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# “FREEDOM FROM UNREAL LOYALTIES”: ON FIDELITY IN CONSTITUTIONAL INTERPRETATION<sup>1</sup>

Catharine A. MacKinnon

TO briefly consider the normative question, does the Constitution deserve our fidelity, I will ask of the Constitution the question Rousseau asked of the inequality he observed around him: “What can make it legitimate?”<sup>2</sup> In so doing, I decline the invitation to theorize morally, meaning to pontificate on what I feel, and therefore “we” should think, is good and bad. This is not my project, nor is my project a disguised version of that project.

In the process, I sketch an approach to the Constitution that provides an alternative to Ronald Dworkin’s “moral reading,” one like his centered on the equality question, but more descriptively accurate of constitutional process and less elitist and exclusionary in method and content. I hope to show that the fidelity I practice is not what Jack Balkin has warned us against in any of its guises, yet is a reading of the Constitution—an aggressive reading, but a reading nonetheless.

This reading stands against moralism, constitutional or otherwise. The moralism criticized here<sup>3</sup> is evident in Balkin’s discussion of “con-

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1. Virginia Woolf, in *Three Guineas*, explains how an organization of women that she imagines would both criticize and recreate institutions:

By criticizing education they would help to create a civilized society which protects culture and intellectual liberty. By criticizing religion they would attempt to free the religious spirit from its present servitude and would help, if need be, to create a new religion based it might well be upon the New Testament, but, it might well be, very different from the religion now erected upon *that basis*. And in all this . . . they would be helped . . . by their position as outsiders, that freedom from unreal loyalties, that freedom from interested motives which are at present assured them by the State.

Virginia Woolf, *Three Guineas* (1938), *reprinted in A Room of One’s Own and Three Guineas* 107, 234 (The Hogarth Press 1984) (emphasis added). Note that it is the insiders who have the “interested motives.” *Id.*

A conversation with Jed Rubenfeld encouraged the shape of this Response. Comments by Cass Sunstein and Martha Nussbaum helped clarify it. Representing my Bosnian and Croatian clients, survivors of the Serbian genocide, with Natalie Nenadic and Asja Armanda has deepened my understanding of accountability.

2. This is how I translate Jean-Jacques Rousseau, *Du Contrat social* 153, 160 (*Le Livre de Poche* 1978) (1762) (“Qu’est-ce qui peut le rendre légitime?”).

3. I am not condemning all moral theory by taking Ronald Dworkin’s particular approach to it as all there is. I do criticize the kind of moral theory he engages in, some features of which, while perhaps extreme in his work, exemplify tendencies common to much, if not all, moral philosophy.

stitutional evil,"<sup>4</sup> his "really bad stuff."<sup>5</sup> I am not saying those things are good. Rather, the main problem Balkin seeks to solve, as I read his paper, is not a problem I have. He is conflicted over faith to a document that originally considered the ancestors of my colleagues and friends to be three-fifths of a person, to be bought and sold as "property."<sup>6</sup> Then, after keeping people like me from practicing law because we were not fully "persons,"<sup>7</sup> and, after strictly scrutinizing for racism, locking up the family of my colleagues and friends in concentration camps for racial reasons,<sup>8</sup> this same document arrives today at a point where my colleagues and friends can still be bought and sold, this time as "speech."<sup>9</sup> I am not torn over fidelity to that document. Behind the angst over infidelity in Jack's engaging paper lurks an identification with the Constitution that masks a deeper identification with those who have authoritatively interpreted it. This identification, I do not share; I do not recognize myself, or feel my power implicated in, the "we" of his discussion.

To state this directly, no one asked women about the Constitution. We never consented to it. This, I take it, is, or should be, a big legitimacy problem. The so-called "majoritarian premise" of the Constitution so widely invoked, including by Ronald Dworkin,<sup>10</sup> began by assuming about fifty-three percent of the population out. Add to this the excluded male slaves then, men of color now, non-property owners then, poor people now, and what is left of the majority in the premise? It refers to the holders of the majority of power, an elite, a tiny minority. Why should I be torn between loyalty to them and other loyalties?<sup>11</sup>

At risk of oversimplification, contrast two dramatically divergent accounts of constitutional interpretation to explain why the location I am claiming produces constitutional fidelity. In account one, Ronald

4. J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *Fordham L. Rev.* 1703, 1706 (1997).

5. J.M. Balkin, Symposium, *Fidelity in Constitutional Theory*, *Fordham University School of Law* 127 (Sept. 21, 1996) (transcript on file with the *Fordham Law Review*).

