Constitutional Virtues

H. Jefferson Powell

The Constitution of the United States begins with what is arguably a lie. Recall the sonorous words of the Preamble:

> We the People of the United States … do ordain and establish this Constitution for the United States of America.

Well no, not really, or not in any very obvious sense, but before we turn to the Preamble's dissimulation, I want us to have clearly in our minds the claim that it is making.

"We the People … do ordain and establish" – with these words, the Preamble asserts, on behalf of the Constitution it thus introduces, a claim of political and perhaps of moral authority. The Constitution, we are to understand, is (as it later claims for itself) "the supreme Law of the Land" because we the People, the very folk who must submit to that supreme law, have made it so; it is we who have ordained and established this particular Constitution. When the Constitution lays claim to our allegiance and to our obedience, it does so on our behalf and it speaks with our own voice.

This is familiar talk, and a familiar concept, in American public life. It is what President Lincoln meant – or perhaps better, what he is usually taken to have meant – when he described the federal Republic as "government of the people, by the people and for the people." It is the stuff of civics lessons and political speeches, it is at the heart of what Americans mean when they call the Republic a democracy. And the popularity of the words and the idea are no ground for high-minded disdain: self-government in the American sense – government constituted and limited by the free decision of the People who are governed – is a majestic concept. It is an ideal that has great appeal in a world where Chairman Mao's rather different axiom – "political power grows out

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of the barrel of a gun." – is, all too often, the governing truth.[1]

A beautiful claim, then, but on its face not true about this Constitution. Just recall, for starters, the political maneuvers by which the Constitution came to acquire at least de facto authority. First, a meeting of dubious legality under the existing federal constitution convenes, goes into secret session, immediately decides to ignore altogether any plausible construction of its commission, and emerges with a radical proposal for a new federal structure that among other details throws aside the requirement of the Articles of Confederation that "any alteration at any time" of the existing federal arrangements had to be "confirmed by the legislatures of every state."[2] Whatever its other merits, the Constitution has little claim to legitimacy based on what the American people had done before 1787.

Well, but what about the ratification process, which is often described with some accuracy as remarkably open in comparison to many previous American exercises in political decisionmaking? Unfortunately, there too we will find little comfort in a search to vindicate the Preamble's claim that the People established the Constitution. The conventions that originally voted on whether to adopt the Constitution were, by any standards acceptable today, grossly unrepresentative of the populations of the several states: women – absent entirely (although being in New Jersey I should acknowledge the remarkable if as a practical matter unimportant fact that some women in your state seem to have been able to vote for a few decades in the founding era), African Americans and Native Americans – absent in most states, poor people – a more complicated story but formal rules of law and social custom make it likely that in most states a great many of the less privileged had no voice, or no free voice, in selecting delegates to the ratifying conventions. I don't want to be misunderstood: I am not making the tired, utterly anachronistic point that the founders did not enjoy our current sensibilities about sex, race, class, and so on. They didn't and that is for present purposes almost irrelevant.

The point I do want to make is this. Whatever we can say about the founders' understanding of who makes up "we the People" who ought to vote on a Constitution, the founders did not employ any definition that we would entertain. Even if you grant that the ratification process could be seen as the act of the People, *by their lights*, it can't make that claim by ours.

The Preamble's assertion is equally and obviously vulnerable when looked at from the perspective of time. Everyone who played a role in the making of the original Constitution, of the Bill of Rights, and of the Civil War amendments, is dead. *No* one belonging to the American people of the early twenty-first century had any part in ordaining or establishing the texts which make up most (by far) of the present Constitution. Of course, this is just a peculiarly American version of one of the oldest questions in Western political theory, but it is vexing nonetheless: without a theory of representation persuasively showing how the actions of the long-dead can somehow be identified as the actions of we the People of today, the Constitution's claim to speak with our voice is empty. The imposition of one group's will, however democratically arrived at, on another group is clearly undemocratic from the second group's perspective. And there is

1 The quote from Lincoln is, of course, from the Gettysburg Address. Chairman Mao's dictum is from a speech dated November 6, 1938. 2 *Selected Works* 224 (1965).

