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RESPONDING TO THE CELEBRATION: THE INSCRUTABLE CONSTITUTION

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Incongruities attend all meaningful discussion of the Constitution. The articles in this Symposium are rich with incongruities, as they offer important points about this document that we so fervently debate and in which we invest such hope. The Constitution carries an enormous burden, for in it different people see different and conflicting visions of a better future. So much of our national hope is bound up in the Constitution that incongruities must result, for we are a diverse people driven by diverse motives to sometimes diverse goals.

In these pages, Gordon Baldwin describes a Constitution laden with "ambiguities which invite interpretation"¹ and, at least in separation of powers cases, which receive interpretations that are "delphic, ambiguous, and seldom supply predictable doctrine."² In these same pages, Edwin Meese describes this same Constitution as a "document of fixed meaning"³ containing "explicit rules."⁴ To Betty Southard Murphy, the Constitution most centrally involves "the protection of individual economic rights and the encouragement of materialism,"⁵ while Christine Wiseman sees a "shift away from the focus on individual property."⁶ Perhaps the incongruity reaches its peak, however, in Jonathan Van Patten's effort to show that Attorney General Meese is less an

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1. Baldwin, *Celebrating the Constitution: The Virtue of Its Vices and Vice Versa*, 70 MARQ. L. REV. 423, 430 (1987).

2. *Id.* at 429.

3. Meese, *Our Constitution's Design: The Implications for Its Interpretation*, 70 MARQ. L. REV. 381, 382 (1987).

4. *Id.* at 383.

5. Murphy, *Economic Liberty: An Exploration of the Link Between the Constitution of the United States, Materialism and Basic Freedom*, 70 MARQ. L. REV. 901, 902 (1987).

6. Wiseman, *A Critical Response to the Interpretivist Constitutional Theories of Meese and Thurmond*, 70 MARQ. L. REV. 475, 481 (1987).

interpretivist than he claims, and that Justice William Brennan is more an interpretivist than he claims.⁷

The incongruities implicit in the Constitution are inescapable. With respect to interpretivism and the role of the Framers' intent, certain facts preclude our wholesale adoption or rejection of such notions. As Professor Van Patten points out,⁸ some provisions of the Constitution were debated at length and may have been adopted with clear intent as to their meaning; however, other language was not thoroughly debated and its intended meaning is much less clear.⁹ Moreover, as Professor Wiseman suggests, it is not clear that the Framers envisioned that their intent should govern the interpretation of the Constitution.¹⁰ And even if the framers did mean for their intent to be part of the document, would that justify an abhorrent decision that members of the Supreme Court could thereafter personally disclaim? Are members of the Court free to reach grotesquely unjust results if their historical research convinces them that the Framers would have reached those same results?

Justice Thurgood Marshall reminds us that the Constitution was framed by white men who, while enlightened in many ways, were sadly ignorant in many ways as well.¹¹ This is no indictment of the Framers: we cannot fairly judge the worth of eighteenth century persons by twentieth century standards. But there is a corollary here as well: we cannot

7. Van Patten, *The Consequences of Ideology: Constitutional Interpretation According to Original Intention and Contemporary Ratification*, 70 MARQ. L. REV. 388, 389 (1987).

8. *Id.* at 393.

9. George Kennan, the diplomat and historian, described the challenge of reconstructing historical events in this way:

And to accomplish this task what does he have to draw upon? Only what he already has within him: his knowledge, of course, of the historical background, his level of cultural sensitivity, his ability to put the isolated bit of evidence into the larger context and, above all, his capacity for insight and empathy, his ability to identify with the historical figures he describes, his educated instinct for what is significant and what is not — in other words, his creative imagination.

Kennan, *History, Literature and the Road to Peterhof*, N.Y. Times, June 29, 1986, § 7 (Book Review), at 42.

10. Wiseman, *supra* note 6, at 478; See also Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

11. Taylor, *Marshall Sounds Critical Note on Bicentennial*, N.Y. Times, May 7, 1987, at 1, col. 4.

wisely place *sole* trust in eighteenth century ideas, reached through political give-and-take, to solve twentieth century problems. Perhaps the Framers knew this too, in drafting a document filled with powerful words that trigger memories, stir emotions, and conjure images of justice and tyranny. The words of the Constitution pack a wallop that cannot be absorbed comfortably by *any* interpretive theory.

