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COMMENT

THE AUGUSTAN CONSTITUTION AND OUR NATURAL RIGHTS TRADITION: IS THERE A CONFLICT?

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INTRODUCTION

Professor Hoffheimer has provided us with a striking picture of two important strands of our constitutional heritage. The first, which he labels "Augustan constitutionalism," descended from classical political thought and the English constitution. Its focus is on the governmental powers that it legitimates, and its themes relate to the forms of government; in the American context, this means that its focus is on separation of powers, checks and balances, and (in general) the problem of organizing and dividing government authority. The second, which he calls the "natural rights tradition," roots government's legitimacy—and indeed its origin and purpose—in the protection of individual rights that citizens possess by nature and bring to the social compact.

In analyzing the significance of these separable strands of constitutional thought for understanding the historic Constitution, as well as modern divisions in constitutional theory, Professor Hoffheimer's paper (and its more complete counterpart which includes careful documentation) ranges across a number of themes and issues. It touches on the grounding of the authority of constitutional text, on questions of continuity and change in our constitutional text and practice, and

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on the vexing questions presented by the task of interpreting authoritative constitutional text. It also includes fascinating and subtle analyses of some noteworthy historical (as well as literary) events, including the implicit dialogue on the reasons (if any) for celebrating the Constitution's bicentennial which has been engaged by (among others) two modern High Priests of our civil religion, Justices Marshall and Scalia. There is far too much here for me adequately to discuss, so I offer some (mainly contrasting) reactions to the connections between the Augustan and natural rights traditions and commend to you the entire article when it appears in print.[1]

I. AUGUSTAN *VERSUS* NATURAL RIGHTS CONSTITUTION?

The general outline of these separable features of our constitutional order as set forth by Hoffheimer is fairly conventional and probably informs such mundane matters as the division of our law school curriculum into separate courses on government powers and individual rights. It is his further suggestion that these distinct aspects of our constitutional heritage reflect potentially competing universes of discourse, and indeed suggest differing theories of textual authority, which moves beyond conventional understandings. While these further points of analysis comport with what is becoming a fairly standard accounting of our constitutional tradition by modern advocates of a natural rights-based constitutionalism, many would disagree. I am one of them.

The thesis that the combining of the Augustan and natural rights constitutional visions presents us with a choice tracks with a similar claim offered in the historical work on the founding period by Professor Suzanna Sherry, among others.[2] Sherry contrasts an emergent constitutional tradition that increasingly perceived the Constitution as a positive enactment of the people with an older tradition that associated constitutionalism with limiting norms (whether found in reason or custom).[3] While these limiting norms might be "declared" in a constitutional text, they were not "enacted," and thus their explication

1. The text here reflects that this commentary was initially presented at a symposium. I continue to commend Hoffheimer's careful work to readers of this symposium issue. *See* Michael Hoffheimer, *Copying Constitutional Text: Natural Law, Constitutionalism, Authority*, 4 S. CAL. INTERDISC. L.J. 653 (1995).

2. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

3. *Id.* at 1132-33, 1146, 1157.

could hardly be limited to the kind of text copying exercise that Hoffheimer criticizes as an interpretive method.[4]

Sherry contends that, with the rise of legal positivism in the nineteenth century, legal thinkers substituted the newer, positivist vision for the older, natural rights-based tradition.[5] But at the founding, Sherry tells us, the notion of "an invented Constitution," as she calls the newer vision, was understood as merely supplementing the idea of inherent limits on government in favor of the indefeasible natural rights of individuals.[6] This is what accounts for what Sherry and Thomas Grey have called "the unwritten constitution," which is the portion that hearkens back to a view of the Constitution as more than a super-statute enacted by the sovereign people.[7] And, of course, for some modern thinkers it is this feature of the founding period that provides a fairly sure foundation for "noninterpretivist" constitutional decision-making in which the Supreme Court finds rights beyond those located within the four corners of the document.

However their accounts may differ in particular points of emphasis, Sherry and Hoffheimer seem to share the premise that these distinct projects, structuring the government and dividing its powers and limiting governmental power in favor of natural rights, present distinct groundings for the authority of constitutional text. Accordingly, as Hoffheimer tells us, "each vision claims a privileged position in constitutional interpretation."[8] Sherry and Hoffheimer each make clear as well that their allegiance falls to the natural rights tradition, and not to the Augustan model that leads, we are told, to a narrow positivist account of the Constitution in which our highest value seems to be establishing continuity with a dead past.

