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DOES THE CONSTITUTION DESERVE OUR FIDELITY?: COLLOQUY

PROFESSOR BALKIN: Why don't I start with Bill's [William Treanor] comments, which are fresh in our minds.

Here is where I disagree with what Bill said. One could argue that the reason why we should have faith in the Constitution is because the alternative would be so much worse. But you could make the same argument in a lot of different situations. It is basically Hobbes's argument for the state. And let me tell you, Hobbes would have put up with an awful lot of bad things from the state. So it doesn't really strike me as a convincing argument for fidelity.

You might make another argument: The Constitution is really bad now, but it is going to get better. But that suggests that what we really believe in is that things will get better. (Saying that the Constitution could be worse is not a statement of faith.) In fact, that won't do: What we really have to believe is that the Constitution is morally acceptable now and that it will get even better in the future. If we don't believe it is acceptable now, then we are conceding that it is unacceptable. We don't even get to the next step. That is why I find Bill's strategy of dealing with the problem of constitutional evil unpersuasive.

Bill also talks about Lincoln. I agree that Lincoln is a wonderful example. Bill is right that Lincoln presents both sides of the problem of constitutional evil, and he's right that Lincoln engages in a transformative moment of constitutional rhetoric. By the way, I also really liked Garry Wills's book *Lincoln at Gettysburg*.

But my only point is that you and I, Bill, are not the President of the United States. In *Constitutional Faith*,¹ Sandy Levinson asks whether he should sign the Constitution of the United States. He compares this decision to Justice Story's act of constitutional faith in upholding the Fugitive Slave Act in *Prigg v. Pennsylvania*² in order to save the Union: You are Justice Story, and *Prigg v. Pennsylvania* is in front of you. How do you resolve the case? And of course, Story says, "Look I've got to preserve the Union. I have to do this."

But it's important to recognize that when you are an ordinary citizen, you are not on the Supreme Court, you are not the President of the United States. You are part of a much larger enterprise, in which your wishes as to what the Constitution will mean are like a little drop in a big ocean. There are very few individuals who have concentrated within them the power to change the meaning of the Constitution on their own. It happens, but there are not a lot of such people. Lincoln

1. Sanford Levinson, *Constitutional Faith* (1988).

2. 41 U.S. (16 Pet.) 539 (1842).

was one of them. That is why the problem of constitutional faith is different for Lincoln and Story than it is for us.

We law professors like to think we are really Supreme Court Justices. We write in normative prescriptions: "The Constitution means this; the courts should do that." Sometimes we write as if we can just draft the article and it will be enforced because it is right. Here is a good reason, so do it. It's like Captain Picard saying, "Engage!" As if giving a good argument would make it so. But of course, this is a fantasy. That's not what is going on.

Because we can't control what the Constitution is or is going to become, the problem of constitutional fidelity for us has to be different than the problem of constitutional fidelity for someone who has that power concentrated within them at a certain point in history.

You don't even have to hold office to be such a figure. Martin Luther King was not elected to anything as far as I know and I think he changed the meaning of the Constitution. He converted what was off the wall into what was on the table. I want to support Bill's point that sometimes that happens.

But the problem of faith for such people will be different than the problem for you, unless, of course, you become that type of person and more power to you! I hope that in this audience there will be several (if there are not already). But I am not betting on it, you know, for myself. I am a poor lowly law professor. Although I have written papers on lots of constitutional issues and taken lots of normative stands, I would be amazed if anyone put them into practice. I'm at the Yale Law School where you would think I would have some influence, but it is not that kind of influence. So we must deal with the problem of constitutional faith for ourselves differently than Lincoln would.

Kitty [Catharine MacKinnon], if you remember, we had a wonderful conversation the last time you were in New Haven, and you began to offer the theory you offered here, and I want to expound it further. You won't describe it in the same way I do because I know you don't like to use the word "morality." Morality is a term loaded with all sorts of political and historical associations that you want to avoid precisely because of their history. So here you have offered a new sort of theory—I think it has always been a part of your work—but I will call it a new theory. Instead of a natural law theory—law is what is truly moral or just—it is Law as Reality. Law is that which appropriately deals with or reflects what is socially real, what is really happening in society. Law is not simply what should be legal. Law already is what is real, and that's what positive law has to become. The law of the courts may not accurately reflect social reality now, but the law will become, will match what is actually going on out there.

