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THE HUMANITIES AND THE CONSTITUTION

*Paul A. Freund**

An eminent physicist was asked by his daughter, an undergraduate, for advice on the choice of a field for graduate study. "You don't have quite a tough enough mind for the hard sciences," he responded. "You have too tough a mind for the soft sciences. I think you're just about right for law." It turned out, fortunately, to be a happy choice. But notably missing was any reference to the humanities; they were evidently off the map altogether. Might the father have prefaced his advice to study law by observing, "you have a strong background in the humanities"?

Asked to describe the relation of the humanities to the law, or to the Constitution in particular, most respondents would venture a rather condescending, twofold answer: the humanities serve to make legal practitioners and interpreters more civilized, and furnish decorative tags that can be attached, like colored streamers on a car, to judgments that have already arrived at their destination. Although neither function is entirely unworthy, taken together their superficiality is complete: the one too amorphous, the other too fragmentary.

To become more civilized (Justice Holmes's sole prescription for our social ills)—to reflect sensitively on life and joy, death and suffering, destiny and chance, the common and the unique, the good and the good-for—enlarges the understanding of the physician, the journalist, and the factory foreman no less than that of the constitutional lawyer or judge. To feel as well as to know—or rather, to sense that to know deeply we must imagine that which we profess to know—is an imperative whether the object of our knowledge is coal mining or the Bill of Rights.

Pinning historical and literary tags on constitutional arguments is frequently no more than a rhetorical flourish, innocent enough unless it deludes the reader by being more powerful than

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its probative force warrants, or unless it reflects self-delusion on the part of the author. Plucking historical or literary nuggets is like looking over a crowd to find one's friends, which is how Santayana described the effort to derive one's moral values from a perusal of modern history.

Still, the telling allusion may provide a genuine flash of insight, and the temptation to use it may be irresistible. I confess to having done so, not in entire shamefacedness, for example drawing on *Measure for Measure* when questioning the virtue of loyalty investigations: "There's scarce truth enough alive to make societies secure; but security enough to make fellowships accursed." Or drawing on Wordsworth when voices are raised saying that God has been driven out of the public schoolrooms along with ritual prayer: "Dear child, dear girl, that walkest with me here,/If thou appear untouched by solemn thought/Thy nature is not therefore less divine./Thou liest in Abraham's bosom all the year,/And worship'st at the Temple's inner shrine,/God being with thee when we know it not."

These, then, are the limbs and outward flourishes of the humanities as they touch the fringes of the process of apprehending the Constitution. The heart and soul of constitutional understanding takes us to the more central concerns of the humanistic disciplines.

The Constitution is a fundamental document. Its elaboration through laws and decisions raises fundamental questions of meaning and the meaning of meaning. There is indeed an ongoing debate on the issue of whether an understanding of the Constitution is essentially a matter of interpreting its language to produce results that we think the framers would have reached, or taking account of the values implicit in its premises and structure, or incorporating into its spacious clauses the values most significant today. The issue is easily recognizable as a basic and subtle one in philosophy, history, and literature, and even in the higher reaches of science. "I don't think he discovered the nucleus of the atom," a colleague remarked of Ernest Rutherford, "I think he put it there." The proper approach will differ from one discipline to another, and from one sector to another within a single discipline. It is not possible to explore the appropriate differences here. In law itself the "meaning" of a bequest in a last will and testament means something different from the "meaning" of due process of law in the Constitution. To confound the two would be akin to reading *Hamlet* as just another Elizabethan revenge play. To fathom the meaning of an imaginative or a constitutive work, ar-

tistic or legal, as a whole or in its parts, it is necessary to know not only the thought at the time of its creation but also what we have become and what we aspire to be.

Look more closely at the problematic provisions of the Constitution. What are we to make of such cardinal provisions as "commerce among the several states," "establishment of religion," "an impartial jury," "privileges and immunities of citizens," "freedom of speech and of the press"? Consider specifically the last-mentioned clause, contained in the first amendment. What is its "meaning"? To take an actual recent issue, does it protect a newspaper which has printed a false and defamatory statement about a private citizen in the context of reporting an event of public interest and concern?

