

# Parchment Matters: A Meditation on the Constitution as Text

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Americans use the term “the Constitution” in a rather peculiar fashion, although we have done so for so long that now we seldom recognize the peculiarity. Sometimes “the Constitution” refers to a document written in Philadelphia in the summer of 1787. At other times—as in the sentence “The Constitution requires that public officials prove actual malice’ to recover in actions for defamation”—the connection with the words of the 1787 (or in the case of the first amendment, 1789) text obviously is more remote; in such cases “the Constitution,” to some significant extent, refers to the decisions of the Supreme Court interpreting or applying the text, rather than to the historical document itself. A third usage of the expression is normative rather than descriptive: “the Constitution” is what the speaker regards as politically or ethically right.

Obviously these three usages are not identical. And yet the attempt somehow to equate them is an intrinsic part of the American constitutional enterprise. No matter how remote from the apparent meaning of the historical document a “constitutional” decision may seem to others, the judges who announce it invariably do so in the name of words penned in 1787, 1789, 1868, and so on. No matter how important the role of extratextual beliefs about justice, efficiency, or human nature in their thinking, those who argue for “constitutional” protection for freedom of contract or gay rights invariably do so by referring, however generally, to the historical document. The equation of the Constitution-as-historical-document, the Constitution-of-judicial-precedent, and the Constitution-as-political-morality has been a constant in American debate over the great issues of governmental structure and human rights.

My purpose in this essay is to reflect on the role of the text—that musty old parchment document—in our common discourse over the distribution and limits of power. The present seems an especially appropriate time for such a meditation for at least two reasons. The first is rather obvious: next year marks the two-hundredth anniversary of the creation of the original text. For the next couple of years we will be congratulating ourselves on having the world’s oldest written national constitution. Much will be said about the wisdom of the document’s framers

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and about their children's success in building a stable and free political order around the document's words. But before we begin the celebration, we well might spend some time in contemplation. Just what part does the document really play in our common life? Does it truly distribute and control political power, or is it simply the façade behind which the Supreme Court sits as a "bevy of Platonic Guardians,"<sup>1</sup> adjusting the political order in accordance with the Justices' own views of morality and expediency? When we have answered, at least tentatively, these questions about social reality, we then can ask the still more fundamental question about what role the text *ought* to play in our society. It is all too easy, because the practice is so familiar, to overlook the oddity of American constitutional discourse. Nowhere else in space or time, except where our example has been followed, have women and men claimed to resolve the most basic questions of political morality through exegesis of the aging work product of a committee adjourned two centuries ago.<sup>2</sup> There is nothing self-evident, to me at any rate, about such an odd tribal custom. That being the case, we ought to ask ourselves why we should structure our political debates around this particular historical document.

A second reason for exploring the role of the text at this time is that the supposed centrality of the text is under assault from more than one side. There are, on the one hand, those who implicitly or explicitly wish to recast American constitutional discourse into what they see as the freer and richer context of general moral debate. On the other hand, there are those who regard the text as the container for an encoded message, and the constitutionalist as a cryptographer equipped with the proper key, whether it be the "framers' intent" or the gospel of economic efficiency. Yet others, by far the largest group, do not so much undercut the text as they ignore it. For them the question of "the Constitution's" meaning is simply an inquiry into the possible implications of Supreme Court decisions.

Against all of these contemporary devaluations of the Constitution-as-historical-document, I will argue that the text has played, and should play, three vital roles—definitional, conserving, and revolutionary—in our political discussions.

### I. THE DEFINITIONAL ROLE OF THE TEXT

The most fundamental role the Constitution-as-historical-document plays in American constitutional discourse is that of definition. Unlike

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1. L. HAND, *THE BILL OF RIGHTS* 73 (1958).

2. The obvious counterexamples are those societies past and present that base social and political thought on a religious text. But the analogy between such societies and our own, while real, is severely limited. Despite all of the civil piety surrounding the Constitution, it is not, and expressly not, *see* U.S. CONST. amend. I (prohibiting "an establishment of religion"), a sacred text, with origins beyond the sphere of secular politics yet

the English constitutional tradition, in which “the Constitution” cannot be identified with any particular document or set of documents, American constitutionalism rests on the equation of “the Constitution” with a particular text written and augmented at discrete points in time by specific people. As a matter of empirical fact, what links discussions in the United States of national authority and local autonomy, the rationality of legislation and the fairness of police procedures, the treatment of women and minorities, and the power of government to shape or suppress opinion, is their common reference to this particular document. Take away that reference and this incredibly diverse culture of moral and political discussion lacks both a common denominator and a historical context. That aging document, and the history of our wrestling with it, gives shape and coherence to the multitude of arguments over power and its exercise that make up a fundamental level of our common life.