There are lots of ways of putting this in terms of the categories that I offered in my paper, but one that strikes me as useful to think about

is this: You are making a claim on the Constitution. It is not a question of whether or not you have fidelity in the Constitution. You are saying, "Listen, this is what you folks *have* to do, because this is what the law *is*. The question of fidelity does not arise for me, because for me the law is what is real. You judges haven't figured it out yet, but that's what it is, don't you see?" That's why the issue of fidelity doesn't arise for you: if the Constitution reflects reality, what's the problem, right?

But on the other hand, you are doing something else as well, which also brackets the question of fidelity, and it's related to Dorothy's paper. You are saying: "I don't want to talk about fidelity. I want to talk about collecting on debts. I want to talk about getting what was owed us. I am not talking about being faithful to you. I want *you* to be faithful to *me*. And it is time for you to do it, put up or shut up."

This is not a rejection of fidelity; it is a demand for fidelity. It is as if you were in a marriage, for twenty years, say, with someone who is sleeping around and one day you say to them: "Look, faithful is faithful. I demand fidelity because you are in this relationship with me and you have an obligation."

Let me talk about Dorothy's paper. I really liked Dorothy's paper and I learned a lot from it. I'm very interested in the study of ideology and the sociology of knowledge. And I'm interested in how people can be self-critical about their political commitments and their views about social reality. Some people are more pessimistic about this than I am, but I believe that such critical self-consciousness is possible. It is not only possible but necessary, necessary to do not only constitutional law, but jurisprudence as well.

But I have discovered over the years that although critical self-consciousness is possible, you can't do it by yourself. You need help. Often help comes from your friends, and often help comes from people whom you didn't expect. But you need help, you can't do it by yourself.

I took Dorothy's paper home last night, read it and had two thoughts. My first thought was: Wow, there is real psychological insight here. Why didn't I think of that? My second thought was, I understood why. She and I see things from different positions. That's the point. Sometimes you can't do it by yourself. You need help. So that's what I wanted to say about Dorothy's paper, from which I learned an enormous amount.

Sot Barber and I agree on the aspirational vision of the Constitution. But I want to emphasize one point of our agreement that is especially important. To be an aspirationalist is not to engage in what I call "happy talk" about the Constitution. It is not to engage in the belief that things are just great and the Constitution is getting better: "In every day and every way, I'm becoming a better Constitution."

That is not what aspirationalism is about. I want to second Sot's views on this and emphasize them. To be an aspirationalist is to understand the darkness and the evil and the wickedness in the beginnings of our existence as a nation.

To be an aspirationalist is to hope for redemption. But to be redeemed you must first recognize sin. You have to understand that your personality and what you have become arise out of that sin, you must come to terms with that. That is why an aspirationalist should be, I think, more sober about the problem of constitutional evil than anybody else.

People who aren't serious about constitutional evil engage in happy talk. As I say in the paper, they are like people who think they are helping an alcoholic or a drug addict by pretending there is nothing wrong. These people are doing that person no good. A person in that condition needs to understand who they are and what they have become. That's the only way others can help them out.

Now let me talk about Michael's paper. One of the things I have been working on over a number of years is the concept of "ideological drift." Ideological drift is the phenomenon where an idea gets repeated over and over again through history and as it gets repeated, it starts to take on a different shape and a different meaning and a different political valence. Take colorblindness in 1896. It's politically radical. But by 1996 it's the rallying cry of racial conservatives.

Michael says the problem with talking about constitutional evil is that the Constitution is indeterminate. It doesn't have to be evil because it can mean lots of different things.

I was looking at Mark Tushnet in the audience. In 1979 he wrote a paper called *Truth, Justice, and the American Way* in the *Texas Law Review*, making an argument for the indeterminacy of the Constitution.³ It's a key paper in the history of critical legal studies.

