Description of document:	Department of Justice (DOJ) Office of Legal Policy (OLP) Original Meaning Jurisprudence: A Sourcebook, 1987
Requested date:	14-January-2026
Release date:	12-February-2026
Posted date:	23-February-2026
Source of document:	FOIA Request U.S. Department of Justice Office of Information Policy Initial Request Staff, 6th Floor 441 G Street, NW Washington, DC 20530-0001 FOIA.gov

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February 12, 2026

Re: FOIA-2026-01315
ADF:VAV:SBT

This responds to your Freedom of Information Act (FOIA) request dated and received in this Office on January 14, 2026, for a copy of an Office of Legal Policy publication from 1987 concerning original meaning jurisprudence. **Please note that this Office was closed due to a lapse in funding appropriations from October 1, 2025, through November 12, 2025, which has resulted in a delay in responding to your request.**

Please be advised, the Office of Legal Policy report to the Attorney General entitled *Original Meaning Jurisprudence: A Sourcebook* (March 12, 1987) is publicly-available at the following link: https://www.ojp.gov/pdffiles1/Digitization/115083NCJRS.pdf.

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the instructions on OIP's website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically submitted within ninety days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." If possible, please provide a copy of your original request and this response letter with your appeal.

Sincerely,

for
Andrew D. Fiorillo
Chief, Initial Request Staff

U.S. Department of Justice
Office of Legal Policy

Report to the Attorney General

Original Meaning Jurisprudence: A Sourcebook

March 12, 1987

ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK

Office of Legal Policy
March 12, 1987

Office of the Attorney General
Washington, D. C. 20530

Throughout our history there have been several schools of thought that differ over the fundamental question of how the Constitution should be interpreted, how its words and phrases should be given meaning. Today, issue has been joined between the interpretivists, those who believe that the Constitution must be interpreted in accordance with the orginal meaning of its terms, and the non-interpretivists, those who see the Constitution as a document whose meaning changes over time to accommodate the shifting values of each succeeding generation.

The questions raised by this debate go to the very heart of our plan of government, the form of our democracy and the role of the courts in that democracy. Well-respected scholars have aligned themselves on each side of the debate.

The present study, "Original Meaning Jurisprudence: A Sourcebook" is a contribution to that on-going discussion. It was prepared by the Justice Department's Office of Legal Policy, which functions as a policy development staff for the Department and undertakes comprehensive analyses of contemporary legal issues.

It is hoped that this study will generate additional thought on a topic of great national importance, a topic about which there are several reasonable points of view. It should be of interest to anyone concerned about a provocative and informative examination of the issues.

Edwin Meese III

EDWIN MEESE III
Attorney General

Executive Summary

This sourcebook is intended to acquaint the reader with the principles of original meaning jurisprudence, a topic that has been the subject of extensive debate within the legal community in recent years. Simply put, original meaning jurisprudence is the enterprise of attempting to interpret the provisions of the Constitution as those provisions were generally understood at the time of their adoption by the society which framed and ratified them. Contrary to the misperceptions of many, this does not entail ascertaining and obeying the private, inner intentions of the framers of a provision, nor does it necessarily entail limiting the rights set forth by the Constitution in accordance with the framers' contemporaneous practices.

Original meaning jurisprudence has been the dominant form of constitutional interpretation during most of our nation's history. Except for a brief period at the beginning of this century, original meaning jurisprudence was all but synonymous with the idea of interpreting the Constitution from the founding of the Union until the mid-1960's, when it became more common for judges to rely on extra-textual sources of values to fashion constitutional rules.

Section I of this report describes the basic conflict between originalists (or "interpretivists") and those who look outside the Constitution for rules of decision in constitutional cases (sometimes called "non-interpretivists"). It argues that original meaning jurisprudence is the only approach that respects the status of our Constitution as fundamental law and is the only approach that preserves the Constitution's fusion of individual rights and democratic self-government.

Section II presents answers to questions often raised in the debate, and attempts to rebut arguments pressed by non-interpretivists. For example, it rejects challenges to originalism based on the observation that some of the Constitution's provisions are ambiguous and that the expressions of a provision's meaning by different parties to its adoption may be contradictory. These facts make the work of interpretation more difficult, certainly, but they are not insuperable and they do not excuse the use of the Constitution to implement personal policy choices or other extra-textual values.

Section III offers examples of cases in which judges looked to original meaning in interpreting the Constitution. Section IV offers examples of cases in which judges looked, not to original meaning, but instead to their own social or economic beliefs; these examples show that both conservative and liberal judges have engaged in noninterpretive review at various times in our history. Section V gives the views of a number of non-interpretivist commentators, in their own words, on how the Constitution should be interpreted.

Finally, for those who would like to pursue the subject further, Section VI is a bibliography of books, articles, and speeches on interpretivism and noninterpretivism.

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I. THE ISSUE

The most basic issue facing constitutional scholars and jurists today is whether federal courts should interpret and apply the Constitution in accordance with its original meaning. Stated bluntly, the debate concerns the extent to which the text of the Constitution as ratified remains relevant to constitutional analysis. Several prominent law professors and jurists have argued that application of the Constitution's original meaning is inadequate to the task of constitutional adjudication, if not impossible to perform. Commonly referred to as "non-interpretivists,"[1] these theorists contend that courts are not bound by original meaning, but may instead decide cases based on amorphous ideals such as "the dignity of full membership in society," "the national will," or "deeply embedded cultural values."[2]

Because these alternative standards are so vague, non-interpretivism often leads to the imposition of the judge's personal concept of prudent public policy. In effect, non-interpretivists argue that life-tenured federal judges should have free rein to decide policy issues that affect virtually every aspect of our society, restrained by neither the text of the Constitution nor the electorate.

For example, during the early 1900's, federal courts developed and applied the doctrine of "substantive due process" to invalidate scores of federal and state statutes designed to ameliorate working conditions and to improve the economy. Many of these now-discredited decisions were not based on the language of the Constitution as originally understood, but on the social and economic views of the specific judges who decided them.[3] In an analogous way, the Supreme Court

[1] Some writers describe the contending sides in the debate as interpretivism and non-interpretivism. *See, e.g.*, J. Ely, *Democracy and Distrust* 1 (1980); Bork, *Styles in Constitutional Theory*, 26 S. Tex. L.J. 383, 384 (1985). Others refer to the opposing schools as originalism and non-originalism. *See, e.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 204 n.1 (1980). In this sourcebook, "interpretivism" and "original meaning jurisprudence" are used synonymously.

[2] A list of standards proposed by various non-interpretivists is set forth in Section V. For a recent example of the effect non-interpretivist scholars are having on legal practitioners, see Kelbley, *Where is the 'real Constitution?*, *The Philadelphia Inquirer*, Feb. 13, 1987, at 23a ("the 'real' Constitution * * * is in a certain frame of mind, written on our spirits, feeding the hunger of the heart to engage in at least a portion of that 'comprehensive ocean of business' that Dickens' Jacob Marley's ghost ignored because of a misplaced trust in the 'letter' of the law of his trade. In that sense the 'real' Constitution is not a final achievement but an endless task of constituting its meaning in the crucible of the impassioned claims of citizens, the forceful arguments of lawyers and, above all, the principled decisions of judges.")

[3] *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905) (discussed in Section IV); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

has recently created out of whole cloth a sweeping "right to privacy," a "right" the Court used to invalidate, among other things, the abortion laws of all 50 states.[4] Although some constitutional provisions do protect certain aspects of privacy, these provisions prohibit only particular kinds of government intrusion in specified situations.[5] The Court recognizes that a general "right of privacy" is nowhere mentioned in the Constitution,[6] but through judicial sleight of hand it purported to find this right in the "penumbras" and "emanations" of the Bill of Rights taken as a whole.[7] Still another recent example of non-interpretivism is the contention that capital punishment is unconstitutional, not because it conflicts with the original meaning of the eighth amendment's prohibition of cruel and unusual punishments, but because it contravenes its opponents' personal concepts of human dignity.[8]

In stark contrast to non-interpretivism stands the notion that courts must construe the Constitution according to its original meaning. Although original meaning jurisprudence has never been universally practiced, it predominated in constitutional adjudication for the first 150 years of our Nation's history.[9] Under this approach, a court determines the most plausible meaning of the constitutional provision at issue to the society that ratified it. This original meaning — discerned from the words, structure, and history of the Constitution — is then applied to the specific circumstances or issues before the court.

The debate between interpretivists and non-interpretivists is not simply a theoretical dispute among academicians. It raises fundamental issues regarding the extent to which we are allowed to govern ourselves. As stated by Professor Lino Graglia:

> [A]t stake is nothing less than the question of how the country should be governed in regard to basic issues of social policy: whether such issues should be decided by elected representatives of the people,

[4] *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (discussed in Section IV); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (same).

[5] *See, e.g.*, U.S. Const. amend. II (protecting the right "to keep and bear Arms"); *id.* amend. III (prohibiting quartering of soldiers "in time of peace * * * in any house, without the consent of the Owner").

[6] *See Roe*, 410 U.S. at 152.

[7] *See Griswold*, 381 U.S. at 484-85.

[8] *See* Address by Justice William J. Brennan, Jr., entitled *The Constitution of the United States: Contemporary Ratification*, before the Text and Teaching Symposium, Georgetown University, at 14-16 (Oct. 12, 1985) (attached as Appendix H).

[9] *See* Bork, *supra* note 1, at 384. As Raoul Berger has noted, "[f]rom Francis Bacon on, the function of a judge has been to interpret, not make, law." Berger, *"Original Intention" in Historical Perspective*, 54 Geo. Wash. L. Rev. 296, 310-11 (1986).

largely on a state-by-state basis, or * * * by a majority of the nine Justices of the United States Supreme Court for the nation as a whole.[10]

Interpretation of the Constitution according to its original meaning is the only approach that takes seriously the status of our Constitution as fundamental law, and that permits our society to remain self-governing. Our civic ancestors established a delicately balanced political system characterized by a limited national government of enumerated powers, democratic decision-making through elected representatives, separation of powers, and checks and balances. This system reflected the founders' fundamental choices regarding the kind of government that would best protect both order and individual liberty. To secure a rule of law and not of men, they reduced their decisions to writing in a Constitution that, by its own terms, is the basic charter of our society.[11] They gave the Constitution authority and legitimacy through a protracted ratification process, thereby ensuring that its principles had the consent of the governed.

Because the Constitution is *written* — a document whose words were debated at length and carefully chosen — we may reasonably presume that it conveys an identifiable meaning. And because the Constitution itself provides a process for changing its provisions through article V, we must conclude that the original meaning of each provision was intended to control unless and until amended.

To preserve the status of the Constitution as our basic charter, the states and each branch of the federal government must consider themselves governed by its terms. Although the Supreme Court is the final interpreter of the Constitution,[12] judicial review is legitimate only when courts adhere strictly to the text of the Constitution. Indeed, Chief Justice John Marshall expressly tied his defense of judicial review to the principle that courts, like legislatures, are bound by our basic charter: "[I]t is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of *courts*, as well as

[10]Graglia, *How the Constitution Disappeared*, 81 Commentary 19, 19 (Feb. 1986) (attached as Appendix E). Although Professor Graglia is an interpretivist, non-interpretivists have likewise noted that this debate has far-reaching implications. *See* Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1, 1 (1984) (the debate "implicates important issues of how much power judges should have in government").

[11]*See* U.S. Const. article VI; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[c]ertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation * * *").

[12]*See Marbury v. Madison, supra* note 11; 1 J. Story, *Commentaries on the Constitution of the of United States* §§373-96 (1833).

of the legislature." [13]

Judge Robert Bork has also noted the relationship between the legitimacy of judicial review and application of the Constitution's original meaning by the courts:

> The question non-interpretivism can never answer is what legitimate authority a judge possesses to rule society when he has no law to apply. * * * [W]hat entitles a judge to tell an electorate that disagrees that they must be governed by that philosophy? To see how extraordinary the claims of the non-interpretivists are it is useful to reflect that, if a judge wrote a statute and used it to decide a case before him, we would all regard that as a egregious usurpation of power, even though, it being a statute, the legislature could repeal or modify it. If moral philosophy would not justify a judge-written statute, how can it justify a judge-written constitution * * *? [14]

In other words, if the courts go beyond the original meaning of the Constitution, if they strike down legislative or executive action based on their personal notions of the public good or on other extra-constitutional principles, they usurp powers not given to them by the people. They transform our constitutional democracy into a judicial aristocracy, and abandon the rule of law based on a judge's subjective notions of what is best for society. [15]

Once we recognize the importance of the Constitution to constitutional law, we must also acknowledge the importance of the Constitution's original meaning to the Constitution. This notion might seem self-evident, but some scholars contend that judges should ignore the original meaning and instead apply an "evolving" or "contemporary" meaning. If courts apply an "evolving" meaning, however, they are no longer interpreting our basic charter as ratified, and no longer carrying out the will of the governed. [16] Acting instead as a "continuing

[13] *Marbury*, 5 U.S. at 179-80 (emphasis in original).

[14] Bork, *Foreword* to G. McDowell, *The Constitution and Contemporary Constitutional Theory* at viii (1985).

[15] Alexander Hamilton believed that, of the three branches of government, the judiciary was "the least dangerous to the political rights of the constitution" because it "has no influence over either the sword or the purse" and exercises "neither FORCE nor WILL, but merely judgement." *The Federalist No. 78*, at 522-23 (J. Cooke ed. 1961). He recognized, however, that " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " *Id.* at 523 (quoting Montesquieu's *Spirit of Laws*).

[16] James Madison accurately described the impropriety of permitting our fundamental law to be interpreted based on a contemporary or modern meaning of words:

constitutional convention,"[17] they are no longer interpreting at all, but amending and inventing.[18] The power to amend, however, has been wisely reserved to our elected representatives so that "we the People" retain control over our destiny.

Ironically, non-interpretivists have used the phrase "a living Constitution" to describe their approach to constitutional adjudication.[19] But the Constitution is truly living only for those who believe that its original meaning should control its application. It remains vibrant only for those who appreciate the genius underlying its enduring principles; who respect its place as our fundamental law; and who recognize that, while its provisions may be applied to new circumstances as our society changes, its meaning remains fixed and timeless. It is the non-interpretivists, on the other hand, who treat the Constitution as dead, as a dusty relic whose meaning is to be ignored and replaced by the latest trends in social theory, or by the moral predilections of individual federal judges. As Professor Graglia reminds us, in the name of enhancing human dignity, non-interpretivists would deny us the most important element of human dignity: the right of self-determination.[20]

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for the consistent and stable, more than for a faithful, exercise of its powers. *If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!*

Letter from J. Madison to H. Lee (June 25, 1824) (emphasis added), *reprinted in* 3 *Letters and Other Writings of James Madison* 441-42 (1865), *quoted in* Berger, *supra* note 9, at 326.

[17] *See* R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 2 (1977).

[18] *See Reynolds v. Sims*, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting) (when the Court ignores "both the language and history of the controlling provisions of the Constitution" to invalidate laws, its "action amounts to nothing less than an exercise of the amending power"). Some non-interpretivists openly defend amendment of our Constitution by the judiciary. *See, e.g.*, Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 1040 (1979) (the Supreme Court should "perform[ ] a function akin to that performed in other contexts by the amending process").

[19] *See* Grey, *Do We Have an Unwritten Constitution*, 27 Stan. L. Rev. 703, 711 (1975).

[20] *See* Graglia, *supra* note 10, at 27

II. QUESTIONS AND ANSWERS

This section contains answers to questions often asked in the debate over how the constitution should be interpreted. Many of these questions have been raised as attacks on interpretivism, and several of those listed below are framed by quoting the words of the non-interpretivists themselves. This section does not purport to answer every question concerning interpretivism, only those most frequently raised. Nor are the answers below exhaustive, for many of these issues would require book-length treatment to provide a detailed analysis. Instead, these responses attempt to identify the most obvious flaws in the objections to interpretivism, and to clarify confusion that exists regarding how the Constitution's original meaning should be discerned and applied.

1. HOW DOES ORIGINAL MEANING JURISPRUDENCE DIFFER FROM NON-INTERPRETIVISM?

Unlike those who interpret the Constitution according to its original meaning, non-interpretivists contend that courts should decide constitutional issues under standards not found in the Constitution. Under non-interpretivism, courts are permitted to strike down duly enacted laws even though those laws do not conflict with applicable constitutional provisions, thus diminishing the status of the Constitution as our fundamental law. As stated by one writer, non-interpretivism views "constitutional clauses as merely selections of more or less suitable pegs on which judicial policy choices are hung."[21]

For example, during the now-discredited *Lochner* era, the Supreme Court created sweeping rights of liberty and property under the due process clauses to strike down hundreds of laws designed to improve working conditions and the economy, even though such rights could not be traced to the original meaning of those clauses. More recently, federal courts have used a broad and judicially created "right of privacy" to invalidate scores of federal and state laws.

Although all non-interpretivists reject original meaning as relevant to constitutional interpretation, there is no consensus among them as to an appropriate alternative standard. Some argue that courts should openly take the lead in developing our Nation's policies and moral standards. Others attempt to provide some minimal constraint to judicial policymaking by suggesting that courts decide cases under certain vague ideals. (See Section V.) In the end, all non-interpretivist theories result in rule by judicial fiat. Their elusive criteria provide no substantive guidance and can easily be manipulated by the very people they purport to constrain, federal judges.

To be sure, interpretation of the Constitution according to its original meaning is sometimes a difficult task. Interpretation is not a mechanical process. Reasonable people can and do disagree about how certain provisions should be interpreted, and such disagreement is to be expected. We must remember, however, that courts face similar difficulties every day when interpreting statutes, contracts, wills, and other legal documents. What is important is that judges, scholars,and others who interpret the Constitution share common interpretive premises, not that they necessarily reach the same conclusions in every case. At a minimum, original meaning jurisprudence limits the range of acceptable choices. The precise original meaning of the due process

[21] Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L.J. 227, 254 (1972).

clause, for example, might be difficult to determine, but at the very least we should be able to agree that the clause is limited to *process*, and does not entitle courts to conduct a *substantive* review of the wisdom of legislation.

2. HOW DOES A COURT INTERPRET THE CONSTITUTION ACCORDING TO ITS ORIGINAL MEANING?

The goal is to determine the meaning of the constitutional language at issue to the society that adopted it.[22]

The most authoritative evidence of original meaning is the specific language used by the framers and ratifiers in the document. This wording was carefully chosen, usually after much reflection and debate, and we may reasonably presume that it conveys an ascertainable meaning. A court should interpret the words of the Constitution according to their plain and natural import in their general and popular use at the time the provision at issue was ratified. As put by Justice Holmes, "we ask, not what [any particular] man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used * * * ."[23]

Contemporaneous dictionaries, records of the ratification debates and the Philadelphia Convention, and other historic sources are usually helpful in determining the general and popular use of constitutional language at the time it was ratified. The original meaning of certain words and phrases will, of course, be identical to the meaning we attach to those words today. We all know what is meant by the words "chosen every second Year" in article I, § 2. Other words might have an original meaning slightly different from the meaning understood by some in today's society. The original meaning of the word "religion" in the first amendment, for example, probably included some element of transcendence. Under original meaning jurisprudence, it should not be construed more broadly to include vegetarianism, nudism, or other non-transcendent world views simply because some people today use the word "religion" loosely to encompass any set of ethical or moral beliefs.

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[22] *See, e.g.*, 3 J. Madison, *supra* note 16, at 245 ("it was the duty of all to support [the constitution] in its true meaning, as understood by the nation at the time of its ratification"), *quoted in* Berger, *supra* note 9, at 326.

[23] Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417-18 (1899); *accord*, *Marbury*, 5 U.S. at 175 (Constitution should be interpreted according to "the plain import of the words"); T. Cooley, *Constitutional Limitations* 91 (7th ed. 1903) ("we must presume that the *words have been employed in their natural and ordinary meaning*") (emphasis in original); *The Federalist No. 83*, *supra* note 15, at 560 (A. Hamilton) ("the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.")

Standard linguistic and grammatical rules should be used to identify the plain import of constitutional language. For example, the mere reference to the President as "He" in article II, § 1, should not be views as restricting presidential eligibility to males.[24] Because "He" was often used in the eighteenth century to refer to both men and women, the more natural interpretation is to read that word as a generic, gender-neutral reference, a view supported by the gender-neutral noun — "Person" — in describing eligibility requirements elsewhere in the article II. Likewise, grammar and structure suggest that the word "religion" denotes the same meaning in both the free exercise clause and the establishment clause. Contrary to the conclusion drawn by some scholars, the text of these provisions — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" — plainly suggests that the word "religion" was originally understood to have a single meaning.

Where the original meaning of constitutional language is plain based on contemporaneous sources of general usage, we should adhere to that plain meaning. For example, article II, § 1, states that "neither shall any Person be eligible to [the Office of President] who shall not have attained to the Age of thirty-five Years." This section plainly establishes a specific numerical cut-off. It should not be viewed as merely a vague recognition of the importance of maturity in our President, as argued by one leading non-interpretivist.[25]

[24] At least two writers have unfairly criticized interpretivism as requiring this rigid reading of article II. *See* Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U.L. Rev. 47, 56 (1986); Saphire, *Judicial Review in the Name of the Constitution*, 8 U. Dayton L. Rev. 745, 796-97 (1983).

