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## Fidelity through History: Colloquy

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## FIDELITY THROUGH HISTORY: COLLOQUY

PROFESSOR RAKOVE: Certainly one of the great ambitions that I had in writing my book was, obviously, to add a historian's perspective to a legal debate. I am very interested to see what kind of absorption my ideas are going to have in the legal community, and to judge from this panel it is going to be a long and somewhat indeterminate process to find out what the results will, in fact, be.

There are a couple of points that came up that I will just very quickly note before I add one other point. One involves, what I guess we are calling the disaggregation of ratifier understanding problem, that I think Larry Kramer in particular, addressed. It is a leading argument in my book, so that's one I would certainly call attention to.

Also, in Larry's comments on historians: I think historians are the lonely long-distance runners of the human sciences, and one reason for that is that we are always nervous to publish until we are sure we have exhausted our sources. Larry talks about the primal sources and claims that we ought to be interested in the squib's parodies and jingle-jangle verses, and conversely that we should not be interested in private correspondence. I actually happen to disagree with those claims on the merits. It seems to me a lot of the jingle-jangle verses are so much noise that we are entitled to discount, because—whether you are Straussian or not—they don't add much of lasting value to the debate. We want to look for the best statements of the rival positions and work from those, and this is what I tried to do in organizing my material in the book.

I think private letters are very important. They are especially important to me as a Madisonian, and as a Madison biographer. A lot of the writing I have done for the last dozen years, especially my piece *Mr. Meese Meet Mr. Madison* from some years ago, relies on the interesting tension between Madison's continued defense of the national veto on state laws in his October 24, 1787 letter to Jefferson, and *Federalist* 10, which was published four weeks later. So those are important points of methodology, and if this were a more focused forum on the propositions I put forward I would pursue them at greater length.

I want to put those aside now, and discuss a different point. There is an aspect of fidelity to history that I alluded to when I quoted Gordon Wood, and which I said earlier I would like to discuss in the context some of Bruce's remarks yesterday and a few passing references we have heard previously. Some of you may know that the *Atlantic* has hit the newsstands with an excerpt from Conor Cruise O'Brien's book that is supposed to be a rather slashing piece about Jefferson, which is a big problem in American historiography and indeed in the political culture of originalism in the broader sense of the term. This is something that I like to think all historians in the founding period have agonized over a great deal, for the last twenty-five

years and more, because it exposes not only the original sin of the American Republic, but the largest single ongoing problem we face in our legal and political culture. More generally, it poses especially difficult problems for a teacher. I know law professors are supposed to shock their students into a state of complete moral anarchy, and then to reconstruct their fragile intellects thereafter. But when I discuss Jefferson, I deal with eighteen- and nineteen-year olds, and I think that makes it an even more troubling situation.

Now, the problem I am alluding to here—I should restate it more generally is: Does a historian have a moral responsibility to his subjects as well as his readers, and to his own sense of professional craft? I think the answer should be yes. But what moral responsibility do I have to Jefferson and Madison (especially the latter, but these guys were so close, it is hard to disaggregate them). What is my moral responsibility as, in a sense, the perpetuator of their acts and deeds and thoughts and memories? There are very different positions that one can take on this. If Paul Finkelman—who writes in much the same vein I do, but probably falls out a little bit differently on a political spectrum—were here, he would offer a tougher critique. I think it would be fair to say that Paul and others would say that our goal as historians, in some way, is to liberate ourselves from the past, in much the same terms as Bruce used yesterday. They would say: We have to be honest about this; we have to not just note the contradiction, but place it in the forefront of our consciousness. But I have actually taken a rather different tack in my teaching. In my American History survey course I actually try to make a strong case for Jefferson, and, indeed in my book, I make a strong case for what I see as the beneficial aspects of the Three-Fifths Clause, of which I am actually something of a fan.

I would rephrase the problem in this way—and this is what I tell my students and I will tell you: Moral judgments are easy; anybody can make a moral judgment about the past. We have exquisite moral sensibilities of our own. It is not hard to call a crime a crime, *ex post facto*, at least in the moral sense, if not in the legal sense. So, it is easy to come in and say these guys were obviously hypocrites and failed to live up to their own norms and expectations for themselves, and therefore whatever our notion of fidelity to the past must mean, it allows us moral room to pass a harsh and severe decree upon them.

