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The "Unwritten Constitution" and the U. C.C.

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The idea of contract lurks in the background of constitutional theory. Much of our theorizing about the Constitution ultimately stems from Locke's social contract theory. It is also common to contrast styles of constitutional interpretation with the judicial approach to other legal documents such as contracts. In fact, this journal recently ran a symposium on "The Constitution as Hard Law," devoted to just such comparisons.[1] These analogies to contract law usually assume that we all know how courts construe contracts. Yet few teachers of constitutional law also teach the contracts course. Just how do courts interpret contracts? How is contract law different from constitutional law?

These questions were brought to mind by a passage in a recent piece about the originalism debate:

> Indeed, if originalism were unsound, the legal system would be in trouble, since it is essentially the method used for interpreting other legal instruments—statutes, contracts, wills, treaties—which are interpreted in light of the understanding of those who enacted or entered into them. Why this process should be thought impossible for the Constitution but natural and inevitable in every other area is something of a mystery.[2]

If only, in other words, we would just approach the Constitution the way we approach a contract . . .

Well, O.K., let's try it. Suppose the Constitution were governed by the Uniform Commercial Code. How would it be construed?

The common assumption seems to be that if the Constitution were considered to be "hard law"—like a contract—courts would decide all issues based solely on the ordinary meaning of the text combined with the drafting history.[3] We wouldn't have any of this nonsense about an "unwritten Constitution" or penumbras or

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1. 6 CONST. COMM. 19 (1989).

2. McConnell, Book Review, 98 YALE L.J. 1501, 1515 (1989). Although I will not pursue the point here, McConnell may well be wrong about the role of originalism in statutory interpretation. *See* W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY ch. 7 (1988).

3. These factors are of course important—indeed, often dominant—in contract interpretation, but they are not exclusive.

nonenumerated rights. Let's take the "right to privacy." If the Constitution were a contract, would it include a "right to privacy"?

If the role of the court is to interpret the contract, presumably such a right would have to be in the document. At least, you might think so. But the Uniform Commercial Code (U.C.C.) says otherwise. The role of the court is indeed to interpret "the contract," but the contract isn't a written document. Section 1-201(10) defines "contract" as "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." It then says "Compare 'Agreement' ". "Agreement," in turn is defined in 1-201(3) as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act." So, we can find the right of privacy in the "contract" even if it isn't in the document in either of two ways: (1) it might be part of the U.C.C.'s background rules, or (2) it might be implied by "other circumstances including course of dealing or usage of trade or course of performance."

We might begin by asking whether a right to privacy was part of the understanding of the parties at the time the agreement was made. Admittedly, it isn't explicitly mentioned in the text. On the other hand, we're not necessarily limited to the text. Under U.C.C. § 2-202, the writing can be supplemented "by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." The Constitution doesn't contain an "integration clause" explicitly eliminating any additional terms. On the contrary, the ninth amendment seems almost to be an explicit disclaimer of such exclusivity. Suppose you saw a contract term that said: "The enumeration in [this contract] of certain rights, shall not be construed to deny or disparage others retained by the [parties]." Would you think the contract was intended to be a complete statement of the rights of the parties?[4]

There seems to be a good argument, then, that "additional terms" are admissible to supplement the constitutional text. Section 2-202 also allows the admission of trade usage. A trade usage is defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction

4. For an extensive historical argument that the Constitution was not intended to be a complete statement of constitutional rights, see Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). The privileges and immunities clause of the fourteenth amendment provides additional textual support for this thesis.

in question." Was government respect for the "right to privacy" such a practice in 1789 when the Constitution was adopted? (Or in 1866 when the fourteenth amendment was adopted?) It's hard to know without detailed historical research, but governments may well have respected some sort of right to privacy with sufficient regularity "to justify an expectation that it will be observed with respect to the transaction in question"—which is to say, in future governmental acts.

The Code's basic interpretative philosophy is stated in the comment 1 to section 1-205:

> [T]he meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

Comment 4 points out that usages of trade "furnish the background and give particular meaning to the language used, and are the framework of common understanding" underlying the contract. Thus, we need to ask whether there was a "common understanding" in 1789 about aspects of privacy. Although the boundaries of that common understanding may be unclear, it does seem reasonable to assume that the framers took for granted the concept of limited government. In giving the federal government the power to govern the District of Columbia, for example, the framers probably did not believe that they were granting despotic authority over the residents (even though the Bill of Rights did not yet exist). Rather, they probably had in mind commonly accepted limitations on government.

