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Essay

The Paradox of Texts and Constitutional Authority: For Rick Kay, Wallace Stevens Professor

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This brief Essay considers and gently rejects Professor Rick Kay's faith in originalism as a constraint on judges. It expresses admiration for Kay's remarkably broad comparative law scholarship and celebrates his pathbreaking work about the early history of the use and abuse of equal protection by American judges.

The Essay applauds ways that Kay has become more comfortable within the paradox of judicial creativity, anchored in constitutional text, yet not rigidly bound by it. It also discusses the author's abiding friendship with Professor Kay, despite their considerable interpretive differences.

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The Paradox of Texts and Constitutional Authority: For Rick Kay, Wallace Stevens Professor

AVIAM SOIFER *

“[T]he squirming facts exceed the squamous mind, / If one may say so. And yet relation appears . . .”¹

INTRODUCTION

Rick Kay and I go way back, and I could hardly refuse an invitation to be part of a *festschrift* in his honor.² After I began teaching at the University of Connecticut School of Law in 1973, I received a one-year humanities fellowship at Harvard. Before I returned to Connecticut in 1977, my spouse, Marlene Booth, who was then a young documentary filmmaker, had landed a dream job at WGBH in Boston, and I therefore faced a long commute to UConn, which wisely had recently hired Rick. He and I quickly became good friends. In fact, Rick and Clare generously rented their third floor to me for a pittance, and I stayed there each week, and returned to Cambridge on weekends.

On occasion it was a bit chilly in my third-floor aerie, yet the warmth of Rick and Clare combined, particularly with the opportunity to watch Rachel and Jeff mature, truly made their house a wonderfully welcoming home away from home. Moreover, Rick and I shared a passion for the Red

* M. Urban Studies, Yale City Planning, 1972, J.D. Yale Law School, 1972. After clerking for then-Federal District Court Judge Jon O. Newman, Soifer began his law teaching career at the University of Connecticut School of Law in 1973. He dedicates this Article to the lively memory of Hugh C. Macgill, his fellow teacher, close friend, and co-author. He thanks Adam Kuegler and his *Law Review* colleagues and Tiffany Silva for her able research assistance with this Essay.

¹ WALLACE STEVENS, *Connoisseur of Chaos*, in COLLECTED POETRY AND PROSE 194–95 (Frank Kermode & Joan Richardson eds., 1997).

²Rick Pomp offered a hilarious after-dinner speech at the opening event, and there is little need to attempt additional humor. It may bear noting, however, that the *shrift* part of the festivities, according to Merriam-Webster, is an archaic noun, most notably used in Shakespeare’s *Richard III* within the context of: “make [your confession quick] . . . the king longs to see your head.” *Short Shrift*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/short%20shrift> (last updated Feb. 16, 2020). And many thanks to Yaniv Roznai, the main organizer of this sparkling symposium, as well as to Dean Fisher and the entire UConn Law School.

On a recent, very sad note, however, this Essay may also be the first published memorial for H. C. Macgill—my close friend, co-author, and larger-than-life colleague, who later became the dean of the University of Connecticut School of Law. Hugh died on February 13, 2020, as I put the finishing touches on this piece.

Hugh Macgill will be remembered by many, many people as a blessing—he was witty, learned, and tremendous fun to be with, no matter what the setting.

Sox, bad though they were in those years.³ We also forged the kind of mutual respect and enjoyment that is an underestimated feature of being young faculty members together.

Rick and I rarely agreed about Constitutional Law then, nor do we now. Along with other participants in this *festschrift* and countless other admirers around the globe, however, I have read, appreciated, and always learned from Rick's prodigious scholarly accomplishments.

This Essay also celebrates the fact that I maintain that Rick also has learned a thing or two in the ensuing years. We are still far apart in many of our ideas about constitutional text, original understanding, and constitutional authority. Nonetheless, I find Rick's current comfort within paradox an encouraging improvement over his earlier efforts to bind judges much more directly than I think they could or should be bound.⁴ A few specific examples will illuminate how, in many ways, Rick's views on such weighty matters are still those of an Eeyore, while I believe that I remain to him an overly optimistic Winnie-the-Pooh.