Whether they intended it or not, the Framers devised a document that has produced a three ring circus of decision-making. One ring consists of learned journals such as this review in which constitutional theory is debated, often with both great heat and light. In these learned journals, constitutional issues are raised and joined, and constitutional agendas are set. Very fine minds are devoted to these tasks, and it is exceedingly rare for important constitutional questions to arise or be decided without being first explored in learned journals. Once constitutional questions are decided, the pages of these journals fairly ring with criticism, excited or measured, hopeful or despairing, sweeping or technical. The expected onslaught of learned criticism sets a very high professional standard for addressing constitutional questions.

A second ring exists in addition to the professional debates. It operates in corner taverns and in the newspapers, in the workplace and on the street, wherever people perceive that law, and especially constitutional law, has an impact on their lives. And what scholar would deny the importance of public opinion? Many of the greatest issues of the day are constitutional in substantial part: school busing, law enforcement, capital punishment, school prayer, abortion, affirmative action. The list is long, and it is an emotional and political minefield. These issues are publicly debated every day, and access to the debate is granted to all who seek it. The public's intense involvement in constitutional problems requires that scholarly theory be tempered by practicality.

And in the center ring sit the courts, buffeted by the action in the journals and on the streets, but bound to apply the rule of law. In constitutional cases, the advice offered the courts is chastening. The Attorney General of the United States advises them that they may be interpretivists and treat the Constitution as a "document of fixed and legally binding meaning," or they may be non-interpretivists and treat it as

merely a "starting point for philosophical adventurism."¹² This is the stark choice expressed by Attorney General Meese — a polarizing choice.

Attorney General Meese draws a false dichotomy. As Professor Van Patten points out,¹³ the meaning of some constitutional provisions cannot be fixed by the Framers' intent because there is inadequate evidence of that intent. Moreover, Professor Van Patten convincingly shows that not even Attorney General Meese can steadily walk the narrow interpretivist line that he exhorts the Court to follow unanimously.

In a recent interview, Justice Brennan described the work of the Court in personal terms rather than the more theoretical terms that preoccupy commentators.¹⁴ His comments underscore the fallacy in addressing constitutional decision-making in starkly theoretical terms, whether those terms are interpretivist, non-interpretivist, or something in between.

Justice Brennan emphasized that with only nine members of the Court, the personalities of the justices play an important role.¹⁵ In deciding cases, the immediate objective is to form a Court, that is, to secure agreement among a majority of the justices, also called the "massing" of a point of view on the Court.¹⁶ This task is made more difficult because of the intellectual strength and independence of members of the Court and because of the importance of diversity on the Court in respect to race, sex, religion, ethnicity, and geography. The Court is constituted to see with many eyes and speak with many voices, but in a given case, a majority of the Court must speak with a single voice if the job is to be done properly.

And yet, even with Justice Brennan's emphasis on the personal dimensions of constitutional decision-making, he sometimes speaks of his job in doctrinal terms. Consider these two comments:

[T]here come issues that no matter what may be the popular, or the Administration's or anyone else's view, in conscience you find that you can't resolve the issue in that way. The

12. Meese, *supra* note 3, at 382.

13. Van Patten, *supra* note 7, at 393. See also Kaufman, *What Did the Founding Fathers Intend?*, N.Y. Times, Feb. 23, 1986, § 6 (Magazine), at 42.

14. Leeds, *A Life on the Court*, N.Y. Times, Oct. 5, 1986, § 6 (Magazine), at 24.

15. *Id.* at 74.

16. *Id.* at 74-76.

Constitution requires a different resolution, and that is pretty obvious to you.¹⁷

* * *

And I had settled in my mind that I had an obligation under the Constitution which could not be influenced by any of my religious principles. As a Roman Catholic I might do as a private citizen what a Roman Catholic does, and that is one thing, but to the extent that that conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way.¹⁸

And so, doctrine and theory have a central place, but so too does the requirement of forming a Court in a given case. The incongruity is inescapably there. Constitutional decisions will not be reached by formula, nor have the Framers provided unmistakably and wisely the outcome for each case. But neither may the Court do solely as it pleases. It is far more complex than that.

