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Fidelity as Integrity: Colloquy

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PROFESSOR DWORKIN: Let me start with two observations. It is, of course, intriguing to hear in the span of such a short time the following accusations: that I play fast and loose with the Constitution; that I don't play loose and fast enough with the Constitution; that I am too wedded to text; that I am not sufficiently wedded to text; and that I don't practice what I preach. The usual thing to say in such circumstances, you have heard it many times, is that I must be doing something right. My own reaction is, I must be doing something mysterious. We'll see.

Some of the remarks which I am about to make may sound to you as if I don't like the idea of the old Dworkin and the new one, the earlier and the later one. It is not really that I don't like the idea. I think that most everything that I am arguing now can be found in a book I published in the 1970s.[1] But I am not going to resist the idea that that's not so, that there really have been great changes, which suggests freshness and vitality, which is obviously not something I wish to disown. And, of course, the leading example in philosophy of someone at war with his earlier self is so flattering that I can't possibly oppose it.

[In the colloquium, Professor Dworkin replied to the comments of Professors McConnell, Schauer, West, and Fleming, revised versions of which are published in the Reply which follows the final panel in this book.[2] But since Professor Dworkin has expanded his replies to these authors (as well as his comments on Professor Rubenfeld's remarks) into his Reply, the colloquy of his replies to these individuals is omitted here.]

PROFESSOR FLEMING: Any questions from the audience?

QUESTION FROM THE AUDIENCE: I am attracted by Professor Dworkin's assault on pragmatism. And I would like to hear him refine it somewhat, particularly against the context of the common law tradition of constitutional adjudication. For instance, the recent Colorado case [*Romer v. Evans*[3]] could have dealt with *Bowers v. Hardwick*.[4] While I am attracted to the result, it flies in the face of the idea from the common law, that courts only resolve questions necessary to adjudicate the claim brought before them by the parties. And I would like to hear how Professor Dworkin would ascertain limits.

PROFESSOR DWORKIN: Yes. That's a very important question, of course. We should proceed case by case in the common law tradition. Let's see what that means. To my mind the common law tradi-

1. Ronald Dworkin, Taking Rights Seriously (1977).
2. *See* Ronald Dworkin, *Reflections on Fidelity*, 65 Fordham L. Rev. 1799 (1997).
3. 116 S. Ct. 1620 (1996).
4. 478 U.S. 186 (1986).

tion required judges—this was its nerve and strength—to identify a principle sufficient to justify what they were doing on that occasion, and to recognize the implications of adopting that principle for other cases.

I put it that way to distinguish a more ambitious idea, which is that they should take the occasion, not just to state principles necessary to decide that very case, but to state principles not necessary to decide that case but which are appealing or indeed even natural continuations of those that are necessary. I'm drawn to the view that—except in rare cases, where the community really has a very important reason for knowing—the second is bad practice. But that doesn't meant that the first is bad practice. Indeed, I think the first is essential.

In *Romer v. Evans*, the court laid down a principle—it wasn't necessarily so articulate, but I have tried to dig it out and present it—which was necessary to decide that case, and it was inconsistent with *Bowers v. Hardwick*. So, acknowledging the inconsistency would to my mind have been adopting the first of the two practices I distinguished, not the second. It would have been recognizing integrity. Integrity doesn't require you to take on issues not at stake in the case. It does require you to recognize what is at stake in the case and to test the principle you are deploying by seeing how it applies in other cases.

And I agree partially with Justice Scalia's remarks in that case. It did seem to me an abdication of a certain responsibility not to acknowledge that this principle was one that condemned a very important prior decision. Now, to a certain degree some notion of statesmanship might come in. If the court had said, *Bowers* is, of course, a different case, it stands—it flourishes as ever it did—then that would have been seriously unprincipled and integrity would have condemned it. Simply to have allowed people to understand that this case was doomed, and not even to have mentioned it, may have been an act of statesmanship, though it doesn't appeal to me.

QUESTION FROM PROFESSOR LEVINSON: Professor Dworkin was kind enough to mention that I have criticized him in the past for having a predilection for happy endings. I would like to pick up on the hitherto ignored Third Amendment, which I think is a fascinating feature of the Constitution. It says—Akhil Amar always carries a copy of the Constitution with him, and I read from his copy—"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." It seems to me that this stands for the incredibly important principle that in time of war the Constitution is not silent. Then I turn to the Emancipation Proclamation, which is based on war power without any other authorization, and indeed Lincoln had earlier suggested that he didn't have the power. Justice Curtis, who of

course dissented in *Scott v. Sandford*,[5] believed that the president did not have the power simply to emancipate the most important property asset of southerners, including loyal southerners. So, the real question is, is it possible that Hercules, when presented with the issue "was the Emancipation Proclamation constitutional," could turn to the Third Amendment for moral guidance and be forced to the dreadfully unhappy conclusion that the Emancipation Proclamation was in fact unconstitutional?

