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BEYOND HISTORICAL BLUSHING: A PLEA FOR CONSTITUTIONAL INTELLIGENCE

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We Americans—We the People—relish our national Constitution and delight in the game of constitutional interpretation.[1] The game of American constitutional interpretation recalls the complexity and nuance of other great games like the Glass Bead Game[2] and Chess.[3] In never-ending iterations about the meaning of our Constitution we pontificate and debate about intellectual antecedents,[4]

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1 Indeed, arguing over the meaning of the Constitution fits multiple definitions of the word "game." *See, e.g.*, THE OXFORD DICTIONARY AND THESAURUS 602–03 (American ed. 1996) (defining "game" as "a form or spell of play or sport esp[ecially] a competitive one played according to rules and decided by skill, strength, or luck"; "a specific instance of playing such a game; a match"; "a scheme or undertaking, etc., regarded as a game (*so that's your game*)"; "an occupation or profession (*the fighting game*)"; or "spirited; eager and willing").

2 *See* HERMAN HESSE, THE GLASS BEAD GAME (Richard Winston and Clara Winston trans., Picador 2002) (1943). In a foreword to the English translation, Theodore Ziolkowski describes the curious nature of Hesse's game:

> What is the "Glass Bead Game"? In the idyllic poem "Hours in the Garden" (1936), which he wrote during the composition of his novel, Hesse speaks of "a game of thoughts called the Glass Bead Game" that he practiced while burning leaves in his garden. As the ashes filter down through the grate, he says, "I hear music and see men of the past and future. I see wise men and poets and scholars and artists harmoniously building the hundred-gated cathedral of Mind." These lines depict as personal experience that intellectual pastime that Hesse, in his novel, was to define as "the *unio mystica* of all separate members of the *Universitas Litterarum*" and that he bodied out symbolically in the form of an elaborate Game performed according to the strictest rules and with supreme virtuosity by the mandarins of his spiritual province.

Id. at xi.

3 Chess—also called the "Royal Game"—"originated in India, or China, during or before the 6th century from ancient forms . . . ." 3 THE NEW ENCYCLOPÆDIA BRITANNICA 177 (15th ed. 1995) (MICROPÆDIA Ready Reference).

4 *See, e.g.*, THE OXFORD COMPANION TO UNITED STATES HISTORY 156–58 (Paul S. Boyer ed., 2001) [hereinafter UNITED STATES HISTORY].

> The origins of the Constitution extend back centuries into Judeo-Christian culture, drawing upon the Bible (the Hebrew scriptures far more than the

historical background,[5] provisions of the Constitution,[6] ratification,[7] contemporary exigencies,[8] and much more.[9]

Seth Barrett Tillman has provided constitutional law "gamers" with two hard-hitting legal think pieces—one, a full-blown article in *Penn State Law Review*,[10] the other, an abridged version of that article in *Cardozo Law Review de*

> Christian); the political culture of the classical world, particularly the five hundred-year history of the Roman republic; natural law and natural rights doctrines formulated by ancient, medieval, and early modern writers; the rhetoric and philosophy of the Renaissance, Reformation and Enlightenment; social contract theory; and English constitutional history, including common law, Whig libertarian tradition, and the formal enunciations in the Magna Carta (1215), Petition of Right (1628), Habeas Corpus Act (1679), and Bill of Rights (1689).

Id. at 156. *See also* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985) (a detailed and rich account of the broad intellectual genesis of the American Constitution).

5 "Beginning with their colonial charters, the New World settlers had embodied their English common-law rights in over two hundred written documents." UNITED STATES HISTORY, *supra* note 4, at 156. These historical documents included founding written guarantees "offered willingly by the crown or benevolent founders or proprietors as in Rhode Island, Pennsylvania, New Jersey and the Carolinas." *Id.* In the aftermath of the Seven Years War in 1763, the British Parliament exercised aggressive imperial measures toward the North American colonies, resulting, in turn, between 1776 and 1780, to American drafting and adoption of state constitutions. *Id.* "At the national level, the Continental Congress, after more than a year of deliberation, submitted a draft constitution, the Articles of Confederation, to the state legislatures for the requisite unanimous ratification." *Id.* Repeated national frustrations in governing the new American republic led the Continental Congress to call for a Constitutional Convention "for the sole and express purpose of revising the Articles of Confederation so they would be adequate to the exigencies of government and the preservation of the Union." *Id.* (internal quotation marks omitted).

6 *Id.* at 157.

7 *Id.* at 157–58.

