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Writing Across the Margins: An Introduction

L.H. LaRue*

I am honored that our guests have come to explore this topic and to let my book, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority*, be the occasion for which we have gathered. I suspect, however, that their primary reason for participating is that they are implicated personally. Each has done the dirty deed of writing about constitutional law from the perspective of the humanities, and so if I am guilty, they are guilty. Let me begin by saying something about each of them.

Jack Balkin brings to the law and legal discourse his love for continental literary and philosophical theory, particularly his fascination with what is called deconstruction and postmodernism. As you might know, Balkin's fascinations do not fit well with the legal academy's image of itself. For most legal scholars, the academy's self-image is that our work is sober, analytical, and above all, responsible. Balkin's indecency is that he laughs at this self-image, and because he is such a witty writer, he has offended (to put it mildly) many of those who believe in that self-image.

Mary Ann Glendon brings to the study of American law a deep knowledge of other legal systems. She is one of our most noted scholars in comparative law. The American legal academy not only has the self-image that I have just mentioned, but it is also incredibly parochial, self-centered, and monolingual. So when Glendon suggests that the Europeans are more civilized than we are when dealing with basic issues of family law and gender justice, most American scholars recoil in shock.

Winnifred Sullivan brings to the law her scholarly interest in religion, especially the history of religion. As you know, the legal academy is resolutely secular. To take religion seriously is to take it too seriously, and when she says that legal discourse about religion is incoherent, she delivers the message that few want to hear.

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Robin West brings to the law her deep respect for the stories that women tell to women as a means for countering the powers that rule. She has disturbed many in the legal academy, both male and female. She disturbs the leading male theorists by exposing how partially they see the world; she disturbs the leading feminist theorists by exposing how partially they listen to their sisters' stories.

And finally, there is James Boyd White, the person to whom I have dedicated my book, as he once dedicated a book to me. White brings to the law a mind that has been deeply shaped by his love of literature, and so he speaks with a voice that is unique in the legal academy. Most members of the legal academy believe that reading poetry is an act of elegant leisure akin to drinking fine wine. But White makes large claims for the cognitive power of poetry. Thus, he blasphemes when he asserts that the poet's imagination can get one closer to the truth than the theorist's imagination, and he blasphemes in the eyes of those who worship theory.

Let me next say a few things about my own book, *Constitutional Law As Fiction*. The first point to clarify is that I do not associate fiction with falsehood. A fictional story is a story produced by the imagination. It may or may not be based on facts, but fictions are neither necessarily false nor necessarily true. You can lie with facts; you can tell the truth with fictions. I will not argue the point here, but I will simply wave a hand toward Homer and Shakespeare and say that I think they tell more truths than most social scientists. If you will grant me, at least hypothetically, the possibility that fictions can reveal truths, then maybe you will be hospitable to my claim that we find many fictions in judicial opinions and to my additional claim that these fictions are crucial. Of course, some of these judicial fictions will be good, some bad, some true, some false; but it will not be their mere fictional quality that leads to these evaluative judgments.

Rather than keep the conversation too abstract, let me give two examples of the kinds of fictions I talk about. One fiction is the perfectly routine fiction about "purpose." Hugo Black told a story, which I recount in my book, about the history of the First Amendment's prohibition that government may not set up, or to use the magic word, "establish" religion. He told this story to clarify the evils that the drafters intended to outlaw and he contended that knowing these evils would aid us in interpreting the First Amendment. My thesis is that Hugo Black's story about the history and the purpose of the First Amendment is a fiction, and if you want to know why I think that, you can read the book. For today, I want only to note that stories about history and purpose are routinely told about contracts, wills, statutes, and other legal documents, and if we did not tell these particular kinds of fictions, it would be very difficult to interpret these documents.

Justice Black should not be criticized for telling a fictional story; he had to do it.

The second type of fiction that interests me are the stories that judges tell about constitutional law itself. There are two great stories that fascinate me. One is the story of the Constitution of limits, the Constitution that lays down rules. The rules, in turn, create rights that can never be taken away. The second is the story of the Constitution of growth, the Constitution as a living and evolving document that grows and adapts to changing circumstances. Both are beautiful stories, and in my heart of hearts, I believe both of them. But my mind also tells my heart that both of these stories are fictional, and also that the two stories are somewhat at odds with each other. How can constitutional rules create rights that can never be taken away if the document which creates the rules constantly changes and grows? Why do we describe change with the benign metaphor of growth? Despite problems in fitting the two stories together, I believe that these two stories are indispensable. Without them, constitutional law as we know it could not even exist.

What can go wrong when one writes a book that claims that the fictions of limits and growth are crucial? I have some evidence about what can go wrong, which I received from my publisher: a review of my book by the bibliographic service, *Choice*. *Choice* does short reviews, prints them in small typeface on 3 x 5 cards, and distributes them to every American library that is interested in receiving them. My book was classified as a book of "political theory," which of course puts it under the heading of "political science," which in turn puts it under the heading "social and behavioral science." The reviewer gave me good marks for one part on the exam he conducted. The review states that I did a very good job in demonstrating that we can read judicial opinions as stories that contain fictions. However, there was a complaint. As I have said, I think these fictions are absolutely crucial; without them constitutional law could not exist. The reviewer states that I fail to support this claim with good arguments. Please do not misunderstand. I am not complaining about the review, because I think it gets the matter exactly right. From the perspective of a social scientist — my reviewer being one — I wrote without science, thereby insuring that I would write defectively. The reviewer is absolutely right that no self-respecting social scientist would write as I have written, and from the perspective of a social scientist there is no properly respectable argument in my book. I think that there is a good argument, but I am quite happy to concede that it is an argument that has its home in the humanities as opposed to the social sciences. By the way, I am not asking social scientists to abandon their calling. We greatly need more good social

scientists, not fewer, and I hope that they work hard in doing what they do even better than they do now. However, I do not concede that they have a monopoly on knowledge; the poets also know, and those who tell stories know, from your grandmother all the way back to Homer's grandmother.