Then I look at Michael and I think: this is what happened to critical legal studies! This is ideological drift. I'm sure you didn't want this to happen, but the *Zeitgeist* has drifted over and fallen on top of you.

In fact it's not clear how much Michael and I disagree. Another argument I've made repeatedly is that what really shapes the path of the law is ideology, or the dominant cultural sense, the ways of understanding, the tools of understanding, the cultural software of the time. That is what makes the law move. My slogan for this is: Ideology is Constraint. At any point the law seems quite determinate, even though it can change. What makes it determinate is people's ways of thinking.

Now these ways of thinking change over time, but at any particular moment they have a certain fixity to them. That's one of the reasons

3. See Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 *Tex. L. Rev.* 1307 (1979).

why law feels determinate. But a change in ideology will produce a change in that sense of determinacy.

Michael says to me: "You know Balkin, the problem is that the Constitution is indeterminate and what keeps things basically settled is the social and political consensus. People respond to the social and political consensus."

And I am thinking, "this guy makes a lot of sense!" You offered an example about the changes between the middle-sixties and now, between the War on Poverty and now. You said that there were many cases and lots of academic literature about constitutional protection of the poor, it was not off the wall then.

Frank Michelman wrote a famous article on this point⁴ His article is not utopian at all. It is a very well-written law review article with suggestions about how to modify doctrine; it was squarely in the middle of a sort of liberal to progressive view of what was politically and legally possible in 1969.

Perhaps where you and I disagree is that I think that this article is now off the wall in terms of the governing political consensus, or the distribution of existing political views. It is not going to become a part of constitutional doctrine anytime soon. That is because—back to the point on which you and I agree—the "engine" that gives determinacy to constitutional doctrine has moved on in a very different direction. So now the distribution of views looks very different than it did when Frank's article was written.

Everyone—you and I and Ronald Dworkin and Michael McConnell and everybody else—is in the middle of this world. We get carried along with it. We are not separate from it, we cannot stand back from it. As the views about what is politically and legally possible begin to change, so too do our ideas about what positions make you a wacko or a perfectly serious scholar, or a perfectly centrist kind of guy. The possibilities for utopian constitutional thought start to change as well. In other words, as the center changes, so too do the ends of the political and legal spectrum.

We have been implicitly talking about left reformist or utopian thought, but one of the things I think is most interesting today in the United States, is that the shift of the political consensus (or the center of the distribution of views) from 1969 to the present, has opened up lots of new possibilities for right wing utopian constitutional thought.

Take Justice Thomas for example. Look at some of the opinions he's been writing recently. In fact what he's doing is not even utopian constitutional thought, because he represents one-ninth of the votes necessary to change the meaning of the Constitution. But beyond Justice Thomas, there are now lots of people on the right who are willing

4. Frank I. Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

to say things now, think things now, and imagine things now that people could not have said, thought, or even imagined a while back.

You can think of this as liberatory from one perspective and as not liberatory from another. I don't care what your personal interpretation of it is. I just want to point out that this is happening right in front of our eyes. These events are evidence of the psychological and sociological constraints we work with when we try to figure out what the Constitution means.

PROFESSOR TREANOR: Any comments from the panel? No. Any questions or comments from the audience?

QUESTION FROM PROFESSOR MARY ANNE CASE: [Noting that the Fordham banner has the letters "IHS."] *In hoc signum*—that means "In this sign you will conquer." The story that is told is the story about Constantine, and how the Roman Empire came to have faith in the cross. It was because the promise of victory was fulfilled. Constantine had a vision that said, in this sign you will conquer, and he said, if I do, then I will make Christianity the official state religion. He did, and it so became the official state religion. It was fortuitous that equality was already in the Constitution, so she could give it her faith, because it already promised the victory that she sought, and the people you were discussing also had that kind of faith.

I note that everybody who believes in predestination also tends to believe that they are among the saved. Is there any case for a constitutional faith even if victory is not promised you under that constitution?

PROFESSOR ROBERTS: I think your question leads to Derrick Bell's position that I mentioned in my talk, which is that not only can we not be assured that victory is imminent, we can be assured it is not going to happen at all. And, therefore, what do we do about our faith in the Constitution?