The first thing a humanist will notice is that I have not properly stated the constitutional provision whose meaning is to be examined, or the other constitutional provisions in the preceding paragraph. There is no positive error in the quotations; what is amiss is the isolation of the phrase from the statement in which it is a term. The "meaning" we seek is the meaning of a statement, not of a word. In the case of the first amendment this could make a significant difference. The statement runs: "Congress shall make no law . . . abridging the freedom of speech or of the press." The absoluteness of the language of immunity raises obvious difficulties in such contexts as verbal incitement to violence, false advertising, and deliberate defamation of character. The absoluteness might have been a tolerable reading in a legal regime where these forms of verbal offenses remained redressible under the laws of the several states; the gloss of federalism would thus have helped to define the terms. When the fourteenth amendment, adopted in 1868, guaranteed "life, liberty, and property" against deprivation by the states without due process of law, it was still open to the Supreme Court to read this more general provision as affording more latitude to the states to deal with these offenses than the first amendment permitted to the national government. The Court, however, did not take this line, and so we are faced with language forbidding both national and state controls on expression.

But categorical imperatives invite a search for escape routes. One is suggested by Justice Holmes's counsel on ascertaining the meaning of constitutional provisions: "Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." For Holmes, history was a liberating force: "The ra-

tional study of law is still to a large extent the study of history . . . because it is the first step toward an enlightened scepticism." When you draw the dragon out of his cave, Holmes said, you can examine his teeth and claws to test his strength; the next step is to kill him or tame him and make him a useful animal.

If we first examine the teeth and claws of the first amendment in the light of history, we find that the protection that libertarians of the time sought for the press was a safeguard against prior censorship, and an assurance of a full trial by jury in prosecutions for libel. That rather modest definition of freedom of the press would leave the press exposed to the risk of limitless civil and criminal liability for honestly believed but mistaken libelous statements in a political context. The first amendment would turn out to be not even a tamed lion, but a meek pussycat, out of reach for example, of the Sedition Act of 1798. In the end, the Court has read the first amendment to protect the press against liability for defamation of private citizens where the misstatement was neither wilful nor negligent, and where negligent to allow only actual damages to be recovered.

Was this judgment unfaithful to the "meaning" of "freedom of the press"? The humanist will appreciate how treacherous is the form of the question. If denotative meaning is called for, the decision went beyond the probable instances to which the framers were attending in their concern for freedom of the press. But if purposive or connotative meaning is wanted, the decision is not precluded by the constitutional language, and is faithful to the framers' central design, to secure an independent and vigilant press as a check on the conduct of public affairs. History is not thereby betrayed or disregarded; affording a vital insight into constitutional meaning, it is seen as comprehending relevant experience and philosophical thought. It is no accident that a scholar bred in the Continental tradition sought to characterize John Rawls's *A Theory of Justice* as "just American constitutional law."

Whatever may be the degree of mental "toughness" needed for the hard and the soft sciences, humanists and lawyers require minds at once capacious, rigorous, and empathetic. Like the historian or the literary critic entering into an epoch or a work of art, the lawyer entering into a set of facts or a regulatory plan must be prepared to engage and disengage: to immerse himself, lest he become abstract and unfeeling, to detach himself, lest he become bemused and sentimental. A constitutional lawyer or judge struggling with the claims of the absolute may think of Ibsen, championing those moral claims in *An Enemy of the People* and *The*

Master Builder, and countering with the life-sustaining illusion in *The Wild Duck*. Or wrestling with the claims of the individual conscience against the impersonal rule of law, he may reflect on *Billy Budd* and so come full circle in his thinking, for that great work was inspired, it has been suggested, by the predicament of Melville's father-in-law, Chief Justice Lemuel Shaw of Massachusetts, in having to decide cases prosecuted under the Fugitive Slave Law. Faced with an unsatisfying pattern of precedents, a judge worrying whether to tinker further or to make a new beginning may recall Duhem's theorem in the philosophy of science, that every experiment tests in principle not only the particular element under observation but the structure of antecedent premises upon which the experiment rests.

Amid the delights and creative constraints of form, the humanist is tormented, as is the constitutional lawyer, by questions of meaning, value, and judgment. Intensive practice with those questions is more important as preparation for the study of law than the command of a particular subject, as in judging a prospective nominee for the bench it is more important to see the books in his library than to look at a list of clients in his office. In law, too, if you would carry back the wealth of the Indies you must bring the wealth of the Indies with you.