> Writers cited [by Americans] during the debate over ratification of the Constitution included first and foremost the Baron de Montesquieu, followed by Sir William Blackstone, John Locke, Sir Edward Coke, Jean Louis DeLolme, James Harrington, Thomas Hobbes, David Hume, Richard Price, and Algernon Sidney. Frequently mentioned ancient writers included Aesop, Horace, Polybius, Socrates, Tacitus, and Virgil. The three most widely cited literary writers were Alexander Pope, William Shakespeare, and Jonathan Swift.

Id. at 156. *See also* ROBERT ALLEN RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787–1788 (1966) (describing in detail the ratification debates in the various states).

8 *See, e.g.*, MICHAEL J. GERHARDT, THOMAS D. ROWE, JR., REBECCA L. BROWN & GIRARDEAU A. SPANN, CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 36–51 (2d ed. 2000) (discussing policy consequentialism versus pedigree as a recurring division in constitutional theory).

9 *See generally id.* (discussing the multiple sources and methods of contemporary constitutional interpretation).

10 Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN ST. L. REV. 391 (forthcoming 2009), *available at* http://www.ssrn.com/ abstract=1333576 (unabridged version).

novo[11]—evaluating and critiquing Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay published in the *UCLA Law Review*.[12] In this modest and concise Essay, I seek to praise Tillman's intellectual virtues (while empathizing, in part, with Professor Stone). My pivoting gambit and larger purpose, however, is to urge legal scholars, jurists and lawyers to strive for what I call *contextual constitutional intelligence* in playing the vital game of interpreting our American Constitution.[13]

I. TILLMAN'S VIRTUES

Mr. Tillman's careful dissection of the historical claims of Professor Stone's Melville B. Nimmer Memorial Lecture and Essay is nothing short of breathtaking. But before we ponder the meaning of Tillman's analysis, we should not forget that Geoffrey Stone is a highly prestigious legal scholar with an excellent reputation. The cautionary significance of Professor Stone's exegetical lapses regarding the intellectual history of the religious milieu of American constitutional moments of the

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11 Seth Barrett Tillman, *Blushing Our Way Past History*, 2009 CARDOZO L. REV. DE NOVO 46, *available at* http://www.cardozolawreview.com/index.php?option=com_content&view=article&id=106:tillman200946&catid=18:other-de-novo-articles&Itemid=20 (abridged version).

12 Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1 (2008).

13 I acknowledge and am indebted to Professor Joseph S. Nye, Jr.'s book review essay in the foreign policy journal, *Foreign Affairs*, for the phrase, "contextual intelligence." In reviewing and critiquing LESLIE H. GELB, POWER RULES: HOW COMMON SENSE CAN RESCUE AMERICAN FOREIGN POLICY (2009), Nye—the University Distinguished Service Professor at Harvard University—wrote:

> Contextual intelligence must start with an understanding of not just the strengths but also the limits of U.S. power. . . . The United States can influence, but not control, other parts of the world. World politics today is like a three-dimensional chess game. At the top level, military power among states is unipolar; but at the middle level, of interstate economic relations, the world is multipolar and has been so for more than a decade. At the bottom level, of transnational relations (involving such issues as climate change, illegal drugs, pandemics, and terrorism), power is chaotically distributed and diffuses to nonstate actors.
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> . . . .
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> Contextual intelligence is needed to produce an integrated strategy [of American power].

Joseph S. Nye, Jr., *Get Smart: Combining Hard and Soft Power*, FOREIGN AFF., July–Aug. 2009, at 160, 162, *available at* http://www.foreignaffairs.com/articles/65163/joseph-s-nye-jr/get-smart. Of course, I recognize the differences between American foreign policy strategy and American constitutional interpretation. Nye's concept of "contextual intelligence," however, is a useful heuristic device for thinking about the project of constitutional interpretation.

late Eighteenth Century[14] should be taken in measured stride by the legal academy. We all make mistakes. Lawyers and law professors—in the company of scientists, literary critics, journalists and others—are prone to overinterpretation.[15] But the *theatricality* of law—the argumentative attempts by advocates of a client or a cause (including legal academics) to justify contested claims[16]—complicates legal discourse.