If I read his writings correctly, it's that we should try some other strategy. He gives the example of a poor Black woman who says she lives to harass white people, and that's it. But I'm really not sure there is a way out other than having faith that victory will occur. Otherwise, the alternative, I think, for many people, of living to harass white people, is just unacceptable. Another alternative is to reject the Constitution altogether and establish a separate nation, for example, which a very small minority believe in. This seems unfeasible as well. And so you really are, I think, left with this faith that victory will be ours. I am not sure of, and I don't even think I have read any other alternative to that. Maybe other people have another way of looking at it, but I don't think there is much alternative to that.

PROFESSOR MACKINNON: I do think I have another way of looking at it. I don't know that I can describe what life without hope looks like. I think that it is hope that makes it possible for people to get up in the morning, to get through the day. Something else is going

on in this. It has to do with how you relate to resistance, and what you get back from fighting against that boot in your neck. And it isn't—only and ultimately even—about dreaming about the day that it won't be there. I see the alternative to fighting the boot on your neck—the ruling alternative as lying there while it is on you while saying that you are standing up vertical. That is the ruling alternative: compliance with denial.

What you get out of actual resistance is essentially the over-my-dead-body stance toward something that is actually keeping you down. I think there is dignity in that. The other thing that comes out, that I know I experience, is the answer to the question: Who are you with? In other words: I won't let them do this to *her*. It isn't just me. It is me *and* her. That is: I stand *with* her, or them, in this. We are not going to know whether we will win or not, see. So, in a sense, it doesn't matter. We really are not going to see this fail or succeed. I say, face that. It is an historical process and really the only question to answer is: Where do you stand in it and with whom?

QUESTION FROM PROFESSOR ACKERMAN: I think that, looking at the big picture here, the Constitution has revolved around two issues over two centuries. One has been identity. I would say that the original American Revolution and the founding created an identity, and the Civil War and Reconstruction centered on identity, and the period beginning, I suppose with *Carolene Products*,⁵ and moving through the war against Hitler, and *Brown v. Board of Education*⁶ also centered around a identity. Who we are as Americans is the central issue of these historical periods.

But there is another great question of constitutional law, revolving around the distribution of wealth. This was the central issue of the Constitution from 1815 to 1860; and from 1876 through 1940. Will this second question reemerge in the future? Consider, for example, a harbinger of a new constitutionalism—the Balanced Budget Amendment. Not much identity politics in that one! And yet its enactment could raise many unasked questions: How, if at all, would the Equal Protection Clause constrain the required budget-balancing?

If the Constitution in the year 2000 has to do with the economy, and not with identity, our resources for talking about it are very impoverished. For example, what is *Romer v. Evans*'s⁷ implications for the question of wealth and its distribution? The answer, quite simply, is that it has no implications. In short, the very nature of main line constitutionalism might be in danger. How to speak about justice in the distribution of wealth after sixty years of identity constitutionalism? All legal scholars can point to are a few articles by Frank Michelman

5. 304 U.S. 144 (1938).

6. 347 U.S. 483 (1954).

7. 116 S. Ct. 1620 (1996).

and Charles Black. But there is not a truly vibrant discussion of these matters—even among critical race theorists.

PROFESSOR TREANOR: Any reactions?

PROFESSOR BALKIN: Separate two issues. One is the issue of whether or not the focus of the federal courts' docket is on the economy. The second is whether—quite apart from that—serious issues of identity, status competition between groups, the continuing struggle of women and minorities to gain social equality, the various compromises that will have to be made among all the new immigrant groups in the United States, will be bubbling up, will become dominant social and political problems. I think they will be.

I think that this is the history of the early twenty-first century: Huge new waves of immigration in the United States, fighting for respect, along with a continuing fight for social equality that includes groups already here.

It's possible that the docket of the federal courts won't reflect that. Perhaps it will be focused on issues of economics: who owns the Internet and the like. But the structure of that docket will not prevent these other things from happening. They will bubble up to the surface and demand our attention eventually. They will have their way, they will demand a voice, because they are such powerful forces. These issues—of group conflict and competition, and struggle for social equality—will be realized in some way in the development of constitutional law.