So far, we have been considering the problem of construing the Constitution at the time of adoption. What of the "living Constitution" idea? The U.C.C. certainly leaves room to consider post-adoption events in interpreting the Constitution. Under 2-208, the "course of performance" under the contract is always relevant to interpreting the agreement, on the theory that the "parties themselves know best what they have meant by their words of agreement and their action and that agreement is the best indication of what that meaning was." Thus, later history would bear on the interpretation of the Constitution's ambiguous clauses.

"Course of performance" can also modify the terms of the contract itself, as 2-208(3) makes clear. The Article V amendment process specifies a particular avenue for modifying the Constitution. Akhil Amar has recently argued that this method of modification

was not intended to be exclusive.[5] Even if it was, course of performance can still affect the rights of the parties. The closest analogue under the U.C.C. is the common use of contract provisions requiring that all modifications of the contract be in writing. The U.C.C., unlike the common law, gives legal effect to these provisions. But the modification can still be effective as a waiver and cannot be retracted if "retraction would be unjust in view of a material change of position in reliance on the waiver." (U.C.C. § 2-209(3)).

Thus, the U.C.C. leaves some room for new terms to enter the Constitution informally, even if the amendment process was intended to be the exclusive method of modification. For example, consider the expansion of federal power under the commerce clause. Even if the current scope of federal power were found to be inconsistent with the clause itself, the current "course of performance" could operate as a waiver of the limits of the commerce clause—and if so, there certainly seems to be enough reliance to make retraction "unjust in view of a material change of position."

So far, we have been considering what the U.C.C. calls the "agreement" of the parties, as opposed to the "contract," which includes terms implied by law. The U.C.C. provides some additional contract terms beyond those specifically intended by the parties. The most important is the "warranty of merchantability." If we consider the government to be something like a "seller" of laws, then section 3-314 implies a warranty that those laws be "merchantable." Disclaimers of this warranty are tightly controlled by § 2-316—for example, the word "merchantable" must be used and the disclaimer must be conspicuous, or else special terms like "sold as is" must be used. The Constitution doesn't contain any language of this type. So, the implied warranty *does* apply.

What does it mean to be merchantable? Among other things, the goods have to be "fit for the ordinary purposes for which such goods are used." U.C.C. § 2-314(2)(d). As applied to a law, this seems to require that the law be "fit for the ordinary purposes for which laws are passed"—that is, that the law be reasonably related to some accepted government purpose. If the government supplies a law that doesn't meet this test, that's a breach of warranty. Precisely how to apply this test is a bit unclear, but it seems plausible to say that the contraceptive law in *Griswold* failed the test. If I had ordered reasonable legislation and were shipped the Connecticut contraceptive law, I'd send it back to the seller with a nasty note.

The warranty of merchantability, like the written terms of the

5. Amar, *Philadelphia Revised: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

contract, is within the control of the parties. But the Code also imposes a mandatory, non-disclaimable obligation that might have some interesting implications for constitutional law. Under § 1-203, "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." The comment describes this as "a basic principle running throughout this Act." Good faith is defined generally in § 1-201(19) as "honesty in fact," but in sales transactions it carries a special meaning. Under 2-201(1)(b), good faith in the case of a merchant also includes "the observance of reasonable commercial standards of fair dealing in the trade." By analogy, the government might be required to comply with "reasonable democratic standards of fair dealing in government." Surely, this is more than enough of a basis for a right to abortion under at least some circumstances, such as cases of rape or incest, or where the woman's health is threatened. This argument might or might not take us all the way to *Roe v. Wade*, but it does go well beyond the originalist position on abortion.

What are we to make of all this? At the very least, people ought to be more careful about making hasty analogies between constitutional law and the supposedly more limited methods of interpretation used in contracts and other private law subjects.[6] But in fact, the U.C.C. may even have some genuine relevance to constitutional law. The idea of consent plays a major role in both constitutional law and contracts. As the U.C.C. illustrates, courts no longer view the "understanding of the parties" as being solely embodied in a written text. Rather, they look at the text as being set in a whole matrix of common understandings, some limited to the parties or their trade, others representing broad social norms of good faith. To use some of the lingo of the contracts trade, we may need to think of the Constitution as more of a "relational" contract. Or, to put it another way, the U.C.C. suggests that we may have not only an unwritten Constitution but also an unwritten social contract.