6. *Scott v. Sandford*, 60 U.S. 343, 404-12 (1856); see Patricia J. Williams, *On Being the Object of Property*, 14 *Signs: J. Women in Culture & Soc'y* 5, 5-6 (1988) (slave ancestors of Professor Williams).

7. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139-42 (1873) (Bradley, J., concurring).

8. *Korematsu v. United States*, 323 U.S. 214, 217-19 (1944); see, e.g., Charles R. Lawrence III & Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* at xvi (1997) (internment of Professor Matsuda's Okinawan family members during World War II).

9. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (pornography harms women but is protected speech), *aff'd*, 475 U.S. 1132 (1986) (summary affirmance).

10. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 1-38 (1996) [hereinafter Dworkin, *Freedom's Law*].

11. See Woolf, *supra* note 1, at 234, on "unreal loyalties."

Dworkin floats above social life, transcending it, accompanied by Herbert Wechsler.<sup>12</sup> He sees words in the Constitution. He reads Supreme Court opinions. He thinks. He theorizes. He decides what is good and bad. He distills principles by sanitizing value judgments to the point where no one's name is discernible on them. He says: This is good. He sees how particular facts—a gritty, low-level notion not in much use—fit under what he calls principles. Through this “top down” approach to constitutional interpretation, he pronounces what is faithful to the Constitution and what violates it.

An alternative: You walk through life, this life. You notice some people—sometimes you, your colleagues, your friends—systematically treated worse than others. It is actually rather hard to miss. People tell you what happens to them. You remember what they tell you and who they are. You try to make sense of what has been done to them. Nobody needs to be told that there is a problem here, because you deny neither the equality of these people nor the inequality imposed on them. You and they want to end it. You remember that there is, supposedly, “no caste here,”<sup>13</sup> no second class citizens under the Constitution.

So a conflict is posed: Does the Constitution permit the practices you have encountered? It does in reality: here is the Constitution, and here are these practices being done. Do you give up on the Constitution, in a crisis of faith, ceasing to believe in God because there is evil in the world? Or do you decide to hold the Constitution to its promise, for the first time if necessary? If you take this “bottom up” approach, it is not because you believe in the Constitution, although you might, but because you believe in the equality of your people, and you are not going to let the Constitution make them less.

Gradually you articulate the equality principle in terms of ending the inequality you see. You know that those who interpreted the Constitution before you did not see it the way you do, but you never allow them to think that they cannot understand what you are saying—no fancy epistemological dodges. They may not have come to see what you see on their own, unaided, but they can sure get their minds around it now.

Gradually you learn that inequality, as lived, keeps people down because of who they are. You decide that if constitutional equality does not mean ending this, it does not mean anything at all. Nobody says you are wrong about that, that the equality principle really permits denigrating subordinated groups, supports trafficking human flesh, imposes inferior status. Then one day you find Ronald Dworkin is trying to get in your way.

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12. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

13. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); see Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410 (1994).

Using the "bottom up" approach to illuminate the "top down" one clarifies some otherwise murky issues in the fidelity discussion. Consider first the confusion between what would be good to encompass in constitutional equality and what equality means. Arguing that a practice is unconstitutionally unequal is not the same as arguing that it is a bad thing in the moral sense. Many things are no doubt bad, but only being part of systematic subordination on a group basis makes something unequal. Bad things may or may not be unconstitutional, but unequal things are.<sup>14</sup> Expanding the standards for cognizable inequality by getting new groups and practices recognized under the Constitution is interpretation. If expanding the meaning of a constitutional term like "equal protection of the laws" to prohibit the reality of second class citizenship of formerly excluded peoples is regarded as a rather large interpretive step by some, it may be because those doing the interpretation want to keep their practices and privileges, or have limited imaginations or narrow lives. But we are still talking interpretation: what is and is not inequality. We are not talking what it would be good to be against: the task of moral theory and legislation.

Take, as an example, the question whether sexual harassment violates the equality principle. Before, it did not. Now it does, by interpretation.<sup>15</sup> That was not done by arguing that sexual harassment is a bad thing. It was done by arguing that sexual harassment is sex discrimination. Consider how to argue that acts that are already supposedly considered bad and criminal, like rape, are also constitutional inequalities. Not by arguing that being raped by state actors is a bad thing; by arguing that being raped by state actors is a distinctively female form of second class citizenship, gendered injustice. That rape is bad does not make it unequal or gendered. That rape is sex-based violation which, when officially allowed, deprives citizens of their rights to equal protection of the laws, does.<sup>16</sup> That rape is bad is not an argument of constitutional interpretation; that rape is a practice of gender inequality is.