Please consider, if you will, the key doctrine of constitutional law — the power of judicial review — and consider how one might understand it from the perspective of the humanities. By "judicial review" I mean the judiciary's power to declare legislative or executive acts unconstitutional. Does our belief in this judicial power rest upon a story or upon a theory? Is it supported by social science or by the humanities? From the humanities' point of view, how should one proceed? I would proceed by exercising my imagination and telling a story which may or may not be based upon fact. I try to imagine why lawyers, judges, and law professors would believe that the judiciary should have a veto over legislation.

They could not be convinced, in my imagination, by the text of the Constitution because it fails to mention a judicial veto. This omission is a quite embarrassing fact. The document mentions an executive veto, and in the context of the time, executive vetoes are ordinary while judicial vetoes are not. Why would the drafters provide for an executive veto — an ordinary power — while omitting mention of a judicial veto, an extraordinary power? Do we not interpret documents to exclude extraordinary powers unless such powers are mentioned?

Because the textual argument hurts the believers' faith, let us imagine turning to the historical evidence about the Framers' intent. Was judicial review an intended power? If one asks the historical question, one must go back to the writings of the great Crosskey, whose evidence has been either ignored or distorted. Most readers have not read Crosskey with the care he deserves. Crosskey did not claim that the drafters intended that there be *no* power of judicial vetoes. Instead, he argued that the drafters did not intend the sort of judicial review we have now, in which the judiciary ranges broadly across every social issue that troubles our nation, rather than restricting themselves to matters that fall within the administrative scope of the judicial branch. Speaking only for myself, I must confess that Crosskey's argument persuades me: the Founders did not intend *what we have now*. However, I imagine that this historical argument (and also the textual argument) might seem too technical or too dry to persuade the believer.

Consider one of the most popular arguments in constitutional law — the structural argument — the canonical version of which appears in *McCulloch v. Maryland*. Structural argument does not proceed straight from the text. From the text one infers the structure, and then from the structure

one infers the result. In *McCulloch v. Maryland*, John Marshall inferred from the text the structural fact that the economy was within the general power of the federal government; from that general power Marshall then inferred the power to establish a bank. How would a structural argument look with judicial review? As Thomas Jefferson pointed out, Congress has the power to impeach both judges and executive officers, and furthermore, the Necessary and Proper Clause, which Jefferson did not cite, has a horizontal sweep. The Congress is given the power to pass laws governing the way the judiciary executes its powers. From these two textual powers one can infer a structure in which Congress is first in power, and from this structure one can infer the result: If Congress is first in power, then the judiciary may not veto its work.

These first three arguments all put the text at the center of our attention — one by construing it, one by asking for the intent that lies behind it, and the third by inferring a structure from it. Can we go deeper? For example, can we imagine using the argument that Professor Bobbitt calls the "ethos" argument? One can easily say that the basic ethical character of our constitutional government is that all power is limited. However, even if our ethical character is one of limits, I suppose that we are still left with the following questions: Who judges when the limits have been exceeded? Why shouldn't the people be the judges? After all, the Constitution begins: "We the People" How can we insure that what we call "the rule of law" does not degenerate into "the rule of lawyers"?

If the ethical argument can instruct us that our government is one of limits, and yet this argument fails to instruct us on who should enforce these limits, then where do we turn? What argument persuades us to devolve this power onto the judiciary? To say what might persuade us, I need to imagine our character. I need to use the human power of sympathy or empathy to understand the audience of lawyers and legal academics, and thus to understand what might persuade them. It will not do to take the scientific stance and stand outside of the community. One must speak from inside the community, speak as a witness. Speaking in this subjective mode, and not as an objective scientist, I would say that most of us (we lawyers and legal academics) are persuaded by the prudential argument for judicial review.

The task of enforcing limits should be given to judges because they will do the least amount of damage. One might well believe the people are the best ultimate judge, but also think they are poorly organized to do the job. If we accept the prudential argument, which in my imagination, is what most people accept, does it rest on a theory or on a story? Why do we believe it? Imagine how a theorist would approach this: First, one

would have to have a theory about what the limits should be. Second, one would have to have a theory about when the judiciary and the people might disagree about those limits. If they agree, the question is moot. Third, in those cases in which the people and judiciary disagree, one would have to specify, according to the first step, how many times the people would be correct and how many times the judiciary would be correct. Finally, having established all of the above in a properly theoretical way, one would have to balance the negative consequences of the number of errors that the judiciary would make against the positive consequences of the number of correct decisions that the judiciary would make.

I hope that describing the theory shows it to be ludicrous. I cannot imagine how one would execute the agenda. It requires one to make a set of empirical judgments for which no evidence could possibly exist. It requires one to theorize specific answers about limits for which there are only nontheoretical answers. Finally, it requires one to do a balancing act at the end of the inquiry, even though we altogether lack an adequate theoretical scale. Consequently, I say that the faith in judicial review rests upon something other than a theory. I think it rests upon a story of some sort, and I suspect that most of us were told the crucial stories long before we became lawyers. I realize that for many self-respecting legal academics my assertion that they do not have a good theory, or alternatively, that if they have one it is irrelevant, is an assertion that might go down hard. Even so, I believe that my story about what my colleagues believe is true.