One counter to the U.C.C. analogy is to point out that the courts can permissibly exercise a greater policymaking role in the contract area, because the legislature can always overrule their judgment. There is obviously something to this argument, but I wonder if it is quite as powerful as it appears. The legislature can change the court's policy judgment prospectively, but for the particular parties to any individual contract, the court's word is almost certain to be final in interpreting *their* rights and duties. Indeed, the

6. Lest you dismiss the U.C.C. as a legislative intrusion on contracting, you should know that the Second Restatement of Contracts tracks it closely.

contract clause may constitutionally preclude the legislature from modifying judicial interpretations retroactively. As to any contract already in existence, the judiciary's word is nearly as final as it is in constitutional matters.

More importantly, this argument misses much of the point of the U.C.C. provisions by viewing them as intruding on the autonomy of the parties. The philosophy of the U.C.C., however, is that the court is upholding rather than restricting the true agreement of the parties—but the U.C.C. views that agreement as including a lot of tacit understandings. Similarly, the real understanding between "We, the People" and the government may be broader than the terms in the document that now resides in the national archives. Or perhaps this is pushing the metaphor of the social contract too far.

At first blush, the idea of applying the U.C.C. to the Constitution seems peculiar. Of course, no one would argue that the U.C.C. has the force of law as applied to the Constitution—how could a mere statute trump the Constitution? But the Constitution does not contain a set of interpretative rules, so we must inevitably look elsewhere for our "meta-constitutional" rules of interpretation. Today, it is fashionable among scholars to look to French literary critics and German philosophers for such guidance. It seems at least equally reasonable, however, to look for guidance to the rules that govern the application of other important legal documents.[7]

One important difference between constitutional interpretation and contract law is that courts have the power to declare contracts invalid, but not the power to set aside constitutional provisions. What we are concerned with here, however, are not the rare cases in which courts set aside contracts, but the much more common cases in which they are called upon to construe them.

There is admittedly a disparity between the grandeur of the Constitution and the commonplace consumer contract. Constitutional law involves weighty matters of public policy, while contract law usually involves economic matters. To a great extent, however, the difference between the areas is only one of scale: contract law is constitutional law "writ small." What the two areas of law have in common is a deep concern with issues of autonomy and consent. The idea of democratic self-rule deservedly carries great weight in constitutional cases, but freedom of contract exerts great force in the smaller arena of contract law. Contract cases place great weight

7. Some readers have also suggested that the Supreme Court cannot apply "outside rules" to the Constitution because the Court gets its authority from the Constitution itself. An arbitrator gets his authority from the contract, however, but can still apply the U.C.C. in contract disputes.

on party autonomy, just as the Supreme Court often stresses the importance of democratic self-rule. At this fundamental level, the parallelism is strong.

Democratic self-rule is, if anything, a more complex exercise of autonomy than contractual autonomy. The lesson of the U.C.C. is that even in the contract arena, the exercise of autonomy is a complex matter that extends beyond the time and place of signing a document. It seems unlikely that creating a constitutional regime is a more straightforward task than the sale of goods. Contracts are not made in a day; neither was the Constitution.

While there are differences between constitutional adjudication and routine contract cases, at least some of these differences cut against originalism. Courts are rarely called upon to construe contracts that are two hundred years old, signed and ratified by hundreds of individuals, and then amended by hundreds more decades later. If faithful attention to text and drafting history do not always suffice in ordinary contract cases, they seem even less adequate in constitutional cases.

The U.C.C. does provide important flexibility in contract cases, but it would be a mistake to suggest that "anything goes" in contract cases (let alone in constitutional cases). In routine cases, contract language (and to a lesser extent the drafting and context of the agreement) are usually decisive. Courts are cautious in their use of the flexible instruments provided by the U.C.C., in part because of concern that excessive judicial discretion in contract cases would undermine legal certainty and risk substituting the court's preferences for those of the parties. Similar concerns clearly are entitled to weight in constitutional law. In neither area, however, have the courts confined themselves to a strict originalism.

One reason for the tenacity with which some people equate the "meaning" of the Constitution and the "original intent" may be a belief that originalism is the norm elsewhere in the law. If nothing else, a study of contract law is helpful in dispelling this illusion. In the leading contemporary treatise on contract law, Professor Farnsworth defines interpretation as "the process by which a court ascertains the meaning that it will give to the language used by the parties in determining the legal effect of the contract." He continues:

> The word *interpretation* has not always been used in this sense. Some writers have used it more narrowly to refer to the process by which a court determines the meaning that the parties themselves attached to their language. Although their meaning is influential in determining the meaning that a court will give to their language, it is not necessarily controlling because a court may take account of fac-

> tors that are unrelated to the parties' intentions.[8]

In short, originalism does not reign in contract law. Perhaps it shouldn't be surprising that it doesn't reign in constitutional law either.

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8. E. FARNSWORTH, CONTRACTS 477 (1982).