Indeed, the paramount virtue of Mr. Tillman's response to Professor Stone is that of lawyerly wisdom: for lawyers to "[n]ever overstate your case" and to "[b]e scrupulously accurate."[17] This is an insight that goes back to the ancient art of rhetoric. "You'll harm your credibility . . . if you characterize the case as a lead-pipe cinch with nothing to be said for the other side." Moreover, "[s]crupulous accuracy consists not merely in never making a statement you know to be incorrect . . . but also in never making a statement you are not *certain* is correct. So err, if you must, on the side of understatement, and flee hyperbole."[18]

Other important virtues of Tillman's critique of Stone include the following: to remind us to be carefully aware of the complete text of the Constitution when making claims of constitutional meaning;[19] to urge us to consider the 1787 Constitution and its meaning to the Framers and Ratifiers separately from the post-1791 Constitution, which incorporated the Bill of Rights;[20] to have us appreciate the

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14 *See generally* Robert F. Blomquist, *Thinking About Law and Creativity: On the 100 Most Creative Moments in American Law*, 30 WHITTIER L. REV. 119, 152–56 (2008) (describing four creative American constitutional moments from the Declaration of Independence in 1776 through the Articles of Confederation in 1777, the drafting and ratification of the Constitution of the United States in 1787–88, and the enactment of the Bill of Rights in 1791–92).

15 This is a topic I am exploring in a manuscript-in-progress. *See* Robert F. Blomquist, Overinterpreting Law (Oct. 1, 2009) (unpublished manuscript, on file with the author).

16 *See, e.g.*, ENCYCLOPEDIA OF RHETORIC 417–19 (Thomas O. Sloane ed., 2001).

17 ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 13 (2008). Alas, even Justice Scalia, from time to time, forgets his own advice. *See, e.g.*, Babbit v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 718 (1995) (Scalia, J., dissenting) (arguing in a hyperbolic fashion that the statutory and regulatory definition of "take" under the Endangered Species Act should be limited to the ancient common law understanding that "describes a class of acts . . . done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals)").

18 SCALIA & GARNER, *supra* note 17, at 13–14. *See also* ROBERT F. BLOMQUIST, LAWYERLY VIRTUES 17–18 (2008) (describing the lawyerly virtue of integrity as requiring an Aristotelian balance of *logos*, *ethos* and *pathos*).

19 *See* Tillman, *supra* note 11, at 47–49.

20 *See id.* at 49. *Cf.* McCreary County v. ACLU of Ky., 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (citing Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 34

complexity of history, in general, and American constitutional history, in particular;[21] to counsel us to practice scholarly prudence in describing historical context in making interpretational claims about the Constitution;[22] and to insist that we corroborate facts through careful source-checking and cross-references.[23]

In agreeing with Mr. Tillman that Professor Stone could have done better in more accurately and completely describing the importance of religion to the Founders and whether or not the United States Constitution created (or endorsed) a "Christian Nation" (or, in my humble opinion, a religiously active but tolerant national culture), we should remember, as Marshall McLuhan once said, that "the medium is the message."[24] With all due respect to endowed law school lecture series that invite distinguished scholars to pontificate on various legal subjects, perhaps there is an all-too-human temptation of those fortunate few who get offered substantial honoraria to speak and greet and publish law review essays for these engagements to sometimes approach the undertaking in a slapdash, shoot-from-the-hip-fashion. Time is short and distinguished legal scholars have much on their respective plates. So maybe we should take such academic legal performances as endowed lectures and follow-up essays with a grain of salt. Or, alternatively, maybe law schools should give invited scholars more time and better guidelines

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(2004)) (noting that George Washington, of his own volition, added the words "so help me God" after the formal, prescribed constitutional oath in 1789).

21 *See* Tillman, *supra* note 11, at 50. Consider, further, the following excerpt from the introduction of an encyclopedia of American history:

> The word *history* has two quite different meanings. *History* can mean both "what happened" in the past and what people who experienced or otherwise learned about past events have said or written about them. No one can describe "what happened" even in a small area and during a brief time. Too much is going on at once, even in the life of an individual, for a complete description to be possible, let alone comprehensible. Historians impose order on the past by selecting those elements of what happened that are relevant to their purposes. Like sculptors, they explain meaning and create understanding as much by what they leave out as by what they include. Give ten sculptors identical blocks of marble and the same model and no two of their statues will be exactly alike. Ask ten historians to write about the same subject and their accounts will be equally individual.
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> No one knows better than a practicing historian that *the past is more complex than any narrative can suggest* and that the order historians impose on it to make it comprehensible is an artifice, not true reality.

THE READER'S COMPANION TO AMERICAN HISTORY xix–xx (Eric Fonder & John A. Garraty eds., 1991) (emphasis added).

22 *See* Tillman, *supra* note 11, at 51–53.

23 *See id.* at 53.

24 MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN 7 (MIT Press 1994) (1964).

in helping them craft their lectures and published essays. Law review editors of journals where the endowed lecture essay will appear should also avoid giving the eminent scholar a free pass.

