"Constitutional Fictions".

https://www.encyclopedia.com/politics/
encyclopedias-almanacs-transcripts-and-maps/constitutional-fictions
Aviam Soifer (1992).

The leading modern American discussion of legal fictions remains Lon Fuller's articles first published in 1930–1931.

Fuller argued that legal fictions promote function, form, and sometimes fairness. It has become increasingly clear, however, that legal fictions no longer serve merely as an "awkward patch" on the fabric of law, as Fuller put it.

Fuller considered legal fictions a necessary evil for systematic thinking about law. He viewed legal fictions as akin to working assumptions in physics: they provide a kind of scaffolding, but are not intended to give essential support nor to deceive.

After their useful function ends, legal fictions should and could be readily removed.

Fuller defined a legal fiction as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."

In today's postrealist world, however, there is a widespread sense that legal fictions are not some small awkward patch, but rather virtually all of law's seamless cloth.

This transforms the problem of defining and explaining legal fictions. The very pervasiveness of legal fictions helps to camouflage them. We may generally ignore a phenomenon that permeates our legal culture.

Fuller's taxonomy of legal fictions illuminated Henry Maine's earlier assertion that legal fictions "satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish (dis-like) for change which is always present."

To Maine, legal fictions were "invaluable expedients for overcoming the rigidity of law," but they were also "the greatest of obstacles to symmetrical classification."

Fuller advanced beyond Maine's complacent legal anthropology, but he still somewhat desperately sought symmetry. Today we tend to regard all law as a gyrating classification system full of overlaps, gaps, and incommensurate variations.

In Grant Gilmore's words, "The process by which a society accommodates to change without abandoning its fundamental structure is what we mean by law."

Precisely because legal fictions are not static, they may grow to influence or even control how we think or refuse to think about basic matters. The fiction that a corporation is a person warranting certain constitutional protections, for example, obviously has spread like (invasive plant) kudzu since the Supreme Court first propounded this notion in dicta in Santa Clara County v. Southern Pacific Railroad (1886).

We employ legal fictions to preserve a notion of continuity with the past, yet legal fictions (help) short-circuit attempts to comprehend the complexity behind the assumptions a legal fiction conveys. Like sunlight, legal fictions affect the directions of growth.

There is a basic irony in our commitment to perserving the rule of law alongside our reverence for pragmatic immediate solutions to pluralistic problems.

Nevertheless, few Americans have ever gone as far in condemning legal fictions as did Jeremy Bentham. Bentham claimed that "In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rotteness." If fictions are to justice "[e]xactly as swindling is to trade," as Bentham put it, Americans tend to exalt trade so much

that we tolerate and even celebrate the trader, the flimflam man, and the innovative judge.

In constitutional law, legal fictions are at least as pervasive as in what is still nostalgically called private law. Obviously, a great judge in a constitutional case has to do more than look up the answer in the constitutional text. But what it is we want a good or great postrealist judge to do remains intensely controversial. The paradoxical way in which Americans revere but fail to heed closely constitutional law suggests that ~~it may be impossible~~ to separate basic constitutional fictions from constitutional governance.

Yet political history in the United States has been dominated by an ongoing, multi-faceted debate about proper interpretation of the Constitution. Controversies about specific instances of judicial review and proposals for constitutional change ebb and flow, but debate about what is true to the Constitution never disappears.

Americans generally display remarkable respect for an old ambiguous text; despite, perhaps because of, wide-spread uncertainty about what it contains. Yet the Constitution and its most important amendments surely were not ratified by a majority of Americans. Moreover, whoever "we the people" may have excluded or included, it is clear that the American people have not actually endorsed the centuries of judicial gloss on the Constitution that provides much basic constitutional law.

Nevertheless, sacerdotalizing of the Constitution amounts to a civic religion.
(https://en.wikipedia.org/wiki/Civil_religion)

General acquiescence in the interpretations of the text by unelected judges thus provides a central constitutional fiction that ironically also has proved to be a notably sturdy foundation.

It is important to distinguish this crucial, general trapeze act involving the assumption of societal consent from the more specific uses of fictions in constitutional law.

As early as the 1830s alexis de tocqueville declared:

"The government of the Union rests almost entirely on legal fictions. The union is an ideal nation which exists, so to say, only in men's minds and whose extent and limits can only be discerned by understanding." Tocqueville made his point about the central role of legal fictions in American governance, ironically, just as constitutional debate about the abolition of slavery began to spiral toward the civil war.

That example of the terrible cost of fundamental disagreements about the meaning of the Constitution helps explain why most Americans most of the time are willing to accept the central constitutional fiction that judicial interpretations of the Constitution somehow can settle even the most controversial questions.

An important initial question is whether the American model of judicial review, promulgated most famously by Chief Justice John Marshall in Marbury v. Madison (1803), may not itself be a fiction of elemental proportions. Marshall insisted that to deserve the "high appellation" of "a government of laws and not of men," the American system required the power of ~~federal~~ judges to declare legislative acts unconstitutional, but this was hardly necessary to decide the case before the Court and lacked explicit support in the constitutional text.

Additional fictions that have played particularly important roles in our constitutional history range from markedly inconsistent judicial declarations enforcing federalism to decisions granting fourteenth amendment protection to corporations.

Among the most important recent examples are decisions applying most but not all of the bill of rights to the states, on the theory that their protections were incorporated through the due process clause of the Fourteenth Amendment, and decisions making equal protection doctrine applicable to the federal government through a theory of "reverse incorporation" premised on the Fifth Amendment.