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4. Sherry's distinction between the unwritten constitution and an emergent conception of an invented constitution seems to track generally with Hoffheimer's distinction between natural rights and Augustan models of constitutionalism. The main difference I perceive is that Sherry seems to offer a specific historical claim that the unwritten rights tradition precedes the more positivist model and that the Constitution's framers did not intend to supplant this older tradition. Hoffheimer's treatment does not appear to rest significantly on such a historical claim, but seems to be grounded more in our nation's developing constitutional tradition which has come to emphasize human rights as the foundation of our constitutional order.

5. Sherry, *supra* note 2, at 1176 (contending that natural rights model of constitutionalism prevailed until approximately 1820 and was displaced by positivist assumptions about law and constitutions).

6. *Id.* at 1146.

7. *See id.*; Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

8. Hoffheimer, *supra* note 1, at 660.

According to Hoffheimer, the division between the Augustan Constitution and the natural rights tradition characterizes a good deal of modern constitutional debate. Modern Augustans—personified by Justice Scalia—are said to minimize the Bill of Rights, extol the structural features of the Constitution, and embrace an originalist model of interpretation that converts the implementation of the Constitution's values into the lifeless task of generating a pale copy of a text which must by its nature—understood in light of the natural rights tradition—serve the needs of the living.

While I agree that there are uses for analyzing both the Augustan features of our Constitution as well as the tradition symbolized by the Bill of Rights, I reject the premise that there is any essential conflict between the two. They are in my judgment complementary, not contradictory, traditions. The tension is created by those who would give priority to some particular vision of only one of these traditions to the detriment of both. What we must avoid are the extremes of modern constitutional theory that would undermine either of these traditions—an essentially lawless quest for securing perceived natural rights via judicial creativity in the name of the Constitution *as well as* a begrudging strict constructionism that defers more to government than it does to a Constitution designed to secure the rights to which people are entitled by their nature.[9]

James Madison, who might justifiably be credited as the father of both the largely Augustan 1787 Constitution and the natural rights-based Bill of Rights, would be puzzled at the suggestion that these two strands of his own constitutional heritage rested on competing grounds of authority and would eventually require a choice as to which would hold the position of priority. For Madison and others the debate over the terms of the Augustan Constitution was in significant measure related to the project of securing the natural rights. For Madison, as well as for others at the Philadelphia Convention, the motivation for a stronger union rested in large part on the conviction that the various states were performing miserably at the task of protecting the rights to which the people were entitled.[10]

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9. As to the evils of the former extreme position, see my own contribution to this symposium. Thomas B. McAffee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalism*, 4 S. CAL. INTERDISC. L.J. 501 (1995). Comments on the latter tendency are found later in this article. *See infra* notes 24-25 and accompanying text.

10. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 614, 616 (1971) (referring

Accordingly, Madison's own rather creative contributions to the nation's deliberations about the Augustan Constitution—especially his defense of the extended republic and his unsuccessful advocacy of a national veto on state laws—were mainly targeted at supplying institutional means for more effectively securing individual rights.[11] Madison's focus was on institutional design precisely because of his skepticism about the value of a Bill of Rights; this skepticism reflected his deeply-held doubts whether substantive declarations on paper could be effective in securing the natural rights in practice.[12]

Madison was hardly alone in associating structural concerns with the task of securing natural rights. The state constitutions' declarations of rights guaranteed separation of powers, popular authority to reform and alter government, and various collective and structural rights.[13] These provisions reflected in part a perceived link between the idea of limited government (to the end of securing liberty and natural rights) and the problems of governmental structure and popular control. Similarly, during the debate over ratification of the federal Constitution, the Constitution's defenders argued against the need for a bill of rights on the ground that the Constitution itself—and especially Article I's delegation of specific powers—was indeed a veritable bill of rights.[14]

Now if Justice Scalia is to be criticized for underscoring that the Bill of Rights itself was an afterthought, what about Madison, Wilson, Sherman, Iredell, and company—after all, they are the ones for whom

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to the unjust laws enacted by "overbearing majorities in every State" that contributed to the need for a new federal Constitution).