My point here is, moralism is not interpretive as a matter of method. Moralism asks, is rape bad, is sexual harassment wrong. This

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14. This assumes, of course, other requisites are met, like state action but also provides a basis for interrogating them.

15. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986) (sexual harassment is sex discrimination under Title VII); *Bohen v. City of E. Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986) (sexual harassment is sex discrimination under 42 U.S.C. § 1983).

16. The subtext of this discussion is *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996) (sexual assault convictions of judge prosecuted under substantive due process liberty theory reversed on grounds that such a right is not clearly defined for purposes of 18 U.S.C. § 242). See Brief Amicus Curiae for Vivian Forsythe-Archie and the National Coalition Against Sexual Assault, *United States v. Lanier*, 116 S. Ct. 2522 (1996) (No. 95-1717) (granting cert.) (arguing that sexual assault by judge of litigants and employees violates well-defined sex equality rights), available in LEXIS, Genfed library, USPlus file.

is not a question of constitutional interpretation. The Constitution does not prohibit the bad and the wrong. It does prohibit the unequal. Even being *really* bad does not make rape and sexual harassment unequal; being based on sex does. Certainly, whether rape or sexual harassment is wrong is an important question, and denial that sexual harassment or rape is wrong or harmful is involved in any adjudication of it. I actually think that what is wrong with rape is inextricable from what is unequal about it. Meaning, if men were raped equally with women, which I am not recommending, I might even get interested in what is wrong with rape apart from its inequality. But so long as sexual assault violates women as women and keeps them inferior, it is an act of inequality, by interpretation.

Another confusion in Ronald Dworkin's work, and in Jack Balkin's also, concerns the matter of internal and external standards for validation of an interpretation. In their view, it seems that having external standards for interpretational validity is a form of infidelity. They tend to assume that you are faithful to the Constitution only if you can validate your interpretation of it by standards that are wholly internal to the document itself.

Gödel showed that internal standards for validation do not work in mathematics,<sup>17</sup> and we are unlikely, in a social discipline like law, to do better on this score. Besides, law is *supposed* to have its feet in the world. It is not supposed to be a closed system, a set of abstract postulates and empty axioms from which determinate conclusions are deduced. The best thing about the legal process, particularly the common law, is that, within principled limits, it is open to reality. Certainly it is muscle-bound with power, resistant to change, *status quo* and status driven, but it is still also fact based, where people live. To require that only internal standards validate interpretation methodologically excludes from the system its most democratic, least solipsistic, and most creative feature. Legal change comes from life, not from the brow of moral readers.

In the "moral reading," interpretation is also, in a sense, literary.<sup>18</sup> I used to think that it was my *criticism* of law professors that they acted as if law were a novel. The fact is, law isn't fiction, folks. With all respect to the real world clout of literature, heads roll in legal cases, and I don't think it's a virtue called "principle" to position yourself to transcend that. There is no virtue in adjudicating child custody cases to better develop character and plot—it makes a better story

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17. Kurt Gödel, *On Formally Undecidable Propositions of Principia Mathematica and Related Systems I*, in 1 Kurt Gödel: *Collected Works* 145, 145-95 (Solomon Feferman ed., 1986); see Ernest Nagel & James R. Newman, *Gödel's Proof* 26-36 (1958). Reading Nagel and Newman's chapter 3 on "Absolute Proofs of Consistency," paralleling "the Constitution" to "mathematics" and "constitutional interpretation" to "meta-mathematics," illustrates this point.

18. Ronald Dworkin, *Law's Empire* 228-38 (1986) [hereinafter Dworkin, *Law's Empire*] (law as chain novel).

about "the best interests of the child" to give little Samantha to Daddy even though he is sexually abusing her. Deciding that law is something this "we" makes up, some collective story by its high theorists, takes authorship from people's lives. Law does not need more of this.

So how is my view of interpretation principled? Because equality is not, *pace* "the moral reader," an abstraction, my equality principle is thick with reality, yet principled.<sup>19</sup> As it happens, the actual constitutional process of equality adjudication has been more open to reality than the "moral reading" appears to be. Courts are a great deal less afraid of substantivity than some who theorize equality out of court—and courts hold themselves faithful to a text. Some courts, who practice interpretation while preaching it, understand that legal principles animated by life can still be principled—indeed, their closeness to reality, precisely their thickness, may be much of their principle.

