

LEGAL THEORY

ASPECTS OF DECONSTRUCTION: THE "EASY CASE" OF THE UNDER-AGED PRESIDENT*

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When the deconstructionist says that *all* cases are to some degree problematic, the mainstream legal scholar gleefully pulls out a favorite crystal-clear case and asserts "not this one!" Judging from the law review commentary, the most popular of these "easy cases" concerns the constitutional mandate that the President shall be at least thirty-five years of age.¹ Judge Frank Easterbrook mooted this so-called "easy case" in 1983:

When the Constitution says that the President must be thirty-five years old, we cannot be certain whether it means thirty-five as the number of revolutions of the world around the sun, as a percentage of average life expectancy (so that the Constitution now has age fifty as a minimum), or as a minimum number of years after puberty (so the minimum now is thirty or so).²

Despite the fact that Judge Easterbrook cited this constitutional provision as presenting an uncertain case, Professor Frederick Schauer peered into it and saw nothing but a crystal-clear "easy case":

The parties concerned know, without litigating and without consulting lawyers . . . that a twenty-nine year-old is not going to be President of the United States.

. . . .
. . . [I]n response to any number of provisions relating to years and dates, it is possible to imagine an intervening change in the calendar. Ever since Macbeth mistakenly relied on the linguistic precision of the witches' prophesy, people have been able to construct weird and fanciful instances in which even the clearest language breaks down.

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¹ See U.S. CONST. art. II, § 1, cl. 5 ("No person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty-five Years . . ."). Justice Frankfurter in 1949 pointed to this provision as among the most explicit in the Constitution. See *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

² Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983).

The easy answer to the argument from weird cases is the observation that the weird hypothetical cases are wildly counterfactual.³

Countering for the deconstructionists, Professor Gary Peller argued that a court could interpret the age requirement as “signif[ying] to the Framers a certain level of maturity rather than some intrinsically significant number of years.”⁴ Along the same lines, Professor Girardeau Spann suggested that “the governing principle [of the clause] is that Presidents should possess a minimum degree of maturity and experience, [so the] principle may best be advanced by ignoring the rule in the case of a particularly precocious thirty-four year old.”⁵

Responding for the doctrinalists, Professor Kenney Hegland conceded that Professor Spann may have shown indeterminacy in a case one year below the constitutional line,⁶ but says that at best Spann constructed a “difficult case.”⁷ Instead, Professor Hegland asks us to consider a truly “easy case,”⁸ where “[t]he candidate is eighteen years old and is, by admission, quite immature.”⁹ Professor Hegland obviously feels that this new case clinches the argument for doctrinalism: “The constitutional provision dictates against the candidacy A judge, assuming good faith, could not avoid the provision, even if a judge wanted to do so. Resources and imagination can always create arguments; they cannot always create *good* arguments and therefore cannot always produce doctrinal uncertainty.”¹⁰

Professor Hegland’s conclusion surely captures present mainstream legal thinking: although poor, bad, or outrageous arguments can always be made, they do not prove the case for deconstruction. Implicitly, if deconstruction needs poor, bad, or outrageous arguments, then it can’t be taken seriously. But on closer examination, we find that Professor Hegland has assumed a heads-I-win-tails-you-lose position. If one fails to articulate a rationale for allowing the eighteen-year-old to hold the office of President, then Hegland wins; if one does assert a rationale, the rationale itself is labeled per se bad or outrageous, and Hegland also wins.¹¹

³ Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414, 420 (1985).

⁴ Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985).

⁵ Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 532-33 (1984).

⁶ Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1207 (1985).

⁷ *Id.* at 1208.

⁸ A literature is developing around the term “easy case.” H.L.A. Hart first suggested that even conceding to the Legal Realists judicial discretion for “hard cases,” there can be no discretion for “plain cases.” H.L.A. HART, *THE CONCEPT OF LAW* 119-50 (1961). Professor Michael Moore contributed an important formal analysis, concluding that “there are no easy applications of rules to facts, and hence, no easy cases.” See Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 271-92; see also Hegland, *supra* note 6; Schauer, *supra* note 3; Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 471-72 (1987).