The hope is that the courts will find a new language that will be helpful, that will help us deal with it. The fear is that courts fascinated with the antitrust implications of the Internet will not listen to or be able to understand the people who are literally crying out to them because of the new kinds of problems that face us at the beginning of the next century.

I don't know what will happen ultimately, but I do think we have to distinguish the question of what the federal judiciary thinks is real, and what is real: what effects will arise from the kinds of social competition and social problems that will exist, whether the federal courts understand this or not.

PROFESSOR TREANOR: Sandy.

PROFESSOR LEVINSON: I almost feel guilty raising this with Bill given the eloquence of his comments about Lincoln. The Emancipation Proclamation is useful in two directions. One direction was yesterday's: Lincoln the emancipator. Ronald Dworkin agreed at least in theory that Hercules might have to come to the conclusion that the Emancipation Proclamation was unconstitutional in taking slaves from loyal North Carolinians and Tennesseans and the like. But there the image is Lincoln the doer of justice and this constitution—Herculean constitution—maybe saying, no, you can't do that. But the Emancipation Proclamation also very notably freed no slaves

in New Orleans Park Parish, because that was controlled by Federal troops.

Now, why did Lincoln do that? There are two explanations. One is that he was a serious constitutionalist, he did this under the war power, and we were no longer at war in New Orleans; we had already won. Therefore, he could not liberate a slave in New Orleans. And remember the Federal Fugitive Slave Act was enforced until 1864, well after the Emancipation Proclamation. So he was without constitutional authority to liberate a slave, even in New Orleans, let alone Delaware, Maryland, Kentucky, or Missouri, the slave states in the Union.

Explanation two: He had that power, but, like Bill Clinton—and David H. Donald in his biography of Lincoln⁸ was so bold as to suggest indirectly that we do have Lincolns among us, one of them is Bill Clinton (not a happy notion for a variety of reasons)—but the other reason he might not have freed a slave in New Orleans is because it would have been politically costly, and there was an election coming up. In fact, Lincoln thought he was going to lose that election, and although there are some quotes of, I will do anything, I will risk losing because morality triumphs, we also know that Lincoln was a very cagey politician who was willing to say all sorts of things—read the Lincoln-Douglas debates—in order to win elections.

So, the question for you is, given Lincoln's refusal to free a slave in New Orleans or the Union States, do you admire him? Is that part of what makes Lincoln a figure of reverence, and you gave a reverential speech. We have Dworkin willing to admit, at least in theory, that maybe Lincoln should be condemned for freeing any slaves. I want you to talk about whether he should be praised for not freeing *all* the slaves.

PROFESSOR TREANOR: I think that is a good question. You are right about my attitude towards Lincoln. I do revere him. With respect to New Orleans, the first explanation that you offer is the one that explains his failure to free the slaves. He was a serious constitutionalist. During the Civil War, Lincoln struggles with the question of how can he free the slaves. He does very firmly believe that the Constitution doesn't give him the blanket power to free the slaves. There is a line that Patrick Henry takes in the Virginia ratifying debates that the President would be able to free the slaves under the war powers. And that is ultimately what Lincoln decides to do. But he also understood his powers under the War Powers Clause as limited, and New Orleans reflects his understanding of those limits.

The larger point that I want to make is that the Constitution is not just a legal document, it is also a document of political transformation, and Lincoln is very aware of that and uses that, uses symbols. Of all

8. David H. Donald, *Lincoln* (1995).

the amendments, there is only one amendment that has been signed by the President, and that's the Thirteenth Amendment. And so Lincoln in signing that was doing something that no President has done at any point, which is to validate this, to say this amendment is something I believe in.

The notion of transformation is also present in the Emancipation Proclamation. Acting within the constitutional order, he was also transforming it because of what he thought was right. Now, would he have gone farther? Could he have gone farther? He was criticized for having gone too far, and he was criticized for not having gone farther. I nonetheless think he deserves to be praised for what he did and for his constitutional integrity.