The definition of basic political discussion as debate over the meaning of the Constitution-as-historical-document has influenced that discussion in subtle and significant ways. One is the text’s provision of a common set of terms and expressions, almost a vocabulary and grammar, for political debate. When we talk about the desirable extent of centralized political authority, we do so by arguing about “the scope of the commerce clause” or “the limits of Congress’ power to enforce the fourteenth amendment.” Discussions about the value of local autonomy revolve around “the reserved powers of the states.” The fairness of governmental procedures, which a modern British administrative lawyer would conceptualize as a question of “natural justice,” we debate as an issue of fifth or fourteenth amendment due process. Examples are legion, and the point is in a way obvious, but it is not therefore trivial. The way in which we formulate the questions, and the “grammatical” constraints on the answers possible, both direct and limit our thinking and our action. The emphatic language of the first amendment (“Congress shall make no law . . .”) and even its somewhat fortuitous place at the beginning of the Bill of Rights have played no insignificant part in the intense concern for expressive liberty that characterizes modern American law. The text has encouraged us to think carefully and care deeply about freedom of speech; by the same token, because individuals and societies inevitably construct hierarchies of social values, the text has discouraged us from equal solicitude for freedom from poverty.

To take another example, the due process clauses (and the other procedural guarantees of the Bill of Rights that selective incorporation has shown to be part of due process) have encouraged us to impose stringent safeguards against the abuse of the criminal justice system in a way that vaguer and more general talk about fairness, justice, and so on, might

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providing a comprehensive blueprint for society. Our Constitution is the effort of the secular, political world to agree on a framework for a common life.

not have done. On the negative side, it is the very wording of the clauses that makes plausible such oddities as *Paul v. Davis*, in which governmental officials, with no apparent concern for fairness at all, do deliberate harm to someone that the courts refuse to redress.<sup>3</sup> More generally, our perception of constitutionalism as a matter of restraining the government rather than of requiring it to act affirmatively has been fostered by the almost exclusive concern of the text, on its surface, with prohibiting undesirable governmental action.

In their fine book on the place of metaphor in thought, George Lakoff and Mark Johnson point out that the choice of a metaphor or set of metaphors to describe something both illuminates and occludes:

The very systematicity that allows us to comprehend one aspect of a concept in terms of another (e.g., comprehending an aspect of arguing in terms of battle) will necessarily hide other aspects of the concept. In allowing us to focus on one aspect of a concept (e.g., the battling aspects of arguing), a metaphorical concept can keep us from focusing on other aspects of the concept that are inconsistent with that metaphor. For example, in the midst of a heated argument, when we are intent on attacking our opponent's position and defending our own, we may lose sight of the cooperative aspects of arguing. Someone who is arguing with you can be viewed as giving you his time, a valuable commodity, in an effort at mutual understanding. But when we are preoccupied with the battle aspects, we often lose sight of the cooperative aspects.<sup>4</sup>

In a similar fashion, by casting political and ethical questions into terms derived from the Constitution-as-historical-document we have rendered some problems easier to see and solve, others more opaque or less obvious.

Beyond providing us with the opportunities and limitations of a specific political idiom, the equation of "Constitution" and text has played a central role in the failure of any particular theory of political morality to achieve canonical status in American political life. As Joseph Story recognized a long time ago, the founders did not bequeath to us a political orthodoxy, but rather the outline of a way to permit people of very different political outlooks to coexist.<sup>5</sup> Despite our continual (and, indeed, unavoidable) efforts over two centuries to make the Constitution speak a coherent philosophy of governance and society—Locke's, Jefferson's, Herbert Spencer's, Rawls', whoever's—we have not and cannot succeed. No political theory can be articulated completely or consistently in a political idiom derived from the atheoretical historical document that defines how one makes political argument in this society. The devotees of particular

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3. See 424 U.S. 693, 698-99, 711-14 (1976).

4. G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* 10 (1980).

5. See 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 422-23, 431-32, 451-53 (1833).

theories, and the seekers after logical consistency, will properly regard the text's influence in this regard as baneful. The rest of us, on the other hand, may recognize in the "parchment barriers"<sup>6</sup> of the text one of our society's most enduring shelters for pluralism.