[25] *See* Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. Cal. L. Rev. 683, 686-87 (1985).

3. HOW SHOULD A COURT INTERPRET A WORD OR PHRASE IN THE CONSTITUTION WHOSE MEANING ON ITS FACE IS AMBIGUOUS?

Usually the original meaning of a word or phrase in the Constitution will be evident based on the text and contemporaneous sources of common usage, including dictionaries, the ratification debates, discussions at the Philadelphia Convention, and other historical records. If, despite our best efforts, the original meaning remains ambiguous, we should adopt the meaning that is most consistent with the nature, purpose, and design of the Constitution. As stated by Justice Joseph Story, "[w]here the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument."[26]

[26] 1 J. Story, *supra* note 12, § 405 at 387.

4. DON'T SOME CONSTITUTIONAL PROVISIONS CONTAIN CERTAIN PHRASES OR WORDS THAT WERE NOT USED OR UNDERSTOOD BY THE GENERAL PUBLIC AT THE TIME THE PROVISIONS WERE RATIFIED?

Yes, but this does not obviate the need to apply interpretivist principles. Some phrases — such as "Habeas Corpus" and "ex post facto" — were technical common law terms not used by the general public in everyday conversation. These terms should be interpreted according to their meaning as understood at the time by the legal profession and others familiar with their technical common law usage. As stated by one eminent scholar, "[t]he community of understanding that leads meaning to the Constitution comes of necessity from * * * the way these words are used in ordinary discourse by persons who are educated in the normal social and cultural discourse of their own time."[27]

[27] R. Epstein, *Takings: Private Property and the Power of Eminent Domain* 20 (1985). This rule of interpretation prevailed at the time the Constitution was ratified and undoubtedly reflects the expectations of the framers and ratifiers as to how common law terms in the Constitution would be interpreted. *See* C. Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* 18 (1986); T. Cooley, *supra* note 23, at 94-95.

5. IN CONSTRUING THE CONSTITUTION, SHOULD A COURT FOCUS SOLELY ON THE CONSTITUTIONAL LANGUAGE AT ISSUE, OR SHOULD IT ALSO CONSIDER CONTEXT AND OTHER CONSTITUTIONAL PROVISIONS?

It is entirely proper for a court to review the constitution as a whole so that its construction of a particular provision is harmonious with other provisions, especially where the provision at issue is ambiguous standing alone.[28]

For example, in construing the necessary and proper clause, Chief Justice Marshall faced the issue whether the word "necessary" is used in its strict sense to mean "indispensable," or in less restrictive fashion to mean "conducive." Reading the Constitution as a whole, Marshall concluded that the word is used in its less restrictive sense, based in part on the use of a different phrase — "absolutely necessary" — to convey indispensability in article I, § 10. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (discussed in Section III).

Courts should assume that the Constitution is internally consistent, that its provisions do not clash, and that each word has meaning and effect. A court should seldom, if ever, declare a portion of the Constitution nugatory due to an apparent conflict with another provision; the sense that two provisions are at odds may signal that at least one of the provisions at issue is being misconstrued.

It is also proper for courts to read constitutional provisions in conjunction with one another. For example, in *McCulloch*, the Court held that Congress has the power to create a national bank. Although no constitutional provision expressly grants this power, the Court properly concluded that the enumerated powers to collect taxes, barrow money, regulate commerce, conduct war, and raise and support armed forces — when read in conjunction with the necessary and proper clause — grant a power to create a national bank by necessary implication. *McCulloch* illustrates how the Constitution's original meaning authorizes flexible legislative responses to "the various crises of human affairs" (17 U.S. at 415), and does not entail a cramped or unduly narrow interpretation.

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[28] *See* T. Cooley, *supra* note 23, at 91 ("It is therefore a very proper rule of construction, that *the whole is to be examined with a view to arriving at the true intention of each part* * * * . If any section of a law be intricate, obscure or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another") (emphasis in original).

6. IS "ORIGINAL MEANING" ANOTHER WAY OF REFERRING TO THE SUBJECTIVE INTENT OF THE FRAMERS AND RATIFIERS?

No. The intent to be given effect is the objective intent as expressed in the words of the law being construed.[29] Our fundamental law is the text of the Constitution as ratified, not the subjective intent or purpose of any individual or group in adopting the provision at issue. As stated by Judge Cooley in his treatise on constitutional law:

> And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that was the sense designed to be conveyed.[30]

[29] *See, e.g.*, T. Cooley, *supra* note 23, at 89 ("in the case of all written laws, it is the intent of the lawgiver that is to be enforced. But his intent is to be found in the instrument itself."); A. Hamilton, *opinion on the Constitutionality of an Act to Establish a Bank* (1791), *reprinted in 8 Papers of Alexander Hamilton* 97, 111 (H. Syrett ed. 1965) ("whatever may have been the intention of the framers of a constitution * * * that intention is to be sought for in the instrument itself * * *.").

[30] T. Cooley, *supra* note 23, at 101-02 (footnotes omitted); *accord*, 1 J. Story, *supra* note 12 at §§ 406-07.

7. ARE THE SUBJECTIVE VIEWS OF THE FRAMERS AND RATIFIERS RELEVANT IN DETERMINE ORIGINAL MEANING?

Yes. Statements made by the framers and ratifiers, while not dispositive, are extremely important in determining original meaning. The founders were highly educated, familiar with the meaning of words, and skilled at using words in legal documents to achieve certain ends. They were commissioned as representatives of the people to draft the fundamental law of our Nation. Their statements were thus expressions made in the very context of elevating the language of the Constitution to the status of our supreme law. Moreover, they deliberated over and chose the words of the Constitution very carefully. Their explanation of why they preferred a certain provisions is highly probative of how the language of the Constitution was understood by the society as a whole.

It is helpful to distinguish between two kinds of subjective views. First, some framers and ratifiers expressed their personal opinions regarding how particular language in the Constitution should be interpreted. Such opinions should generally be considered in construing the Constitution, not because they are dispositive in themselves, but because the framers and ratifiers were a significant part of the ratifying society.[31] As noted by Chief Justice Marshall, "[g]reat weight has been attached, and very rightly attached, to contemporaneous exposition."[32] The weight given to such subjective views depends on the extent to which those views seem reasonable in light of the text and can be shown to be representative of the understanding of the ratifying society as a whole.

In addition to views regarding interpretation, some founders articulated the general purposes or goals that prompted the adoption of particular constitutional provisions. These views are at least on further step removed as reliable guides to original meaning than statements regarding interpretation. Although all historical evidence is subject to empirical difficulties, evidence of underlying goals or purposes is less direct evidence of original meaning than are statements regarding the proper interpretation of specific language. Even if the evidence accurately reflects the general purpose of a provision, that purpose might not have been translated into the text. As noted by Alexander

[31] *See* Address by Justice Antonin Scalia in Washington, D.C. (June 14, 1986) (attached as Appendix C).

[32] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821) (discussed in Section III).

Hamilton, "nothing is more common than for laws to *express* and *effect*, more or less than was intended."[33]

[33] Hamilton, *supra* note 29, at 111 (emphasis in original).

8. WHAT DANGERS ARE THERE IN RELYING TOO HEAVILY ON EVIDENCE OF THE FOUNDERS' SUBJECTIVE VIEWS?

Our fundamental law is the text of the Constitution as understood by the ratifying society, not the subjective views of any group or individual. To the extent we stray from the text, we risk departing from the meaning of our basic charter as ratified.[34] We are certainly entitled to rely on the statements of the framers and ratifiers to discern the original understanding of the society as a whole; we may not, however, depart from that original societal understanding based on the contrary expressions of one or more framers.

As noted above, evidence of the underlying goals or purposes of a provision, even if historically reliable, is less decisive because the language as ratified might be broader or narrower than those goals. Evidence of how certain founders interpreted the Constitution might exaggerate or fail to reflect the full implications of the constitutional language to which it relates. For example, proponents of a proposed constitutional provision might advance an unduly narrow interpretation to minimize its supposed effect, and thus help secure its ratification. If future ratification is all but certain, however, proponents might advocate a reading that is broader than the provision's plain meaning in the hope that future courts will ignore the text and rely instead on its proponents' subjective views.

On the other hand, opponents of a proposed provision might formulate an unreasonably broad interpretation and attempt to secure its defeat with a "parade of horribles" that they contend will flow from the provision if ratified. If, however, ratification is imminent, opponents might adopt an unduly narrow, reading in an attempt to minimize the provision's effects. In other cases, a constitutional provision may appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a tendency to lead directly away from the meaning in the minds of the majority.[35]

[34] *See* 2 J. Story, *supra* note 12, § 1263 at 143-46 ("But, whatever may have been the private intentions of the framers of the constitution * * *, it is certain, that the true rule of interpretation is to ascertain the public and just intention from the language of the instrument itself, according to the common rules applied to all laws. The people, who adopted the Constitution, could know nothing of the private intentions of the framers. They adopted it upon its own clear import, upon its own naked text. * * * [I]t must be judged of by its words and sense, and not by any private intentions of members of the legislature").

[35] T. Cooley, *supra* note 23, at 101.

These analytical difficulties arise when interpreting any law. They are not, however, insurmountable. The most helpful historical evidence of subjective intent is often that which reflects common ground between opponents and proponents of a particular provision. Such views can rarely be challenged as politically inspired, and might well reflect the original meaning of a provision as understood by the entire society that adopted it. For example, in holding that the appellate power of the United States extends to state court judgments that rest on interpretations of federal law, Justice Story supported his textual analysis by noting that supporters and opponents of the Constitution expressed views consistent with his conclusion:

> Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first congress, * * * the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. * * * This weight of contemporaneous exposition by all parties, this acquiescence by enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine on a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.[36]

Also helpful are views that tend to undercut the political interests or positions held by those expressing such views. For example, *The Federalist* was written in large measure to allay concerns that the Constitution would unduly impair state sovereignty. It is therefore generally a credible guide to original meaning where it defends the existence of a federal power, as noted by Chief Justice Marshall when he relied on it to uphold Supreme Court authority to review state criminal proceedings.[37]

[36] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351-52 (1816) (discussed in Section III).

[37] *See Cohens*, *supra* note 32 (discussed in Section III).

Unfortunately, when the use of historical materials is overemphasized, there is a tendency (as one wag put it) to resort to the text only when the legislative history is ambiguous. We should not view the language of the Constitution as a last resort, nor as a mere starting point, nor as simply a shorthand expression of its history.[38] The text of the Constitution is our fundamental law and should remain our primary focus throughout the interpretive enterprise.

[38] In his dissent in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), Justice Rutledge characterized the establishment clause as "the terse summation of its history" and improperly treated Madison's "Memorial and Remonstrance Against Religious Assessments" as the equivalent of a constitutional amendment. *Id.* at 33, 37-43.

9. WHOSE INTENT IS CONTROLLING WHEN INTERPRETING THE CONSTITUTION?

Non-interpretivists frequently contend that this question poses insuperable difficulties for interpretivists. They argue that different founders held different views on many issues, and that there is no principled basis for choosing one set of views over another. Are we to adopt the views of the majority at the Philadelphia convention? Or those expressed at the state ratifying conventions? If the latter, which state's views should control? And what of the states whose debates were not preserved in printed records? These interpretive difficulties, they claim, are insurmountable for the interpretivist.

In fact, this attack on interpretivism again confuses subjective intent with original meaning. All historical evidence of meaning is relevant, but no source is always controlling. As explained above, we should apply a constitutional provision according to the plain and natural import of its terms as understood by the ratifying society as a whole. The common understanding of the text is what counts, not the views of any individual or group. Thus, we are not forced to choose between the views of Madison and Hamilton, or between the positions of New York as opposed to Virginia. The intent of any group or individual should be respected only to the extent that it is thought to be representative of the general consensus of the ratifying society at large.

When recourse to historical materials is necessary to clarify ambiguities in the text, all evidence of original meaning is relevant, including views expressed by the framers, ratifiers, and anyone else who was familiar with the manner in which the words of the Constitution were used by the ratifying society. The views of those who participated in the Philadelphia Convention should, of course, be given serious consideration. But statements made by those at the state ratifying conventions are at least as helpful — if not more so — because presumably they were more concerned with the effect of the specific words of the Constitution and less influenced by the immediate legislative goals and purposes that motivated the framers to adopt any particular provision.

10. ISN'T JUSTICE BRENNAN CORRECT TO QUESTION WHETHER AN ATTEMPT TO DERIVE A *SINGLE* ORIGINAL MEANING IS A COHERENT WAY OF THINKING ABOUT A JOINTLY DRAFTED DOCUMENT?[39]

No. In everyday discourse, people frequently communicate collective thoughts, consensus opinions, and common understandings through a single statement or group of statements. The notion of a collective understanding is also a common and legitimate legal concept used to describe the meaning of treaties, statutes, contracts, and other jointly drafted documents.

Although it is unlikely that every member of the ratifying society shared precisely the same understanding of every constitutional provision, most shared common or core understandings of the language they ratified.

The collective understanding of a constitutional provision will occasionally be somewhat fuzzy around the edges, thereby causing disputes over legitimate interpretations of the text. But the agreed-upon collective meaning will nevertheless serve to exclude whole ranges of possible decisions from the discretion of the judiciary in deciding constitutional issues.

[39] Brennan, *supra* note 8, at 4.

11. WHAT EXTRA-TEXTUAL EVIDENCE IN ADDITION TO THE VIEWS OF THE FRAMERS AND RATIFIERS MAY BE USED TO IDENTIFY THE ORIGINAL MEANING OF A CONSTITUTIONAL PROVISION?

A court should be somewhat reluctant to rely on extrinsic aids in interpreting the Constitution.[40] Where the original meaning is not apparent from the text, however, a court may rely on *any* evidence that sheds light on original meaning.

For example, a court may properly examine the meaning of identical or similar provisions in contemporaneous documents such as the Articles of Confederation, the Northwest Ordinance, or state constitutions, whose context might supply additional evidence of usage.

Contemporaneous societal practice can also be helpful in determining the original meaning of a constitutional provision. Generally, it is fair to assume that those who ratify a constitutional provision will not deliberately act in a manner contrary to their understanding of its obligations. Moreover, radical changes in public policy are normally occasioned by some discussion and debate. The Supreme Court recognized these common-sense presumptions when it upheld the longstanding use of legislative chaplains under the establishment clause.[41]

On the other hand, the limits of such historic evidence must be recognized. "[N]o one acquires a vested or protected right in violation of the Constitution by long use * * *."[42] One can imagine several instances in which contemporaneous practice might contravene the mandate of the Constitution. For example, Congress or the separate states might not understand, or have the political will to vindicate, the full implications of a constitutional provision. A state that refused to ratify an amendment might act in defiance immediately after its adoption. As with evidence of subjective intent, other extrinsic evidence is subject to misinterpretation and should be used cautiously. Contemporaneous practice and construction "can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries."[43]

[40] *See* T. Cooley, *supra* note 23, at 91 ("Nor is it lightly to be inferred that any portion of a written law is so ambiguous as to require extrinsic aid in its construction.")

[41] *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

[42] *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970).

[43] 1 J. Story, *supra* note 12, § 407 at 390 (footnote omitted).

12. DIDN'T THE FRAMERS AND RATIFIERS THEMSELVES REJECT THE NOTION THAT THE CONSTITUTION SHOULD BE INTERPRETED ACCORDING TO ITS ORIGINAL MEANING?

Relying on a recent survey of historical materials by H. Jefferson Powell,[44] several writers have argued that interpretivism is fatally flawed because the founders themselves rejected it as a coherent approach to constitutional adjudication.[45] This criticism, however, further reflects the confusion between original meaning and subjective intent.

Powell argues that the framers did not intend future interpreters to construe the Constitution exclusively according to the framers' subjective purposes and expectations.[46] But he also establishes that their "primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language."[47]

In the framers' day, the phrase "original intent" referred to intent as evidenced in the Constitution's language.[48] Far from undermining modern interpretivism, Powell's research shows that original meaning jurisprudence based on the text of the Constitution is completely consistent with the founders expectations.

The very purpose of committing the Constitution to writing, and of carefully choosing its words, was to establish certain rules and precepts as our fundamental law. We can thus presume that the language of the Constitution does have a fixed and ascertainable meaning. The founders did not intend future courts to infuse their words with meaning, but to discover and apply the meaning as originally understood and reflected in the text.

[44] *See* Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985).

[45] *See e.g.*, S. Macedo, *The New Right v. The Constitution* 13-14 (1986) ("the Framers of the Constitution did reject reliance on historical intentions") (citing Powell, *supra* note 44); Chemerinsky, *supra* note 24, at 57-58 ("[b]ecause the theory of interpretation intended by the Framers is unknown, originalism cannot be justified * * *") (citing Powell, *supra* note 44).

[46] *See* Powell, *supra* note 44, at 902-24.

[47] *Id.* at 903.

[48] *Id.* at 948.

13. CAN INTERPRETIVISM ACCOMMODATE TECHNOLOGICAL ADVANCES?

Yes. A common canard raised by opponents of original meaning jurisprudence is that it requires constitutional provisions to be applied only to those circumstances specifically contemplated by our civic ancestors at the time the Constitution was ratified. A slightly more generous, but equally flawed, criticism is that interpretivism permits application of the Constitution only to circumstances or events identical to those that existed when the relevant provision was ratified. These critics claim, for example, that under interpretivism, a judge may not apply the fourth amendment's prohibition of unreasonable searches and seizures to electronic surveillance like wiretaps, or the first amendment to television or radio.

These criticisms rest on a fundamental confusion of the Constitution's *meaning* — which is fixed and permanent — with its *application* to modern issues. We can properly apply the fourth amendment to wiretaps, not because its original meaning is irrelevant (as the non-interpretivists sometimes contend), but because the plain original meaning of "unreasonable searches and seizures" is broad enough to encompass electronic surveillance.

Whether advances in technology affect the application of the Constitution depends, of course, on the constitutional language at issue. The language of the fourth amendment, for example, is broad enough to include new technologies that facilitate searches or seizures, by the government. Likewise, the eighth amendment's prohibition of "cruel and unusual punishments" is plainly broad enough to include torture by sophisticated electronic devices. The application of other provisions, however, appears to remain unaffected by technological change. For example, the specific requirement that "Congress shall assemble once in every year" in article 1, § 4 and in the twentieth amendment could not properly be construed as requiring more frequent assemblies simply because advances in transportation have reduced the burden of long-distance travel.

Although no prominent advocate of original meaning jurisprudence today argues that the Constitution is inapplicable to modern technology,[49] non-interpretivists continue to caricature their opponents by

[49] *See, e.g.*, Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 694 (1976) ("Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the

suggesting that the Constitution's original meaning is restricted by the specific subjective concerns of the Framers, and is therefore technologically archaic.[50]

Constitution may not be applied to such a course of conduct"); Address by Judge Robert Bork entitled *The Constitution, Original Intent, and Economic Rights*, University of San Diego Law School (Nov. 1985) (attached as Appendix D) (original meaning jurisprudence "is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the framers.")

[50] *See, e.g.*, Tribe, *The Holy Grail of Original Intent*, Humanities Magazine, vol. 7, no. 1, at 24 (Feb. 1986) (describing original meaning as "reflect[ing] narrowly the specific practices and concrete concerns that moved the founding generation); Brennan, *supra* note 8, at 4 (describing fidelity to original meaning as "facile historicism" that "upholds constitutional claims only if they were within the specific contemplation of the Framers").

14. CAN INTERPRETIVISM ACCOMMODATE CHANGING SOCIAL VALUES?

Yes. Although the original meaning of the Constitution is sometimes criticized as saddling modern society with outdated social values, nothing could be further from the truth. The great bulk of the Constitution is concerned with the structure of our political institutions. It addresses, not substantive issues and decisions, but procedures governing *how* and *by whom* those decisions are to be made. It primarily secures, not moral values, but timeless political values such as federalism, separation of powers, and checks and balances. The Constitution accommodates new social values because it neither prohibits nor requires their acceptance, but permits their evolution and their implementation into law through democratically elected representatives acting under republican constraints.

Moreover, the article V amendment process permits our society to incorporate new social values into our basic charter. In light of article V, interpretivism can clearly accommodate changing values as well as non-interpretivism. The difference is that, under interpretivism, the values elevated to constitutional status will be those of the people. Under non-interpretivism, the values advanced are those of the judges, or of non-interpretivist legal scholars who influence those judges.

Many scholars who attack the original meaning of the Constitution as embodying archaic social or moral values are also dissatisfied with the values held by most Americans today. Their real complaint is that they are unable to achieve their social agenda through the legislative process. They therefore contend that federal courts should impose this agenda under the guise of constitutional adjudication. In response to politically conservative non-interpretivists, Justice Holmes noted that the Constitution "does not enact Mr. Herbert Spencer's Social Statics.[51] Non-interpretivists today need to be reminded that neither does the Constitution enact *in toto* any liberal social or economic agenda or any judge's subjective vision of the public good.

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[51] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

15. DOES INTERPRETIVISM REQUIRE COURTS TO DECIDE CASES BASED ON "WHAT THE FRAMERS WOULD HAVE SAID HAD TODAY'S PROBLEMS BEEN PUT TO THEM AS AN ORIGINAL MATTER," AS PROFESSOR TRIBE CONTENDS?[52]

No. It is both artificial and unnecessary to ask how the framers would have decided the constitutional issues we face today. Modern society is vastly different from that which existed in the late eighteenth century. No one can possibly determine precisely how the framers would have viewed today's constitutional issues.