A core of our ongoing disagreement is anchored in our different views of the appropriate degree of judicial discretion. We differ significantly regarding how constrained judges should be within the context of a written constitution. As Rick put it years ago: "There is more pressure upon judges and lawyers to come up with the one 'best' interpretation of a text than there is on literary critics."⁵ I fully agree with that comparison to literary critics, yet Rick and I part ways with his affirmative comparison of the limits on a judge's discretion with a musician's limited freedom in interpreting a settled score.⁶ I think, for example, that early on Rick missed or rejected the subtlety of Robert Cover's basic point about cognitive dissonance and the "the Judicial Can't."⁷ Bob contrasted what he

³ We therefore were able to purchase a "day game package" at Fenway Park with a few other colleagues, and we still have those seats—Row G behind home plate—even for night games on weekends, Patriots' Day, etc. This helped us raise our kids well, through Red Sox thick and thin. And Rick remains my very capable agent during the ticket distribution each spring.

⁴ Richard S. Kay, "Originalist" Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL'Y 335, 340 (1996) (discussing Kay's view of originalism); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication*, 88 NW. U. L. REV. 226, 228–29 (1988) (discussing and responding to several objections to originalism).

⁵ Kay, *Adherence to the Original Intentions in Constitutional Adjudication*, *supra* note 4, at 238.

⁶ *Id.* at 238–39.

⁷ Early in Rick's career, in a review of Robert Cover's *Justice Accused: Antislavery and the Judicial Process* in the *Harvard Civil Rights-Civil Liberties Law Review*, Rick argued that "[a]ll of us . . . have some stake in the suppression of judicial consciences at least some of the time." Richard S. Kay, *Justice Accused*, 12 HARV. C.R.-C.L. L. REV. 219, 221–22 (1977) (reviewing ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975)). This point seems inarguable. Yet it does not follow that, as Rick proclaimed in his next sentence, "it will probably be in the most sensitive and controversial areas that we will find the injection of subjective convictions most offensive." *id.* See generally Aviam Soifer, *Constrained Choices: New England Slavery Decisions in the Antebellum Era*, in FREEDOM'S CONDITIONS IN THE U.S.-CANADIAN BORDERLANDS IN THE AGE OF

considered the overstated duty to follow the law with the opportunity that judges have to grasp that “[l]aw is the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there.”⁸ In contrast, Rick celebrated “the clear constitutional limits that predefine government and the judiciary’s role within it.”⁹

I. TEXTUALISM?

With only a few of the multiple contemporary examples available, I believe I can counter Rick’s belief by describing the artful dodging done by so-called conservative, textualist, formalist, and/or originalist Justices of the United States. Even while pointing to the text of the Constitution, these judges actually find few, if any, constraints within its words.¹⁰ They tend to insist that it is the text that compels their answers.¹¹ Yet, as with their Gilded Age precursors, the constitutional text in practice seems to afford them the freedom to turn “consciously or instinctively to the economic and social philosophies dominant among men of their background and class.”¹²

EMANCIPATION 173 (Tony Freyer & Lyndsay Campbell eds., 2011); Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987).

⁸ Bob later explained his concept that “[l]aw is the projection of an imagined future upon reality.” Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1604 (1986).

⁹ Kay, *Justice Accused*, *supra* note 7, at 222. Cover developed the contrast between formal law and law stories in his well-known Robert Cover, *The Supreme Court, 1982 Term – Foreword, Nomos and Narrative*, 97 HARV. L. REV. 4 (1983), and declared himself an anarchist who loved law; he used the bridge metaphor to illustrate the connection between two flawed ideals, both produced by human beings and together creating vital tension, with his own emphasis on a better, even redemptive future.

¹⁰ Like many others, I had the benefit of several entertaining conversations with Justice Scalia, and thus I had the chance to witness his funny skit when asked about the text of the Ninth Amendment. His glib performance revolved around a latecomer who presents the words: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” This interloper is not well received by hard-working Framers who have carefully drafted, adopted, and amended the rest of the original document and the Bill of Rights. But the text does contain these open-ended Ninth Amendment words. U.S. CONST. amend. IX.

¹¹ Another prime example is the Eleventh Amendment, which states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

How, one might legitimately wonder, did this very specific textual immunity against out-of-state plaintiffs extend to a citizen suing that citizen’s own state? Scalia conceded to a group at our Law School in 2014 that this leap—made in *Hans v. Louisiana*, 134 U.S. 1 (1890)—was indeed problematic, but he added that it was an old case that did not warrant overturning.