11. For useful commentary, see Michael P. Zuckert, *A System Without Precedent: Federalism in the American Constitution*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 132, 145-49 (Leonard Levy & Dennis J. Mahoney eds., 1987) [hereinafter THE FRAMING].

12. As Zuckert points out, Madison perceived that republican government by its nature posed a threat to natural rights inasmuch as majority-based factions with interests opposed to basic rights would likely be dominant. *Id.* at 146-47. *Accord* Robert A. Rutland, *The Framing and Ratifying of the First Ten Amendments*, *in* THE FRAMING, *supra* note 11, at 305, 308.

13. *See, e.g.*, Robert C. Palmer, *Liberties as Constitutional Provisions, 1776-1791*, *in* CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55, 62-66 (1987).

14. *See* Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267, 285-87, 291 & n.60 (1992) [hereinafter McAffee, *Bill of Rights*]; Walter Berns, *The Constitution as Bill of Rights*, *in* HOW DOES THE CONSTITUTION SECURE RIGHTS? 50 (Robert A. Goldwin & William A. Schambra eds., 1985). On the specific point about Article I's enumerated powers scheme, see 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 151, 153 (J. Elliot ed., 2d ed. 1866) (Dr. Charles Jarvis, Massachusetts Ratifying Convention, Feb. 4, 1788) ("the first article proposed . . . is an explicit reservation of every right and privilege which is nearest and most agreeable to the people").

the Bill of Rights *was* an afterthought. Each of these Federalist defenders of the proposed Constitution professed a deep commitment to the doctrine of natural rights. Were each of them, despite these professions, really just a closet Augustan, committed to reorienting the nation's priorities toward nation-building and commercial development, and perhaps continuity with classical forms of government, to the diminishment of its natural rights heritage? I should hope that this sort of Beardian thesis would be a hard sale today.

The very features of the Constitution that Justice Scalia emphasizes—separation of powers, judicial independence, free elections—these are what the founders themselves believed were necessary prerequisites to a free state which protected human rights. It is thus important to place Justice Scalia's remarks on the Bill of Rights in context—in particular, the context of the almost inevitable frustration of one who has taught constitutional law with the tendency to celebrate certain important "ends" of our constitutionalism (those embodied in our Bill of Rights) to the virtual ignoring of the "means" by which the ends are realized (Augustan features such as the separation of powers, the provision for judicial independence, and judicial review, none of which are provided for in the Bill of Rights itself). Justice Scalia never makes the claim that the Bill of Rights was superfluous, as some modern commentators have done,[15] nor even that it was unimportant in contributing to our system of freedom; he merely asks us to recognize that bills of rights of themselves do not secure freedom.

As a teacher of constitutional law, I think I understand Justice Scalia's frustration and his message. Sometimes our task is to reveal what is easily hidden. Each year my students look terribly bored when I take some time in my individual rights course to underscore the contributions that constitutional structure makes to securing our rights. Contrast that with my experience several years ago, when I lectured a delegation of judges, lawyers, and law professors from Bulgaria on "The American System of Individual Rights." My colleague from Poland, Maria Frankowska (a former Solidarity member and Professor of International Law at my law school), encouraged me to

15. *See, e.g.*, Berns, *supra* note 14, at 52 (asserting that "history has vindicated the Federalists, who insisted that, so far as the federal government was the object of concern, a bill of rights was unnecessary").

begin my presentation with the role of separation of powers and judicial independence in securing our rights; and then to proceed to decisions explicating our individual rights guarantees. Naturally I happily agreed, as this was already a theme I prefer to develop in teaching about our system of rights. I was pleasantly surprised that these Bulgarians, far more than my law students who take the role of constitutional structure as a tedious given, were extremely interested in the entirety of the American constitutional tradition, the idea of an independent judiciary (including, but not limited to, the doctrine of judicial review), and the depth of our commitment to achieving the rule of law (understood by contrast to systems, such as their own had been, in which the legal system was nothing more than another arm for implementing regime policy).