## II. THE CONSERVING ROLE OF THE TEXT

The equation of "the Constitution" with a particular document written in 1787 in Philadelphia and augmented on several occasions since that time not only defines the terms in which we think and talk about power in the United States; the equation also binds us, inevitably, to the particular history within which that document was conceived, written, ratified, interpreted, and amended. This unbreakable link that the text forges between present and past is the kernel of truth in the delusive pursuit of the "original intent." Intentionalism itself, to be sure, is fundamentally antitextual, for it treats the document as a mere occasion for a partial and always distorted re-creation of what certain individuals wanted the text to accomplish. Once again, Justice Story long ago enunciated what should have been the final word on such an endeavor: "Nothing but the text was adopted by the people."<sup>7</sup> The words of particular eighteenth-century individuals, lifted out of context and applied in an argument over twentieth-century issues, are not and cannot be made to be *the* original meaning of the text. Even so, those words, along with the rest of the complex and unruly history surrounding the text, do bear on its meaning for us today. We cannot escape the historical specificity of this document in the way one might abstract a philosophical account of justice from its cultural origins and then study it "in itself." Our Constitution-as-historical-document, for example, enunciates no grand and general theory of equality, not even in the aphoristic form found in the Declaration of Independence; what it gives us instead are discrete legal rules forged out of the particular historical tragedies of slavery, civil war, and sexual oppression. When it is true to the text, American constitutional thinking about the problems of equality in a racially diverse nation does not begin with a "self-evident truth" about all people everywhere; instead, it starts with words ("Neither slavery nor involuntary servitude . . . shall exist,"<sup>8</sup> "nor shall any State . . . deny to any person . . . the equal protection of the laws,"<sup>9</sup> "on account of race, color, or previous condition of servitude"<sup>10</sup>) that, first and foremost, memorialize the nation's recognition of racism as its greatest societal sickness. It is, at least in part, disregard for the historical specificity of the text that leads to the sad and ironic specter of federal judges attack-

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6. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in *THE MIND OF THE FOUNDER* 156 (M. Meyers rev. ed. 1981).

7. J. STORY, *supra* note 5, § 406, at 389.

8. U.S. CONST. amend. XIII, § 1.

9. *Id.* amend. XIV, § 1.

10. *Id.* amend. XV, § 1.

ing efforts to alleviate and eliminate racism in the name of equal protection.<sup>11</sup>

Of course, the particularity of the Constitution-as-historical-document carries with it the reality of imperfection.<sup>12</sup> Our predecessors' past experiences did not encompass all political and moral issues that we may face, and they themselves were not flawless. As a consequence, the text they wrote embodies their limited vision and moral obtuseness. Our Constitution, precisely because it is a historical document, does not always embody justice, liberty, or equality. The 1787 text's safeguards for human slavery<sup>13</sup> are only the most blatant examples of this gap between the real and the ideal. Another, of great current significance, is the text's failure explicitly to acknowledge society's affirmative obligations to the poor, the elderly, and the disadvantaged.

The text, fortunately, recognizes the possibility of its own imperfection, and provides us with a way to rectify any defects.<sup>14</sup> But the amending process is more than a method to deal with specific problems. It also provides us with the means to celebrate milestones in our history as a moral community and to formalize them by placing into the text a record of our achievements. And once an amendment promising freedom to the slave or dignity to the oppressed is ratified, it stays there, even after our moral fervor is gone and our idealism has died. The words are there to haunt us, to remind us of the clarity of vision we once enjoyed and have now renounced for more comfortable, and less laudable, pursuits. The Constitution-as-historical-document conserves the insights and achievements of the past as well as its shortcomings. It aids in the recognition of failure as well as the achievement of progress. For this reason, creative judicial explication of the existing text is no substitute for amending the text when a genuine moral issue of the highest importance is at stake. No Supreme Court opinion recognizing sex as a "suspect class,"

11. *See, e.g.,* Fullilove v. Klutznick, 448 U.S. 448, 522-28 (1980) (Stewart, J., dissenting).

12. While I strongly disagree with Professor Monaghan's intentionalist theory of constitutional interpretation, I think his argument about the Constitution's necessary imperfection is profoundly correct. *See generally* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

13. *See* U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to the Year one thousand eight hundred and eight . . ."); *id.* art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State . . . escaping into another, shall . . . be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."); *id.* art. V ("[N]o Amendment [to the Constitution] which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first . . . Clause[] in the Ninth Section of the first Article . . ."); *see also id.* art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . by adding to the whole Number of free Persons . . . three fifths of all other Persons.").

14. *See id.* art. V ("The Congress . . . shall propose Amendments to this Constitution . . . which . . . shall be valid . . . as Part of this Constitution, when ratified . . .").

for example, ought to satisfy those who regard the elimination of sexual discrimination as a primary moral goal for contemporary Americans, for Supreme Court decisions are not “the Constitution.” Only the musty old parchment, and the changes we solemnly have made in it, can claim that dignity.<sup>15</sup>

### III. THE REVOLUTIONARY ROLE OF THE TEXT

In thinking about the revolutionary role of the Constitution-as-historical-document, we might begin with the last observation made in the previous section, that only the text can claim the dignity of *being* “the Constitution.” Extratextual pronouncements, whether written by scholars or Presidents, issued by congressional committees, or even declared by the United States Supreme Court, are at most *about* “the Constitution.”