I take a rather different tack. If moral judgments are easy, there isn't all that much point making them. I mean, there is not much serious work to be done there. The real heavy lifting—that's a phrase I use and Chris [Eisgruber] used earlier—the real heavy lifting in historical work is to explain why people in the past acted in the way they did. It is to explain how they lived a contradiction. It is to explain how they could somehow reconcile, in not very satisfactory ways to us, what seems to be a strong and principled and explosive belief in

equality—and the forms of constitutionalism that grew out of that commitment—with the fact that they were members of the society which seemed to regard property in other people as part of the natural order of things. That's the hard problem. Now, I don't want to reach the position to say that to know all is to forgive all. We don't have to go that far in thinking about these issues. But I think the hard work is to understand what were the sources of the contradiction? Where did the contradiction lead? What were the tensions it created and how were they balanced out?

And there is a sense in which I think there is a much better case to be made for Jefferson than the ones we rather flippantly tend to throw off in these contexts. So, let me just run two arguments by you real quickly that I offer by way of dealing with this. The first is that I think it is a fundamental aspect of the history of American constitutionalism that Jefferson had the good sense to put in the Declaration of Independence the statement that all men are created equal. If you know the genesis of this—and Pauline Maier has a book that is coming out next year which I think will clarify the genesis of it—it is very much tied to the debate in Virginia, in the first article of the Virginia Declaration of Rights as to what form an equality statement should take. But whatever Jefferson's ambition, the recognition of equality as a fundamental principle, had at least this effect. Equality is, in my view, inherently a corrosive concept; corrosive not in the sense of rusting away, but in the sense that once you legitimate it in one sphere of activity, it is impossible to restrain it there. It inherently carries over into others. So, I think the republic probably owes Jefferson a great deal for having the good sense to make that commitment, despite himself.

Secondly and more important—this is a more historical argument—if we ask, what is it that makes emancipation possible? it has always seemed to me that we can only explain emancipation in terms of the religious history of the American people. And, in fact, in terms that are fundamentally Protestant. I used the term, in context with Professor Levinson, but it is the same basic fact. (And, of course, here we are at Fordham, and I am a Jewish kid from Chicago and I am saying this is a fundamentally Protestant culture.)

What is it that allowed the North to sustain the enormous cost that the emancipation of slavery entailed? It seems to me that it has to involve something more than a sense that slavery is a fundamental wrong because it contradicts the equality principle. It *was* a fundamental wrong, but there are a lot of things that are wrong in the world that we tolerate, and, of course, we tolerate as much as people in the Eighteenth Century did. But you say that slavery is sinful—which is, of course, what people said in the thirty years leading up to the Civil War—then you shift the equation in rather dramatic and powerful ways.

Now, what is it that made it possible for Americans, at least Northerners, to say that slavery was sinful in the decades leading up to the Civil War? This argument doesn't work too well for Southern Baptists, of course. But what was it that made it possible at least in the North to form something of an anti-slavery consensus that enables the North to sustain some hundreds of thousands of casualties in the end to rid the South, to rid the nation, of this blight? It was, I think, the fact that mid-nineteenth century America was a more Protestant society and a more vigorously Protestant society than eighteenth-century America.

And what is it that makes that possible? Well, there are many explanations for what Jon Butler has called the antebellum spiritual hot house of Nineteenth Century culture. I think among the very most important factors was the commitment to disestablishment and free exercise of conscience that was so much a part of the Jeffersonian-Madisonian project. And it is so much a part of our constitutional legacy, because it is that commitment which makes possible, in a direct and indirect way, the enormous creativity of Nineteenth Century American Protestantism, and with it, the rebirth or the reinvigoration of those Calvinist sensibilities which are essential to anti-slavery.

So, a historian with a moral responsibility to his subjects has to be as ambiguous here as he might be elsewhere in other respects. On the one hand, he has to be prepared with Finkelman to say, we have to be honest about who these guys were, but he also has to try to explain why they failed, what the sources of their failure were, and he has to deal with the consequences, sometimes inadvertent, of their actions, and which may over time have actually redeemed them from the original sins to which they were a party. So, that is a kind of final point here, which I am going to try to work on at some points in the revisions and space permitting, put into my paper, it seems to me appropriate, because the notions of fidelity both of the historian and the lawyer involve some evaluation of the moral quality of what was done in the past, and I would want the ledger to be balanced and not to be drawn up in a kind of casual and even flippant way.

PROFESSOR KACZOROWSKI: Are there questions?

QUESTION FROM PROFESSOR LEVINSON: I have two nits to pick and then a cheap shot. One nit is with Larry Kramer. It seems to me that if you know that something is offered on a "take it or leave it" basis, you will make strategic decisions on how you represent features of a bill or Constitution in a way different from if it were a genuine clause by clause choice. If you think there is a lot of opposition to a clause but you want the whole thing to pass you will say, don't worry, it really doesn't have these dreadful consequences. If you are opposed to the whole thing, you will say, don't you realize this just is the very worst thing and so on and so forth. So, I think that your notion

that Jack's point isn't a powerful one is mistaken. I think it remains a powerful point that was offered, take it or leave it.