PROFESSOR DWORKIN: Yes, and maybe even wouldn't need the Third Amendment to do it. But it is very important—and you remind us of an extremely important occasion that illustrates it—it is very important to distinguish between the gravitational force, as I have called it, of a constitutional provision and its correct translation.

In *Freedom's Law*, I denied that it would be a good translation of the Third Amendment itself to say it requires, or it is the source of, a general right of privacy. That seems to me an interpretive mistake. The linguistic intention, I think, was very different.

But you are absolutely right, it doesn't follow from that that in asking the question, how do we make most sense of the document as a whole, we shouldn't recognize that here was an occasion in which it was asserted that the Constitution holds sway even in war time. Absolutely right. I call that gravitational force, meaning the fact that that provision is there and did that thing, is pertinent to and maybe decisive of the correct interpretation of other more general clauses and issues. So, I agree.

PROFESSOR MCCONNELL: What I would be inclined to say is that it is very probable that the Third Amendment was referring to one's own citizens and not the citizens of a power against whom one is waging war, and that the theory behind the Emancipation Proclamation was that since we were waging war against these people, the seizure of their property was intended to effectuate the successful effort of the conflict and, therefore, is not at all inconsistent with the Third Amendment.

PROFESSOR LEVINSON: That's a Confederate argument; it certainly wasn't Lincoln's argument that Virginians were no longer citizens.

PROFESSOR MCCONNELL: No, what I am saying is that Lincoln could not have seized the property of loyal Yankees on our side, but the Third Amendment doesn't say anything about quartering soldiers in the homes of enemy countries against whom we are waging war.

PROFESSOR DWORKIN: But the Emancipation Proclamation applied to loyal southerners.

5. 60 U.S. (19 How.) 393 (1857).

PROFESSOR MCCONNELL: No, it did not. There were still slaves held in Kentucky and Delaware until the ratification of the Thirteenth Amendment.

PROFESSOR DWORKIN: But the Emancipation Proclamation did not exempt loyal southerners. It may not have been enforced against them.

PROFESSOR MCCONNELL: No, it specifically applied only in the territories of the rebellion.

PROFESSOR AMAR: That's to loyal citizens even in those territories.

PROFESSOR MCCONNELL: Right.

PROFESSOR DWORKIN: Good. History has some use, thank you.

QUESTION FROM ROBERT LIPKIN: I would like to know if this a correct understanding of your view, Professor Dworkin, that since the translation of the Constitution requires not finding out what they meant or what the Constitution means, properly understood, is it conceivable then that fidelity to the Constitution could mean infidelity to what the framers thought it meant?

PROFESSOR DWORKIN: No. Well, that's a possible view. Mr. Justice Derrida might take that view. But I don't. Again I am insisting on something that I think is mysteriously neglected, and that is the distinction between two issues about the intentions of people. I am trying to distinguish between the linguistic intention and the political—as I've called it today, I have called it different things at different times—intentions.

First, McConnell at some point said he would like to know why I pay so much attention to intention, speaker's intention, in answer to the first of these questions, what does the Constitution say? And it is because I think there has got to be an identity constraint. There has to be. We have to give sense to the notion, what is this document to which we are being faithful? And if we say that it is the document manifest in a certain canonical set of inscriptions, then we have to answer the further question, what words does it contain?

I used an example on Wednesday night that is often used in opposition to my views about interpretation, I think wrongly. There is a passage in *Paradise Lost* in which Milton refers to Satan and his gay hordes. And the question is, what does that say? Does that say that Satan's hordes were jolly or that they were homosexual? To my mind it has got to say the first, or in any case it can't say the second, because the connotation of homosexual to gay post-dated Milton's life by a very long time. Now, if a scholar here, some historian, says I am wrong about that, then the question is back in play. Suppose I am right about that, then that's ineligible. It is because there has to be an answer to the question, what words make up the document? These

are two words, gay meaning jolly and gay meaning homosexual, and I've got to decide which is the word that is in the text if I am going to offer an understanding of *Paradise Lost*.