⁹ Hegland, *supra* note 6, at 1208.

¹⁰ *Id.* (emphasis in original).

¹¹ In fact, it seems that every writer who poses a self-proclaimed outrageously “easy” case uses

The key to this debate is the emotional impact upon the reader suggested by the term "outrageous." But, what seems "outrageous" necessarily depends upon its context. Thus we have to look at the underlying contextual assumptions in considering the arguments of Professors Schauer, Peller, Spann, and Hegland.¹² Deconstructionists say that all interpretation depends on context. Radical deconstructionists add that, because contexts can change, there can be no such thing as a single interpretation of any text that is absolute and unchanging for all time.¹³

The relativity of contexts may be appreciated by considering an example in recent history which came close to challenging the constitutional qualifications for the Presidency. George Romney was a serious contender for the Republican nomination for President in 1968. He was not, however, a "natural born Citizen"¹⁴—a requirement appearing in the same provision as the age requirement. This fact presented a "legal problem," as the media referred to it at the time. But this "legal problem" was not considered disabling; rather, it was just a "negative" in the Romney "picture." Every candidate had negatives; this one was simply a Romney negative. It probably would not have been enough to derail the Romney nomination (other factors led to his ultimate downfall as a candidate).

One tactic quickly used by the Romney campaign was to redefine the plain meaning of the term "natural born." When he announced his candidacy, a story in the *New York Times* explained:

Mr. Romney said his birth in a Mormon colony in Chihuahua, Mexico, would be no barrier to his election. The Constitution requires that the President be a "natural born citizen of the United States." He said the question had been studied by several law firms and that since both his parents were Americans he was a "natural born" American.

"There can be no question on this point," he said.¹⁵

Romney was engaging in a bit of deconstruction (not to mention a uniquely dubious appeal to the authority of unnamed counsel) in his effort to overcome the citizenship requirement. "Natural born" does not mean (at least to the doctrinalists) "born of American parents." But the idea behind the strategy was to defuse the issue and get Romney nomi-

this ploy. See, e.g., Pollack, *Constitutional Interpretation as Political Choice*, 48 U. PITT. L. REV. 989 (1987).

Any theory of interpretation (at least, one that is to be taken seriously) must yield a determined result in those cases where the text is specific. For example, a President must be thirty-five years of age. No "legitimate" theory could read the text as signifying "maturity" as the standard, and thus as permitting thirty year olds to hold office.

Id. at 1023.

¹² See also Solum, *supra* note 8, at 474.

¹³ Extreme-radical deconstructionists, such as myself, even stumble over the words "interpretation," "text," and "context," but that is another story.

¹⁴ U.S. CONST. art. II, § 1, cl. 5.

¹⁵ *Romney Declares He's in '68 Race; Predicts Victory*, N.Y. Times, Nov. 19, 1967, at 1, col. 1, at 62, col. 1.

nated by the Republican party. The matter could then be left for scholars, lawyers, and perhaps Supreme Court justices to quibble about.

What *would* have happened had Romney been elected President? Perhaps, there would have been some agitation to amend the Constitution—with retroactive application—taking out the “natural born Citizen” qualification. The victorious Republicans would have probably opposed that idea, fearing that the large majorities needed to pass a constitutional amendment would not be available. The Republicans most likely would have adopted the strategy to wait and defend the Romney presidency in the courts.