The nit with Bob is that I think that, in fact, *Prigg v. Pennsylvania*<sup>1</sup> is a far more excessive case than *McCullough v. Maryland*,<sup>2</sup> because *McCullough* is at least a Necessary and Proper Clause case, an Article I case. *Prigg* is not an Article I case. There is no conceivable reference to anything in Article I, Section 8, to justify the Fugitive Slave Clause. You have to do it as an Article IV case, and there are notorious embarrassments with doing that. The Court basically just punts on this, and says we are not going to explain exactly why it is constitutional but it just has to be the case.

The cheap shot really is directed at Steve Calabresi. I have always been intrigued with the fact that the Federalist Society, and I am using Steve as the representative of the Federalist Society, has James Madison's iconic figure, because it seems to me that among the things that are important about Madison is that he really didn't believe very much in theories of original intent. His one great effort, arguably, to make an original intent pitch was that the bank was unconstitutional, and the most important feature of the case book that Paul Brest and I edited is that it begins with Madison's speech. He lost, however. So this at least raises the point that for all of Madison's importance, he just wasn't taken that seriously as a guide to what the Constitution meant, and maybe originalism wasn't even taken all that seriously as a guide to what the Constitution meant. But the cheap shot, the serious question, is: Why don't you have Alexander Hamilton as your iconographic figure instead of James Madison? Hamilton was the winner after all. But I suspect you think that Hamilton, when all was said and done, isn't quite so classy a guy as James Madison in terms of selling the Federalist program.

PROFESSOR KRAMER: Sandy, I just want to answer about the disaggregation point. The fact is it wasn't offered on a take it or leave it basis. Whether it would be taken on a take it or leave it basis was part of the debate. One of the things I go through in the paper here is exactly the debate over that. So, the whole issue of conditional amendments and whether to allow them, and the way people were persuaded out of them, and the timing of that is irrelevant. So, your point is right to some extent, but it is not as though anyone up front knew they were committed to that, and therefore, had to change their arguments in light of it necessarily. That was up for grabs.

PROFESSOR KACZOROWSKI: Excuse me, I think you [Professor Calabresi] really do deserve an opportunity to respond.

PROFESSOR CALABRESI: I was going to say, I think there are many reasons why Madison was picked as the emblem, not least of

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1. 41 U.S. 539 (1842).

2. 17 U.S. 316 (1819).

which the defense of checks and balances of a structural Constitution, which we thought was being overlooked, and the importance of the essays and *The Federalist Papers*. Obviously there is no founding figure that one could agree with completely.

QUESTION FROM PROFESSOR LEVINSON: I would like to ask Akhil, if the object of constitutional meaning for him is the entire Constitution as opposed to the clause or the theory or the generation, don't we also need a further, a more comprehensive theory of interpretation to tell us how to address the text? What is the text (which would be a relatively simple question)? What is the structure (which would presumably be a more difficult question)? What are the priorities, if it turned out that a textual injunction was in conflict with the structure of the Constitution?

This also applies to Jed Rubinfeld's paradigms. Paradigms don't remove the need for a theory of interpretation, because you need a theory of interpretation to identify paradigms. Which are the paradigms and what do they mean? And so isn't this attempt, which seems to me to circumvent—and I might have misunderstood you there—the need to have a theory of interpretation? Isn't all of this dependent on first having a theory of interpretation?

PROFESSOR AMAR: When I am thinking about passing a car on the freeway, knowing calculus would be extremely helpful in trying to figure out whether I can do this without getting steamrolled by the truck coming in the other lane—but lots of folks today manage to drive pretty well without knowing calculus.

I don't know how elaborate a general theory of interpretation of all documents it is necessary to self-consciously have in order to do interpretation, which we all do all the time. So, to that extent I want to associate myself with Jed, who I think was not contradicted, really, by many of his fellow panelists, in suggesting that one wants an account of the *Constitution* which may or may not be an account of all interpretation.

So, I do think it is important to think about what kind of document the Constitution is. It is more than just a document, but what is the object of the interpretation and what purposes does a written Constitution have? So, I think all of that, but I don't know about a general theory of interpretation, and the Wittgenstenians might say actually that sometimes rather than a general theory with necessary and sufficient conditions, there are particularly good exemplars or prototypes of good interpretation.

I intended in my exposition to try to give you some examples of constitutional interpretation—by their fruits you will know them—because it is so difficult to do in the abstract. I actually think it is more helpful sometimes to say, here is how I would do it here, now tell me whether you agree or not, and then we can actually in the context of

that conversation try to think about what might be a better interpretive approach.