We need not, however, be concerned with this sort of speculation. The framers did not attempt to provide immediate solutions to every conceivable constitutional issue. But they did provide basic principles — revealed by the, text of the Constitution — that we can apply to today's issues in order to arrive at solutions. For example, we can apply the fourth amendment prohibition of unreasonable searches and seizures to wiretaps without having to speculate how the framers would have viewed such surveillance. Instead, we determine whether — in the words of the amendment — the use of wiretaps in a particular situation violates "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *."

Although Professor Tribe caricatures original meaning jurisprudence as requiring an awkward inquiry into how the framers would have reacted to today's issues, even other non-interpretivists recognize that this criticism is baseless:

> Originalism does not 'require[ ] fidelity, to decisions the framers would have made.' Rather, originalism requires fidelity to the decisions they *did* make, in the sense of the beliefs they accorded authoritative status [as reflected in the text of the Constitution].[53]

[52] Tribe, *supra* note 50, at 23.

[53] Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional "Interpretation"*, 58 S. Cal. L. Rev. 551, 600 (1985) (quoting and refuting Bennett, *The Mission of Moral of Moral Reasoning in Constitutional Law*, 58 S. Cal. L. Rev. 647 (1985)).

16. ISN'T THE ORIGINAL MEANING OF CERTAIN CONSTITUTIONAL PROVISIONS IMPOSSIBLE TO DETERMINE, THEREBY FORCING COURTS TO RELY ON VALUES OUTSIDE THE CONSTITUTION?

In the overwhelming majority of cases, the indices of meaning — the words and structure and context of the Constitution — are sufficient to determine the original meaning. The document was, after all, designed to establish and endure as our highest positive law.

Where the original meaning is not readily apparent from the text of the Constitution, there exists a wealth of historical materials that may serve as interpretive guides, including records from the ratification debates and the Philadelphia Convention. Contrary to the impression created by some non-interpretivists, our Constitution was not authored during a remote and mysterious era. Our libraries abound with contemporaneous books, pamphlets, correspondence, newspapers, and other documents that reflect the views of virtually every segment of our Nation's first generation regarding the issues of the day and, more importantly, their sense and use of language. In the overwhelming majority of cases, these documents are more than sufficient to clarify the meaning of the Constitution as originally understood.

Due to the imprecision of language and the fallibility of humans, however, sometimes the best we can hope for is to determine the *probable* original meaning of a particular constitutional provision. That perfection and certainty cannot be achieved does not mean that the effort should be abandoned.

On exceedingly rare occasions, a certain aspect of original meaning might be impossible to determine, or two conflicting interpretations of original meaning might appear to be equally plausible. If the constitutionality of proposed executive or legislative action of the federal government remains a matter of doubt despite a thorough interpretive analysis, that action should not be undertaken.[54] The Constitution establishes a federal government of limited enumerated powers, and that government should not act unless it is clearly authorized to do so. When reviewing the constitutionality of action undertaken by a state, federal courts should refrain from rejecting a reasonable interpretation that sustains such action. The power to invalidate action by elected representatives is an awesome one and should be exercised only when

[54] All branches of government, including the executive and legislative branches, are obliged to consider the constitutionality of their actions. *See* T. Cooley, *supra* note 23 at 109; 1 J. Story, *supra* note 12, § 373 at 345-46.

such action plainly conflicts with the Constitution. Otherwise there would be no authoritative external standard against which the state action could be measured, a prerequisite for the exercise of federal judicial power.

17. DOESN'T INTERPRETIVISM REQUIRE THAT WE "FOLLOW THE FRAMERS' VALUES — VALUES THAT WERE RACIST AND SEXIST," AS ARGUED BY NON-INTERPRETIVISTS?[55]

Of course not. Preliminarily, we must recognize that the founders were acutely aware of the inequalities that existed at the time our Constitution was ratified, and they expressly provided the means for curing these inequalities in article V, as well as in the powers for self-government established in the text of the constitution.[56] More to the point, this argument not only misuses subjective intent, but overlooks the obvious fact that the amendments to our Constitution are as much a part of our basic charter as the original seven articles. Undoubtedly, eighteenth-century American society was tragically flawed by the practice of slavery and other social injustices. But the Civil War amendments abolished slavery, extended suffrage to blacks, and secured for them basic civil rights. Likewise the nineteenth amendment extended suffrage to women. "We the People" have eradicated many injustices of the past through constitutional amendments and subsequent legislation, as many of the founders hoped we would. These avenues remain available should we desire to change our political structure in other ways.

Those who raise this attack are in fact challenging our entire constitutional system. They want to scrap our basic charter so that they can restructure our society according to their own political goals and values. Interpretivism requires acceptance, not of the founders' values, but of the rule of law and self-governance that enables us as a nation to implement our vision of a just society.

[55] Chemerinsky, *supra* note 24, at 59; *see also* Brest, *supra* note 1, at 230 (questioning why we should rely on the original meaning of a document ratified by white male property holders).

[56] James Madison hailed the ability of the American people after 1808 to abolish slavery under article V:

> It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate for ever within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement from the federal Government, and may be totally abolished by a concurrence of the few States which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the Union.

Federalist No. 42, *supra* note 15, at 281-82.

18. HASN'T "CONGRESS LEFT PRIMARILY TO THE FEDERAL JUDICIARY THE TASKS OF DEFINING WHAT CONSTITUTES A DENIAL OF 'DUE PROCESS OF LAW' OR 'EQUAL PROTECTION OF THE LAWS,'" AS JUSTICE BRENNAN CONTENDS? [57]

No. The role of the courts is to *interpret*, not *define*, the law. Neither the federal judiciary nor any other branch of government is authorized to define the meaning of any constitutional provision. Because Congress itself has no authority to "define" the meaning of the Constitution, it could not possibly delegate such authority to the courts. The original meaning is fixed by the words of the Constitution itself. In the words of Judge Cooley:

> What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.[58]

Although Justice Brennan has described the fourteenth amendment due process clause as a "particularly empty vessel[ ]" that can accommodate "changing concepts of social justice",[59] in fact that clause has a specific identifiable meaning. Like an identical provision contained in the fifth amendment that applies to the federal government, the phrase "due process of law" as used in the fourteenth amendment was a technical common law term whose roots are traceable to the Magna Carta. As originally understood, this phrase referred to appropriate legal *procedures*.[60] It does not authorize federal courts to evaluate the wisdom of legislation, and it by no means serves as an open invitation to be used to advance any judge's subjective notion of the public good.

Certainly some constitutional provisions, such as the equal protection clause, are more general than others. But every provision has a specific

[57] Address by Justice William J. Brennan, Jr., entitled *The Fourteenth Amendment*, before the Section on Individual Rights and Responsibilities, American Bar Association, New York, N.Y., at 8 (Aug. 8, 1985) (attached as Appendix I).

[58] T. Cooley, *supra* note 23, at 89 (emphasis in original).

[59] Brennan, *supra* note 57, at 14.

[60] *See* II W. Crosskey, *Politics and the Constitution in the History of the United States* 1102-10 (1953).

original meaning. No provision, not even those described as "majestic generalities,"[61] should be viewed as a blank check to the federal judiciary to engage in social policy-making at will.[62]

Significantly, only the most radical non-interpretivists suggest that courts may depart from the plain meaning of structural constitutional provisions, such as those that establish and describe our bicameral legislature. But it is no more legitimate for a court to stray from the original meaning of broader provisions like the equal protection clause. In either case, the court would be improperly deviating from our fundamental law.

[61] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1934).

[62] *See* R. Berger, *supra* note 17, at 300-38, 373-96.

19. DOESN'T THE SUPREME COURT POSSESS, IN THE WORDS OF JUSTICE BRENNAN, A "PECULIAR COMPETENCE" TO "DEFINE" THE MEANING OF THE FOURTEENTH AMENDMENT AND OTHER CONSTITUTIONAL PROVISIONS?[63]

No. Judges are to interpret, not define. "We the People" have established the meaning of our basic charter through ratification of carefully chosen words.

Federal courts are particularly incompetent to resolve the complex issues of social policy they have reached out to decide in the name of interpreting the Constitution. Unlike Congress and state legislatures, courts are not equipped to fashion decrees that accommodate necessary compromises in the development of public policy or to allow for helpful exceptions to general rules; instead they are limited to all-or-nothing, often heavy-handed determinations that fail to reflect the complexity of the issues they address. The Supreme Court does not possess the broadranging factfinding capability that legislatures possess. Because federal judges are unelected and life-termed, they are publicly unaccountable, and it would be arrogant for courts to believe that they are able to discern the popular will better than are legislatures.

Moreover, the federal bench consists almost exclusively of upper-middle class lawyers. It therefore offers only a single narrow perspective, generally lacking expertise in philosophy, economics, medicine and other disciplines relevant to the complex policy issues we face in our society. In contrast our federal and state legislatures contain members from many professions and backgrounds, and they are able to bring broad and deep knowledge and experience to bear on social policy issues.

[63]Brennan, *supra* note 57, at 12.

20. AREN'T JUDGES NECESSARILY SADDLED WITH THEIR OWN BIASES, CULTURAL INFLUENCES, AND PREDISPOSITIONS WHEN ATTEMPTING TO DISCERN ORIGINAL MEANING?

Of course, but these influences do not render the search for original meaning impossible. Original meaning jurisprudence does not require a judge to adopt the collective "mindset" of the ratifying society, if such a thing even exists. Its aim is more modest: to construe the objective meaning of words as understood by those who adopted them. A judge does not have to agree with the law to be able to understand and apply it.

In many cases, the words of the Constitution are plain and straightforward, and will convey on their face the same meaning to us as they did to the ratifying society. The interpretation of other provisions might be somewhat more complex, but in no instance will the differences between our society and the founding society foreclose identification of the Constitution's original meaning.

Courts interpret statutes, wills, contracts, and other legal documents every day. It would be absurd to suggest that judges could ignore the meaning of these documents simply because they do not have a psychological make-up identical to the instruments' drafters. Similarly, judges should not refuse to interpret the Constitution according to its original meaning due to inevitable difficulties involved in interpretation.

21. DOESN'T INTERPRETIVISM ENTAIL CHANGE IN OUR FUNDAMENTAL PRINCIPLES "WITH EACH SHIFT IN THE WINDS OF SCHOLARSHIP" THAT UNEARTHS A NEW INTERPRETATION, AS PROFESSOR SCHWARTZ CONTENDS?[64]

It is ironic that non-interpretivists such as Professor Schwartz attack original meaning analysis as leading to instability. Non-interpretivism entails change in our fundamental law whenever a judge changes his mind regarding what constitutes sound policy. Adherence to the original meaning of the Constitution is plainly the best way to ensure stability in constitutional adjudication over the long run.[65]

A new understanding of original meaning might well result in a rethinking of our constitutional law regarding a particular provision or issue. But the relevant interpretive tools have been available and subject to analysis for generations, and much common ground has been reached in ascertaining the original meaning of many constitutional provisions. Disputes regarding original meaning will of course continue, and such debates are healthy.

Any marginal short-term instability, however, cannot compare with the unsteadiness that results when constitutional law lurches from one interpretation to another based on the personal value choices of transient Supreme Court majorities. For example, longstanding laws in all 50 states were invalidated in one fell swoop as the result of the Supreme Court's non-interpretivist excursion into the abortion controversy. Similar dislocations have occurred in criminal procedures, school prayer, and a variety of other areas. In the words of Justice Black, non-interpretivism transforms the federal judiciary into a "day-to-day constitutional convention" which radically undermines the stability that results from adherence to a written Constitution and a rule of law.[66]

[64]Schwartz, *A Constitutional Shell Game*, The Nation, December 7, 1985, at 607, 608.

[65]*See* T. Cooley, *supra* note 23, at 88 ("A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.")

[66]*Griswold*, 381 U.S. at 520 (Black, J., dissenting).

22. DOESN'T INTERPRETIVISM MAKE THE COURTS TOO DEPENDENT ON THE HISTORICAL RESEARCH OF COMPETING LAWYERS WHOSE SKILLS AND RESOURCES VARY, AND WHOSE OBJECTIVITY IS UNDERMINED BY THEIR DUTY TO BE ZEALOUS ADVOCATES FOR THEIR CLIENTS?

The text of the Constitution — the best evidence of its meaning — is available to everyone.

This argument is really an attack on the adversarial system itself. The judicial resolution of any legal issue is influenced somewhat by the relative skills of the attorneys involved. Our legal system is premised, however, on the assumption that adversarial competition is the best way ultimately to reach the truth and to administer justice.

Moreover, much of the relevant historical analysis has already been undertaken by academics who are considered to be relatively objective and have had vast resources available to enhance their research.

The widespread availability of public advocacy groups also makes it highly unlikely that any particular view of the original meaning will be left unpresented. In any event, concern about the quality of advocacy does not authorize a court to ignore the text of the Constitution.

23. DOESN'T THE NINTH AMENDMENT AUTHORIZE RELIANCE ON EXTRA-CONSTITUTIONAL SOURCES AND VALUES TO PROTECT UNENUMERATED RIGHTS?

No. Many founders opposed ratification of the Bill of Rights because they feared that the express protection of certain rights would imply that the rights not listed had been waived or delegated to the federal government. Such an interpretation would have plainly undercut their effort to create a limited national government of *enumerated* powers. The ninth amendment was added to alleviate this concern. It provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It thus precludes any implication, based on the enumeration of rights in the Constitution, that all other rights have been surrendered to the federal government and made subject to its control. The amendment thus affirms that the national government is one of limited powers: every act and practice of the federal government must be authorized by a specific power listed in the Constitution; it cannot be justified based simply on the absence of a protection in the Bill of Rights.

In light of the amendment's words and history, it is clear that the ninth amendment neither creates new rights nor authorizes a federal court to import extra-constitutional values to limit expressly granted government powers. Unenumerated rights, including rights created or reserved by state constitutions, are protected by the provisions that establish a national government of limited powers, thereby leaving non-enumerated areas free from federal intrusion.

24. ISN'T THE AMENDMENT PROCESS SET FORTH IN ARTICLE V TOO CUMBERSOME TO ASSURE PROTECTION OF CONTEMPORARY RIGHTS AND VALUES THAT WERE NOT EMPHASIZED IN EIGHTEENTH-CENTURY AMERICA?

No. To ensure both an avenue for peaceful change and some measure of stability, article V provides a balanced approach to constitutional amendment, one that requires proposal of amendments by two-thirds of both houses of Congress or by convention called for by two-thirds of the states, and ratification by three-fourths of the states. The amendment process was specifically structured to prevent change in our fundamental law by transient majorities. As noted by Justice Story:

> A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. * * * The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.[67]

In any event, any perceived difficulty in the amendment process would hardly justify amendment of our fundamental law by unelected federal judges.

We have ratified 26 amendments in our Nation's history, and 11 in this century. These figures hardly suggest that the process is fatally cumbersome. Moreover, even when the people fail to ratify a proposed constitutional amendment, in many cases effective social change can be accomplished through state or federal legislation.

[67] 1 J. Story, *supra* note 12, § 182 at 686; *accord The Federalist No. 43, supra* note 15, at 296 (J. Madison) (article V "guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.")

25. ISN'T INTERPRETIVISM A DISGUISE FOR THE CONSERVATIVE POLITICAL AGENDA?

No. As stated by Attorney General Meese:

> A jurisprudence that seeks fidelity to the Constitution * * * is not a jurisprudence of political results. It is very much concerned with process, and it is a jurisprudence that in our day seeks to de-politicize the law. The great genius of the constitutional blueprint is found in its creation and respect for spheres of authority and the limits it places on governmental power. In this scheme the Framers did not see the courts as the exclusive custodians of the Constitution. Indeed, because the document posits so few conclusions it leaves to the more political branches the matter of adopting and vivifying its principles in each generation.[68]

In fact, original meaning analysis is antithetical to attempts by some scholars to promote conservative economic reforms by resurrecting *Lochner* and the doctrine of economic substantive due process.[69]

Moreover, many political liberals have felt bound to interpret the Constitutional according to its original meaning as they understood it, most notably Justice Hugo Black. As stated by the Attorney General:

> For Justice Black was, if nothing else, a true political liberal in his personal outlook. But no one better exemplified the apolitical character of an original intent jurisprudence than did Justice Black. With simplicity, clarity and power, he persistently defended the importance of our written Constitution. And, following as he did his belief in the integrity of the Constitution — his Constitutional faith, as he put it — he often found himself voting against policies that, had he been a legislator, he may very well have embraced and vigorously supported.[70]

In other words, the original meaning of the Constitution does not inevitably further any particular political or social creed. That is why

[68] Address by Attorney General Edwin Meese III before the D.C. Chapter of the Federalist Society Lawyers Division in Washington, D.C., at 12-13 (Nov. 15, 1985) (attached as Appendix B).

[69] *Cf.* S. Macedo, *supra* note 45.

[70] Address by Attorney General Edwin Meese III before the St. Louis School of Law, at 4 (Sept. 12, 1986).

Justice Black, by attempting to adhere to the Constitution, could leave a legacy accurately described as both activist and restrained, liberal and conservative.[71] Although many interpretivists disagree with some of the conclusions reached by Justice Black, particularly with respect to the first and fourteenth amendments, he seemed genuinely committed to interpreting the language of the Constitution as it was originally understood.

Although interpretivism advances neither a conservative nor a liberal political agenda, non-interpretivists never hesitate to promote their subjective notions of sound public policy through constitutional advocacy, as demonstrated in Sections IV and V below.

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[71] *Id.* at 6.

26. HASN'T OUR SOCIETY ACQUIESCED IN, AND THUS IMPLICITLY CONSENTED TO, AN ACTIVIST JUDICIARY, JUDGE-MADE LAW, AND NON-INTERPRETIVIST CONSTITUTIONAL INTERPRETATION?[72]

Original meaning jurisprudence, although not explicitly designated as such, was the prevailing theory of constitutional interpretation for at least the first 150 years of our Nation's history. Even today, popular acceptance of the Supreme Court's authority is premised on the understanding that the Court's opinions are based on constitutional principle, not the Justices' own value choices. Judge Bork finds the most telling evidence of this understanding in the Court's opinions:

> The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.[73]

In other words, although the Court has certainly departed from the Constitution's original meaning on numerous occasions, it has seldom done so explicitly. To the contrary, it has consistently sought to justify its decisions as rooted in constitutional principles, even to the point of purporting to find certain principles — such as the judicially created "right of privacy" — in the "penumbras" and "emanations" of the text.[74]

Accordingly, there is no reason to conclude that the American people have in any way acquiesced in, or consented to, non-interpretivism as a proper approach to constitutional issues, even if this were appropriate as a means of transforming the role of our written Constitution. In fact, the people have ratified several constitutional amendments in direct response to Supreme Court decisions with which they disagreed,

[72] One leading non-interpretivist contends that "the practice of supplementing and derogating from the text and original understanding is itself part of our constitutional tradition." Brest, *supra* not 1, at 225.

[73] Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 3-4 (1971).

[74] In the words of two observers, many judges attempt to use the Constitution to legitimate their non-interpretive decision "like an Orthodox priest drafted to sprinkle holy water on Red Army tanks." Brimelow & Markman, *Supreme Irony*, Harper's 16, 18 (Oct. 1981).

including the eleventh, fourteenth, sixteenth, and twenty-sixth amendments.

Moreover, under the system of government that we the people have ordained, changes to our supreme law cannot be made through mere "acquiescence." Rather, our rule of law requires that any constitutional change be effected openly, through ratification of new, written principles under the article V amendment process, and not through a vague "consensus" of some elite legal scholars that the people have surrendered their right to self rule.

27. DOESN'T *McCULLOCH V. MARYLAND*, 17 U.S. (4 WHEAT.) 316 (1819), STATE THAT FEDERAL COURTS SHOULD APPLY AN EVOLVING MEANING SO THAT THE CONSTITUTION WILL BE ABLE TO ENDURE?

No, although non-interpretivists often display this misunderstanding. The Court in *McCulloch* did state that "we must never forget that it is a *constitution* we are expounding," one "intended to endure for ages to come." 17 U.S. at 407, 415 (emphasis in original). These statements were not, however, intended to expand the power of the federal *judiciary*, but to emphasize the flexibility accorded to *Congress* under the necessary and proper clause to develop and implement imaginative legislative solutions to the exigencies of the day:

> The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.

Id. at 415-16 (emphasis in original).

28. WHY SHOULDN'T COURTS DEPART FROM THE ORIGINAL MEANING IN ORDER TO ENHANCE OUR DEMOCRATIC PROCESSES, AS PROFESSOR ELY CONTENDS?

Professor Ely basically argues that courts should interpret the more general provisions of the Constitution, not according to their original meaning, but in a manner that enhances democracy, and that promotes the interests of "those groups in society whose needs and wishes elected official have no apparent interest in attending."[75] Although sometimes referred to as "moderate" interpretivisim, approaches like Professor Ely's are arguably as invalid as other non-interpretivist theories. They improperly permit federal judges to stray from the original meaning of the Constitution and thus to rewrites our fundamental law without authorization.