QUESTION FROM THE AUDIENCE: The soul of this two-day conference has been about a lot of power of ideas, but there has been a reluctance for folks to maybe take us seventy-five years down the road. Are we going to see this country constituted in a way where we can genuinely celebrate a tri-centennial which begins in about three-quarters of a century, looking to the Declaration period? Not so much in terms of the world as you want to see it, but your most realistic assessment. Where are we going to be at in our tri-centennial era?

PROFESSOR TREANOR: Responses?

PROFESSOR BALKIN: I don't know.

PROFESSOR KLARMAN: I don't mind taking a shot at that. It starts out the same way Jack did, which is the Supreme Court's interpretations of the Constitution will depend on where we are socially and it is hard to know what the issues will be like. I would think that gay rights would be an issue, if you judge from the opinion polls and you look at the obvious age biases, you look at what people over sixty think about gay rights and what people between eighteen and twenty-four think about gay rights. That issue is going to be resolved and people will look back at *Bowers v. Hardwick*⁹ and think that is the equivalent of *Plessy v. Ferguson*.¹⁰

You have to just use your imagination about what you think the divisive social issues will be at the time and that is where the Supreme Court will be, and whether they get them right or not will depend on your perspective even advancing further down the road. This is one of my discomforts with the idea—which I think suffuses the Symposium—that judicial review and constitutionalism represent a politically liberal agenda. We are all operating in the shadow of the Warren Court. There is absolutely no reason in the world to think that constitutionalism or judicial review has a liberal bias. It happened in the last forty years. For the first 150 years, most of the time the Court stood up for the bad guys. The Court prevented wealth distribution.

9. 478 U.S. 186 (1986).

10. 163 U.S. 537 (1896)

The Court struck down civil rights legislation. I would think in today's world with conservative Presidents and conservative Justices, the liberals actually do better than they ought to expect to do. But think about the nasty things that the conservative Court does. They strike down campaign finance laws. They strike down economic regulation under the Takings Clause. They strike down minority voting districts. They strike down affirmative action.

You need to know what the issues look like, but then the prediction as to whether the Court will be on the side of justice—what you perceive to be justice—or the other side, that just depends on what the composition of the Court looks like. They do regressive things as well as progressive things. They try to predict the future. Sometimes they get it right, like in *Brown v. Board of Education*. Sometimes they get it wrong, like in *Furman v. Georgia*,¹¹ where they thought they were going to strike down the death penalty, and everybody would jump along on the bandwagon, and they got that as wrong as they possibly could.

The Court is always more or less where the public is. They are confronting social issues where there is a division of opinion. They are more or less in the ballpark, but whether they will come down on your side or the other side seems to me to be a bit of a coin toss with one exception, which is they represent culturally elite values. That's what makes the thing anti-democratic. They represent culturally elite values because they're better educated and they have higher incomes than the average person in the community. To me, that is an argument for leaving things up to the political branches. But since I belong to the same culturally elite segment of the community, I suppose that's a statement against interest.

PROFESSOR TREANOR: Any other comments?

PROFESSOR MACKINNON: I would like to say something small rather than something big about that. It really is just about sexual assault. The mathematics of it are staggering. One of two things are happening is that it is in the process of escalating dramatically, particularly sexual abuse of children, and the numbers themselves begin at a staggeringly high percentage of both boys and girls who are sexually abused as children. Not all men who were sexually abused as boys go on to sexually abuse anybody. But almost all these people—most of whom but not all of whom are men—who sexually abuse other people, were sexually abused as children. And each of them abuses many people, usually.

If you start out with an already high number, and some unknown percentage of the people who are sexually abused—especially men—go on to sexually abuse not one person, but a couple of hundred children in their lifetime—that's actually not even a very large number for

11. 408 U.S. 238 (1972) (per curiam).

at least some of these perpetrators—you just have an immense explosion. Exactly what the consequences of that is, I think, something that would give an important answer to the question you asked—an answer a lot of people do not seem to be ready to think about.

PROFESSOR TREANOR: I think that's all the time we have. I want to thank this panel for just a terrific discussion. I want to thank all of the panelists who have been here, and I want to thank you all very much for coming; you have really made it a very special occasion.