A vitally important consequence follows. Just as in a scriptural religion, the most elaborate and established theological system can be challenged by the call *ad fontes* (“back to the sources”); so in American constitutional law it is always possible to go back to the text, to challenge what currently is in the name of what once was written. Neither decades of popular acquiescence nor an unbroken string of Supreme Court decisions can insulate a governmental practice from such a challenge.

My claim that the text has the capacity to incite radical and even revolutionary attacks on the legal status quo will not be accepted by some. Those who are impressed above all by the opaqueness and malleability of the text will maintain that its emptiness, not its concreteness, creates the possibility of change. According to the disbelievers in language, the words of the equal protection clause, for example, have permitted judges to effect modern notions of equality precisely because the words are essentially devoid of meaning. I disagree. During the long, sad decades of Jim Crow, the text bore mute witness to the nation’s prior recognition of the evil of racism. And in the end, the residual, commonsense meaning of a phrase like “the equal protection of the laws,” read against the backdrop of a civil war fought in part to end a racial caste system, empowered judges, lawmakers, and ordinary citizens to question and then to overthrow that caste system.

The earliest history of dispute over the first amendment provides another example of the text’s capacity to disturb accepted truth. In 1798 the predominant view in all three branches of the federal government was that the United States was threatened by invasion from without and insurrection from within by the soldiers and sympathizers of Revolutionary

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15. *Cf.* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land”). The *Cooper* Justices’ firm insistence that state and local officials enforce the Court’s mandate was of course completely justified, but the opinion’s apparent equation of judicial precedent with the Constitution is deeply problematic.

France. Genuinely alarmed by this perceived threat to liberty, the Congress passed, and the President signed, a statute that allowed federal criminal prosecution for statements defaming the President, Congress, or governmental system of the Republic.<sup>16</sup> The act's supporters reconciled it with the first amendment's protection of "freedom of speech" and "of the press" by arguing that all the words "freedom of the press" traditionally had meant in England was the absence of prior restraint by a censor. Since the new statute punished seditious libel only after the fact, by definition it did not abridge press freedom. Furthermore, its supporters added, the act incorporated the most recent and advanced American thinking on these freedoms by permitting the defendant to raise the truth of her remarks as a defense. This was quite true, as far as it went: the 1798 Sedition Act was remarkably libertarian, by the standards of 1789, when the first amendment was written. But other Americans tested the Act's legitimacy not against legal tradition but against what the text itself seemed to say. How could the Sedition Act be consistent, these doubters asked, with a constitutional command that Congress "make *no* law . . . *abridging* the freedom of speech, or of the press?" Isn't a person less free to speak, for all practical purposes, if she can be fined or imprisoned if her speech insults the President or suggests that Congress is acting for selfish rather than patriotic goals? It was the first amendment's text, the words on the page, on which the opponents of the Sedition Act constructed a new and more comprehensive vision of expressive freedom that first challenged, and then overthrew, the older views of 1789 and of the 1798 Congress.

I am not claiming, of course, that the first-amendment-as-document broadened our freedom to speak and write of its own force. Nor am I contending that the words written in 1868 about "equal protection" have been the sole, or even the most important, intellectual and moral foundation of the modern movements for racial and sexual equality. What I do believe, however, is that the objectivity of the text, the undeniable existence in the document of these and other words, has played an indispensable role in our constitutional history. Far from having always been a bulwark of the status quo, the Constitution-as-historical-document has played a radical, indeed a revolutionary part in the unfolding of American society. At different moments the words of article one, of the Bill of Rights, and of the fourteenth amendment have served to bring present arrangements into question, to cast doubt on current practice, to deny legitimacy to the preferences of a majority. Without the Constitution-as-historical-document, our movement toward greater freedom and justice necessarily would have taken different paths, and I believe our current achievements, imperfect as they are, would have been far more limited. By defining a

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16. See Act of July 14, 1798, ch. 74, §§ 2-4, 1 Stat. 596, 596-97 (expired Mar. 3, 1801).



common political idiom for a morally pluralistic society, by conserving the achievements of the past, and above all, by its power to provoke us to new insights, the Constitution-as-historical-document has justified the central place we give it in our political discourse.

It might be replied that the text may have played this revolutionary role from time to time in our history, but that such a capacity is hardly unique to this particular historical document. The Declaration of Independence, the Gettysburg Address, Martin Luther King's speeches—one can make quite a long list of other texts that have shown themselves capable of stirring women and men to renewed moral and political effort. This is true, and American constitutional discourse in the narrowest legal sense always has benefited when it has stopped to hear what these other voices have to say. Nevertheless, the Constitution-as-historical-document stands apart, for it—and only it—is *the* Constitution, the one authentic expression of the will and the vision of “We the People.” And in that capacity, the Constitution's text is uniquely powerful. Parchment matters.