Ely's aims are respectable in that he attempts to constrain federal courts based on a principle of representative democracy derived from the Constitution. But he erroneously assumes that protection of this principle requires the exercise of illegitimate judicial power rather than fidelity to the original meaning of the Constitution. The Constitution itself sets forth the means of protecting the integrity of our democratic republic, and judges have no authority to override our democratic processes by inventing new rights or protections, regardless of the ends they purport to advance.

[75] J. Ely, *supra* note 1, at 73-134, 151.

29. HASN'T NON-INTERPRETIVISM INSPIRED PROGRESSIVE REFORMS THAT WE ACKNOWLEDGE TO BE WORTHWHILE?

Some scholars acknowledge that federal courts have no authority to depart from the original meaning of the Constitution, but argue that we should encourage such departures anyway because they sometime lead to results that these scholars view as beneficial. It may well be true that certain non-interpretivist decisions have resulted in some needed reforms, but that is not the issue. History shows that unchecked political power, even if put to good use in some instances, inevitably leads to the abuse of that power at the expense of the people.

Despite isolated instances where the Court has formulated social policies that appear to many people today to be sound, we must recognize the overriding injustice and potential threat to liberty entailed by an imperial judiciary. Every time a court uses something other than the original meaning of the Constitution to strike down a law enacted by popularly elected representatives, it improperly strips us of our right to self-government. And, as noted by Justice Robert Jackson, "time has proved that [the Court's] judgment was wrong on most of the outstanding issues upon which it has chosen to challenge the popular branches."[76] For every non-interpretivist decision that might appear to be socially progressive, there stands a *Dred Scott* or *Lochner* or *Roe*, and the threat that benevolence will turn to malevolence if judicial whim is so inclined.

[76]R. Jackson, *The Struggle for Judicial Supremacy* at x, 37 (1941). See Q & A 19 for a discussion of judicial competence to address complex issues of social policy.

30. IS *BROWN V. BOARD OF EDUCATION*, 347 U.S. 483 (1954), CONSISTENT WITH THE ORIGINAL MEANING OF THE CONSTITUTION?

In *Brown*, the Supreme Court held that state laws mandating racially segregated public schools violate the equal protection clause of the fourteenth amendment. Many critics of interpretivism contend that adherence to original meaning would require that *Brown* be overruled.

In fact, *Brown*'s holding is fully consistent with the original meaning of the equal protection clause, and served to correct the Court's prior departure from that meaning in *Plessy v Ferguson*, 163 U.S. 537 (1896). In *Plessy*, which upheld state-imposed racial segregation, the Court conceded that the fourteenth amendment was meant "to enforce absolute equality of the two races before the law." *Id.* The Court ignored the word of the amendment, however, and instead concluded that the framers and ratifiers did not objectively intend to abolish such segregation, as evidenced by contemporaneous laws forbidding interracial marriage and requiring segregated schools. Justice Harlan correctly noted in dissent that this extrinsic evidence was highly suspect because it reflected the racial prejudices of the day, not the meaning of the words of the fourteenth amendment. *Id.* at 563. Focusing on the Constitution itself, Harlan concluded (*id.* at 559):

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

By overruling *Plessy*, *Brown* effected a return to the original meaning of the equal protection clause. Because the words of the clause plainly prohibit unequal treatment of the races by states (*see Strauder v. West Virginia*, 100 U.S. 303, 307 (1880)), the *Brown* Court properly rejected reliance on evidence of subjective intent, which it characterized as "inconclusive." 347 U.S. at 489. Although the Court in *Brown* stated that it could not "turn the clock back to 1868 when the Amendment was adopted," the Court did not ignore original meaning, but simply recognized that this meaning had to be applied to "public education in the light of its full development and its present place in American life throughout the Nation." *Id.* at 492-93. Once it concluded that separate but equal was "inherently unequal," the holding in *Brown* followed inexorably from the plain words of the equal protection clause.

31. ISN'T NON-INTERPRETIVISM SUFFICIENTLY CONSTRAINED BY THE CONSTITUTIONAL AUTHORITY OF CONGRESS TO RESTRICT FEDERAL JURISDICTION?

Some law professors argue that federal courts should be permitted to depart from the original meaning of the Constitution because Congress may remove federal court jurisdiction. These theorists believe that this power to restrict jurisdiction makes the courts sufficiently accountable to the people so that non-interpretive decisions do not threaten our democratic system.[77]

First, even if this alternative were available to provide some measure of judicial accountability, non-interpretivists would still be unable to justify deviation from the Constitution's original meaning. The Courts have no authority to strike down democratically enacted laws simply because the Constitution provides certain democratic checks and balances on the judiciary. Departure from the original meaning of our Constitution is no more justified by congressional authority to restrict jurisdiction than by the executive authority to appoint judges with the advice and consent of the Senate, or by any other constitutional check on federal courts.

As a practical matter, it is unrealistic to view restriction of jurisdiction as a genuine constraint. Indeed, the same people who advocate judicial activism and non-interpretivism also campaign rigorously against jurisdiction restriction. As noted by one interpretivist:

> There are many Congressmen who probably would vote to take away jurisdiction from the courts, except that every time the idea comes up, tour buses full of law professors from Harvard and Yale Law Schools come down to tell Congress that the idea is unconstitutional — or, if not unconstitutional, at least contrary to the 'spirit' of the Constitution.[78]

[77] *See, e.g.*, M. Perry, *The Constitution, the Courts, and Human Rights* (1982).

[78] Rees, *Methods of Constitutional Interpretation*, 7 Harv. J. Law & Pub. Pol. 81, 83-84 (1984).

32. DOESN'T INTERPRETIVISM PERMIT JUDGES TO CLOAK THEIR PERSONAL PREDILECTIONS WITH DISTORTED HISTORICAL EVIDENCE AND THEREBY IMPROPERLY ENHANCE THEIR OWN VALUE CHOICES WITH CONSTITUTIONAL LEGITIMACY, AS PROFESSOR TRIBE CONTENDS?[79]

It is ironic that non-interpretivists make this argument; their alternative standards for constitutional decision-making are so vague that they almost inevitably lead to the imposition of judges' personal beliefs and values.

Original meaning analysis, like any constitutional theory, can be misused and abused. The mere characterization of a decision as an application of the Constitution's original meaning doesn't make it so. The mere string citing of constitutional provisions is no substitute for serious analysis of their original meaning and the application of that meaning to modern problems. Distortion of evidence of original meaning to disguise personal predilections is as illegitimate as direct imposition of those predilections without the disguise through non-interpretivism.

More to the point, interpretivism is *more* conducive to meaningful dispute and to substantiation than non-interpretivism. Tribe himself acknowledges that a non-interpretivist's appeal to tradition and legal philosophy are "less determinate" than original meaning. Because they are less determinate, they are also less capable of being checked and measured against an objective standard. For example, it is far easier to dispute or to verify whether a given practice is an unreasonable search or seizure under original meaning analysis than to determine whether that practice "enhance human dignity," furthers the "evolution of our constitutional morality," or measures up to the other vague ideals used by non-interpretivists.

[79] *See, e.g.*, Tribe, *supra* note 50, at 25 ("However adorned by scholarly references to history, such claims [regarding the Constitution's original meaning] are far less subject to meaningful dispute, and hence far less constrained by the requirements of persuasion, than are the more modest claims of those who admittedly base their constitutional arguments on a more eclectic, less determinate mix of appeals to language, precedent, and legal philosophy.")

33. WOULD A RESTORATION OF ORIGINAL MEANING JURISPRUDENCE REQUIRE REVOLUTIONARY CHANGES IN EXISTING CONSTITUTIONAL LAW?

Our fundamental law would remain unchanged because that law is firmly fixed in the text of our Constitution. As noted above, the ultimate source of stability is the fixed original meaning of our written Constitution. Some changes would, of course, be necessary regarding how that law is interpreted. In the long run, however, stability would be enhanced by adhering to the fixed original meaning of our Constitution and by effecting changes in our fundamental law exclusively through the article V amendment process. What could be more dramatic than the changes wrought by non-interpretivism when the Supreme Court invalidated scores of laws more recently laws relating to school prayer, abortion, and capital punishment? In *Roe v. Wade*, for example, the Supreme Court overturned longstanding laws regarding abortion in all 50 states.

Lower courts are, of course, bound to continue to follow Supreme Court precedent until that precedent is changed. They should, however, refuse to expand Supreme Court holdings in a manner inconsistent with the original meaning of the Constitution.

III. CASES ILLUSTRATING INTERPRETIVIST JURISPRUDENCE

The cases listed below exemplify efforts by the Supreme Court to identify and apply the original meaning of the Constitution. Although we do not necessarily agree with the specific interpretation or result in any particular opinion, these cases illustrate the principles of original meaning jurisprudence described in this paper. Discussion of a particular case should not be viewed as an endorsement of the decision as a whole or of other aspects of the decision not discussed.

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Chief Justice John Marshall was perhaps the Supreme Court's greatest advocate of applying the Constitution as originally understood. In his landmark decision in *Marbury*, Marshall justified the legitimacy of judicial review to the legislation. He tied the power of judicial review to the obligation of courts to adhere strictly to the text of the Constitution. Noting that "[t]he government of the United States has been emphatically termed a government of laws, and not of men" (5 U.S. at 163), Marshall insisted that the Constitution is "a rule for the government of *courts*, as well as of the legislature." *Id.* at 180 (emphasis in original). *Marbury* itself is a splendid example of fidelity to constitutional language. Marshall began his interpretation of the provision at issue — article III — by quoting it. He was careful to apply "the plain import of the words" (*id.* at 175), and to adhere "to their obvious meaning." *Id.* Likewise he rejected interpretations that would render any clause "mere surplusage" (*id.* at 174), or that would require the courts to "close their eyes on the constitution." *Id.* at 178. In short, Marshall based his decision in *Marbury* on the original meaning of the Constitution as derived from its language and structure, not on values or principles found outside the text.

2. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

In *Fletcher*, the Supreme Court struck down a Georgia statute as a violation of the contract clause in article I, § 10. Due to rampant allegations of bribery, the Georgia legislature annulled an earlier grant of land from Georgia to several companies. The primary constitutional issue was whether the clause applies to a grant of land by a state to private party. In a straightforward analysis of the original meaning of the contract clause, Chief Justice Marshal held that the clause applies to executed contracts like grants, stating "since the constitution uses the general term, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former." 10 U.S. at 137. Similarly, the clause applies to a grant from a state because "[t]he words themselves contain no such distinction" between public and private parties. *Id.*

Unfortunately, Marshall briefly departed from his original meaning analysis in *Fletcher* by alluding to an alternative ground for the Court's holding based on "general principles which are common to our free institutions." *Id.* at 139. This uncharacteristic reliance on extra-textual principles by Marshall shows that even those committed to applying the original meaning of the constitutional text might occasionally slip into non-interpretivism.

3. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

Justice Story's opinion in *Martin* upholds the legitimacy of Supreme Court review of state court decisions that interpret federal law. Like Marshall in *Marbury*, Story attempted to identify and apply the original meaning of the constitutional provisions at issue, primarily articles III and VI, emphasizing throughout the specific language he was interpreting. Story insisted that the Constitution, "like every other grant [of powers], is to have a reasonable construction, according to the import of its terms." 14 U.S. at 326. He states that "[t]he words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Id.* After quoting portions of article III at length, Story noted that its language "is manifestly designed to be mandatory upon the legislature," as evidence by phrase such as "shall be vested," "shall hold," and "shall, at stated times, receive." *Id.* at 328. And he properly looked to the use of mandatory language in other provisions to shed light on the original meaning of similar language in article III.

Story's constitutional interpretation was not cramped or inflexible. He recognized that "[t]he constitution unavoidably deals in general language," and that "where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication." *Id.* at 326. Space limitations preclude comprehensive discussion of the numerous ways in which Justice Story sought to discern the Constitution's original meaning in *Martin*, but the above examples illustrate his fidelity to the text.

4. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)

In *McCulloch*, Chief Justice Marshall addressed the issue of whether Congress is constitutionally authorized to establish a national bank. Interpreting the necessary and proper clause in article I, § 8, Marshall noted that the Constitutional by necessity does not have "the prolixity of a legal code," but rather sets forth only "great outlines" and "important objects" to serve as our fundamental law. 17 U.S. at 407. In an oft-quoted line, he emphasized that "we must never forget that it is *a constitution* we are expounding." *Id.* (emphasis in original). Although this portion of *McCulloch* is frequently cited by non-interpretivists as justifying departure from the Constitution's original meaning, *McCulloch* itself is a fine example of original meaning analysis. Marshall's

message was not that original meaning is irrelevant, but that the general clauses in the Constitution should not be construed in an unreasonably cramped manner that conflicts with their original meaning, or that unduly hampers the ability of Congress (not the courts) to address the issues of the day.

Anyone who doubts that Marshall engaged in original meaning analysis in *McCulloch* need only review his brilliant exposition of the word "necessary." He painstakingly attempted to interpret the word as used" in the common affairs of the world, or in approved authors," relying on the "character of human language," the nature of the word, and the use of a different phrase — "absolutely necessary" in article I, § 10 — to convey indispensability. *Id.* at 414. His conclusion rested, not on extra-constitutional values, but on "the subject, the context, [and] the intention of the person[s] using the [word]" at issue. *Id.* at 415.

5. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

In *Cohens*, Chief Justice Marshall reaffirmed Justice Story's analysis in *Martin* regarding the legitimacy of Supreme Court review of state cases, this time in the criminal context. He revealed his loyalty to the Constitution's original meaning early in the opinion, stating "[i]f such be of the constitution, it is the duty of the Court to bow with respectful submission to its provisions." 19 U.S. at 377. After engaging in an extended analysis of the constitutional language at issue, Marshall confirmed his interpretation by relying on contemporaneous exposition in *The Federalist* and the contemporaneous practice of Congress in passing the Judiciary Act, both of which reaffirmed Marshall's conclusion that the Supreme Court may review state criminal cases that involve federal issues. He rejected the interpretation proposed by the State of Virginia as "founded, not on the words of the constitution, but on its spirit, a spirit extracted, not from the words of the instrument, but from [counsel's] view of the nature of our Union, and of the great fundamental principles on which the fabric stands." *Id.* at 422. Marshall concluded by expressing a healthy skepticism of any interpretation based on a perceived "spirit" that contradicts the language as ratified.

6. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

In *Gibbons*, the New York legislature had granted to two persons the exclusive right of navigation for steamboats in New York waters. The Supreme Court held that the grant conflicted with certain federal laws enacted under the commerce clause in article I, § 8. In determining the reach of the commerce clause, Chief Justice Marshall rejected as extra-constitutional the principle that the enumerated powers should generally be strictly construed, asking "Is there one sentence in the constitution which gives countenance to this rule?" 22 U.S. at 187. He insisted that the words at issue be interpreted in their "natural sense,"

and that ambiguities be resolved by reference to their purpose and object. Regarding the issue whether the commerce clause extends to navigation, he noted that "[a]ll America understands, and has uniformly understood, the word 'commerce' to comprehend navigation." *Id.* at 190. Construing the phrase "among the several States," Marshall likewise tried to identify its original meaning. He concluded that it does not include commerce completely internal within a single state, but does extend to "commerce which concerns more States than one," and specifically to navigation within New York if it commences or terminates in another state. *Id.* at 194-95. Although some scholars might dispute his specific conclusions, Chief Justice Marshall's interpretation of the commerce clause illustrates his attempt to remain loyal to the original meaning of the Constitution.

7. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332-58 (1827) (Marshall, C.J., dissenting).

In *Ogden*, a majority of the Supreme Court held that the contract clause of the Constitution does not prohibit state laws that regulate contracts made *after* the law was enacted. In dissent, Chief Justice Marshall relied on his analysis of the original meaning of the contract clause to argue that the majority had erred. He stated:

> To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor to objects not comprehended in them * * * is to repeat what has been already said more at large, and is all that can be necessary.

25 U.S. at 332. As to the merits of this case, he determined that "the words of the [contract clause], taken in their natural and obvious sense, admit of a prospective, as well as a retrospective operation." He therefore rejected the majority's view that the scope of the clause was entirely retrospective.

While there are strong arguments on both sides of this dispute about the meaning of the contract clause, it is clear that Chief Justice Marshall saw the proper judicial inquiry as a matter of ascertaining the clause's meaning, not as a matter of weighing the policy concerns that might justify one interpretation over another.

8. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

Strauder invalidated a state statute permitting only white citizens to serve as jurors. The case illustrates an appropriate approach to interpreting the equal protection clause according to its original meaning. The *Strauder* Court first

quoted the text of the clause. It then stated that it was "one of a series of constitutional provisions having a common purpose: namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that [white persons] enjoy." 100 U.S. at 306. Concluding that the words and purposes of the equal protection clause require that state laws "be the same for the black as for the white" (*id.* at 307), the Court held that the statute at issue was inconsistent with the meaning of the clause.

9. *Hawke v. Smith*, 253 U.S. 221 (1920).

In 1919 the Ohio General Assembly adopted a resolution ratifying the eighteenth amendment to the U.S. Constitution. The Ohio state constitution, however, contained a provision requiring that proposed amendments to the U.S. Constitution be submitted, not only to the Ohio General Assembly, but also to the people of the state by referendum. The issue in *Hawke* was whether this state constitutional requirement conflicted with the amendment process specified in article V of the U.S. Constitution whereby proposed amendments become effective "when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof." Although this case was decided during the *Lochner* era — throughout which the Court often adopted a non-interpretive view of the due process clause — the Supreme Court in *Hawke* attempted to identify and apply the original meaning of article V. Based on this meaning, the Court unanimously voted to strike down the state provision at issue. Noting that "[t]he language of [article V] is plain, and admits of no doubts in its interpretation" (253 U.S. at 227), the Court stated that the word "Legislatures" in that article "was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." *Id.* The Court looked to the use of the word in other provisions and concluded that the term uniformly refers to representative bodies, whereas reference to direct voting by the people was specifically described in article I, § 2 as action "by the People of the several States." That same day, the Court applied its original meaning analysis in *Hawke* to a virtually identical case involving Ohio's ratification of the nineteenth amendment extending the right of suffrage to women. *See Hawke v. Smith*, 253 U.S. 231 (1920).

10. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448-83 (1934) (Sutherland, J., dissenting).

In *Blaisdell*, the Court upheld a Minnesota statute that authorized relief against mortgage foreclosures and execution sales of real property. The law was extremely similar to the debtor-relief statutes that were the principal evil sought to be cured by the founders in adopting the contract clause in article I, § 10. The

Court eschewed any attempt to identify and apply the original meaning of the clause, but instead "ascertain[ed] the scope of the constitutional prohibition [by] examin[ing] the course of judicial decisions." 290 U.S. at 428. It concluded that the statute at issue was constitutional due to the emergency conditions that prompted its passage.

Justice Sutherland's dissent represents an admirable effort to identify and apply the original meaning of the contract clause, and it reprimands the majority for departing from what he perceived that meaning to be. He began by emphasizing that constitutional language "does not mean one thing at one time and an entirely different thing at another time." 290 U.S. at 449. Because the Constitution is a written instrument, " 'its meaning does not alter. That which it meant when adopted, it means now.' " *Id.* at 450 (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)). He then quoted with approval a fundamental principle of original meaning jurisprudence:

> But it may easily happen that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended * * *.

290 U.S. at 451 (quoting *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 139-40 (1865)).

Like Marshall and Story, Justice Sutherland did not believe that application of the Constitution's original meaning necessarily entailed a cramped or narrow jurisprudence. He recognized that its provisions are "pliable" and "have the capacity of bringing within their grasp every new condition which falls within their meaning." *Id.* at 451. But he insisted that "their *meaning* is changeless; it is only their *application* which is extensible." *Id.* (emphasis in original). After an exhaustive original meaning analysis, Sutherland concluded that the text of the contract clause was unequivocally understood to apply *primarily and especially * * * in time of emergency.*" *id.* at 465 (emphasis in original). He thus rejected the majority's interpretation and voted to invalidate the statute at issue.

11. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

In this case, the Supreme Court addressed the issue whether the commerce clause authorizes Congress to regulate insurance transactions stretching across state lines. Writing for the Court, Justice Hugo Black plainly strove to discern and apply the meaning of that clause as originally understood:

> Ordinarily courts do not construe words in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word "commerce" was used in the Commerce Clause does not include a business such as insurance would do just that. Whatever other meanings "commerce" may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it include trade: business [like insurance] in which persons bought and sold, bargained and contracted.

322 U.S. at 539 (footnotes omitted). Stating that the Court's responsibility "in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it" (*id.* at 552), the Court held that the original understanding of that clause authorized Congress to regulate insurance.

12. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 251-64 (1978) (Brennan, J., dissenting).

Although Justice Brennan has recently challenged the notion of applying the original meaning of the Constitution (*see, e.g.*, Appendices H and I), his dissent in *Spannaus* exemplifies original meaning jurisprudence. In this case, the majority held that the contract clause was violated by a state statute requiring employers to make payments to pension plans so that terminated employees would ultimately receive the benefits they reasonably expected. Justice Brennan's dissent rejects this holding as inconsistent with the constitutional text. 438 U.S. at 251. He states that "[t]he terms of the Contract Clause negate any basis for [the majority's] interpretation as protecting all contract-based expectations from unjustifiable interference." *Id.* at 257. The evil sought to be cured, he wrote, "is identified with admirable precision: 'Law[s] *impairing* the Obligation of Contracts.' (Emphasis supplied.)" *Id.* at 258. Brennan concluded that "[i]t is nothing less than an abuse of the English language to interpret, as does the Court, the term 'impairing' as including laws which create new duties." *Id.* One does not have to agree with Brennan's ultimate conclusions regarding the original meaning of the word "impairing" in order to respect his efforts to discern that meaning.