My view also faces the fact that social location and accountability—who you are and who you answer to—are central to interpretation. A legal interpreter has to be all people at all times in all places and social positions before his reading qualifies as "the moral reading." With all respect to Ronald Dworkin's immortal stature, this is impossible. Not only *is* no one this person, no one *can* do it, and trying denies reality and validates power.<sup>20</sup> Would our floating everyone, the no one in particular who is capable of the "moral reading," have known what was wrong with *Dred Scott* in 1857? This reader knows that sexual harassment is a practice of inequality today,<sup>21</sup> but would he have known it before the courts did? Forgive me if I doubt it, given that "the moral reader" today, along with law today, tells us that women can be bought and sold as sex called speech and constitutional equality is troubled not at all.<sup>22</sup> The "moral reading" of equality knows only what power has already been brought to concede. If this is constitutional fidelity, count me an adulterer.

Observe that, in the discussion of whether the Constitution deserves fidelity, equality is not just as an artifact or a convenient example. Equality keeps coming up not only because it is a dynamic doctrine with big interpretive shifts, or because the mainstream equality idea about sameness and difference also animates legal method's reasoning by analogy and distinction, making equality law a fair stand-in for law itself. The reason is that equality makes the Constitution legitimate, so its treatment is central to answering the question of why we should

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19. *Id.* at 381 (stating the "abstract principle" of equality as he understands it); *id.* at 296 ("Government, we say, has an abstract responsibility to treat each citizen's fate as equally important.").

20. On why the objective stance supports power, see Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 162-63, 231-34 (1989).

21. Dworkin, *Freedom's Law*, *supra* note 10, at 234.

22. *Id.* at 216-23, 233-39 (ballistic discussion of civil rights approach to pornography).

be loyal to it. Equality comes up in the fidelity discussion precisely because, to the degree the Constitution is not equal, it is not legitimate, hence not deserving of adherence, so it becomes unacceptable merely to interpret it.

I am saying, if there were no equality guarantee in the Constitution, or in the fundamental understandings with which it is interpreted, I would be trying to get one in. Would that make me faithless? I do know I could not work in the position of interpretation I do now, a luxury I owe to those who got equality in there in the first place, because there would be no equality to interpret. And I would have less faith in a Constitution that would deserve less.

The Constitution became more legitimate the day it guaranteed equal protection of the laws. It will become more legitimate the day it delivers on this promise. It became more legitimate the day it prohibited facial sex discrimination by interpretation. It will become more legitimate the day it recognizes that discrimination against gays and lesbians in all its forms is unequal. It will be more legitimate still the day it interprets its other amendments in light of a serious equality guarantee, so that just as no one's slavery can be someone else's property, no one's slavery can be someone else's speech.

Lawyers think we have to legitimate our legal arguments by asserting that all we ask of law is interpretation. My point is that, in a democracy, the Constitution also has to legitimate itself with people, and as to women it has quite a lot to answer for. In this sense, fidelity, in law as in life, is a relationship, a two-way street: Our fidelity to the Constitution is bound up with its fidelity to us.

The last concrete discussion that I was around for of what is interpretation and therefore a reading, thus faithful, versus what is imported or made up or brought in or effectively legislated, therefore lacking faith—in Jack Balkin's terms, what is "on the table" or "off-the-wall"<sup>23</sup>—was whether the Fourteenth Amendment could or would expand to provide sex equality, or whether we needed an Equal Rights Amendment ("E.R.A."), saying in so many words that women are constitutionally equal. The question remains whether a Constitution that does not facially guarantee women's equality deserves women's fidelity. The Constitution is less legitimate today than on the day E.R.A. becomes part of it. Women cannot get full equal rights, nor does the Constitution deserve their faith, to the degree it would if E.R.A. were there. Until that day, women's equality is less legitimate in constitutional interpretation, but the Constitution is also less legitimate from women's point of view. And where is democratic legitimacy grounded, in people or texts?

I think that an equality mandate requires refusing to reflect back to the law the limits its powerful interpreters have set on the lives of the

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23. Balkin, *supra* note 4, at 1704, 1729.



unequal, and seeing instead your own face in terms that reflect you whole—terms like citizen, like person. To interpret an equality guarantee faithfully is to embody this aspiration in law and society. If it is instrumentalism or consequentialism, as opposed to principled, to care about the outcome of this process, then call what I do something other than principled. Alternatively, show me someone who is indifferent to the human consequences of their principles, and I will show you someone who is in great need of what the word integrity implies.<sup>24</sup>

Fidelity in this view is not about the constitutional equivalent of “do you believe in God?” It begins with asking “who are your people?” It requires finding those to whom you are accountable. You can listen to everyone, be in dialogue with everyone, be fair-minded to everyone, but you cannot be equally accountable to everyone at once in an unequal world. This perspective reframes the fidelity question as a lawyer’s question I have long wanted to ask “the moral reader”: Who *do* you represent?

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24. Dworkin, *Law's Empire*, *supra* note 18, at 225-75 (law as integrity).