They were, by contrast and to my surprise (until I thought about it), not terribly interested in the particular decisions of our courts on issues of church and state, free speech, or abortion (to name a few examples). Their concern was, most of all, not with any idea of political continuity with a dead past, but with the living processes by which we have made good on the promises contained in our constitutional text.

Notice also that Madison himself was not converted to the idea of including a bill of rights in the federal Constitution because he changed his mind about the importance of natural rights; to the extent that his change of mind went to the merits of the project (and we know that politics played an important role of its own), it appears that it may have been generated by Jefferson's rather Augustan suggestion to him in correspondence that a bill of rights could provide a legal ground for judges to control legislative excess that ran afoul of its provisions.[16] Even at that, it appears that Madison grossly underestimated the role that the judiciary would come to play in securing the rights of the people.

Madison would be equally surprised, I believe, at the suggestion that the Augustan Constitution points toward a different grounding of authority for constitutional text than the natural rights tradition. Madison held to the view that the ground of constitutional authority in America was the inherent power of the sovereign people. With

16. For discussion, see LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 164-65, 167 (1988); Thomas B. McAffee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 U. CIN. L. REV. 107, 168-69 (1992).

Wilson, Madison believed that the people were greater than their constitutions.[17] Now that may strike some modern minds as a betrayal of the natural rights tradition—perhaps even an Augustan-based heresy—but we should stop to realize that Madison was well situated to combine his commitment to popular sovereignty (which was axiomatic in his day), with his passion for structuring a system of government calculated to secure the human rights which most Americans agreed were among the ends for which people create government.

II. NATURAL RIGHTS AND CONSTITUTIONAL INTERPRETATION

Consistent with his popular sovereignty roots, Madison shared another vice with Justice Scalia as well—a deep commitment to an originalist canon of constitutional interpretation. Perhaps to the dismay of some modern thinkers, Madison could sound at least as Augustan as Justice Scalia, as when he reminded us that "there can be no security for consistent and stable," let alone a "faithful exercise of [the Constitution's] powers," if its language is not construed according to its original meaning.[18] Professor Hoffheimer quotes Joseph Story as to the frequent "obscurity" of constitutional text, with the implication that he believed it promoted "freedom of interpretation."[19] Perhaps I read a different Joseph Story. But the one I read enjoined us to interpret by reference to "the words, the context, the subject-matter, the effects and consequences, or the reason and spirit of the law."[20] The last of these considerations Story equated with "the causes, which led to [the provision's] enactment," and he contended that these were often "the best exponents of the words."[21] I read this as language of commitment to seeking the original meaning of the text, not as

17. For evidence that the founders in general were deeply committed to the doctrine of popular sovereignty, see McAffee, *Bill of Rights*, *supra* note 14, at 274-76, 279. For Madison's assertion of the same principle, see THE FEDERALIST No. 40, at 258, 265 (Jacob E. Cooke ed., 1961) (Constitution was framed to be submitted to "the people themselves" who are the "supreme authority").

18. Letter from James Madison to Henry Lee (June 25, 1824), *quoted in*, Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARIES 77, 105 n.101 (1988).

19. Hoffheimer, *supra* note 1, at 688-89.

20. JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (1833). Story also asserted that the first rule of construction was to construe "according to the sense of the terms, and the intentions of the parties." *Id.*

21. *Id.* at 384. For a similar conclusion as to Story's views on constitutional interpretation, see Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 & n.27 (1988).

favoring the "originality of interpretation" praised by Professor Hoffheimer.

If we looked further than the debate over originalism, taking a cue from an important recent work on constitutional theory by Professor Michael Perry, Professor Hoffheimer and I might be able to find more common ground than is suggested by my comments to this point.[22] Perry draws an important distinction between originalism as a theory of interpretation and the philosophy of interpretive minimalism.[23] Minimalists are constitutional interpreters who, based on skepticism about the judiciary, a theory of deference to democratic decision-makers, or deep moral skepticism, resolve any doubts about the scope of a constitutional directive, or its specification and application in concrete cases, in favor of minimizing the judicial role.

While the issues raised are complex ones, it is my view that constitutional minimalists sometimes cross the line from (even minimal) fidelity to text and context to undercutting the constitutional purpose to secure important natural rights. Its proponents often confess antipathy for the very idea of constitutional limitations on the authority of the people to rule in the present.[24] What follows is too often a strict constructionism that takes the form of either a narrow intentionalism or an arid textualism, devoid of an effort to understand the general meaning of constitutional language read in its original context.[25]

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22. MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS (1994).