I take the same view about the Constitution or any canonical legal document. But, of course, when people say, well, aren't you in danger of departing from what they meant—typically, for example, in Scalia's writing on intention—it is a typical confusion between intended to say and intended to be the result. Yes, the people who adopted, whoever they may be, the Eighth Amendment certainly did not intend to outlaw capital punishment. We have absolutely convincing evidence that that was not part of their expectation intention. However, what they said and intended to say might very well have outlawed capital punishment. That's the difference.

PROFESSOR MCCONNELL: May I jump in here? I think this idea that we are not looking either for what they meant, or what we mean, but for what the words mean, I think is an example of Professor Dworkin not fully assimilating the view that there is no "the" moral reading. That is to say, a phrase like equal protection of the laws, that is words, and when different people attach different understandings to those same sets of words, it is simply not accurate to say that there is a correct meaning of those words. All we can say is, what do certain people mean when they use those words, and then the question becomes, by what right do we, if we happen to hold particular office, say as a federal judge, say that what we think those words mean has a superior claim against what our fellow citizens think that they mean?

PROFESSOR DWORKIN: Can I just say quickly—I apologize, go ahead.

PROFESSOR SCHAUER: It may be that we were going to say the same thing. I think Professor McConnell is wrong in his understanding of what it is for a word to mean something. He has collapsed the distinction between speakers' meaning and utterance meaning. To have a linguistic intention is to intend to use a certain kind of convention. The very existence of the convention presupposes at least some degree of sharing. If it turns out that the meaning of every word is what the user of the word intends it to mean, without reference to intention-independent linguistic conventions, it is hard to understand how we can talk to each other.

PROFESSOR DWORKIN: Or disagree with one another.

PROFESSOR SCHAUER: Or disagree with one another for that matter. So, it is certainly possible that there will exist in the language certain noises or marks on a printed page as to which there is so little agreement that they are essentially meaningless. But it is also possible that there are noises or words on a printed page as to which there is substantial shared meaning, even in the face of outliers or disagreement or whatever, or even in the face of disagreement about a very concrete reference.

I think on this issue Dworkin and I agree that there is a convention about words like "equal" and the like, and the fact that in some other domain people may have different meanings for the word, or the fact that there are outliers, doesn't mean that the word has no meaning, nor does it mean that the meaning of the word collapses completely into the specific or even the general intentions of speakers.

PROFESSOR MCCONNELL: The shared meanings are not the problem in constitutional cases. I fully agree that there are certain aspects that every view, from the framers, up through ours and presumably including the Grand Kleagle's view, of equal will be the same. That's not what we fight about. The question is, when do we identify different meanings that reasonable people have held through time? And then to say that one of those meanings is "the" meaning seems to me simply inaccurate.

PROFESSOR DWORKIN: Could I intervene just a second? It seems to me that the important point here is the possible misuse you have made of the word "meaning," because we have got always to distinguish between differences in sense and differences in judgment. It is extremely difficult sometimes, but the whole sense of agreeing or disagreeing depends upon that distinction.

When you say people mean different things by equal citizenship, it would be more accurate, at least more helpful in thinking about these problems, to say they have different theories about what equal citizenship consists in, and, of course, I agree with that. Their theories about what equal citizenship consists in disagree with one another. But, we cannot collapse the idea of people having different understandings of what the terms require into their meaning something different by the terms, because if we do that we have to say that these deep disagreements among us aren't disagreements at all, they are simply people talking past one another, as if you and I were arguing about the correct understanding of *Paradise Lost* and I meant jolly and you meant homosexual.

Now, I keep pounding this—I fear I'm pounding it—because I would very much like you to put the matter in the following way. The correct translation of what the framers' said is that they commanded equal citizenship. That leaves open this question. What reasons do we have for accepting the framers' own answer to the question: What is equal citizenship? Many answers can be given. I don't like any of them, but some can be given. But to put the point by saying that everybody means something different by equal citizenship so that the words themselves mean nothing, makes the point drain into the sand.

PROFESSOR MCCONNELL: Excuse me, it is you who made use of the rhetorical proposition that we don't look at what they meant, or

what we meant, but what it meant.[6] And all I say is that is a useless proposition.

PROFESSOR DWORKIN: I never said that. I don't accept a sharp distinction between what words mean and what the speaker intends them to mean. Perhaps you are remembering my statement that I'm interested in the answer to what equal citizenship is, not what people think it is. But that's obviously a very different distinction.

6. *Fidelity as Integrity: Colloquy*, 65 Fordham L. Rev. 1357, 1360 (1997) (Professor Dworkin: "I am not interested in what we think, I am interested in the right answer to the question, what is equal citizenship properly understood?).