Less obvious but equally important constitutional fictions limit or ignore the constitutional

text. For example, the slaughterhouse cases (1873) rendered the privileges or immunities clause of the Fourteenth Amendment essentially redundant. Also, there has been long-standing reluctance to give the ninth amendment any content at all.

Constitutional fictions thus may restrain as well as enlarge judicial authority. Particularly flagrant constitutional fictions have produced a smattering of serious scholarly and political criticism, but most Americans apparently continue to revere the Supreme Court and to accept its interpretations even when not pleased by the results in specific cases.

For example, there were withering attacks on the Court's aggressive use of what many saw as fictional limitations on progressive legislation in the 1920s and 1930s, but the failure of President Franklin D. Roosevelt's court-packing plan suggested that Americans, even when outraged at specific results and dubious about their bases, nevertheless were more willing to accept judicially created fictions than to tinker with the institution of judicial review.

As James Russell Lowell stated in 1888, "After our Constitution got fairly into working order it really seemed as if we had invented a machine that would go of itself, and this begot a faith in our luck which even the civil war itself but momentarily disturbed."

But Lowell sardonically continued, "I admire the splendid complacency of my countrymen, and find something exhilarating and inspiring in it ... And this confidence in our luck with the absorption in material interests, generated by unparalleled opportunity, has in some respects made us neglectful of our political duties."

It might be thought that legal fictions ought to play a diminished role in constitutional law, in contrast to their prevalence in common law. For instance, constitutional law does not lack a text, whereas the common law, in Frederick Pollock's words, "professes … to develop and apply principles that have never been committed to any authentic form of words."

Despite the best efforts of interpretivists, originalists, and self-proclaimed strict constructionists, however, constitutional law as we know it, and as it has been from the start, demonstrates clearly that even our written "authentic form of words" requires additional criteria for everyday construction and interpretation.

In fact, we seem to grow ever more doubtful about what sources we should consult, to say nothing of what might be thought authoritative.

We lack any rule of recognition to distinguish constitutional truth from constitutional fiction.

Moreover, our constitutional history clearly reveals that some sections of the authentic text have been relegated to limbo through nonoriginalist hierarchical principles, whereas other sections have acquired so many levels of added meaning that it is now hard to discern any original shape beneath the layers of barnacles added over the years.

The constitutional text is manipulable, but that need not mean it is infinitely manipulable. Federal judges have declared themselves less bound by stare decisis in the constitutional realm than they are in other domains, but they tend to remain concerned with the past and with their won places in history.

Yet these same judges use legal fictions to purge the past of its blemishes and discontinuities. There seems to be a kind of ideological frontier thesis in constitutional law. Justices who start anew and never actually look back are applauded. Because they usually can find precedents readily and tend not to consider contexts, these judges reinforce a tendency to turn our backs on past unpleasantness.

Fundamental assumptions in constitutional doctrine posit an America full of openings: we may all escape the sins of the past; we all enjoy a fair and equal start in the race of life. Equality among citizens, for example, is virtually always assumed, whether actual or not. This formal ideal of equality generally provides a complete defense against those who seek remedies for past

discrimination unless they can demonstrate that the defendants actually violated the plaintiffs' equality; thus, the victim must place the defendant at the scene of past crimes.

This fiction was essential a century ago in the civil rights cases (1883) and Plessy v. Ferguson (1896); a similar fiction was crucial when the Court vigorously enforced its version of freedom of contract before the new deal; and its formal fictional counterpart seems prevalent in racial discrimination cases today.

In constitutional law we are devoted to the artificial doctrinal categories and analytic tests that judges create. This remains so even if we are subliminally aware, as Justice Oliver Wendell Holmes noted, that a particular doctrine may be "little more than a fiction intended to beautify what is disagreeable to the sufferers." Judicial reliance on binary tests to foster pseudocertainty, is not new, of course, as anyone who recalls the twilight zone of dual federalism must acknowledge.

https://en.wikipedia.org/wiki/Dual_federalism

In constitutional cases today, however, judges seem to rely even more frequently on multipart formulas to convey that "delusive exactness" Holmes decried, and sometimes practiced. Legal fictions are quite different from literary fictions. As Robert Cover pointed out, potential violence lurks beneath the fictions created by judges, whereas the nexus between real force and even the most powerful literary fiction is attenuated (reduced).

Additionally, the author of literary fiction enjoys more freedom than the creator of legal fiction. The poet, even the novelist, usually tries to operate on multiple levels and even dreams of reaching a broad and varied audience. Writers of literary fiction also tend to acknowledge and even to use the possibility of complicity between the teller of the tale and the recipient of it, so that shared understanding is a core concern.

By contrast, legal fiction employs a specialized shorthand; many creators and users of legal fiction intend their work product to be confined to, or even ignored by, only a narrow audience of professionals.

Americans find it easy to read prepossessions into the Constitution. We resemble religious sects who are able to find diverse creeds in the same Bible. A century ago, Christopher G. Tiedeman, a leading conservative treatise writer, admiringly noted that "when public opinion … requires the written words to be ignored the court justly obeys the will of the popular mandate, at the same time keeping up a show of obedience to the written word by a skillful use of legal fictions."

Today heated political and social controversies often revolve around whether the Constitution resolves, or is even relevant to, the debate over abortion or affirmative action, for example. Many people will consider whatever answers the Supreme Court hands down to be constitutional fictions at best. Yet, as the historian Charles Beard put it in 1930, "Humanity and ideas, as well as things, are facts."

Constitutional fictions tend to grow into fundamental facts of life in a culture that reveres law.

Aviam Soifer (1992) (see also: Constitution as Civil Religion; Constitutional Interpretation; Incorporation Doctrine; Legal Realism.)

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