For an exploration of why the Takings Clause does not appear within the text of the Fourteenth Amendment—which otherwise borrowed language directly from the Fifth Amendment—see Aviam Soifer, *Text-Mess: There Is No Textual Basis for Application of the Takings Clause to the States*, 28 U. HAW. L. REV. 373, 376–77, 379–80 (2006).

¹² Richard S. Kay, *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFF. L. REV. 667, 713 (1980). As Rick added in his careful, persuasive study of the equal protection opinions of United States Supreme Court Justices from 1873-1903, “[S]ince these philosophies themselves were

To me, a troubling example of the malleability of constitutional text occurred in Chief Justice Roberts's majority opinion in *Shelby County v. Holder*,¹³ that eviscerated much of the Voting Rights Act of 1965. A key prong in Roberts's emphasis on state sovereignty was his paraphrase of the Tenth Amendment: "Indeed, the Constitution provides that all powers *not specifically granted* to the Federal Government are reserved to the States or *citizens*."¹⁴ Yet this is what the Tenth Amendment actually states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁵

Even an initial small sample from Rick's prolific scholarship will illustrate his deep research and original ideas, as well as his unusually crisp and clear writing style. Given the degree of difficulty within his chosen context—addressing complex but significant interpretive quandaries—his craftsmanship stands out in striking fashion. Though many of us share an urge to have textual answers and/or to watch judges behave like good umpires in simply calling balls and strikes,¹⁶ attention to the opinions of

far from determinate . . . their [equal protection] decisions yielded no discernable pattern of adjudication." *Id.*

(I use the term "men" advisedly: Justices Ginsburg, Sotomayor, and Kagan generally do not try to hide beneath a comforting quilt of textualism or originalism.)

¹³ 133 S. Ct. 2612 (2013).

¹⁴ *Id.* at 2623 (emphasis added) (citation omitted).

¹⁵ U.S. CONST. amend. X. While it is true that Roberts does not claim to be quoting the Tenth Amendment directly but only paraphrasing it, this paraphrase contains two substantial, even shocking, departures from the text. The Tenth Amendment in fact did not adopt the "expressly granted" language of the Articles of Confederation; it was none other than James Madison who repeatedly led the successful fight against doing so. Aviam Soifer, *Of Swords, Shields, and a Gun to the Head*, 39 SEATTLE U. L. REV. 787, 797 (2016). For a very different view of the Tenth Amendment, see, for example, Justice Holmes's opinion for the Court in *Missouri v. Holland*, 252 U.S. 416, 434 (1920), in which he mocked the "invisible radiation" emanating from the Tenth Amendment. See also *United States v. Darby Lumber*, 312 U.S. 100, 124 (1941) (terming the Tenth Amendment "but a truism").

In addition, as we all have been learning painfully in recent years, the substitution of "citizens" for "people" in Chief Justice Roberts's Tenth Amendment paraphrase can make a significant difference in the context of constitutional rights. Indeed, as is clearly specified in significant surviving statutes based on the Thirteenth Amendment, adopted before the Fourteenth Amendment was promulgated—and soon thereafter made explicit within Section 1 of the Fourteenth Amendment—the 39th Congress repeatedly announced broad protection for "persons," and not merely for "citizens." See, e.g., Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2012)); Peonage Abolition Act of 1867, ch. 187, § 1, 14 Stat. 546 (1867) (current version at 42 U.S.C. § 1994 (2012)). See also Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1610 (2012) (exploring "the theme of a federal duty to afford protection, not only to all citizens, but also to every person within the United States and its territories"); Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 196 (Alexander Tsesis ed., 2010) ("The core of the 1866 Civil Rights Act remains part of our federal statutes.").

¹⁶ John Roberts's famous statement during his confirmation hearing, "it's my job to call balls and strikes, and not to pitch or bat." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be*

the U.S. Supreme Court in either the period 1873-1903 or 1973-2020 repeatedly undermines such faith, or even such hope. We might wish this were not true of our highest Court, but it is flagrantly often the case.