2 Article XIII.

no plausible candidate, even on the far horizon, for the job of generally accepted theory of representation.

It is tempting to dismiss the question of the Constitution's authority as an abstraction, a fit subject for a class in political philosophy but of no practical significance. After all, whatever one may say about the Preamble, the founders or the principles of representative democracy, the exercise of power under and in the name of the Constitution is a simple matter of brute fact and force. The Internal Revenue Service collects the federal income tax, Congress and the president require American soldiers to go to war, defeated incumbents give way at the appointed times to successors they despise, government officials give lip service and much of time actual heed to the commands of unelected judges, and when we disagree over the Constitution's meaning, the United States Supreme Court decides. As a matter of political practice, "[w]e are under a Constitution, but the Constitution is what the judges say it is," as Charles Evans Hughes said a century ago.[3] So can't we just stipulate to the reality of constitutional authority and get on with it?

I think not. As this society's general acquiescence in judicial review proves, American political practice itself incorporates the notion that the Constitution's commands override political decisions, even widely-accepted ones, which conflict with those commands. In this system, political practice is normative *only* when it accords with the Constitution, and that includes the practice of judicial review by the high Court. I quoted Chief Justice Hughes a couple of minutes ago about the Constitution being what the judges say it is. Hughes came to regret that sentence.

> This remark has been used [he wrote later], regardless of its context, as if permitting the inference that I was picturing constitutional interpretation by the courts as a matter of judicial caprice. This was farthest from my thought. … I was speaking of the essential function of the courts under our system in interpreting and applying constitutional safeguards … .[4]

"Interpreting and applying" safeguards – not making them up. Justice William Brennan, it is said, customarily taught his clerks that the most important rule in constitutional law is the rule of five – meaning that with five votes on the Court you can do anything[5] – but it was Chief Justice Hughes, not Justice Brennan at least as portrayed in the anecdote, who expressed the traditional understanding of constitutional law, the one generally shared in American society, at least outside the legal and political-science professions: most Americans assume that judicial review – and constitutional law generally, whoever announces and enforces it – is a matter of "interpreting and applying" a set of commands or norms rather than the creation of norms out of whole cloth, even cloth made by judicial experts. Americans do not, for the most part anyway, regard "the Constitution" as a euphemism for rule by a bevy of Platonic Guardians.[6] The justices themselves bear witness to this social understanding in every constitutional opin-

3 Charles Evans Hughes, *Addresses of Charles Evans Hughes* 185 (1916).

4 Hughes, *The Autobiographical Notes of Charles Evans Hughes* 143–44 (1973).

5 See James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* 54 (1995). Apparently some of Brennan's clerks interpreted his gesture to mean that "it takes five votes to do anything" on the Court. See Mark Tushnet, Themes in Warren Court Biographies, 70 N.Y.U. L. Rev. 748, 763 (1995).

6 See Learned Hand, *The Bill of Rights* 73 (1958).

ion they render, all of which purport to show how the decision reached is grounded in the Constitution.

If I am right about all this, the question of the Constitution's authority cannot be dismissed blithely as academic or theoretical. Where there is more than one plausible solution to a question of constitutional law, by common understanding the authority of the answer proposed, whether by the Supreme Court or anyone else, ultimately must rest somewhere other than on the identity of the answerer. Whatever else one may say about those intellectual perspectives that deny the possibility of political and legal decision on any basis other than the preferences of the decisionmaker, they are utterly destructive of anything resembling the traditional practice of constitutional law. And that understanding, let me repeat, assumes that the authority of a constitutional decision lies in its proper grounding in a Constitution that is itself authoritative. Unless the Constitution has legitimate authority, the claim to our allegiance and our obedience present in every proposed constitutional decision and in the system as a whole is a lie or self-deception.