Constitutional theory, the practicalities of the age, and the individual temperaments and visions of each justice of the Court simultaneously exert their powerful forces. Each has its important say. In the three ring circus of constitutional decision-making, we are frequently dismayed to find the focus shift away from what we personally see to be the point. However, no single focus adequately captures significant constitutional problems, and this may ensure the eternal interest and frustration of constitutional theorists.

The articles in this Symposium demonstrate extensive disagreement on particular constitutional points and the outright rejection of some constitutional theories. At times, the Constitution seems more like a boxing ring than a circus ring. But the analogy to a ring is the central point: the Constitution confines us to the same vocabulary, the same set of powerful words, such as due process, establishment of religion, interstate commerce, and equal protection. We as a people exhibit a remarkable willingness to discuss our most profound national problems in the words of the Constitution. Moreover, our Constitution possesses a remarkable ability to shed light on those problems because of the words it contains.

17. *Id.* at 78.

18. *Id.* at 79.

COMMENTS

THE PSYCHIATRIC EXPERT IN THE CRIMINAL TRIAL: ARE BIFURCATION AND THE RULES CONCERNING OPINION TESTIMONY ON ULTIMATE ISSUES CONSTITUTIONALLY COMPATIBLE?

INTRODUCTION

Evidentiary rules and court decisions have attempted to rationalize and crystalize legal issues. The desire to minimize confusion and further justice has been the impetus to these endeavors. One confusion-causing factor has been the use of psychiatric expert testimony in the criminal trial. Courts and legislatures have raised doubts concerning the scientific validity of psychiatry. Evidentiary rules and court decisions have therefore imposed restrictions upon the admissibility of psychiatric expert testimony. The difficulty arises when specific intent and insanity are key issues in a criminal trial. Each issue deals with a state of mind or a mental purpose, and psychiatry is the science that deals most closely with these issues.

This Comment deals chiefly with specific intent crimes. It will be helpful to keep an example in mind while reading. Wisconsin defines first-degree murder as an act in which one "causes the death of another human being with intent to kill

that person or another."¹ Intent to kill means the "mental purpose to take the life of another human being."²

The basic scope of this Comment is the bifurcated trial system and the use of a psychiatrist's opinion on ultimate issues within that system. There is a discussion of Federal Rule of Evidence 704³ and state statutes and case law which emulate its recent revision. The Comment also addresses the constitutionality of bifurcation, psychiatric expert opinion testimony, and the operational nexus between these concepts. The Comment concludes with some proposals that attempt to alleviate confusion and make their function more constitutionally acceptable.

The aim of this Comment is not to delve deeply into the present state of the insanity defense nor to discuss the various theories on insanity. Its chief goal is to provide some insight into the procedural and evidentiary devices which surround the bifurcated trial and highlight the value of psychiatric expert testimony.

I. THE BIFURCATED TRIAL SYSTEM

It has been stated that "[b]ifurcation is nothing more than a procedural device, analytically a pure form without substantive impact and value free in terms of whether it is 'pro prosecution' or 'pro defense.'"⁴ The United States Supreme Court has noted that two-part jury trials are uncommon in federal jurisprudence being neither constitutionally nor procedurally

1. WIS. STAT. § 940.01(1) (1985-86). Section 940.01(1) provides as follows: "Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony." *Id.* A "Class A" felony carries a penalty of life imprisonment. *See* WIS. STAT. § 939.50(3)(a) (1985-86). In contrast, the Model Penal Code defines murder as follows: "[C]riminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. . . ." MODEL PENAL CODE § 210.2(1) (1962).

2. WIS. STAT. § 940.01(2) (1985-86). Section 940.01(2) provides: "In this chapter 'intent to kill' means the mental purpose to take the life of another human being." *Id.* *See generally* MODEL PENAL CODE § 2.02 (1962). Section 2.02 of the Model Penal Code defines "purposefully," "knowingly" and "recklessly" as they are used in relation to culpability.

3. *See infra* note 86.

4. Gallivan, *Insanity, Bifurcation and Due Process: Can Values Survive Doctrine*, 13 LAND & WATER L. REV. 515, 518 (1978).