to a particular result. And the process of Constitutional interpretation is consequently replaced with an exercise of mere power.