Tonight I wish to propose to you an argument that the Constitution does enjoy de jure authority and that its authority does rest in its relationship to the People as the Preamble claims, although not in the ordinary sense. I shall not attempt to present in its entirety an adequate and persuasive account of the Constitution's authority. Such an account, I think, must include other themes. As Walter Murphy told us years ago, to understand constitutional interpretation we must look synoptically at issues of definition, institutional role and behavior, and modes of reasoning – his three great questions of What, Who and How?[7] Each of these questions bears on the problem of constitutional authority as well, but I shall not be able here to speak to them. Instead I want us to get at the problem of authority from a somewhat different direction. Here is the thesis in a nutshell.

The practices of interpreting and applying the Constitution, as they are traditionally understood, demand of those who undertake it certain habits of mind and will – certain intellectual and moral virtues, to use the old word. The constitutional virtues, as I shall call them, are necessary if anyone – judge, legislator, voter, citizen – is to engage in those political and legal practices that revolve around the Constitution. Where the constitutional virtues are imperfectly realized – no doubt most or all of time – our practices are only partly successful. In the complete absence or eclipse of the constitutional virtues, those practices become unintelligible. But the constitutional virtues are not merely prerequisites to engaging successfully in a certain activity, in the way, for example, that the habit of keeping track of the cards played is a prerequisite to being successful at playing bridge. They are virtues in a broader or stronger sense and involve choices about who we are and who we wish to be as human beings and members of a community. Whether we are actively interpreting the Constitution or making the correlative decision to accept and obey a constitutional interpretation propounded by someone else, we are inevitably shaping ourselves as moral actors in a political society. And it is in that fact, I believe, that we can discern some of the answer to our problem. The Constitution's authority rests in part in the character of those habits of mind and will it demands we develop because those constitutional virtues are worthy ambitions

7 See, e.g., Walter F. Murphy, James E. Fleming, & William F. Harris, II, *American Constitutional Interpretation* (1986).

for citizens of a decent and humane society. The Constitution is authoritative because it asks us to be the People we ought to wish to be.

In recent decades, the concept of the virtues has come to assume a central place in a great deal of philosophical and theological work in ethics. I cannot stop to review that fascinating development, nor do I want to tie my proposal about the Constitution's authority to a particular theoretical account of the virtues, or indeed to any general need to accept virtue ethics at all. In typical academic-lawyer fashion, I simply want to raid other people's thinking for a couple of ideas useful to my own project.[8] By a virtue, as I have already suggested, I mean to refer to a habit or disposition of mind or will, oriented in (say) Aristotelian thought to happiness or eudaimonia, and in the American constitutional tradition to the interpretation and application of the Constitution as supreme law. In addition, I am going to assume that virtues necessarily rest on presuppositions about the individuals and communities that embrace them. Aristotle, for example, presupposed that human beings, or perhaps some human beings, are political by nature, appropriately the inhabitants of a polis, and this shaped his account of the moral virtues. The Constitution of the United States also makes certain presuppositions about American society, even if implicitly, and the constitutional virtues are grounded in these presuppositions.

Let me begin with what is, I think, the most fundamental presupposition of the Constitution: its own intelligibility. The enterprise of creating and continuing to talk over time about a written Constitution as ongoing law assumes that human beings are capable of employing language in such a fashion as to enable themselves and others to make sense of it. The point may seem obvious but it is terribly important. There are, of course, other ways in which linguistic activity can make sense, but the meaningfulness of the Constitution is inextricably tied up with the intelligibility of its commands. In our system, Chief Justice John Marshall famously wrote, "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." The very purpose of the written Constitution, in other words, is to supply rules of law that we can make sense of cognitively. In going on to consider the implications of the judiciary's power to decide cases arising under the Constitution, Marshall insisted that it was ridiculous to assume such a case "should be decided without examining the instrument under which it arises;" in reaching a decision, "the constitution must be looked into by the judges" for its meaning as an intelligible communication, not invoked by them as a mute symbol or a talisman of power.[9]