13. *INS v. Chadha*, 462 U.S. 919 (1983).

In *Chadha* the Court addressed the constitutionality of a "legislative veto", specifically the procedure whereby the House of Representatives could, by resolution, overturn a decision of the Immigration and Naturalization Service and require a person to leave the United States. Because the resolution would have had the same effect as a law, the issue was whether this procedure violated article I, § 7 — which provides that for a bill to become law it must pass both

houses of Congress and be signed by the President (or, alternatively, a Presidential veto must be overridden by two-thirds of both Houses). The majority opinion properly emphasized the specific language at issue rather than any subjective intent of the framers. Because the dispute procedure did not comport with the explicit requirements for lawmaking set forth in article I, the majority concluded that it was unconstitutional. In contrast, the dissent emphasized unfocused rhetoric regarding "separation of powers" and the need for "flexibility" and "adaption." The dissent illustrates the approach criticized by Marshall in *Cohens* that attempts to vindicate an alleged "spirit" of the constitution even though that spirit cannot be reconciled with the specific constitutional language at issue.

14. *Marsh v. Chambers*, 463 U.S. 783 (1983).

In *Marsh* the Court upheld the practice of the Nebraska legislature of opening its sessions with a prayer by a chaplain. Rejecting an establishment clause challenge, Chief Justice Burger's majority opinion is based on an exhaustive review of historical evidence showing that "[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." 463 U.S. at 786. The *Marsh* court concluded that the practice of the Nebraska legislature is constitutional, stating that the "evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that clause applied to [a similar] practice authorized by the First Congress * * *." *Id.* at 790.

15. *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

Wallace involved the constitutionality of a state statute authorizing a daily period of silence in public schools for voluntary prayer or meditation. The majority struck down the statute as a violation of the first amendment's establishment clause. Although the Court concluded that the clause was meant to erect "a wall of separation between Church and State" — a phrase borrowed from a letter of Thomas Jefferson written many years after the Bill of Rights was passed by Congress — Justice Rehnquist's dissent demonstrates the danger in relying on such subjective views that were not in any real sense a part of the framing and ratification of the first amendment. After noting that Jefferson was in France when the Bill of Rights was ratified and was thus "a less than ideal source of contemporary history as to the [original] meaning" (472 U.S. at 92), Justice Rehnquist engaged in an extensive analysis of the text and history of the establishment clause. He concluded that the clause has "a well-accepting meaning: It forbade establishment of a national religion, and forbade preference among religious sects or denominations." *Id.* at 106. He therefore voted to sustain the statute at issue.

IV. CASES ILLUSTRATING NON-INTERPRETIVIST JURISPRUDENCE

The cases discussed below are examples of failures by the Supreme Court and certain lower federal courts to identify and apply the original meaning of the Constitution. The courts in these cases engaged in non-interpretivism, applying extra-constitutional values rather than principles derived from the original understanding of the constitutional text. The ultimate results reached in these cases do not necessarily differ from the meaning, but the analysis in each case is both illegitimate and representative of the jurisprudence advocated by non-interpretivists today.

1. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

Although original meaning jurisprudence was the predominant theory of constitutional interpretation during the first 150 years of our Nation's history, even some early Justices viewed the Constitution as authorizing federal judges to vindicate any right they deemed to be "fundamental," regardless of textual support. As evidenced by Justice Chase's 1798 opinion in *Calder*, the ink was barely dry on the Constitution before he succumbed to the temptation to set himself up as a Platonic Guardian. Chase stated that federal judges could strike down state law even where the law was not "expressly restrained by the Constitution." 3 U.S. at 387-88. He believed that federal judges were empowered to enforce "the nature and terms of the social compact" and "vital principles in our free Republican governments." *Id.* at 388. In a separate opinion, Justice James Iredell rejected Chase's attempted usurpation of power:

> [S]ome speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under [our constitutional system], any Court of Justice would possess a power to declare it so. * * * If * * * the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.

2. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

The infamous case of *Dred Scott* was plainly the result of non-interpretivism. There, the Court ruled that the due process clause of the fifth amendment prohibited Congress from restricting slavery in federal territories, as Congress had attempted to do through the Missouri compromise. Chief Justice Taney paid lip service to the idea of construing the Constitution "according to its true intent and meaning when it was adopted." 60 U.S. at 405. But Taney's opinion in *Dred Scott* relies, not on the original meaning of the due process clause, but on

the extra-constitutional notion of substantive due process. Without explanation Taney wrote: "[A]n Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, * * * could hardly be dignified with the name of due process of law." *Id.* at 450. *Dred Scott*'s similarity with recent substantive due process decisions caused one historian to note its "distinctly modern ring":

> American courts in the late twentieth century are no longer mere constitutional censors of public polices fashioned by other hands. They have also become initiators of social change. * * * [*Dred Scott*] provided an early indication of the vast judicial power that could be generated if political issues were converted by definition into constitutional question.[80]

3. *Lochner v. New York*, 198 U.S. 45 (1905).

Lochner epitomizes the now-discredited era of economic substantive due process during which the Supreme Court invalidated nearly 200 state and federal regulations affecting economic affairs. To justify its promotion of a laissez-faire marketplace, the Court purported to rely on the due process clauses of the fifth and fourteenth amendments, but it never seriously attempted to justify its expansive interpretation of these clauses with their original meaning. In *Lochner*, the Court struck down a New York labor law prohibiting the employment of bakery employees for more than 10 hours a day or 60 hours a week. Justice Holmes in dissent criticized the majority's contorted Social-Darwinist reading of the Constitution with the memorable line: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. at 75.

4. *Mapp v. Ohio*, 367 U.S. 643 (1961).

In *Mapp*, the Warren Court held that the fourteenth amendment compels state courts to enforce the exclusionary rule, which bars the use in criminal prosecutions of evidence obtained in violation of the fourth amendment. In so holding the Court reversed its decision in *Wolf v. Colorado*, 338 U.S. 25 (1949), which refused to apply the exclusionary rule to the states. The *Wolf* court recognized that the rule does not derive from the original meaning of the fourth amendment, but is a judicially created rule of evidence. Since *Mapp*, the Court has again recognized that the fourth and fourteenth Amendments do not require states to adhere to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 905-08 (1984); *United States v. Calandra*, 414 U.S. 338, 347-55 (1974). The

[80] D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 5 (1978).

Court nevertheless continues to overturn state convictions where the rule has not been followed.

5. *Engel v. Vitale*, 370 U.S. 421 (1962).

In *Engel*, a local school board had provided that students who so desired could join in a brief non-denominational prayer at the beginning of the school day. The Supreme Court held that this practice established "an official religion" and therefore violated the establishment clause of the first amendment. In so holding, the Court overturned long-standing laws of more than 40 states. Rather than analyzing the words of the clause to determine their original meaning, the Court held that voluntary school prayer breached an alleged "constitutional wall between Church and State." *Id.* at 425. As pointed out by Justice Stewart in dissent, however, "the Court's talk, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical innovation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution." *Id.* at 445.

6. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Griswold*, the Supreme Court struck down a state statute prohibiting the use of contraceptive devices because the statute intruded on what the Court viewed as a constitutionally protected "right of privacy." Apparently recognizing the absence of any textual basis for this "right of privacy," the Court stated that the right was "formed by the emanations" and found in the "penumbras" of various provisions in the Bill of Rights. 381 U.S. at 484. To justify the creation of this new constitutional principle, the Court relied on the "penumbras" of no less than six amendments, including the third amendment's protection against quartering soldiers, the fifth amendment's protection against self-incrimination, the fourth amendment's prohibition of unreasonable searches and seizures, "a right of association" which itself was found in the penumbras of the first amendment, the ninth amendment, and the fourteenth amendment. Nowhere does the opinion discuss the original meaning of these provisions. Indeed, as noted by Justice Stewart in dissent, "the Court does not say which of these Amendments, if any, it thinks is infringed by the Connecticut Law." *Id.* at 427-28. Instead, the majority improperly substituted the words "right of privacy" for the language chosen by the founders. *Id.* at 530.

7. *Miranda v. Arizona*, 384 U.S. 436 (1966).

By a vote of 5 to 4, the *Miranda* Court overturned long-accepted precedent to fashion and impose a detailed set of procedures governing police interrogations of criminal suspects. Although this decision purports to rest on the fifth amendment, the language of that provision simply prohibits a person from being "compelled in any criminal case to be a witness against himself." The *Miranda* procedures, however, are not a logical outgrowth of that constitutional standard.

Justice White noted in dissent that the Court's novel system of interrogation rules "is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent." 384 U.S. at 531. Justice White then stated the obvious: that the majority had not applied the original meaning of the Constitution, but had "made new law and new public policy." *Id.* The Supreme Court has conceded that the *Miranda* rules are not constitutional requirements, *see, e.g., Oregon v. Elstad*, 470 U.S. 298, 304-09 (1985); *New York v. Quarles*, 467 U.S. 649, 654-58 (1984); *Michigan v. Tucker*, 417 U.S. 433, 443-46 (1974), but it continues to apply them in reviewing state and federal cases.

8. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Katzenbach involved an interpretation of the enforcement clause of the fourteenth amendment. Through the 1965 Voting Rights Act, Congress barred certain literacy requirements imposed by the states for voting. Although the Supreme Court had previously upheld identical literacy requirements as not prohibited by the fourteenth and fifteenth amendments, it held in *Katzenbach* that the literacy test provisions of the Voting Rights Act were a proper exercise of congressional power under the enforcement clause of the fourteenth amendment. In effect, the Court interpreted the clause as empowering Congress to *define* the substantive scope for the fourteenth amendment even though the clause is limited on its face to *enforcement*. Justice Brennan's majority opinion viewed the clause as conferring "the same broad powers expressed in the necessary and proper clause." 384 U.S. at 650. The Court noted that early drafts of the enforcement clause contained language similar to the necessary and proper clause, and summarily concluded that there is no evidence to indicate that the language ultimately adopted was intended to be more narrow. Rather than emphasizing an earlier draft and the absence of evidence of a subsequent change in meaning, the *Katzenbach* Court should have focused on the language that was in fact ratified. The issue before the Court was not the propriety of administering literacy tests, but the ability of Congress to change the meaning of the fourteenth amendment. As noted by Justice Harlan in dissent, the majority "confused the issue of how much enforcement power Congress possesses under § 5 [of the fourteenth amendment] with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature." *Id.* at 666. Whether an act or practice violates the equal protection clause ultimately remains a judicial question, and unless such a violation exists, the congressional enforcement power does not come into play. *Id.*

9. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

In *Shapiro*, the Supreme Court struck down state and District of Columbia statutes that denied welfare assistance to persons who had not resided within the relevant jurisdiction for at least one year. The Court held that such restrictions violated a constitutional "right to travel" because they discouraged indigents from migrating or relocating. Finding it unnecessary "to ascribe the source of this right to travel interstate to a particular constitutional provision" (394 U.S. at 630), the Court was content to assert that it flowed from "the nature of our Federal Union and our constitutional concepts of personal liberty." *Id.* at 629. In dissent, Chief Justice Warren properly criticized the majority for resurrecting the doctrine of substantive due process: "The era is long past when this Court under the rubric of due process has reviewed the wisdom of a congressional decision that interstate commerce will be fostered by the enactment of certain regulations." *Id.* at 654. Justice Harlan likewise noted that the Court's holding reflected, not the original meaning of the Constitution, but the "notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is constrained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises." *Id.* at 677.

10. *Perez v. United States*, 402 U.S. 146 (1971).

In this case, the Supreme Court upheld Title II of the Consumer Credit Protection Act as a valid exercise of congressional authority under the commerce clause. The statute made a federal crime of "loan sharking," the use of extortionate means in collecting an extension of credit. Although the petitioner's crime occurred entirely within one state, the Court held that the statute was constitutional as applied because loan sharking is a "class of activity" that affects interstate commerce. The Court did not, however, attempt to show that the commerce clause as originally understood empowered Congress to regulate all aspects of any such class of activities. As noted by Justice Stewart in dissent, nothing in the text or history of the clause authorizes Congress to "define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws." 402 U.S. at 157.

11. *Furman v. Georgia*, 408 U.S. 238 (1972).

In *Furman* a 5-4 majority of the Supreme Court invalidated the capital punishment practices of 39 states and the federal government as "cruel and unusual punishments" prohibited by the eighth amendment. Each of the nine Justices wrote separate opinions, thereby evidencing the varying standards employed by those in the majority to strike down the laws at issue. None of the Justices in the majority seriously attempted to apply the original meaning of the eighth amendment, or of the several indirect references to capital punishment in

the text of the Constitution itself (in the fifth and fourteenth amendments for example). In dissent Justice Rehnquist emphasized the illegitimacy of judicial invalidation of majority will as expressed through elected representatives when that invalidation is not based on the original meaning of the Constitution.

12. *Roe v. Wade*, 410 U.S. 113 (1973).

In *Roe*, the Supreme Court extended the *Griswold* "right of privacy" to invalidate state laws prohibiting abortion. As in *Griswold*, the Court in *Roe* made no attempt to justify its decision as based on the original meaning of the Constitution. After holding that the *Griswold* right of privacy encompasses a woman's decision to abort, the Court proceeded to construct a code-like set of restrictions on the regulation of abortion that it deemed to be constitutionally compelled. *Roe* has been extensively criticized — even by those who consider themselves to be pro-abortion — as an illegitimate application of the Constitution. As state by one prominent critic, the right to abort created in *Roe* "is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the national governmental structure. * * * [*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[81]

13. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982).

In this case, a minority of the Supreme Court sought to create a constitutional "right to receive ideas" enjoyed by students in junior high school and high school, a right allegedly derived from the first amendment's protection of the freedom of speech and the press. Having invented this new right, Justice Brennan's plurality opinion concluded that local school boards may not remove a book from school libraries based on the contents of the book. Apart from a single quotation of the first amendment in a footnote, the Court's opinion never discussed the text of the constitutional provision it purportedly interpreted. In dissent, Justice Rehnquist characterized the newly found "right to receive ideas" as "fashion[ed] out of whole cloth" by Justice Brennan. *Id.* at 910. Although the precise scope of the original meaning of "the freedom of speech, or of the press" might be difficult to define at the edges, Justice Brennan's opinion in *Pico* provided no justification for concluding that this meaning encompasses a broad "right to receive ideas." The ultimate result of the *Pico* plurality's non-interpretivism might well be that personal values of federal judges, rather than

[81] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935-36, 947 (1973) (emphasis in original) (footnotes omitted).

of parents and educators, will determine the manner in which public school students will be educated.

14. *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982).

Engblom involved a constitutional challenge to the eviction of striking state correction officers from staff housing and the use of this housing by National Guardsmen called in to maintain order during the strike. The state owned the buildings and had obviously consented to their occupation by the Guardsmen. Although the striking officers merely leased the buildings from the state as an incident of their employment, they argued that the state violated the third amendment's prohibition of quartering of soldiers "in any house, without the consent of the Owner."

The Second Circuit noted that, apart from the district court's opinion and isolated metaphorical applications, there were no reported decisions construing the third amendment. The appellate court should have been delighted with the rare opportunity to discern the original meaning of a provision unspoiled by the Supreme Court's non-interpretivist applications. Instead, the Court denigrated the constitutional text by lamenting: "The absence of any case law directly construing this provisions presents a serious interpretive problem * * *." 677 F.2d at 962. Rather than determining whether the original meaning of the word "Owner" in the third amendment is limited to fee simply owners (a construction the court summarily rejected as "formalistic"), the court stated that the amendment "was designed to assure a fundamental right to privacy" (citing *Griswold*), and concluded that the "property-based privacy interests protected by the Third Amendment" extend to any occupation accompanied by a legal right to exclude. As a result of this non-interpretive analysis, the Second Circuit reversed the lower court's dismissal of the third amendment claim and remanded the case for a trial on the merits.

15. *Kite v. Marshall*, 494 F. Supp. 227 (S.D. Tex. 1980), *rev'd, 661 F.2d 1027 (5th Cir. 1981), cert. denied*, 457 U.S. 1120 (1982).

Kite presented a constitutional challenge to a rule imposed by a Texas public school athletic association stating that students who attended special athletic training camps were ineligible to participate in school athletics in the relevant sport for one year. The obvious purpose of the rule was to ensure that member schools competed on a reasonably equal basis and to keep athletics in its proper perspective in the total educational program. The federal district court judge struck down the rule as a violation of "the fundamental right of personal privacy" discussed in *Roe* and *Griswold*, which the judge deemed to be broad enough to encompass a family's decision to send a child to summer basketball camp. 494 F. Supp. at 230-32. Needless to say, the court engaged in no analysis of the original understanding of the Constitution during the course of inventing

this fundamental right to attend summer camp. Fortunately, the fifth Circuit reversed on appeal, holding that the rule "implicate[d] no fundamental constitutional right." 661 F.2d at 1029.

V. STANDARDS PROPOSED BY NON-INTERPRETIVISTS

Listed below are fifteen quotations describing standards suggested by non-interpretivists to be used in deciding constitutional issues.[82] The list is not exhaustive, but is instead intended to provide representative examples of the vague and widely varying concepts that non-interpretivists have proposed to replace the Constitution as our fundamental law. The reader should not despair if some (or all) of the passages below appear to be unintelligible. Having departed from the Constitution, non-interpretivists have become increasingly abstruse. They draw inspiration, not from the founders, but from positivism, contractarianism, utilitarianism, and a variety of other philosophical "-isms". The proliferation of these abstract theories make it exceedingly difficult for judges and lawyers — much less the average citizen — to keep abreast of the constitutional arguments advanced in legal journals and in litigation.

1. "THE WELL-BEING OF OUR SOCIETY"/"THE ENDS OF CONSTITUTIONAL GOVERNMENT

> Having abandoned both consent and fidelity to the text and original understanding as the touchstones of constitutional decision-making, let me propose a designedly vague criterion: How well, compared to possible alternatives, does the practice contribute to the well-being of our society — or, more narrowly, to the ends of constitutional government? Among other things, the practice should (1) foster democratic government; (2) protect individuals against arbitrary, unfair, and intrusive official action; (3) conduce to a political order that is relatively stable but which also responds to changing conditions, values, and needs; (4) not readily lend itself to arbitrary decisions or abuses; and (5) be acceptable to the populace.

Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 226 (1980).

2. "VALUES THAT WE HOLD TO BE FUNDAMENTAL IN THE OPERATIONS OF GOVERNMENT"

> To argue that neither the language of the Constitution nor the intentions of those who employed it controls the meaning that may subsequently be given to the Constitution is not, of course, to argue that they lack relevance to the process by which that meaning is

[82] This list draws heavily from similar compilations set forth in J. Choper, *Judicial Review and the National Political Process* 74 (1980); J. Ely, *supra* note 1, at 43-72; and Monaghan, *Our Perfect Constitution*, 56 N.Y. U. L. Rev. 353, 358-60 (1981).

derived. Constitutional law is the means by which we express the values that we hold to be fundamental in the operations of government. Judges, or other who wish to appeal to the Constitution, must demonstrate that the principles upon which they propose to confer constitutional status express values that our society does hold to be fundamental.

Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033, 1069 (1981).

3. "DEEPLY EMBEDDED CULTURAL VALUES"

In articulating the basis for his intuitive judgement, a Justice should reach for arguments which make use of reasons that apply to deeply embedded cultural values and thereby transcend his own biases. * * * [U]nder this formulation the Court does not wait until it perceives that a social consensus exists with regard to a particular issue; Justices decide cases intuitively and then search to justify their intuitions by making arguments directed at a wide audience. The effectiveness of their argument ultimately turns on the extent to which they can demonstrate that a given result further values which American society has traditionally considered of high importance, and is in that sense "right" and "just." Over time, the rightness of a result may be called into question; just as the Constitution is capable of changing interpretations, the collective insights of Justices are capable of being repudiated. But the possibility of repudiation should not deter the Court from deciding difficult cases in emerging areas of social controversy.

G. White, *Patterns of American Legal Thought* 160 (1978).

4. "VALUES DEEPLY EMBEDDED IN THE SOCIETY"

An extraordinary national majority may oppose a law over many decades, but for reasons that dramatize the difference between a republic and a democracy, its members may fail to enshrine their opposition in the form of a statute or constitutional amendment. On such occasions, the Court has a legitimate gap-filling role to play. Pieces of the nation's bedrock may lie chipped and broken in the gap, and the Court can mend them by performing a function akin to that performed in other contexts by the amending process — it can test the depth, over time, of the community's commitment to the inviolability and unique importance of certain values. * * * The words may change, but the search remains the same. It is for values deeply embedded in the society, values treasured by both past and present, values behind which the society and its legal system have unmistakably thrown their weight.

Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 1039-40 (1979) (emphasis and footnoted omitted).