II. CONTEXTUAL CONSTITUTIONAL INTELLIGENCE

The larger significance of Mr. Tillman's penetrating critique is, I think, a call for more rigorous and careful constitutional interpretation. Tillman's project is linked with the musings of Professors Daniel A. Farber and Suzanna Sherry who warn against "foundational theories of interpretation to provide simple answers to all constitutional questions and unify all of constitutional doctrine," and who go on to observe that those who "try[] to make constitutional interpretation simple, certain, and coherent . . . mischaracterize both the Constitution and the judicial enterprise."[25] For Farber and Sherry, both the Constitution and the judicial enterprise "are human creations, and thus both are complex, uncertain, and sometimes inconsistent. Judicial interpretation of the Constitution is a constantly evolving process of accommodation, and it cannot be constrained by artificial theories built from the ground up."[26]

The complex, uncertain and sometimes inconsistent process of constitutional interpretation should draw upon what Professor Wilson Huhn calls the five types of legal argument: text, intent, precedent, tradition and policy analysis.[27] Importantly, as Tillman reminds us, the meaning of the Constitution of the United States needs to be grasped by a scrupulous and thorough examination of the specific words in the document's various iterations and the structure of the whole document. What the text of the Constitution meant to the panoply of Founders and Ratifiers (in a wide assortment of written accounts) in the late Eighteenth Century is vitally important as well. American constitutional interpretation must also give due measure to the holdings and opinions of our Supreme Court Justices over the course of more than two centuries. Traditional ways that Americans have conducted themselves on matters of personal conduct and governance are relevant and weighty on some constitutional questions.

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25 DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS ix (2002).

26 *Id.*

27 WILSON HUHN, FIVE TYPES OF LEGAL ARGUMENT 13 (2002).

Finally, pragmatic, forward-looking balancing of social costs and benefits can also shed critical light on constitutional interpretation.

Contextual constitutional intelligence is a way to tie together the aforementioned insights. For example, on the meta-question of whether or not the Founders and Ratifiers created a "Christian Nation," we need, first, to read every word of the Constitution, itself, and seek, as Mr. Tillman suggests, a particularistic and a holistic sense of the entire *text*, viewed through a temporal analytical lens. Second, we should strive (though it is a Herculean endeavor) to synoptically grasp the *intent* of the founding/ratifying generation by poring over Eighteenth Century American essays, journals, books, pamphlets, letters and newspapers, while taking advantage of the labors and insights of later historians. Third, the full corpus of United States Supreme Court *precedent*—majority, plurality, concurring and dissenting opinions of our Justices from 1790 to the present with selective sampling of lower court judicial opinions—can help us gain perspective on the views of the American judiciary across the spectrum of, at one end, a religiously thick Nation, and at the other end, a religiously threadbare Nation. Nonjudicial precedents concerning the interplay between the state and religion can also be instructive.[28] Moreover, taking stock of the panoply of American *traditions* that have yoked together the secular with the sacred would allow us to identify patterns of cooperation and respect between government and religion.[29] Finally, the forward-looking, utility-maximizing, instrumentalism of *policy* analysis would afford us a futuristic ballast to the backward-looking techniques of text, intent, precedent and tradition. From the standpoint of policy analysis, perhaps the United States of America in the Twenty-First Century has transcended its origins as an arguably

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28 *See generally* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 111–46 (2008) (discussing the nature of and categories of nonjudicial precedent). Congressional activities as well as Presidential activities can create important nonjudicial precedents. *See, e.g.*, Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 7–35 (2004) (discussing the precedent of oath-taking presidents adding "so help me God" to the Presidential Oath and mentioning God in their inaugural addresses).

29 *See, e.g.*, PROF. JOHN. H. ELLIOTT FBA, EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492–1830, at 184–218 (2006). University of Oxford Regius Professor Emeritus of Modern History, Sir John Huxtable Elliott, starts his chapter, *America as a Sacred Place*, with the following sentence, describing the empire-building worldviews of England and Spain in the New World: "For Protestants and Catholics alike, America held a special place in God's providential design." *Id.* at 184.

"Christian Nation," or a "Religious Nation," to become a "Spiritual Nation."[30]

Constitutional gamers of all stripes should be thankful for the brilliant and bracing thoughts of Seth Barrett Tillman.

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30 *See, e.g.*, Robert F. Blomquist, *Law and Spirituality: Some First Thoughts on an Emerging Relation*, 71 UMKC L. REV. 583 (2003).