Suppose someone brought a legal action against Romney to declare that he could not serve as President. An immediate defense the Romney team might have used would have been to challenge the standing of the plaintiff. Under *Frothingham v. Mellon*,¹⁶ the legal position of a plaintiff challenging the constitutional acceptability of an elected President would be indistinguishable from that of any other citizen of the United States, and hence there would arguably be no standing at all.¹⁷ Waiting in the wings should the standing argument be insufficient to dismiss the claim is the political question doctrine.¹⁸

If the lack-of-standing argument will defeat any challenge under the qualifications clause of Article II, then we might effectively conclude that the qualifications for President are unenforceable and hence only of political value. This political value is not the same as no value; after all, during the 1968 election campaign, Romney was in fact charged with being an “unconstitutional” candidate because he was not a natural born citizen, and this may have cost him some electoral support. But it would mean that Professor Schauer’s “easy case” is not, in fact, determinate, and that a “clear” qualification for President can be overridden by the dynamics of a popular majority expressing itself in a presidential campaign.

Suppose, to take Professor Spann’s example, a thirty-four year-old were elected President. Assuming that the “standing” issue could be surmounted, a court would probably hold the case moot on the ground that the President, by the time the lawsuit was filed and litigated, had turned thirty-five. Another variant would be to claim that as long as the President attains the age of thirty-five during his or her projected term in

¹⁶ 262 U.S. 447 (1923).

¹⁷ The *losing* candidate would also lack standing to sue to prevent the victorious under-aged candidate from taking office since, having lost the election, his position would be no different from that of the average citizen.

¹⁸ See *Baker v. Carr*, 369 U.S. 820 (1962) (refusing to interpret meaning of the constitutional requirement of a “republican form of government”); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (same). Although the political question doctrine itself may be nothing other than a tactic of judicial avoidance, it typically is justified rhetorically by the story that the text of the Constitution (*i.e.*, the meaning of its language) indicates that the Framers did not intend judicial review of this constitutional clause.

office, the constitutional requirement is satisfied. A court might even stretch this reasoning to include a projected second term—if a majority of the justices felt that it was vital to the security and “domestic Tranquility”¹⁹ of the United States that this particular individual serve as President. Thus, even Professor Schauer’s twenty-nine year-old could make it to (and stay in) the Oval Office.

I previously said that the Romney example was only an aid to understanding the relativity of contexts in construing texts. Professors Schauer and Hegland can surely argue that my lack-of-standing conjecture is not what they had in mind when they posited a clear case of the under-aged President, for I have simply avoided making a substantive legal argument. Their claim is that there is no good or reasonable argument (*i.e.*, no non-outrageous argument) that could be made on the *merits* that would defeat the thirty-five year-old qualification.

I think there is a “good” constitutional argument—that is, an argument that can be made on the merits—for permitting an under-aged President. But simply to announce the argument would be to fall into the same contextual trap of impliedly assuming the present context to be the one that applies. Indeed, it is hard to imagine a major party²⁰ in the present day putting forth an eighteen-year-old as its presidential nominee. My reply to Professors Schauer and Hegland, thus, would be: Your so-called easy case of the eighteen-year-old President is itself outrageous; it will not come up—and if it does, in some future context, then it will no longer be outrageous. This is a more *realistic* reply to Professor Schauer’s hypothetical than arguing the merits and then encountering his anticipated reply that *my* argument is outrageous!

Let us, nonetheless, imagine and supply a suitable context in which an eighteen-year-old candidate is elected President. Only by imagining a plausible context *in which the posited case arises* can we then evaluate the reasonableness of supporting arguments. This may be what Professor Mark Tushnet had in mind in urging us to be cautious about the “argument from weird cases”: “[T]he cases are weird until someone finds it worthwhile to pursue them. Then we see that what we thought of as constraints built into the language were only constraints built into our accepted ways of doing things.”²¹

If we are willing to supply a suitable context in which we can imagine that an eighteen-year-old would be nominated and have a serious chance of winning the election, then the legal argument I make will appear quite reasonable. We can easily speculate as to future contexts. Perhaps a student-led revolt leads to demands for new leadership and the

¹⁹ U.S. CONST. preamble.

²⁰ I use the qualification “major” to avoid candidates from splinter parties who are not meant to be serious candidates (*e.g.*, nominating a comedian for President as occurred in the 1960s).