5. "MORAL EVOLUTION"

> The significance of this religious American self-understanding for our purposes is that it supplies the crucial context in which the function of non-interpretive review in human rights cases can be clarified. Judicial review represents the institutionalization of prophecy. The function of non-interpretive review in human rights cases is prophetic; it is to call the American people — actually the government, the representative of the people — to provisional judgment.
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>
> The notion of moral evolution — of ongoing reevaluation and moral growth — may not justify the court in applying a single moral system to resolve moral problems. But the notion of moral evolution *can* help explain and justify the Court as a policymaking institution whose members, not every one of whom has the same criteria of moral rightness, deal with moral problems by actively and creatively subjecting established moral conventions to critical reevaluation. It can explain and justify a policymaking institution whose morality is "open," not "closed" — an institution that resolves moral problems not simply by looking backward to the sediment of old moralities, but ahead to emergent principles in terms of which fragment of a new moral order can be forged.

Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. Rev. 278, 291, 307 (1981) (emphasis in original) (footnote omitted).

6. EVOLVING CONCEPTS OF "HUMAN DIGNITY"

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time.
>
> * * * *
>
> As augmented by the Bill of Rights and the Civil War Amendment, this text is a sparkling vision of the supremacy of the human dignity of every individual. * * * It is a vision that has guided us as a people throughout our history, although the precise rules by which we

have protected fundamental human dignity have been transformed over time in response to both transformations of social condition and evolution of our concepts of human dignity.

Address by Justice William J. Brennan, Jr., entitled *The Constitution of the United States: Contemporary Ratification*, before the text and Teaching Symposium, Georgetown University, Washington, D.C. at 7, 9 (Oct. 12, 1985) (attached as Appendix H).

7. "THE LIVING DEVELOPMENT OF CONSTITUTIONAL JUSTICE"

> While addressing relevant issues of institutional capacities and roles, I do not stop at discussing the Court as the right or wrong forum to review a particular issue and render judgement; the more crucial question for me is whether the judgment itself was right or wrong as an element in the living development of constitutional justice. * * * In advocating a more candidly creative role than conventional scholarship has accorded the courts, I see myself as a proponent more of self-awareness than of an altered balance of governmental power. * * * [T]he highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution's own phrase, "to form a more perfect Union" between right and rights within that charter's necessarily evolutionary design.

L. Tribe, *American Constitutional Law* iii-iv (1978).

8. "AUTONOMY AND EQUAL CONCERN AND RESPECT" ENHANCED BY A CONTRACTARIAN MORAL THEORY

> The task of interpreting human rights in terms of the focal values of autonomy and equal concern and respect has been substantially furthered by the recent revival of contractarian theory in the work of John Rawls. His seminal writings explicate such rights and their institutionalization in American constitutional law in a way that the existing moral theories of constitutional theorists — utilitarianism and value skepticism — cannot imitate.

Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. Pa. L. Rev. 1195, 1228 (1979) (footnote omitted).

9. "WELFARE RIGHTS"

> One can thus well imagine that constitutional lawyers and scholars, seeking or weighing legal definition, recognition, and enforce-

ment of welfare rights, would eagerly take to [John] Rawls in search of a principled account of such rights — one which could be used to support or explain such legal events (actual or desired) as inclusion of specific welfare guaranties in a constitution or determinations by the judiciary that some such guaranties are already present in the spacious locutions of, say, section one of the fourteenth amendment.

Michelman, *In Pursuit of Constitutional Welfare Rights: One view of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962, 966 (1973) (footnotes omitted).

10. "A FUSION OF CONSTITUTIONAL LAW AND MORAL THEORY"

Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place. It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available than the lawyers may remember.

R. Dworkin, *Taking Rights Seriously* 149 (1977).

11. "THE NATIONAL WILL"

In terms of judicial statesmanship, the Burger Court leaves something to be desired; and the same can be said of many of its predecessor Courts. Yet if we take the long view and examine the history of the Supreme Court in its entirety, we cannot but admit that it has translated the national will into constitutional terms with remarkable fidelity and has developed the Constitution by incorporating in it the temper of successive periods in the nation's history.

Letter to the Editor from Dean Alfange entitled *The Political Mission of the Supreme Court*, N.Y. Times, June 1, 1980, § 4, at 20, col. 4.

12. "THE DIGNITY OF FULL MEMBERSHIP IN SOCIETY"

Citizenship, in its narrowest sense, is a legal status. In relation to the rights of citizenship, all citizens are equal. So viewed, citizenship is a constitutional trifle, "at best a simple idea for a simple government." But the emergent constitutional principle of equal citizenship does not exhaust itself in tautology. The essence of equal citizenship is the dignity of full membership in the society. Thus, the principle not only

demands a measure of equality of legal status, but also promotes a greater equality of that other kind of status which is a social fact — namely, one's rank on a scale defined by degrees of deference or regard. The principle embodies "an ethic of mutual respect and self-esteem"; it often bears its fruit in those regions where symbol becomes substance.

Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 5-6 (1977) (footnotes omitted).

13. OUR SOCIETY'S "DISTINCTIVE PUBLIC MORALITY"

The values that lie at the heart of most structural litigation today — equality, due process, Liberty, security of the person, no cruel and unusual punishment — are not embodied in textually-specific prohibitions * * *. The absence of textual specificity does not make the values any less real, nor any less important. The values embodied in such non-textually-specific prohibitions as the equal protection and due process clauses are central to our constitutional order. They give our society an identity and inner coherence — its distinctive public morality. The absence of a textually-specific prohibition does not deny the importance of these values, but only makes the meaning-giving enterprise more arduous: less reliance can be placed on text.

Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 11 (1979).

14. "THE SETTLED WEIGHT OF RESPONSIBLE OPINION"

Against this background, I would specify some criteria for elaborating substantive due process rights, and elucidate them by explaining how they would be applied in a variety of cases. First, no substantive due process right should be established unless there is general agreement on the social importance of that right. Social importance, in turn, can be established by referring to the recognition given that right in nonconstitutional contexts, the relationship between the right and other constitutionally guaranteed rights, and the exercise of ordinary common sense by the Justices. Second, a substantive due process right should be established only to the extent supported by the settled weight of responsible opinion. The Court should look to sources like the American Law Institute, the Commissioners for Uniform State Laws, and more specialized commissions of inquiry such as the Administrative Conference. The two criteria are not entirely distinct, but in general judgments of social importance will probably be more useful in defining a broad area in which a right should be recognized,

while the views of informed experts will probably be more useful in defining the precise contours of the right.

Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 Sup. Ct. Rev. 261, 279-80 (footnotes omitted).

15. THE JUDGE'S "PERSONAL PREFERENCES AND SUBSTANTIVE VALUE JUDGMENTS"

If, as some members of the Court itself have declared, the justices are often not basing their decisions on law in any usual sense but rather on their personal preferences and subjective value judgments; if they are, in fact, legislating under the guise of judging, shouldn't they state this frankly and clearly in their decisions?

* * * * *

We have failed to see that the Supreme Court has evolved into a new institution — one that is even more unique and unprecedented than commonly supposed. Indeed, the institution can no longer be described with any accuracy as a court, in the customary sense. Unlike a court, its primary function is not judicial but legislative. It is a governing body in the sense that it makes the basic policy decisions of the nation, selects among the competing values of our society, and administers and executes the directions it chooses in political, social, and ethical matters. It has become the major societal agency for reform.

* * * * *

But note well that it is not an act of condemnation or disapproval to say that the institution is not primarily a court. It is a matter of healthy recognition that a new kind of governmental institution has evolved — one probably unique in the history of governmental institutions. It is an institution that has thus far been highly successful as an instrument of political action despite the fact that in combining legislative, judicial, and executive powers it has contradicted the basic warnings of the doctrine of separation of powers, and the apprehensions against concentrated power expressed by the framers of the Constitution.

Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212, 1214, 1216 (1977).

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APPENDIX A

THE CONSTITUTION OF THE UNITED STATES

CONSTITUTION OF THE UNITED STATES OF AMERICA—1787 [1]

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. [2]The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall be Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

[1]In May, 1785, a committee of Congress made a report recommending an alteration in the Articles of Confederation, but no action was taken on it, and it was left to the State Legislatures to proceed in the matter. In January, 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz: Delaware, New York, New Jersey, and Pennsylvania; the commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Under the circumstances of so partial a representation, the commissioners present agreed upon a report, (drawn by Mr. Hamilton, of New York,) expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the Second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on the 21st of February, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On the 25th of May, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed constitution was commenced. On the 17th of September, 1787, the Constitution as engrossed and agreed upon was signed by all the members present, except Mr. Gerry of Massachusetts, and Messrs. Mason and Randolph, of Virginia. The president of the convention transmitted it to Congress, with a resolution stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on the 28th of September, 1787, directed the Constitution so framed, with the resolutions and letter concerning the same, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 25, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that North Carolina had ratified the Constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1790. Vermont, in convention, ratified the Constitution January 10, 1791, and was, by an act of Congress approved February 18, 1791, "received and admitted into this Union as a new and entire member of the United States."

[2]The part of this clause relating to the mode of apportionment of representatives among the several States, has been affected by the 14th Amendment, § 2 (p. LVI), and as to taxes on incomes without apportionment, by the 16th Amendment (p. LVIII).

[3]SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

[4]SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before

[3]This section has been affected by the 17th amendment, p. LVII.

[4]This section has been affected by the 20th amendment, p. LVIII.

the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.[5]

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the

[5]This clause has been affected by the 16th amendment, p. LVII.

Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[6]The Electors shall meet in their respective States, and vote by Ballot for two Persons of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[6]This clause has been affected by the 12th amendment, p. LV.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for

their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[7]SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[8]

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or

[7]This section has been affected by the 11th amendment, p. LV.

[8]This clause was affected by the 13th amendment, p. LVI.

Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. IN WITNESS whereof We have hereunto subscribed our Names,

GO. WASHINGTON—*Presidt.*
and deputy from Virginia

Attest WILLIAM JACKSON *Secretary*

New Hampshire

JOHN LANGDON — NICHOLAS GILMAN

Massachusetts

NATHANIEL GORHAM — RUFUS KING

Connecticut

WM. SAML. JOHNSON — ROGER SHERMAN

New York

ALEXANDER HAMILTON

New Jersey

WIL. LIVINGSTON — WM. PATERSON.
DAVID BREARLEY. — JONA. DAYTON

Pennsylvania

B. FRANKLIN — THOS. FITZSIMONS
THOMAS MIFFLIN — JARED INGERSOLL
ROBT. MORRIS — JAMES WILSON.
GEO. CLYMER — GOUV. MORRIS

Delaware

GEO. READ — RICHARD BASSETT
GUNNING BEDFORD jun — JACO. BROOM
JOHN DICKINSON

Maryland

JAMES MCHENRY — DANL. CARROLL.
DAN OF ST. THOS. JENIFER

Virginia

JOHN BLAIR— — JAMES MADISON Jr.

North Carolina

WM. BLOUNT — HU. WILLIAMSON
RICHD. DOBBS SPAIGHT.

South Carolina

J. RUTLEDGE — CHARLES PINCKNEY
CHARLES COTESWORTH Pinckney — PIERCE BUTLER.

Georgia

WILLIAM FEW — ABR. BALDWIN

ARTICLES IN ADDITION TO, AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

ARTICLE [I.] [9]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE [II.]

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE [III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, lib-

[9] The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress, on the 25th of September, 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 24, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. The amendments were subsequently ratified by the legislatures of Massachusetts, March 2, 1939; Georgia, March 18, 1939; and Connecticut, April 19, 1939.

erty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

ARTICLE [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE [IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE [X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[ARTICLE XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

PROPOSAL AND RATIFICATION

The eleventh amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Third Congress, on the 4th of March 1794; and was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the States. The dates of ratification were: New York, March 27, 1794; Rhode Island, March 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between October 9, 1794 and November 9, 1794; Virginia, November 18, 1794; Georgia, November 29, 1794; Kentucky, December 7, 1794; Maryland, December 26, 1794; Delaware, January 23, 1795; North Carolina, February 7, 1795.

Ratification was completed on February 7, 1795.

The amendment was subsequently ratified by South Carolina on December 4, 1797. New Jersey and Pennsylvania did not take action on the amendment.

[ARTICLE XII.] [10]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

PROPOSAL AND RATIFICATION

The twelfth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Eighth Congress, on the 9th of December, 1803, in lieu of the original third paragraph of the first section of the second article; and was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of 13 of the 17 States. The dates of ratification were: North Carolina, December 21, 1803; Maryland, December 24, 1803; Kentucky, December 27, 1803; Ohio, December 30, 1803; Pennsylvania, January 5, 1804; Vermont, January 30, 1804; Virginia, February 3, 1804; New York, February 10, 1804; New Jersey, February 22, 1804; Rhode Island, March 12, 1804; South Carolina, May 15, 1804; Georgia, May 19, 1804; New Hampshire, June 15, 1804.

Ratification was completed on June 15, 1804.

The amendment was subsequently ratified by Tennessee, July 27, 1804.

The amendment was rejected by Delaware, January 18, 1804; Massachusetts, February 3, 1804; Connecticut, at its session begun May 10, 1804.

[10] This amendment was affected by the 20th amendment, § 3, p. LVIII.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

PROPOSAL AND RATIFICATION

The thirteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 31st day of January, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States. The dates of ratification were: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; Pennsylvania, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Indiana, February 13, 1865; Nevada, February 16, 1865; Louisiana, February 17, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865; Tennessee, April 7, 1865; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, July 1, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865; North Carolina, December 4, 1865; Georgia, December 6, 1865.

Ratification was completed on December 6, 1865.

The amendment was subsequently ratified by Oregon, December 8, 1865; California, December 19, 1865; Florida, December 28, 1865 (Florida again ratified on June 9, 1868, upon its adoption of a new constitution); Iowa, January 15, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 18, 1870; Delaware, February 12, 1901 (after having rejected the amendment on February 8, 1865); Kentucky, March 18, 1976 (after having rejected it on February 24, 1865).

The amendment was rejected (and not subsequently ratified) by Mississippi, December 4, 1865.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

PROPOSAL AND RATIFICATION

The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 13th of June, 1866. It was declared, in a certificate of the Secretary of State dated July 28, 1868 to have been ratified by the legislatures of 28 of the 37 States. The dates of ratification were: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (subsequently the legislature rescinded its ratification, and on March 24, 1868, readopted its resolution of rescission over the Governor's veto, and on Nov. 12, 1980, expressed support for the 14th amendment); Oregon, September 19, 1866 (and rescinded its ratification on October 15, 1868); Vermont, October 30, 1866; Ohio, January 4, 1867 (and rescinded its ratification on January 15, 1868); New York, January 10, 1867; Kansas, January 11, 1867; Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Minnesota, January 16, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 25, 1867; Rhode Island, February 7, 1867; Wisconsin, February 7, 1867; Pennsylvania, February 12, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 16, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868 (after having rejected it on December 14, 1866); Louisiana, July 9, 1868 (after having rejected it on February 6, 1867); South Carolina, July 9, 1868 (after having rejected it on December 20, 1866).

Ratification was completed on July 9, 1868.

The amendment was subsequently ratified by Alabama, July 13, 1868; Georgia, July 21, 1868 (after having rejected it on November 9, 1866); Virginia, October 8, 1869 (after having rejected it on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected it on October 27, 1866); Delaware, February 12, 1901 (after having rejected it on February 8, 1867); Maryland, April 4, 1959 (after having rejected it on March 23, 1867); California, May 6, 1959; Kentucky, March 18, 1976 (after having rejected it on January 8, 1867).

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

PROPOSAL AND RATIFICATION

The fifteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Fortieth Congress, on the 26th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven States. The dates of ratification were: Nevada, March 1, 1869; West Virginia, March 3, 1869; Illinois, March 5, 1869; Louisiana, March 5, 1869; North Carolina, March 5, 1869; Michigan, March 8, 1869; Wisconsin, March 9, 1889; Maine, March 11, 1869; Massachusetts, March 12, 1869; Arkansas, March 15, 1869; South Carolina, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it, which action it rescinded on March 30, 1970); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Missouri, January 7, 1870; Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870; Ohio, January 27, 1870 (after having rejected it on April 30, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870.

Ratification was completed on February 3, 1870, unless the withdrawal of ratification by New York was effective; in which event ratification was completed on February 17, 1870, when Nebraska ratified.

The amendment was subsequently ratified by Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected it on February 7, 1870); Delaware, February 12, 1901 (after having rejected it on March 18, 1889); Oregon, February 24, 1959; California, April 3, 1962 (after having rejected it on January 28, 1870); Kentucky, March 18, 1976 (after having rejected it on March 12, 1869).

The amendment was approved by the Governor of Maryland, May 7, 1973; Maryland having previously rejected it on February 26, 1870.

The amendment was rejected (and not subsequently ratified) by Tennessee, November 16, 1869.

ARTICLE XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

PROPOSAL AND RATIFICATION

The sixteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-first Congress on the 12th of July, 1909, and was declared, in a proclamation of the Secretary of State, dated the 25th of February, 1913, to have been ratified by 36 of the 48 States. The dates of ratification were: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 30, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 3, 1911; Nebraska, February 9. 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Kansas, February 18, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected it earlier); Wisconsin, May 26, 1911; New York, July 12, 1911; Arizona, April 6, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; New Mexico, February 3, 1913.

Ratification was completed on February 3, 1913.

The amendment was subsequently ratified by Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected it on March 2, 1911).

The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island, and Utah.

ARTICLE [XVII.]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

PROPOSAL AND RATIFICATION

The seventeenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-second Congress on the 13th of May, 1912, and was declared, in a proclamation of the Secretary of State, dated the 31st of May, 1913, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Maine, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; Connecticut, April 8, 1913.

Ratification was completed on April 8, 1913.

The amendment was subsequently ratified by Louisiana, June 11, 1914.

The amendment was rejected by Utah (and not subsequently ratified) on February 26, 1913.

ARTICLE [XVIII.] [1]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or

[1] Repealed. See Article [XXI.]

transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

PROPOSAL AND RATIFICATION

The eighteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-fifth Congress, on the 18th of December, 1917, and was declared, in a proclamation of the Secretary of State, dated the 29th of January, 1919, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 25, 1918; South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 3, 1918; Florida, December 3, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919.

Ratification was completed on January 16, 1919.

The amendment was subsequently ratified by Minnesota on January 17, 1917; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; New York, January 29, 1919; Vermont, January 29, 1919; Pennsylvania, February 25, 1919; Connecticut, May 6, 1919; and New Jersey, March 9, 1922.

The amendment was rejected (and not subsequently ratified) by Rhode Island.

ARTICLE [XIX.]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

PROPOSAL AND RATIFICATION

The nineteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-sixth Congress, on the 4th of June, 1919, and was declared, in a proclamation of the Secretary of State, dated the 26th of August, 1920, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Illinois, June 10, 1919 (and that State readopted its resolution of ratification June 17, 1919); Michigan, June 10, 1919; Wisconsin, June 10, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Ohio, June 16, 1919; Pennsylvania, June 24, 1919; Massachusetts, June 25, 1919; Texas, June 28, 1919; Iowa, July 2, 1919; Missouri, July 3, 1919; Arkansas, July 28, 1919; Montana, August 2, 1919; Nebraska, August 2, 1919; Minnesota, September 8, 1919; New Hampshire, September 10, 1919; Utah, October 2, 1919; California, November 1, 1919; Maine, November 5, 1919; North Dakota, December 1, 1919; South Dakota, December 4, 1919; Colorado, December 15, 1919; Kentucky, January 6, 1920; Rhode Island, January 6, 1920; Oregon, January 13, 1920; Indiana, January 16, 1920; Wyoming, January 27, 1920; Nevada, February 7, 1920; New Jersey, February 9, 1920; Idaho, February 11, 1920; Arizona, February 12, 1920; New Mexico, February 21, 1920; Oklahoma, February 28, 1920; West Virginia, March 10, 1920; Washington, March 22, 1920; Tennessee, August 18, 1920.

Ratification was completed on August 18, 1920.

The amendment was subsequently ratified by Connecticut on September 14, 1920 (and that State reaffirmed on September 21, 1920); Vermont, February 8, 1921; Maryland, March 29, 1941 (after having rejected it on February 24, 1920; ratification certified on February 25, 1958); Virginia, February 21, 1952 (after rejecting it on February 12, 1920); Alabama, September 8, 1953 (after rejecting it on September 22, 1919); Florida, May 13, 1969; South Carolina, July 1, 1969 (after rejecting it on January 28, 1920; ratification certified on August 22, 1973); Georgia, February 20, 1970 (after rejecting it on July 24, 1919); Louisiana, June 11, 1970 (after rejecting it on July 1, 1920); North Carolina, May 6, 1971.

The amendment was rejected (and not subsequently ratified) by Mississippi, March 29, 1920; Delaware, June 2, 1920.

ARTICLE [XX.]