What then is the constitutional virtue that flows most directly from the constitutional presupposition of intelligibility? The answer, I think, is clearly signaled by the oath clauses of Article II and Article VI. When a president-elect promises to "preserve, protect and defend the Constitution" and all other American executive officers, judges and legislators bind themselves "to support" it, they are not swearing blind obedience to

8 For many years the chief victims of my piracy in this regard have been Stanley Hauerwas and Alasdair MacIntyre. See, e.g., Hauerwas, *The Peaceable Kingdom* (1984); MacIntyre, *After Virtue* (2d ed. 1984).

9 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 179 (1803).

an oracle of power. They are, as Chief Justice Marshall noted with specific reference to judges, making a promise to engage their "abilities and understanding" in a good faith effort to make sense of an instrument that is susceptible to such efforts. This would make no sense at all, indeed to require or to make such a promise would be objectionable, if in Marshall's language the Constitution were in fact "closed" to the oath-taker's understanding. The oath clauses are "worse than solemn mockery" if good faith interpretation of an intelligible Constitution is forbidden or impossible, and the constitutional virtue that makes such interpretation possible I shall call the virtue of faith.[10]

Now let me immediately concede that this terminological choice may seem a little provocative. Faith has certainly long been seen in the Western ethical tradition as a possible virtue, but it has usually been classed as a theological virtue and thus peculiar to certain sectarian strands of Western religion. I want to employ the term faith nevertheless, not so much to be provocative as to pick up on pick up on the dual meaning it has often been given by Christian theologians: faith as the intellectual activity of belief, and faith as the practical activity of commitment. The constitutional virtue of faith – and here you can put the theologians to one side – involves both an acceptance of the Constitution's intelligibility (it is not just an empty vessel into which we can pour whatever values or preferences we choose) and an undertaking to govern oneself as a constitutional actor in accordance with the Constitution's intelligible meaning. Without this belief and commitment, American constitutionalism makes no sense.

In an era when many academics believe that this is all moonshine or bad faith, it is worth recalling that the great intellectual antagonists of the Warren Court, Hugo Black and John Marshall Harlan, were alike in their possession of faith in the sense I am using the word. I don't mean that they agreed on everything – they certainly did not! Justice Black was famous for his insistence that in exercising the power of judicial review the Court's commission begins and ends with the words of the written Constitution. Justice Harlan, in contrast, thought that constitutional "liberty is not a series of isolated points pricked out in terms of [the text's words]. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[11] Black and Harlan disagreed radically … but they disagreed radically over how best to do a task they understood fundamentally in the same manner. Black the textualist believed, as he repeatedly wrote, that "words can have many meanings" and therefore that constitutional interpretation cannot be simply a matter of looking definitions up in a dictionary: it is, rather, the practice of, in his words, "seeking to execute policies written into the Constitution."[12] At the same time, while Harlan often stressed that "it is the purposes of those guarantees and not their text" that is the ultimate goal of interpretation, doing so involved for him painstaking attention to the language of the Constitution.[13] The long-running dispute between Black and Harlan was a lovers' quarrel that assumed the intelligibility of the Constitution and of constitutional law; their disagreement was passionate because both were committed to

10 Id.

11 *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

12 *Griswold v. Connecticut*, 381 U.S. 479, 525 (1965) (Black, J., dissenting).

13 *Poe*, 367 U.S. at 544 (Harlan, J., dissenting).

the same endeavor.

Justices Black and Harlan were, then, exemplars of what I am calling the constitutional virtue of faith, and their collegiality in the presence of sharp disagreement was not merely the product of personal sympathy and affection but also a sign of what the virtue of faith enables, the possibility of dialogue. As one of Black's clerks remembered later, Harlan "invariably stop[ped] by to pick Black up going to court and conference and they'd walk down the hall together … [while] Black would try with great animation to convince Harlan to go the other way."[14] Faith in the intelligibility of the Constitution makes it possible to discuss issues of its interpretation as problems that we can work together at solving, even if our differing perspectives make it unlikely that we will agree. We can talk together, not just shout at each other. In contrast, the talismanic Constitution of political choice is merely a form of argumentum ad baculum.