II. FAKING IT?

Rick's important recent book, *The Glorious Revolution and the Continuity of Law*, reminds us of a similar dilemma faced by the English revolutionaries of 1688-1689: "Every step of the process by which William and Mary became King and Queen was unauthorized under any plausible conception of English law."¹⁷ Therefore, "basically what they did was this: they crammed irregular decisions into the regular forms; they described illegal actions with legal terminology. In short, they faked it."¹⁸ Similarly, Supreme Court Justices have delighted in the discretion available to them within uncharted abstractions such as "Our Federalism"¹⁹ and "the precepts of federalism."²⁰ They use these distensible terms often to invalidate federal law not to their liking—all the while claiming to be bound by the constitutional text. The Court majority, for example, killed off a longstanding limit on its authority that was established over five decades ago in *Baker v. Carr* and explicitly applied only to the actions of the federal government.²¹ Chief Justice Roberts instead extended the political question doctrine to allow states to use partisan gerrymandering as much as

Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr.).

¹⁷ RICHARD S. KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* 16 (2014).

¹⁸ *Id.* at 17.

¹⁹ "Our Federalism" has been a theme for many decades, perhaps most vividly employed in the context of federal court abstention. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 45 (1971) (First Amendment challenge to California Criminal Syndicalism Act); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (theater owner's First Amendment claim). *See* Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1143 (1977) (arguing that "the *Younger* line of cases has seriously undermined, if not sacrificed altogether upon the altar of 'Our Federalism,' the role of the federal courts as 'the primary and powerful reliances for vindicating every right given by the Constitution'"). *But see* *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2168, 2174 n.5 (2019) (immediate access to federal court in Takings Clause claim due to importance of property rights).

²⁰ *United States v. Comstock*, 560 U.S. 126, 150, 153 (2010) (Kennedy, J., concurring) (federal government has the authority to enact a federal civil commitment program). In *U.S. Term Limits, Inc. v. Thornton*, Kennedy's decisive concurrence celebrated the American discovery of federalism and noted, memorably, "[t]he Framers split the atom of sovereignty." 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

²¹ 369 U.S. 186 (1962). Jim Newton, author of a careful, extensive biography of Earl Warren, noted that Warren himself considered *Baker v. Carr* to be "even more important" than the unanimous opinion Warren had crafted in *Brown v. Board of Education*, 347 U.S. 483 (1954). JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 388 (2006). *Baker v. Carr* allowed federal judicial review of badly malapportioned state legislatures by confining the political question barrier to judicial review to clashes involving federal separation of powers concerns. *Baker*, 369 U.S. at 197.

they so choose, free of any federal court scrutiny, based on his assertion that “[t]here are no legal standards discernible in the Constitution for making such judgments.”²² There was not a single mention of *Baker v. Carr*.

III. EARLY SUPREME COURT EQUAL PROTECTION DECISIONS

A good place to begin my sobering tale of real legal realism is Rick’s important, yet largely overlooked, excavation of the Court’s early interpretations of the Equal Protection Clause of the Fourteenth Amendment. Rick convincingly demonstrates that equal protection adjudication in the Supreme Court “has been subjected to stark oversimplification.”²³ Instead of mechanical formalism, Rick uncovered early “adjudication without standards or boundaries.”²⁴ The attempted distinction between the invalidity of true “class legislation” and permissible “incidental inequality” collapsed of its own weight. It turns out that virtually all legislation is, in fact, class legislation. Labeling something as class legislation and striking it down has great popular appeal.²⁵ Nonetheless, the effort to distinguish “unjustifiable classifications” from “impermissible classifications” could not last, and “the Court was left with nothing but an unspecific bar against some kinds of legislative classifications.”²⁶

Generations of students appalled by Justice Holmes’s “three generations of imbeciles are enough” probably do not notice his rejection of an equal protection claim: “the last resort of constitutional arguments.”²⁷ Those who do notice may take Holmes to be saying that this argument, attacking the forced sterilization the Court was willing to uphold, is blatantly farfetched. In fact, however, Rick’s pathbreaking work in which he dug up and carefully analyzed initial judicial treatment of equal protection claims demonstrates that equal protection decisions were prominent throughout the period, in large measure because the Court repeatedly invoked equal protection and generally used it to strike down legislation it disfavored. This stream of decisions first anticipated and then regularly flowed in parallel fashion with the Court’s infamous liberty of contract-substantive holdings claimed to be based on due process.

²² *Rucho v. Common Cause*, 588 U.S. ___, 19 (2019).

²³ *Kay, Equal Protection*, *supra* note 12, at 667.