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to

the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

PROPOSAL AND RATIFICATION

The twentieth amendment to the Constitution was proposed to the legislatures of the several states by the Seventy-Second Congress, on the 2d day of March, 1932, and was declared, in a proclamation by the Secretary of State, dated on the 6th day of February, 1933, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Virginia, March 4, 1932; New York, March 11, 1932; Mississippi, March 16, 1932; Arkansas, March 17, 1932; Kentucky, March 17, 1932; New Jersey, March 21, 1932; South Carolina, March 25, 1932; Michigan, March 31, 1932; Maine, April 1, 1932; Rhode Island, April 14, 1932; Illinois, April 21, 1932; Louisiana, June 22, 1932; West Virginia, July 30, 1932; Pennsylvania, August 11, 1932; Indiana, August 15, 1932; Texas, September 7, 1932; Alabama, September 13, 1932; California, January 4, 1933; North Carolina, January 5, 1933; North Dakota, January 9, 1933; Minnesota, January 12, 1933; Arizona, January 13, 1933; Montana, January 13, 1933; Nebraska, January 13, 1933; Oklahoma, January 13, 1933; Kansas, January 16, 1933; Oregon, January 16, 1933; Delaware, January 19, 1933; Washington, January 19, 1933; Wyoming, January 19, 1933; Iowa, January 20, 1933; South Dakota, January 20, 1933; Tennessee, January 20, 1933; Idaho, January 21, 1933; New Mexico, January 21, 1933; Georgia, January 23, 1933; Missouri, January 23, 1933; Ohio, January 23, 1933; Utah, January 23, 1933.

Ratification was completed on January 23, 1933.

The amendment was subsequently ratified by Massachusetts on January 24, 1933; Wisconsin, January 24, 1933; Colorado, January 24, 1933; Nevada, January 26, 1933; Connecticut, January 27, 1933; New Hampshire, January 31, 1933; Vermont, February 2, 1933; Maryland, March 24, 1933; Florida, April 26, 1933.

ARTICLE [XXI.]

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

PROPOSAL AND RATIFICATION

The twenty-first amendment to the Constitution was proposed to the several states by the Seventy-Second Congress, on the 20th day of February, 1933, and was declared, in a proclamation by the Secretary of State, dated on the 5th day of December, 1933, to have been ratified by 36 of the 48 States. The dates of ratification were: Michigan, April 10, 1933; Wisconsin, April 25, 1933; Rhode Island, May 8, 1933; Wyoming, May 25, 1933; New Jersey, June 1, 1933; Delaware, June 24, 1933; Indiana, June 26, 1933; Massachusetts, June 26, 1933; New York, June 27, 1933; Illinois, July 10, 1933; Iowa, July 10, 1933; Connecticut, July 11, 1933; New Hampshire, July 11, 1933; California, July 24, 1933; West Virginia, July 25, 1933; Arkansas, August 1, 1933; Oregon, August 7, 1933; Alabama, August 8, 1933; Tennessee, August 11, 1933; Missouri, August 29, 1933; Arizona, September 5, 1933; Nevada, September 5, 1933; Vermont, September 23, 1933; Colorado, September 26, 1933; Washington, October 3, 1933; Minnesota, October 10, 1933; Idaho, October 17, 1933; Maryland, October 18, 1933; Virginia, October 25, 1933; New Mexico, November 2, 1933; Florida, November 14, 1933; Texas, November 24, 1933; Kentucky, November 27, 1933; Ohio, December 5, 1933; Pennsylvania, December 5, 1933; Utah, December 5, 1933.

Ratification was completed on December 5, 1933.

The amendment was subsequently ratified by Maine, on December 6, 1933, and by Montana, on August 6, 1934.

The amendment was rejected (and not subsequently ratified) by South Carolina, on December 4, 1933.

ARTICLE [XXII.]

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SEC. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

PROPOSAL AND RATIFICATION

This amendment was proposed to the legislatures of the several States by the Eightieth Congress on Mar. 21, 1947 by House Joint Res. No. 27, and was declared by the Administrator of General Services, on Mar. 1, 1951, to have been ratified by the legislatures of 36 of the 48 States. The dates of ratification were: Maine, March 31, 1947; Michigan, March 31, 1947; Iowa, April 1, 1947; Kansas, April 1, 1947; New Hampshire, April 1, 1947; Delaware, April 2, 1947; Illinois, April 3, 1947; Oregon, April 3, 1947; Colorado, April 12, 1947; California, April 15, 1947; New Jersey, April 15, 1947; Vermont, April 15, 1947; Ohio, April 16, 1947; Wisconsin, April 16, 1947; Pennsylvania, April 29, 1947; Connecticut, May 21, 1947; Missouri, May 22, 1947; Nebraska, May 23, 1947; Virginia, January 28, 1948; Mississippi, February 12, 1948; New York, March 9, 1948; South Dakota, January 21, 1949; North Dakota, February 25, 1949; Louisiana, May 17, 1950; Montana, January 25, 1951; Indiana, January 29, 1951; Idaho, January 30, 1951; New Mexico, February 12, 1951; Wyoming, February 12, 1951; Arkansas, February 15, 1951; Georgia, February 17, 1951; Tennessee, February 20, 1951; Texas, February 22, 1951; Nevada, February 26, 1951; Utah, February 26, 1951; Minnesota, February 27, 1951.

Ratification was completed on February 27, 1951.

The amendment was subsequently ratified by North Carolina on February 28, 1951; South Carolina, March 13, 1951; Maryland, March 14, 1951; Florida, April 16, 1951; Alabama, May 4, 1951.

The amendment was rejected (and not subsequently ratified) by Oklahoma in June 1947, and Massachusetts on June 9, 1949.

CERTIFICATION OF VALIDITY

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on Mar. 1, 1951, F.R. Doc. 51-2940, 16 F.R. 2019.

ARTICLE [XXIII.]

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

PROPOSAL AND RATIFICATION

This amendment was proposed by the Eighty-sixth Congress on June 17, 1960 and was declared by the Administrator of General Services on Apr. 3, 1961, to have been ratified by 38 of the 50 States. The dates of ratification were: Hawaii, June 23, 1960 (and that State made a technical correction to its resolution on June 30, 1960); Massachusetts, August 22, 1960; New Jersey, December 19, 1960; New York, January 17, 1961; California, January 19, 1961; Oregon, January 27, 1961; Maryland, January 30, 1961; Idaho, January 31, 1961; Maine, January 31, 1961; Minnesota, January 31, 1961; New Mexico, February 1, 1961; Nevada, February 2, 1961; Montana, February 6, 1961; South Dakota, February 6, 1961; Colorado, February 8, 1961; Washington, February 9, 1961; West Virginia, February 9, 1961; Alaska, February 10, 1961; Wyoming, February 13, 1961; Delaware, February 20, 1961; Utah, February 21, 1961; Wisconsin, February 21, 1961; Pennsylvania, February 28, 1961; Indiana, March 3, 1961; North Dakota, March 3, 1961; Tennessee, March 6, 1961; Michigan, March 8, 1961; Connecticut, March 9, 1961; Arizona, March 10, 1961; Illinois, March 14, 1961; Nebraska, March 15, 1961; Vermont, March 15, 1961; Iowa, March 16, 1961; Missouri, March 20, 1961; Oklahoma, March 21, 1961; Rhode Island, March 22, 1961; Kansas, March 29, 1961; Ohio, March 29, 1961.

Ratification was completed on March 29, 1961.

The amendment was subsequently ratified by New Hampshire on March 30, 1961 (when that State annulled and then repeated its ratification of March 29, 1961).

The amendment was rejected (and not subsequently ratified) by Arkansas on January 24, 1961.

CERTIFICATION OF VALIDITY

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on Apr. 3, 1961, F.R. Doc. 61-3017, 26 F.R. 2808.

ARTICLE [XXIV.]

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

PROPOSAL AND RATIFICATION

This amendment was proposed by the Eighty-seventh Congress by Senate Joint Resolution No. 29, which was approved by the Senate on Mar. 27, 1962, and by the House of Representatives on Aug. 27, 1962. It was declared by the Administrator of General Services on Feb. 4, 1964, to have been ratified by the legislatures of 38 of the 50 States.

This amendment was ratified by the following States:

Illinois, Nov. 14, 1962; New Jersey, Dec. 3, 1962; Oregon, Jan. 25, 1963; Montana, Jan. 28, 1963; West Virginia, Feb. 1, 1963; New York, Feb. 4, 1963; Maryland, Feb. 6, 1963; California, Feb. 7, 1963; Alaska, Feb. 11, 1963; Rhode Island, Feb. 14, 1963; Indiana, Feb. 19, 1963; Utah, Feb. 20, 1963; Michigan, Feb. 20, 1963; Colorado, Feb. 21, 1963; Ohio, Feb. 27, 1963; Minnesota, Feb. 27, 1963; New Mexico, Mar. 5, 1963; Hawaii, Mar. 6, 1963; North Dakota, Mar. 7, 1963; Idaho, Mar. 8, 1963; Washington, Mar. 14, 1963; Vermont, Mar. 15, 1963; Nevada, Mar. 19, 1963; Connecticut, Mar. 20, 1963; Tennessee, Mar. 21, 1963; Pennsylvania, Mar. 25, 1963; Wisconsin, Mar. 26, 1963; Kansas, Mar. 28, 1963; Massachusetts, Mar. 28, 1963; Nebraska, Apr. 4, 1963; Florida, Apr. 18, 1963; Iowa, Apr. 24, 1963; Delaware, May 1, 1963; Missouri, May 13, 1963; New Hampshire, June 12, 1963; Kentucky, June 27, 1963; Maine, Jan. 16, 1964; South Dakota, Jan. 23, 1964; Virginia, Feb. 25, 1977.

Ratification was completed on January 23, 1964.

The amendment was rejected by Mississippi (and not subsequently ratified) on December 20, 1962.

CERTIFICATION OF VALIDITY

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on Feb. 5, 1964, F.R. Doc. 64-1229, 29 F.R. 1715.

ARTICLE [XXV.]

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days

to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

PROPOSAL AND RATIFICATION

This amendment was proposed by the Eighty-ninth Congress by Senate Joint Resolution No. 1, which was approved by the Senate on Feb. 19, 1965, and by the House of Representatives, in amended form, on Apr. 13, 1965. The House of Representatives agreed to a Conference Report on June 30, 1965, and the Senate agreed to the Conference Report on July 6, 1965. It was declared by the Administrator of General Services, on Feb. 23, 1967, to have been ratified by the legislatures of 39 of the 50 States.

This amendment was ratified by the following States:

Nebraska, July 12, 1965; Wisconsin, July 13, 1965; Oklahoma, July 16, 1965; Massachusetts, Aug. 9, 1965; Pennsylvania, Aug. 18, 1965; Kentucky, Sept. 15, 1965; Arizona, Sept. 22, 1965; Michigan, Oct. 5, 1965; Indiana, Oct. 20, 1965; California, Oct. 21, 1965; Arkansas, Nov. 4, 1965; New Jersey, Nov. 29, 1965; Delaware, Dec. 7, 1965; Utah, Jan. 17, 1966; West Virginia, Jan. 20, 1966; Maine, Jan. 24, 1966; Rhode Island, Jan. 28, 1966; Colorado, Feb. 3, 1966; New Mexico, Feb. 3, 1966; Kansas, Feb. 8, 1966; Vermont, Feb. 10, 1966; Alaska, Feb. 18, 1966; Idaho, Mar. 2, 1966; Hawaii, Mar. 3, 1966; Virginia, Mar. 8, 1966; Mississippi, Mar. 10, 1966; New York, Mar. 14, 1966; Maryland, Mar. 23, 1966; Missouri, Mar. 30, 1966; New Hampshire, June 13, 1966; Louisiana, July 5, 1966; Tennessee, Jan. 12, 1967; Wyoming, Jan. 25, 1967; Washington, Jan. 26, 1967; Iowa, Jan. 26, 1967; Oregon, Feb. 2, 1967; Minnesota, Feb. 10, 1967; Nevada, Feb. 10, 1967.

Ratification was completed on Feb. 10, 1967.

The amendment was subsequently ratified by Connecticut, Feb. 14, 1967; Montana, Feb. 15, 1967; South Dakota, Mar. 6, 1967; Ohio, Mar. 7, 1967; Alabama, Mar. 14, 1967; North Carolina, Mar. 22, 1967; Illinois, Mar. 22, 1967; Texas, April 25, 1967; Florida, May 25, 1967.

CERTIFICATION OF VALIDITY

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on Feb. 25, 1967, F.R. Doc. 67-2208, 32 F.R. 3287.

ARTICLE [XXVI.]

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

PROPOSAL AND RATIFICATION

This amendment was proposed by the Ninety-second Congress by Senate Joint Resolution No. 7, which was approved by the Senate on Mar. 10, 1971, and by the House of Representatives on Mar. 23, 1971. It was declared by the Administrator of General Services on July 5, 1971, to have been ratified by the legislatures of 39 of the 50 States.

This amendment was ratified by the following States: Connecticut, March 23, 1971; Delaware, March 23, 1971; Minnesota, March 23, 1971; Tennessee, March 23, 1971; Washington, March 23, 1971; Hawaii, March 24, 1971; Massachusetts, March 24, 1971; Montana, March 29, 1971; Arkansas, March 30, 1971; Idaho, March 30, 1971; Iowa, March 30, 1971; Nebraska, April 2, 1971; New Jersey, April 3, 1971; Kansas, April 7, 1971; Michigan, April 7, 1971; Alaska, April 8, 1971; Maryland, April 8, 1971; Indiana, April 8, 1971; Maine, April 9, 1971; Vermont, April 16, 1971; Louisiana, April 17, 1971; California, April 19, 1971; Colorado, April 27, 1971; Pennsylvania, April 27, 1971; Texas, April 27, 1971; South Carolina, April 28, 1971; West Virginia, April 28, 1971; New Hampshire, May 13, 1971; Arizona, May 14, 1971; Rhode Island, May 27, 1971; New York, June 2, 1971; Oregon, June 4, 1971; Missouri, June 14, 1971; Wisconsin, June 22, 1971; Illinois, June 29, 1971; Alabama, June 30, 1971; Ohio, June 30, 1971; North Carolina, July 1, 1971; Oklahoma, July 1, 1971.

Ratification was completed on July 1, 1971.

The amendment was subsequently ratified by Virginia, July 8, 1971; Wyoming, July 8, 1971; Georgia, October 4, 1971.

CERTIFICATION OF VALIDITY

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on July 7, 1971, F.R. Doc. 71-9691, 36 F.R. 12725.

APPENDIX B

ADDRESS

OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE D.C. CHAPTER
OF THE
FEDERALIST SOCIETY LAWYERS DIVISION

1:00 P.M. EST
FRIDAY, NOVEMBER 15, 1985
GOLDEN PALACE
720 SEVENTH STREET, N.W.
WASHINGTON, D.C.

NOTE: Because Mr. Meese often speaks from notes the speech as delivered may vary from this text. However, he stand behind this speech as printed.

A large part of American history has been the history of Constitutional debate. From the Federalists and the Anti-Federalists, to Webster and Calhoun, to Lincoln and Douglas, we find many examples. Now, as we approach the bicentennial of the framing of the Constitution, we are witnessing another debate concerning our fundamental law. It is not simply a ceremonial debate, but one that promises to have a profound impact on the future of our Republic.

The current debate is a sign of a healthy nation. Unlike people of many other countries, we are free both to discover the defects of our laws and our government through open discussion and to correct them through our political system.

This debate on the Constitution involves great and fundamental issues. It invites the participation of the best minds the bar, the academy, and the bench have to offer. In recent weeks there have been important new contributions to this debate from some of the most distinguished scholars and jurists in the land. Representatives of the three branches of the federal government have entered the debate, journalistic commentators too.

A great deal has already been said, much of it of merit and on point. But occasionally there has been confusion. There has been some misunderstanding, some perhaps on purpose. Caricatures and straw men, as one customarily finds even in the greatest debates, have made appearances.

Still, whatever the differences, most participants are agreed about the same high objective: fidelity to our fundamental law.

Today I would like to discuss further the meaning of constitutional fidelity. In particular, I would like to describe in more detail this administration's approach.

Before doing so, I would like to make a few commonplace observations about the original document itself.

It is easy to forget what a young country America really is. The bicentennial of our independence was just a few years ago, that of the Constitution still two years off.

The period surrounding the creation of the Constitution is not a dark and mythical realm. The young America of the 1780's and 90's was a vibrant place, alive with pamphlets, newspapers and books chronicling and commenting upon the great issues of the day. We know how the Founding Fathers lived, and much of what they read, thought, and believed. The disputes and compromises of the Constitutional Convention were carefully recorded. The minutes of the Convention are a matter of public record. Several of the most important participants — including James Madison, the "father" of the Constitution — wrote comprehen-

sive accounts of the convention. Others, Federalists and Anti-Federalists alike, committed their arguments for and against ratification, as well as their understandings of the Constitution, to paper, so that their ideas and conclusions could be widely circulated, read, and understood.

In short, the Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis. The Bicentennial is encouraging even more scholarship about its origins. We know who did what, when, and many times why. One can talk intelligently about a "founding generation."

With these thought in mind, I would like to discuss the administration's approach to constitutional interpretation. But to begin, it may be useful to say what it is not.

Our approach does not view the Constitution as some kind of super-municipal code, designed to address merely the problems of a particular era — whether those of 1787, 1789, or 1868. There is no question that the Constitutional Convention grew out of widespread dissatisfaction with the Articles of Confederation. But the delegates at Philadelphia moved beyond the job of patching that document to write a *Constitution*. Their intention was to write a document not just for their times but for posterity.

The language they employed clearly reflects this. For example, they addressed *commerce*, not simply shipping or barter. Later the Bill or Rights spoke, through the Fourth Amendment, to "unreasonable searches and seizures", not merely the regulation of specific law enforcement practices of 1789. Still later, the Framers of the 14th Amendment were concerned not simply about the rights of black citizens to personal security, but also about the equal protection of the law for all persons within the states.

The Constitution is not a legislative code bound to the time in which it was written. Neither, however, is it a mirror that simply reflects the thoughts and ideas of those who stand before it.

Our approach to constitutional interpretation begins with the document itself. The plain fact is, it exists. It is something that has been written down. Walter Berns of the American Enterprise Institute has noted that the central object of American constitutionalism was "the effort" of the Founders "to express fundamental governmental arrangements in a legal document — to 'get it in writing.' "

Indeed, judicial review has been grounded in the fact that the Constitution is a written, as opposed to an unwritten, document. In *Marbury* v. *Madison* John Marshall rested his rationale for judicial review on the fact that we have a written constitution with meaning that is binding upon judges. "[I]t is apparent," he wrote, "that the framers of the constitution contemplated that

instrument as a rule for the government of *courts*, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it?."

The presumption of a written document is that it conveys meaning. As Thomas Grey of the Stanford Law School has said, it makes "relatively definite and explicit what otherwise would be relatively indefinite and tacit."

We know that those who framed the Constitution chose their words carefully. They debated at great length the most minute points. The language they chose meant something. They proposed, they substituted, they edited, and they carefully revised. Their words were studied with equal care by state ratifying conventions.

This is not to suggest that there was unanimity among the framers and ratifiers on all points. The Constitution and the Bill of Rights, and some of the subsequent amendments, emerged after protracted debate. Nobody got everything they wanted. What's more, the Framers were not clairvoyants — they could not foresee every issue that would be submitted for judicial review. Nor could they predict how all foreseeable disputes would be resolved under the Constitution. But the point is the meaning of the Constitution can be known.

What does this written Constitution mean? In places it is exactingly specific. Where it says that Presidents of the United States must be at least 35 years of age it means exactly that. (I have not heard of any claim that 35 means 30 or 25 or 20). Where it specifies how the House and Senate are to be organized, it means what it says.

The Constitution also expresses particular principles. One is the right to be free of an unreasonable search or seizure. Another concerns religious liberty. Another is the right to equal protection of the laws.

Those who framed these principles meant something by them. And the meanings can be found. The Constitution itself is also an expression of certain general principles. These principles reflect the deepest purpose of the Constitution — that of establishing a political system through which Americans can best govern themselves consistent with the goal of securing liberty.

The text and structure of the Constitution is instructive. It contains very little in the way of specific political solutions. It speaks volumes on how problems should be approached, and by *whom*. For example, the first three articles set out clearly the scope and limits of three distinct branches of a national government. The powers of each being carefully and specifically enumerated. In this scheme it is no accident to find the legislative branch described first, as the Framers had fought and sacrificed to secure the right of democratic self-governance. Naturally, this faith in republicanism was not unbounded, as the next two articles make clear.

Yet the Constitution remains a document of powers and principles. And its undergirding premise remains that democratic self government is subject only to the limits of certain constitutional principles. This respect for the political process was made explicit early on. When John Marshall upheld the act of Congress chartering a national bank in *McCulloch v. Maryland* he wrote: "The Constitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." But to use *McCulloch,* as some have tried, as support for the idea that the Constitution is a protean, changeable thing is to stand history on its head. Marshall was keeping faith with the original intention that Congress be free to elaborate and apply constitutional powers and principles. He was not saying that the Court must invent some new constitutional value in order to keep pace with the times. In Walter Berns words: "Marshall's meaning is not that the Constitution may be adapted to the 'various crises of human affairs', but that the legislative powers granted by the Constitution are adaptable to meet these crises."

The approach this administration advocates is rooted in the text of the Constitution as illuminated by those who drafted, proposed, and ratified it. In his famous Commentary on the Constitution of the United States Justice Joseph Story explained that:

> The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.

Our approach understands the significance of a written document and seeks to discern the particular and general principles it expresses. It recognizes that there may be debate at times over the application of these principles. But it does not mean these principles cannot be identified.