Let's turn now to a second presupposition of the Constitution: the unavoidable presence of uncertainty in its interpretation and execution. Founding-era constitutionalists understood, correctly I think, that no legal instrument complex in its provisions or in its goals can eliminate ambiguity. The founders therefore accepted quite consciously the corollary that interpreting the Constitution is an intellectually creative activity, not a mechanical process of unveiling outcomes already fixed in the text. Madison was only stating a truism of the era when he wrote in *The Federalist* that "all new laws [including the Constitution], though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[15] The Constitution is intelligible, but much of the time its specific meaning, as applied to a specific situation, is not indisputable.

From the adoption of the ninth amendment on, the Constitution's text has rendered this presupposition explicit. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Leave aside the ongoing debate about what use, if any, a court may make of the ninth amendment in exercising the power of judicial review: that is a contested question. But what surely cannot be disputed is that the ninth amendment acknowledges the possibility of varying constructions of the text: the command not to construe the text in a certain manner implies the rational possibility of doing so. Some linguistically possible constructions are patently unreasonable, but a great many readings of the Constitution's provisions are plausible but must nevertheless be wrong under the supreme law of the excluded middle.

The ninth amendment and a few other provisions are attempts in the text itself to rule out wrong-headed constitutional arguments, but for the most part the Constitution leaves it to its interpreters to deal appropriately with constitutional uncertainty … and after all, even the ninth amendment requires interpretation. In the presence of ambiguity, if constitutional interpretation is not to devolve into cynical posturing, interpreters must display the constitutional

14 Roger K. Newman, The Warren Court and American Politics: An Impressionistic Appreciation, 18 Const. Comment. 661, 667 n. 29 (2002), quoting an interview with Joseph Price.

15 The Federalist No. 37, at 236 (Jacob E. Cooke ed. 1961).

virtues of integrity and candor: integrity in coming to decision, candor in the presentation of arguments that often can only be said to be the interpreter's best judgment, not the text's unmistakable bidding. Constitutional ambiguity is as Madison knew unavoidable, and (as he also knew) uncertainty gives ample room for insincere and manipulative arguments. The virtues of integrity and candor mark the distinction between pretense and reality in constitutional interpretation, and as such they are indispensable.

No member of the Supreme Court has ever dealt with greater openness about the Constitution's ambiguity than Robert Jackson. Jackson's expression of uncertainty in the *Kahriger* gambling-tax case is well-known: he began his concurrence with the statement that "I concur in the judgment and opinion of the Court, but with such doubt that if the minority agreed upon an opinion which did not impair legitimate use of the taxing power I probably would join it." *Kahriger* was no sport, moreover: Jackson opinions on constitutional issues often allude to the necessity of decision in the presence of uncertainty. In a 1941 opinion, for example, he wrote that he did "not ignore or belittle the difficulties" of "giving concrete meaning to [the Constitution's often] obscure and vagrant phrases." "But," he continued, "the difficulty of the task does not excuse us from giving [its] general and abstract words whatever of specific content and concreteness they will bear as we mark out their application."[16]