²¹ Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 688 n.24 (1985).

students and their supporters put forth their eighteen-year-old leader against the incumbent President. Or, as in science-fiction, an unstoppable virus causes the death of all persons over twenty-years-old—leaving the eighteen-year-old candidate as one of the oldest available!

Given *any* context in which it is reasonable to imagine an eighteen-year-old presidential nominee, my constitutional argument would be the following. The qualifications for President are listed in article II of the Constitution. Every provision of the Constitution is subject to amendment, and must be assumed to have been superseded or qualified by any relevant amendment. In this case, the relevant amendments are the fifth and fourteenth amendments. Age discrimination—in a matter that restricts the right of the people to elect a President of their own choosing—would clearly violate the due process clause of the fifth amendment, and the due process and equal protection clauses of the fourteenth amendment.²² The provision requiring the President to be thirty-five years of age thus sets up an unconstitutional discrimination against younger persons based on an irrational age limit, and is therefore a nullity.

My constitutional argument is not itself *dependent* upon the change of context which I have assumed. But the contextual change *is* important to overcome the “outrageousness” test that is, after all, the last refuge of the doctrinalists in characterizing the arguments of deconstructionists. If I flatly claim that the age qualification amounts to age discrimination in violation of the fifth and fourteenth amendments, a doctrinalist might well characterize my argument as “outrageous.” But it will appear far less outrageous—in fact, it will appear quite normal and ordinary!—if we actually have a serious case of a presidential nominee who fails to meet one of the article II qualifications. To some extent, the Romney case is a case in point.

Hence, once we get over the “outrageous”-ness (or “weird”-ness, or “nonstandard”-ness) hurdle, we can find that *even in the present context* a reasonable, substantive legal argument exists (here, age discrimination) that could suddenly make the case appear not at all “easy.” “Outrageousness” always depends upon the context in which the argument is made. If no context is specified, the present context is assumed—but that is a *real* context. The relativity of contexts assures, for the deconstructionist, the relativity of texts.

The most critical query to a posited “easy case,” I believe, asks whether it is truly a “case.” The failure to focus on that word has resulted in the assertion of numerous outrageous hypotheticals which are absurdly “easy” to decide. However, none of these hypotheticals give rise to a case, dispute, or controversy; if they do, then they are no longer

²² My argument is not even necessarily dependent upon the existence of the fifth and fourteenth amendments. In their absence, a court could nevertheless find the principle of nondiscrimination in matters pertaining to age to be “implicit in the concept of ordered liberty.” See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.).

easy.²³ To pick one example among many, I offer Lawrence Solum's candidate for the irrefutable, clincher case: "[I]t is not difficult to imagine easy cases where a particular action clearly does not violate *any* legal rule. If a homeowner eats ice cream in the privacy of her home, it will not give rise to any legal action."²⁴ But there is no dispute here! No one is claiming that the homeowner has injured anyone else by eating ice cream, and hence there is no occasion to cite a legal rule that she may have violated. There is, in short, no "case." Professor Solum must supply us with a posited but real harm to someone resulting from the homeowner's action in order to have a person who could make a claim against her.

Nonetheless, given temporary license to be gruesome, the deconstructionist can supply such a case: the homeowner's child is starving (and indeed starves to death) while the homeowner eats ice cream. In this case, the homeowner's action (or inaction) gives rise to a criminal case; the state will (or at least should) bring charges of negligent manslaughter.²⁵ As Stanley Fish put it in a recent symposium, "Either there is no problem, or it can only be solved in relation to that which is in dispute."²⁶

²³ Michael Moore's observation is particularly apt here. *See supra* note 8.

²⁴ Solum, *supra* note 8, at 472 (emphasis in original).

²⁵ If we change the jurisdiction to another country—one dominated by a religious fundamentalism that prohibits the eating of dairy products—then the homeowner, whether in the privacy of her own home or not, has violated the legal rule in that jurisdiction.

²⁶ S. Fish, *The Law Wishes to Have a Formal Existence* (paper presented at the symposium "Deconstruction and the Possibility of Justice," Cardozo Law School, October 2, 1989).