HARD LAW AND MANDATE FOR JUSTICE

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The question is whether the Constitution should be treated as "hard law" and interpreted essentially the way the Uniform Commercial Code or the Motor Vehicles Law is interpreted, or whether the constitution should be treated as a more general mandate to do justice and create as far as possible a good society.

If this were a multiple choice test, I think the only correct answer would be: Both of the above.

If this were a "short-answer"-type exam, I would write: The Constitution is "hard law" *and* it is a general source of inspiration—and its authority as each depends largely on the other.

For my essay-type answer I want to use a yachting metaphor: if you want to win the America's Cup, your boat needs both a keel and a sail (or even to put yourself in a plausible position to litigate about it). The constitution's authority depends on its keel—its hard law dimension—in conjunction with its sail—its expression and advancement of the evolving ideals of the society.

Now, the test of whether a constitution really counts as an expression of ideals is whether the constitution occasionally makes possible a moral breakthrough, showing that the ideals are alive. For most Americans today, I think *Brown v. Board of Education* represents such a constitutional breakthrough.

It seems to me that people came to accept *Brown v. Board of Education*, even though the result of the case was controversial at the time, because the decision relied on a constitution that has a reassuringly solid, legal quality, rather than relying merely on some general principle or bromide that could be used by anybody anytime to mean anything at all.

In exactly the same way, people accept the often-arbitrary "hard-law" provisions of the constitution—after all, why should a 34-year-old be disqualified to be president, why should money bills have to originate in the House of Representatives, why should Rhode Island have as many U.S. Senators as New York—because these provisions are found in a document that also embodies the

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ideals that people respect, a document that underwrites breakthroughs like *Brown v. Board of Education* which most people eventually come to be proud of.

If keel and sail are dependent on each other in this way, if neither would have much authority without the other, you would not expect the U.S. Constitution to be unique in having both dimensions. And indeed, in other legal systems there coexist the "hard-law" quality and what might be called the quality of "inspiration."

For purposes of comparison, let me suggest two examples from very different cultures.

The English common law was traditionally full of legalistic complexity, notorious for being bound by precedent, full of technicalities, full of the "quiddities" of the law. But the common law was also the "heritage of the free-born Englishman," the essence of justice under law, the thing that for centuries distinguished the humblest Englishman from what he considered the servile, contemptible French peasant. This may be why legal language, legal metaphors turn up in virtually every act of every Shakespeare play. As E.P. Thompson and others have made clear, the law (with all its injustices) entered proudly into ordinary people's sense of who they were and of what it was to be English. And if the common law had both keel and sail, the values we might identify with the sail dimension made possible the breakthrough decisions of the English common law—the decision guaranteeing the right of the jury to return a verdict of acquittal in a criminal case, the decision abolishing slavery, and so on.

The second example is that of Jewish law (called Halacha in Hebrew) and Islamic law (called Sharia in Arabic). (The two systems are so congruent in structure and in ethos that it is only fair to treat them conceptually as one system.) These systems, again, are hard law, technical, sometimes hypertechnical in a way that nonsemites disparage as "Talmudic." Yet for orthodox Jews and Muslims the law is also literally God's gift to mankind: the living embodiment of what is good, so that studying and practicing the law is the supreme way for human beings to live a Godly life, with all that that implies in cultures pervaded by religious emotion.

Perhaps in every legal system, the sail dimension reinforces the authority of the keel dimension, and vice versa. In a constitutional democracy, this mutual reinforcement goes a long way toward resolving the twin paradoxes of constitutionalism, namely "Why do free citizens continue to accept rules—some of them very specific and perfectly arbitrary—laid down two hundred years ago?" and "Why do free citizens accept decisions about controversial public

questions by unelected judges invoking the inspiration of the Constitution?" The answer seems to be that they wouldn't accept the one if it weren't for the other: that a 200-year-old road-vehicles code couldn't remotely be enforced today, any more than people would accept grand Supreme Court decisions that relied solely on some general injunction to do justice, pursue righteousness, or build Socialism in One Country.

Needless to say, the point here is *not* that the Constitution has some "hard law" provisions, and some uninhibited "do-justice" provisions, and never the twain shall meet, but rather that virtually any act of constitutional interpretation, in order to be plausible, needs to be true to both constitutional dimensions.

Now, I have been relying on my keel-sail metaphor, but here is where the usefulness of that metaphor comes to an end. (You can't push any metaphor too far.) You might be able to calculate precisely, at least in theory, just how much keel and how much sail you need (say) to win the America's Cup. But there is no "science" of an effective constitution that would lend itself to any such calculation because the variables are too many and too subjective: history, politics, psychology, what the Annales historians call "mentalités"—all are factors in the very changeable balance of keel (hard law) and sail (high ideal) in American constitutionalism at any given time.

The truth is that people rightly want constitutional continuity, predictability, stability, law-likeness. People also rightly want justice, goodness, and wisdom. (And some people want utopia, or at least they want an effort to approximate utopia through constitutional interpretation.)

But you cannot have both perfect law-likeness *and* the quest for perfect justice in constitutional interpretation. What is more, it is very unlikely you really want either in perfect form. Perfect law-likeness, in the sense of "hard-and-fast rules," would be intolerably static, the legal equivalent of the architecture of the Pharaohs in the Valley of the Kings. Perfectly utopian constitutional interpretation would be equally frightening. Your idea of utopia and mine are different, and the history of the twentieth century illustrates the gruesome things that happen—the gulags, Thousand Year Reichs, collectivisation famines—that happen when people fight out their conflicting visions of utopia unrestrained by "hard law."

If the constitution should not be *only* hard law, or *only* utopian inspiration, and if it cannot perfectly be both at the same time, then the only remaining possibility is for the constitution to be *im*perfectly law-like and at the same time *im*perfectly a mandate to do

justice. Constitutionalism is a rough compromise between the conflicting "goods" of hard law and utopian inspiration: a compromise between "goods" that are fundamentally irreconcilable with each other, "goods" either of which, if pushed too far at the expense of the other, might not turn out to be so very good at all.

It is this inescapable element of muddle and compromise that keeps constitutional interpretation interesting, and prevents constitutional law from ever becoming a cut-and-dried science. And after all, in between law suits they are still running the America's Cup race: the yacht-engineers don't seem to be anywhere near to cracking the keel-sail problem just yet, either.