Justice Jackson is a towering figure in American constitutional history, but fame is neither a necessary nor a sufficient indicator of the constitutional virtues of integrity and candor. One of my personal heroes, and a great exemplar of those virtues, is a man little known today: Amos T. Akerman. Akerman was a New Hampshire native who moved to Georgia before the Civil War, and when secession came he fought for the Confederacy. Because, as he later explained, Akerman believed that the South's "surrender in good faith" ought to involve "a surrender of the substance as well as of the forms of the Confederate cause," he joined the Republican party after the War;[17] and from June 1870 through January 1872, Akerman was the Attorney General of the United States. As an historical matter, Akerman's most important role was his heroic attempt to protect the civil rights and voting rights of African Americans in the South, but that noble and heart-breaking story is not my interest tonight. Instead I want us briefly to consider an opinion Akerman wrote as attorney general in August 1871. The question was whether it would violate the Constitution's grant to the president of the power to appoint officers of the federal government if Congress required some officers to pass a civil service exam. Akerman's answer was that with respect to the officers at issue such a requirement would be constitutional as long as it left the president enough candidates to permit a real choice. Before concluding his opinion, Akerman briefly addressed a possible objection:

> But it may be asked [Akerman wrote], at what point must [Congress] stop? I confess my inability to answer. But the difficulty of drawing a line between such limitations as are, and such as are not, allowed by the Constitution, is no proof that both classes do not exist. In

16 *United States v. Kahriger*, 345 U.S. 22, 34 (1953) (Jackson, J., concurring); *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring).

17 Akerman, letter to James Jackson (Nov. 20, 1971), quoted in Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871–1872* 44 (1996).

> constitutional and legal inquiries, right or wrong is often a question of degree.

The fact that, as Akerman acknowledged, "it is impossible to tell precisely where in the scale [constitutional] right ceases and [constitutional] wrong begins," does not mean that anything goes, that any conclusion is consistent with a fair-minded attempt to obey the Constitution.[18]

As was the case with the issue posed to Akerman, the Constitution's commands often require us to come to practical judgments, not logical deductions, about where on the constitutional scale of right and wrong some matter falls. The constitutional virtues of integrity and candor that Attorney General Akerman exhibited in his 1871 opinion are essential to our system because of the inescapability of judgment in the interpretation and application of the Constitution.

Human beings, and especially human beings organized into political societies, typically do not like disagreement. The reasons are perfectly understandable: disagreement on anything above the trivial is confusing, puts harmonious relations at risk, tends to expand and become self-perpetuating, can spiral into overt and violent conflict. As an historical matter, the typical political response to these dangers has been to try to eliminate their source: if we all agree, the problem disappears. Or that is the implicit theory underlying the long story of social attempts to impose political, ethical and religious uniformity: we can get rid of disagreement and therefore we should.

The Constitution rests on the opposite presupposition: disagreement on matters of great importance is ineradicable and it is a tragic mistake to attempt to eliminate it. Long before John Rawls, James Madison wrote that as long as there is liberty, "which is essential to political life," there will be factions, citizens "united and actuated by some common impulse of passion, or of interest" not shared by other citizens since it is quite impossible to stop different people from coming to different opinions. "The latent causes of faction are … sown in the nature of man; and we see them everywhere."[19] Without denying the potentially destructive force of disagreement over political, economic or religious matters, Madison insisted that the Constitution would deal with such dangers by other means than the attempted imposition of unity in opinion. In other words, from the beginning it has been clear that disagreement, even passionate and principled disagreement, will always be a feature of political life under the Constitution because the Constitution embodies a commitment to liberty. In 2006 many of us tend reflexively to think of the first amendment when we think about the legitimacy of disagreement, but let us recall that the original Constitution already included an explicit guarantee of disagreement that was bold, even radical against the backdrop of Western history: Article VI's provision that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Madison's solution to the problem of faction in *The Federalist* invoked the federal structure of the Republic, but after ratification it quickly became clear that there could be no purely structural answer to the risks disagreement poses to the unity of the community. The Sedition Act of 1798 stands as an early example of the susceptibility of the Constitution's own structural forms to dis-

18 Civil-Service Commission, 13 Op. Att'y Gen. 516, 524–25 (1871).

19 The Federalist No. 10, at 57–58.

tortion and manipulation by those afraid to run the risk of social conflict. The Constitution's ambition to maintain political community in the midst of radical disagreement can only be achieved if those who act under it possess the constitutional virtue that I shall call humility, the habit of doubting that the Constitution resolves divisive political or social issues as opposed to requiring them to be thrashed out through the processes of ordinary, revisable politics. This is not the same as skepticism or self-doubt: what I mean by the constitutional virtue of humility is perfectly consistent with a strong and even passionate commitment to one's views on contested matters of constitutional interpretation. The virtue manifests itself in a continuing recognition that the Constitution is primarily a framework for political argument and decision and not a tool for the elimination of debate. The result is a humble or limited conception of the role of the Constitution, of the Supreme Court, and of one's own constitutional convictions.