23. *Id.* at 54-82.

24. *See, e.g.*, Lino A. Graglia, *The Constitution, Community, and Liberty*, 8 HARV. J.L. & PUB. POL'Y 291, 294 (1985) (contending that we are fortunate that the Constitution contains so few rights and contending that we would be better off with fewer rights than the ones specified); Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 58-60 (1981) (suggesting that the right to impose constitutional constraints on subsequent generations has a dubious foundation as a matter of constitutional theory; concluding that this is a good reason to oppose interpretive strategies that are not rooted in constitutional text and history).

25. For useful commentary on these tendencies among modern conservatives, see Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 768-69 (1987); Thomas B. McAffee, *Berger v. the Supreme Court—the Implications of His Exceptions-Clause Odyssey*, 9 U. DAYTON L. REV. 219, 246-49, 252-54, 269-70 & n.315 (1984) (focusing on these tendencies in the scholarly works of Raoul Berger). These modes of interpretive strategy often reflect the bias of many modern legal positivists for certainty and determinacy and the fear that acknowledging the relative indeterminacy of some constitutional directives would be to effectively grant undue discretionary authority to unelected judges. The problem is that determinacy is only one goal of a legal order, and there are good reasons why constitutional drafters would occasionally use indeterminacy as a hedge against an indefinite and expanding future. *See* PERRY, *supra* note 22, at 76-78; Thomas B. McAffee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 289-90 (1986). Despite their insistence that they are originalists, interpreters who insist upon determinacy even where the evidence belies the conclusion that

These sorts of approaches to interpretation may bear comparison to the mis-uses of Victor Hugo's novel to which Hoffheimer so poignantly directs our attention.

But notice something else as well. What is unfaithful about such interpretive efforts is precisely the unwillingness of the interpreter to go all the way with the text, read in a relevant context; like the Southerner editing Hugo's work, such readings lack integrity because the interpreters were more animated by a hidden political agenda than by a commitment to implementing the decision (or fairly representing the artistic expression) embodied in the text. Hoffheimer described the combination of "plagiaristic copying" and "politically motivated censorship" as rendering the edited Hugo a "deeply flawed text."[26] If this is "copying" the text, it is only in the most barren, mechanical sense; I agree with Perry that true originalism does not entail such an approach.

Moreover, if our real goal is the simple pursuit of natural rights, why quarrel about interpretation at all? Indeed, if that is the goal, why should we be interested in constitutional text at all?[27] Even considered purely as a text, a constitutional provision may well be deficient for pursuing the goal of implementing natural rights, at least by our best lights. And if constitutional interpretation is fundamentally an act of creation, characterized by at most a fidelity to the bare text itself, the quarrel with constitutional minimalists is purely political—natural rights advocates favor the robust pursuit of the natural rights tradition while they favor a more robust democracy. Neither group may care one whit what decision was intended to be embodied in any text, but fidelity is hardly the issue. We can say that the minimalists have "misinterpreted" the Constitution, but all we mean is that we believe their creativity served the wrong moral and political ends. For my money, I feel rather more confident about insisting that, whatever

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the text was intended to be determinate trade fidelity to the originalist canon for a preferred jurisprudence and a preferred theory of the judicial role.

26. Hoffheimer, *supra* note 1, at 669.

27. For more complete analysis suggesting that fidelity to statutory or constitutional texts without loyalty to the decision intended to be embodied in those texts is an incoherent approach to interpretation of law, see Thomas B. McAffee, *Reed Dickerson's Originalism—What It Contributes to Contemporary Constitutional Debate*, 16 S. ILL. U. L.J. 617, 629-30 (1992); Richard S. Kay, *The Bork Nomination and the Definition of "The Constitution,"* 84 NW. U. L. REV. 1190, 1193 (1990); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1528 (1989); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989) (referring to statutory interpretation).

the value of their politics, the minimalists ought to feel constrained by the fairest reading of the Constitution until it is amended. That, after all, was the purpose for having a written Constitution in the first place.