PROFESSOR LEVINSON: You can't be serious here, Akhil, about the car driving analogy though, right? You are not under these circumstances just driving your own car along the freeway. You are recommending interpretations that are going to control the lives of other people, who disagree with you about these things.

PROFESSOR AMAR: My interpretations don't, thankfully. And unlike some folks in the room, I am actually not a judge "wanna-be."

PROFESSOR EISGRUBER: But you are a judge influencer "wanna-be." You want people to agree with your arguments when you make them. Then you want them to act on the basis of those arguments.

PROFESSOR AMAR: All that I want to say is: Here is an argument. Now tell me whether you agree and if you don't why, and if you do, then maybe we can try to figure out what it is that appealed to you, why you found this opinion a better exposition than that opinion?

PROFESSOR EISGRUBER: So, eventually, you are going to have to want a theory when people do end up disagreeing—as they are—about the cases that you care about.

PROFESSOR AMAR: I'm somewhat dubious of the idea of an utterly deductive theory of an algorithm. I do think that I am very powerfully influenced by Phillip Bobbit, and by Dick Fallon. I think there are different techniques of constitutional interpretation. To do constitutional interpretation is to be able to make arguments from text and history and structure and practice and practicality, and then often, as applied, one will have a sense that a certain set of arguments in this context is more apt; they fit better.

PROFESSOR KACZOROWSKI: Mike McConnell.

QUESTION FROM PROFESSOR MCCONNELL: I wanted to ask Jack Rakove about the implications of his argument for originalism in the following sense. It seems to me that originalism does two types of work which are almost at tension with each other. On the one hand, it gives a theory for why judges today can tell the legislatures of today that the legislatures can't do what they want. An example of that would be the recent *United States v. Lopez*<sup>3</sup> case.

It seems to me the argument is very powerful against that or at least it suggests that one should be very cautious in looking to an originalist understanding of the Constitution in any kind of a rigid forum because, in fact, the framers understood themselves to be setting up an experimental document and they were not doing something that was in a rigid format. That seems to me to follow from your argument. The other function that originalism plays in modern debate, and I

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3. 115 S. Ct. 1624 (1995).

think it is the more interesting, controversial, and important one, is that originalism is a reason why judges should not tell legislatures that they can't do what they want to do when there is no grounding in the text historically understood. *Roe v. Wade*<sup>4</sup> is, of course, the modern classic in that. And it doesn't seem to me that anything in your argument discredits that second use of originalism, that is originalism as a constraint on judicial moralizing.

PROFESSOR RAKOVE: Well, I don't know if you asked me this as a historian or as a theorist. Let me say a couple of things, Michael, and they may not completely answer your question directly. To begin with—just to clarify my position—there is a limit to my indeterminacy as a historian. I wouldn't be a historian if I didn't think we couldn't come up with good evidence of, the best evidence possible, of why certain provisions took the form they did. I'm that kind of historical positivist, I guess. And I think Leonard Levy is too, even though his own efforts to explain why judges could never use originalism successfully, I think, probably better describes what happens when originalists undertake this foray. I mean, I very much like the point that Martin Flaherty makes in a recent paper taking on what strikes me as the absolutely bizarre use by Scalia of the Massachusetts Constitution in 1780 as a paradigmatic statement of the original theory of separated power. That strikes me as ludicrous.

Let me now talk about judicial review, which I think is at the bottom of your inquiry as it is of this whole project, right? I think before we get to any theory of judicial review, one has to understand just how novel the concept of an independent judiciary was in the 1780s. Gordon Wood pointed this out in his bibliography to *The Creation of the American Republic*, and I think the point still has yet to sink in. The whole idea of thinking of the judiciary as a third distinct body, department of government, was itself a great novelty. How we go about enforcing the written Constitution, and against whom I take it is much more important to force it against the states than against Congress—is a second great novelty. Whether the decision makers are themselves going to be judges or jurors is a third aspect of this, which I think we are only starting to kind of come to grips here. Some people have; it is there in some of Bill Nelson's work.

So, it seems to me that the idea that the Supreme Court's essential function is appellate, that there will be a need to coordinate decisions taking place in different venues, that they have a uniform law—as I think Hamilton says in *Federalist 22*, these are all propositions that are getting started. But on the indeterminacy side, I think there is so much novelty to the original conceptions of judicial independence, enforcement of written constitutions—and whether judges or jurors are decision makers and, if so, who acts when and at what point, that I

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4. 410 U.S. 113 (1972).

would be very reluctant to try to lock any kind of robust definition of a strong originalist character into the understandings of 1787.