²⁴ *Id.* at 668.

²⁵ *See, e.g., Sierra Club v. Dep’t of Transp. of Haw.*, 202 P.3d 1226, 1259 (Haw. 2009) (state attempt to aid Superferry company invalidated as a special class of one).

²⁶ *Kay, Equal Protection*, *supra* note 12, at 673.

²⁷ *Buck v. Bell*, 274 U.S. 200, 207–08 (1927).

IV. A COMPARATIVELY HAPPIER ENDING

Rick's recent impressively learned, yet still clear and cogent law review articles, along with his *Glorious Revolution* book, indicate a significant change for Rick. He moved from a tendency toward what could seem formalistic, abstract analysis to a more relaxed and more specific discussion of intriguing concepts about how written constitutions are constituted, for example, and what the constitutive authority of "the people" has meant across time and space. Gone are the somewhat reductionist binaries of his youth, now replaced with a spectrum of intriguing responses to abiding dilemmas such as the necessity of a "constituent event" without the comfort of legal authorization.²⁸ Rick is recognized as one of the world's leading comparative law experts, and his broad and deep knowledge allows him to "compare and contrast" a fascinating range of origin stories.

For example, in Rick's important essay about *Constituent Authority*, his decades of cogent thought and deep learning make a significant contribution regarding the complex issue of who are "the people" entitled to constitute "an effective positive law written constitution."²⁹ It may be more than a quibble, however, that in assessing constitutional origins, Rick tends to downplay the natural law strand that weaves throughout the founding of the American republic.³⁰ It is intertwined in important ways with the antislavery movement³¹ and it provided much of the impetus for the immediate post-Civil War constitutional amendments.³² Nonetheless,

²⁸ Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 734 (2011).

²⁹ *Id.* at 720. Throughout this article, Rick probes the distinction between constituent authority and constituent power.

³⁰ See, e.g., Thomas Grey, *Do We Have An Unwritten Constitution*, 27 STAN. L. REV. 703 (1975); Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928-29). And there is, after all, the Ninth Amendment, discussed *supra* note 10. It is well known that the Justices rejected President George Washington's request that they enlighten him about American neutrality in 1793. They declined to provide an advisory opinion when Washington asked for help with questions whose answers depended on "the construction of our treaties, on the laws of nature and nations, and on the laws of the land." NOAH FELDMAN & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 35 (20th ed. 2019) (emphasis added).

³¹ Robert Cover underscored the basic belief, manifested famously in Lord Mansfield's *Somerset's Case* decision, that natural law afforded overarching freedom, though positive law could supersede it by allowing slavery. ROBERT COVER, JUSTICE ACCUSED 8-22 (1975).

³² As is his custom, Eric Foner brilliantly captures the pervasive, albeit often overlooked theme, of the amendments adopted in the wake of the Civil War in ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019). Yet recent U.S. Supreme Court decisions generally join Rick Kay in downplaying—or even, for the most part, ignoring—the substantial changes instituted by these amendments. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (Congress lacks the power under the Fourteenth Amendment or the Commerce Clause to provide a civil remedy for the victims of gender discrimination); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Congress's power under the Enforcement Clause of the Fourteenth Amendment limited to "remedial power").

Rick's erudite comparative discussion about who constitutes "the people" at the time constitutions are launched is a refreshing contrast, for example, to the simple federal/state binary debated by the Court in *U.S. Term Limits, Inc. v. Thornton*.³³

CONCLUSION

Rick's prolific scholarly career truly has educated and inspired other scholars across the globe. His work reaches remarkably far: it is no exaggeration to say that Richard S. Kay is a scholar's scholar. He is also a wonderful friend and colleague. I miss being near him so that together we could roll easily yet informatively through our interpretive disagreements. I know that my work would be better if we could still do that in person on a regular basis. Still, being Rick's friend is itself a game-clinching home run.

³³ 514 U.S. 779 (1995). Justice Stevens's majority opinion sided with Chief Justice John Marshall's view in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *Thornton*, 514 U.S. at 821. Justice Thomas, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, insisted instead that the federal government's power is severely limited by the Tenth Amendment—unless granted power "expressly or by necessary implication"—and that "[t]he Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation." *Id.* at 848 (Thomas, J., dissenting). As mentioned, *supra* note 20, Justice Kennedy's concurring opinion split the difference.