Justice Oliver Wendell Holmes, Jr., was not a humble man in the ordinary sense of the adjective, but he consistently displayed the constitutional virtue of humility. Holmes is often understood as a skeptic, of course, but I believe that is inaccurate, at least with reference to his views on constitutional law. Both Holmes's famous deference to political decisionmaking and his post-1918 advocacy of strong constitutional protections for freedom of speech stem from the fact that he understood the Constitution along the lines I have indicated. While Holmes's views on the first amendment did develop over time, he signaled his basic attitude of humility about the role of the Constitution at the very beginning of his service on the Supreme Court, in *Otis v. Parker*, decided in 1903. Holmes wrote:

> Considerable latitude must be allowed for differences of view … . Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.[20]

The existence of honest "differences of view" over the meaning of the Constitution ought to give one pause before concluding that the Constitution forbids the resolution of a social conflict through ordinary politics, that it (in essence) ordains a certain orthodoxy on the matter. Of course the Constitution's "fundamental rules of right" sometimes do rule out government's adoption of a particular economic, social or moral view, but as a general matter the Constitution leaves our disagreements to the political domain of conflict and faction, for as Holmes also wrote, it "is made for people of fundamentally differing views."[21] The constitutional virtue of humility is a predisposition to recall that under this Constitution political and social disagreement is ordinarily addressed through the contingent and revisable forms of politics.

I have identified what I believe are certain constitutional virtues, dispositions of mind and will that are necessary if men and women are to interpret and apply the Constitution as that instrument, and the history of our dealings with it, demand. Without those virtues as ideals, and as realities, to the extent that is possible for fallible and

20 *Otis v. Parker*, 187 U.S. 606, 608–09 (1903).

21 *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

fallen human beings, American constitutionalism is a fraud. Even if you accept that claim, however, in itself it does not resolve the problem with which I began: the observation that you need to follow the cards closely to be a good bridge player doesn't say anything about whether you should want to be a good bridge player. And I promised you that I was going to give part of the answer to the question of the Constitution's authority, of why you should want to uphold and obey it. Well, here it is (again): the Constitution's legitimate claim to authority over you and over me rests in part on what it asks us to be if we are to play the game it proposes. Justice Holmes, it seems, once rejected the exhortation to "do justice" with the response that his job was "to play the game according to the rules."[22] Perhaps Holmes thought that understanding of constitutional interpretation made the enterprise completely parallel to the enterprise of playing bridge, just a matter of choosing what game to play without broader significance for the character of the player. If so, he was wrong.

The constitutional virtues of faith, integrity, candor, and humility are essential to the game of constitutional interpretation, but their exercise is not limited to the game: they draw the outline of a particular attitude toward life in political community. Confidence in the possibility of dialogue, recognition of the inescapability of judgment, humility in the imposition of one's own opinions – these are not dispositions parallel to following the card play, they describe the characteristics of men and women who recognize the incorrigible otherness of those with whom they must live, and yet who decline the old, sour solution of denying the equal humanity of the other. To interpret and apply this Constitution, we the People must embody these virtues; to be a humane and decent society we must do the same. The Constitution requires of us that we achieve decency and humanity. In that demand it achieves authority over us, not because we the People made it, but because it makes of us a People that we ought to be.

22 See Michael Herz's superb essay, "Do Justice!" Variations of a Thrice-Told Tale, 82 Va. L. Rev. 111 (1996).