Constitutional adjudication is obviously not a mechanical process. It requires an appeal to reason and discretion. The text and intention of the Constitution must be understood to constitute the banks within which constitutional interpretation must flow. As James Madison said, if "the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers."

Thomas Jefferson, so often cited incorrectly as a framer of the Constitution, in fact shared Madison's view: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

Jefferson was even more explicit in his personal correspondence:

> On every question of construction [we should] carry ourselves back to the time, when the constitution was adapted; recollect the spirit

> manifested in the debates; and instead of trying [to find], what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed.

In the main a jurisprudence that seeks to be faithful to our Constitution — a jurisprudence of original intention, as I have called it — is not difficult to describe. Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

Sadly, while almost everyone participating in the current constitutional debate would give assent to these propositions, the techniques and conclusions of some of the debaters do violence to them. What is the source of this violence? In large part I believe that it is the misuse of history stemming from the neglect of the idea of a written constitution.

There is a frank proclamation by some judges and commentators that what matters most about the Constitution is not its words but its so-called "spirit". These individuals focus less on the language of specific provision than on what they describe as the "vision" or "concepts of human dignity" they find embodied in the Constitution. This approach to jurisprudence has led to some remarkable and tragic conclusions.

In the 1850's, the Supreme Court under Chief Justice Roger S. Taney read blacks out of the Constitution in order to invalidate Congress' attempt to limit the spread of slavery. The *Dred Scott* decision, famously described as a judicial "self-inflicted wound", helped bring on civil war.

There is a lesson in this history. There is danger in seeing the Constitution as an empty vessel into which each generation may pour its passion and prejudice.

Our own time has its own fashions and passions. In recent decades many have come to view the Constitution — more accurately, part of the Constitution, provisions of the Bill of Rights and the Fourteenth Amendment — as a charter for judicial activism of behalf of various constituencies. Those who hold this view often have lacked demonstrable textual or historical support for their conclusions. Instead they have "grounded" their rulings in appeals to social theories, to moral philosophies or personal notions of human dignity, or to "penumbras", somehow emanating ghostlike from various provisions — identified and not identified — in the Bill of Rights. The problem with this approach is that, as John Hart Ely, Dean of the Stanford Law School has observed with

respect to one such decision, is not that it is bad constitutional law, but that it is not constitutional law in any meaningful sense, at all.

Despite this fact, the perceived popularity of some results in particular cases has encouraged some observers to believe that any critique of the methodology of those decision is an attack on the results. This perception is sufficiently widespread that it deserves an answer. My answer is to look at history.

When the Supreme Court, in *Brown v. Board of Education*, sounded the death knell for official segregation in the country, it earned all the plaudits it received. But the Supreme Court in that case was not giving new life to old words, or adapting a "living," "flexible" Constitution to new reality. It was restoring the original principle of the Constitution to constitutional law. The *Brown* Court was correcting the damage done 50 years earlier, when in *Plessy v. Ferguson* an earlier Supreme Court had disregarded the clear intent of the Framers of the civil war amendments to eliminate the legal degradation of blacks, and had contrived a theory of the Constitution to support the charade of "separate but equal" discrimination.

Similarly, the decisions of the New Deal and beyond that freed Congress to regulate commerce and enact a plethora of social legislation were not judicial adaptations of Constitution to new realities. They were in fact removals of encrustations of earlier courts that had strayed from the original intent of the Framers regarding the power of the legislature to make policy.

It is amazing how so much of what passes for social and political progress is really the undoing of old judicial mistakes.

Mistakes occur when the principles of specific constitutional provisions — such as those contained in the Bill of Rights — are taken by some as invitations to read into the constitution values that contradict the clear language of other provisions.

Acceptances to this illusory invitation have proliferated in recent decades. One Supreme Court justice identified the proper judicial standard as asking "what's best for this country." Another said it is important to "keep the Court out in front" of the general society. Various academic commentators have poured rhetorical grease on this judicial fire, suggesting that constitutional interpretation appropriately be guided by such standards as whether a public policy "personifies justice" or "comports with the notion of moral evolution" or confers "an identity" upon our society or was consistent with "natural ethical law" or was consistent with some "right of equal citizenship."

Unfortunately, as I've noted, navigation by such lodestars has in the past given us questionable economics, governmental disorder, and racism — all in

the guise of constitutional law. Recently one of the distinguished judges of one of our federal appeals courts got it about right when he wrote: "The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else." Or, as we recently put it before the Supreme Court in an important brief: "The further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning."

In the *Osborne* v. *Bank of United States* decision 21 years after *Marbury*, Chief Justice Marshall further elaborated his view of the relationship between the judge and the law, be it statutory or constitutional:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it.

Any true approach to constitutional interpretation must respect the document in all its parts and be faithful to the Constitution in its entirety.

What must be remembered in the current debate is that interpretation does not imply results. The Framers were not trying to anticipate every answer. They were trying to create a tripartite national government, within a federal system, that would have the flexibility to adapt to face new exigencies — as it did, for example, in chartering a national bank. Their great interest was in the distribution of power and responsibility in order to secure the great goal of liberty for all.

A jurisprudence that seeks fidelity to the Constitution — a jurisprudence of original intention — is not jurisprudence of political results. It is very much concerned with process, and it is a jurisprudence that in our day seeks to depoliticize the law. The great genius of the constitutional blueprint is found in its creation and respect for spheres of authority and the limits it places on governmental power. In this scheme the Framers did not see the courts as the exclusive custodians of the Constitution. Indeed, because the document posits so few conclusions it leaves to the more political branches the matter of adapting and vivifying its principles in each generation. It also leaves to the people of the states, in the 10th amendment, those responsibilities and rights not committed to federal care. The power to declare acts of congress and laws of the states null and void is truly awesome. This power must be used when the Constitution clearly speaks. It should not be used when the Constitution does not.

In *Marbury v. Madison*, at the same time he vindicated the concept of judicial review, Marshall wrote that the "principles" of the Constitution "are deemed fundamental and permanent," and except for formal amendment, "unchangeable." If we want to change in our Constitution or in our laws we must seek it through the formal mechanisms presented in that organizing document of our government.

In summary, I would emphasize that what is at issue here is not an agenda of issues or a menu of results. At issue is a way of government. A jurisprudence based on first principles is neither conservative nor liberal, neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of government the proper ambit of its responsibilities. It is a jurisprudence faithful to our Constitution.

By the same token, an activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence, changing color and form in each era. The same activism hailed today may threaten the capacity for decision through democratic consensus tomorrow, as it has in many yesterdays. Ultimately, as the early democrats wrote into the Massachusetts state constitution, the best defense of our liberties is a government of laws and not men.

On this point it is helpful to recall the words the late Justice Frankfurter. As he wrote:

> [t]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate.

I am afraid that I have gone on somewhat too long. I realize that these occasions of your society are usually reserved for brief remarks. But if I have imposed upon your patience, I hope it has been for a good end. Given the timeliness of this issue, and the interest of this distinguished organization, it has seemed an appropriate forum to share these thoughts.

I close, unsurprisingly, by returning a last time to the period of the Constitution's birth.

As students of the Constitution are aware, the struggle for ratification was protracted and bitter. Essential to the success of the campaign was the outcome of the debate in the two most significant states: Virginia and New York. In New York the battle between Federalist and Anti-Federalist forces was particularly hard. Both sides eagerly awaited the outcome in Virginia, which was sure to

have a profound effect on the struggle in the Empire States. When news that Virginia had voted to ratify came, it was a particularly bitter blow to the Anti-Federalist side. Yet on the evening the message reached New York an event took place that speaks volumes about the character of early America. The losing side, instead of grousing, feted the Federalist leaders in the taverns and inns of the city. There followed a night of drinking, good fellowship, and mutual toasting. When the effects of the good cheer wore off, the two sides returned to their inkwells and presses, and the debate resumed.

There is a great temptation among those who view this debate from the outside to see in it a clash of personalities, a bitter exchange. But you and I, and the other participants in this dialogue know better. We and our distinguished opponents carry on the old tradition, of free, uninhibited, and vigorous debate. Out of such arguments come no losers, only truth.

It's the American way. And the Founders wouldn't want it any other way.

APPENDIX C

Address by Justice Antonin Scalia before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986)

When I was in law teaching I was fond of doing what is called "teaching against the class" — that is, taking positions that the students were almost certain to disagree with, in order to generate some discussion, if not productive thought. I have tended to take a similar contrary approach in public talks; it is neither any fun nor any use preaching to the choir. Thus, when Prof. Epstein and I last appeared on the same program in Washington it was at the Cato Institute, where I took the position that we should not extend (or re-extend) the concept of substantive due process to economic rights. I did not have the feeling that I was the home team. This endearing quality of saying the right thing at the wrong time is the secret of my popularity.

When I was invited to give this luncheon address, I was initially at a loss to think of a subject that would be sufficiently obnoxious. On the expansion of substantive due process, for example, I figured this audience would be split about 50-50. I could whine about why judges should be paid more money, even though Attorneys General and Assistant Attorneys General should not — but that subject has such an air of unreality about it, that if it raised any hackles they would be make-believe hackles. As I was musing in my chambers over this perplexing problem, the room was filled with the sound of a voice — loud, though it was in a whisper — which seemed to be coming from the picture of Mount Sinai that we have hanging in the D.C. Circuit's Conference Room (I always wondered what that was doing there, by the way). It said: CRITICIZE THE DOCTRINE OF ORIGINAL I TENT. The voice, I must admit, sounded a little like David Bazelon. Then again, it sounded a bit like Robert Bork. In any case, since I am rarely given these revelations, I thought that was what I should do.

There is also a less supernatural urging that led me to the same conclusion — and that is, public reaction to what is referred to in my chambers as The Speech. You may recall that when President Reagan ran in 1980 he had a set talk that he would give around the country, with minor alterations as the circumstances warranted. Well, I have found that to be a pretty useful format for a least some of those events at which federal judges are invited to speak. Each year I have picked out one particular subject that interests me, and have addressed it in a number of talks — the text gradually expanding over the course of the year as I have time for new research, or as new ideas occur to me. The Speech for this year has been about judicial use of legislative history in the interpretation of statutes. My general attitude towards it can be summed up (I don't want to give the entire Speech here) by saying that I regard it as the greatest surviving legal fiction. If you can believe that a committee report (to take the most respected form of legislative history) in fact expresses what all the Members of Congress (or at least a majority of them) "intended" on the obscure issues that it addresses; if you can believe that a majority of them even *read* the committee report; indeed, if you can believe that a majority of them was even *aware* of the *existence* of the obscure issue; then you would have had no trouble,

several hundred years ago, in permitting all tort action to be squeezed into the writ of assumpsit by the patently phony allegation that the defendant had *undertaken* (assumpsit) to be careful. Even beyond the unreliability of almost all legislative history (most of which is now cooked-up legislative history) as an indication of intent, it seems to me that asking what the legislators *intended* rather than what they *enacted* is quite the wrong question. Nero, it is said, used to have his edicts posted high up on the pillars of the forum, thus rendering them more difficult to read and more easy to transgress unknowingly. The secrets of legislative history are the twentieth-century equivalent of high-posting. Statutes should be interpreted, it seems to me, not on the basis of the unpromulgated intentions of those who enacted them (assuming — quite unrealistically as to most points of interpretation — that such unpromulgated intentions actually existed on the part of more than a few legislators) but rather on the basis of what is the most probable meaning of the *words* of the enactment, in the context of the whole body of public law with which they must be reconciled.

But to return to the point: On most occasions on which I delivered The Speech, I would receive a Pharisaic question from the floor (modeled after the question "Master, is it lawful to pay tribute to Caesar?") which would go something like this: "From what you say, Judge Scalia, I presume you disagree with Attorney General Meese concerning original intent as the correct criterion for interpreting the Constitution." Of course there is a lot less to that question than meets the ear. The debate regarding the doctrine of original intent — which has, after many years, finally been elevated to a public level — focuses upon the first, rather than the second word of the doctrine. The fighting issue is not whether "intent" should govern, but rather whether *original* intent should govern, as opposed to some manner of interpretation that permits application of the provision to evolve over time.

So much of the attention has been focused on the first word, however, that I am not sure whether even the main participants in the debate (whoever they are) are clear about what they mean by the second. The burden of my brief remarks today is that it seems to me they should mean not "original intent of the Framers" but "original intent of the Constitution." What was the most plausible meaning of the words of the Constitution to the society that adopted it — regardless of what the Framers might secretly have intended? This does not mean, of course, that the expressions of the Framers are irrelevant. To the contrary, they are strong indications of what the most knowledgeable people of the time understood the words to mean. When the proponents of original intent invoke the Founding Fathers, I in fact understand them to invoke them *for that reason.* It is not that "the Constitution must mean this because Alexander Hamilton thought it meant this, and he wrote it"; but rather that "the Constitution must mean this because Alexander Hamilton, who for Pete's sake must have understood the thing, thought it meant this." How else to explain, for

example, reliance on those five numbers of the Federalist Papers written by John Jay, who was not a delegate to the Constitutional Convention. Or, come to think of it, reliance upon Thomas Jefferson, who also was not there. Indeed, how to explain greater reliance upon those knowledgeable national figures who were present at the Convention than upon the remarks in the state ratifying debates — since it was ultimately the *states* (or the *people*) who were the parties to this contract, and whose innermost "intent" (if anyone's) is relevant?

But really the trump card to establish that "original intent" would more accurately be expressed "original meaning" is this: Even if you believe in original intent in the literal sense you must end up believing in original meaning, because it is perfectly clear that the original intent was that the Constitution would be interpreted according to its original meaning. If you had asked the participants at the Constitutional Convention whether their debates could be an *authoritative* source for construing the Constitution, there is no doubt that the answer would have been no. This is apparent not only from the fact that the use of legislative history was in those days anathema — as it remains today in England — but also from many extrinsic indications. The *Journal of the Convention*, for example (which was taken in fairly slipshod form and never reviewed by the whole body) was not immediately published, but was turned over to George Washington, subject to disposition by the future Congress under the new Constitution. It remained under seal in the Department of State until it was published by resolution of Congress (after editing by Secretary of State John Quincy Adams) in 1818.

[This presents an interesting quandary, by the way. If original intent in the narrow sense is the touchstone, then we have got it all wrong in believing that judicial decisions that date closest to the Constitution are the most reliable. To the contrary, the benighted judges writing before 1818 did not have the *Journal of the Convention* to guide them. Those writing before 1840 did not have Madison's extensive notes; and before 1845 *Elliot's Debates*, which included debates in the ratifying conventions. And only in 1911 did Farrand undertake a comprehensive compilation of all the records pertaining to the adoption of the Constitution. More documentation has of course come to light since. So, logically, Chief Justice Burger should know more about what the Constitution originally prescribed than Chief Justice Marshall.]

Beyond the decision not to publish the *Journal* as an indication that the original intent was to use the original meaning, there are quite explicit statements on the point by some of the most prominent framers. In his 1791 Opinion to President Washington on the Constitutionality of an Act to Establish a Bank, Alexander Hamilton wrote:

> [W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument

> itself, according to usual & established rules of construction. Nothing is more common than for laws to *express* and *effect*, more or less than was intended. . . . [A]rguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected."

(Emphasis in original.) In one of his letters, James Madison drew a sharp distinction between the "true meaning" of the Constitution and "whatever might have been the opinions entertained in forming the Constitution." The reason Madison gave for not publishing his notes of the Convention until his death was that he wished to wait until:

> the Constitution should be well settled by practice, and till a knowledge of the controversial part of the proceedings of its framers could be turned to no improper account. . . . As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character.

In yet another letter, Madison wrote:

> [W]hatever respect may be thought due to the intention of the Convention which prepared and proposed the Constitution, *as presumptive evidence of the general understanding at the time of the language use*, it must be kept in mind that the only authoritative intentions were those of the people of the States, as expressed through the Conventions which ratified the Constitution.

(Emphasis in original.)

Of course it was true in the eighteenth century, as it remains true now, that there is one very good (if unprincipled) reason for using legislative history: it sometimes supports the position one wishes to establish. As it turns out, even George Washington was not immune to the blandishments of this reality. In 1796, when the House was debating whether certain treaties had to be concurred in by the lower house, President Washington sent the House a message opposing that position. It included the following:

> If other proofs than these, and the plain letter of the Constitution itself, be necessary to ascertain the point under consideration, they may be found in the Journals of the Great Convention, which I have deposited in the office of the Department of State. In those Journals it will appear, that a proposition was made, "that no Treaty should be binding on the United States which was not ratified by a law," and that the proposition was explicitly rejected.

(Although George Washington did write a wonderful letter to the Jewish Community of Newport, Rhode Island, it is not recorded that he was familiar with the word "chutzpah." The above quoted message, however, relying upon documentation that only he and his administration knew about, since it was under seal in the State Department, suggests that he had some grasp of the substance of the thing.) The reaction by the House was outrage. Madison objected to use of the *Journal* as "a clue to the meaning of the Constitution," and said he "did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material in any Constitutional question" in Congress or the Supreme Court.

As I have said, therefore, it seems to me a no-win situation: Even if you believe in original intent you must believe in original meaning. I suppose it is tolerable to use the one term to mean the other — Alexander Hamilton did just that in his Opinion on the Constitutionality of an Act to Establish a Bank, which I quoted from earlier. He used the term "intent of the Convention" to mean the "true meaning" as it was determined by the "obvious & popular sense" of the Constitutional provision in question (the necessary and proper clause) and the "whole turn of the clause containing it." And as far as I know, Attorney General Meese and Justice Brennan use the term in the same sense. In the interests of precision, however, I suppose I ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning. As I often tell my law clerks, terminology is destiny.

APPENDIX D

Address by Judge Robert H. Bork entitled *The Constitution, Original Intent and Economic Rights*, University of San Diego Law School (November 1985)

The Constitution, Original Intent, and Economic rights

University of San Diego Law School
Robert H. Bork

Everyone who ever met Sharon Siegan is, I am certain, gratified that the University of San Diego School of Law has established a lecture series in her memory. My wife and I first met Sharon Siegan just two years ago. She was a lovely woman in every way. I am immensely honored to have been invited to give the inaugural lecture in the series named for her.

To approach the subject of economic rights it is necessary to state a general theory about how a judge should deal with the Constitution of the United States in adjudication that brings that document before the court. More specifically, I intend to speak to the question of whether a judge should consider himself or herself bound by the original intentions of those who framed, proposed, and ratified the Constitution. I think the judge is so bound. I wish to demonstrate that original intent is the only legitimate basis for constitutional decision and to meet objections that have been made to that proposition.

This has been a topic of fierce debate in the law schools for the past thirty years. The controversy shows no sign of subsiding. To the contrary, the torrent of words is freshening. Yet it is odd that the one group whose members rarely discuss the intellectual framework within which they decide cases is the federal judiciary. Judges, by and large, are not much attracted to theory. That is unfortunate, and perhaps it is changing. There are several reasons why it should change.

Law is an intellectual system. It progresses, if at all, through continual intellectual exchanges. There is no reason why members of the judiciary should not engage in such discussion and, since theirs is the ultimate responsibility, every reason why they should. The only real control the American people have over their judges is that of criticism — criticism that ought to be informed and to focus not upon the congeniality of political results but upon the judges' faithfulness to their assigned role. Judges ought to make explicit what they think their assigned role to be.

We appear to be at a tipping point in the relationship of judicial power to democracy. The opposing philosophies about the role of judges are being articulated more clearly. Those who argue that original intention is crucial do so in order to draw a sharp line between judicial power and democratic authority. Their philosophy is called intentionalism or interpretivism. Those who would assign an ever increasing role to judges are called non-intentionalist or non-interpretivist. The future role of the American judiciary will be decided by the victory of one set of ideas or the other.

In these remarks I am not concerned to prove that any particular decision or doctrine is wrong. I am concerned with the method of reasoning by which constitutional argument should proceed.

The problem for constitutional law always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority.

Over time it has come to be thought that the resolution of the Madisonian problem — the definition of majority power and minority freedom — is primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals but they must also be scrupulous not to deny the majority's legitimate right to govern. How can that be done?

Any intelligible view of constitutional adjudication starts from the proposition that the Constitution is law. That may sound obvious but in a moment you will see that it is not obvious to a great many people, including professors of law. What does it mean to say that the words in a document are law? One of the things it means is that the words constrain judgment. They control judges every bit as much as they control legislators, executives, and citizens.

The provisions of the Bill of Rights and the Civil War Amendments not only have contents that protect individual liberties, they also have limits. They do not cover all possible or even all desirable liberties. Freedom of speech covers speech not sexual conduct. Freedom from unreasonable searches and seizures does not protect businesses' power to set prices. The fact of limits means that the judge's authority has limits and outside the designated areas democratic institutions govern.

If this were not so, if judges could govern areas not committed to them by specific clauses of the Constitution, then there would be no law other than the will of the judge. It is common ground that such a situation is not legitimate in a democracy. Justice Brennan recently put the point well: "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." Brennan, "The Constitution of the United States: Contemporary Ratification" (Georgetown University Oct. 12, 1985). This means that

any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges. An observer must be able to say whether or not the judge's result follows fairly from premises given by an authoritative, external source and is not merely a question of taste or opinion.

There are those in the academic world professors at very prestigious institutions, who deny that the Constitution is law. I will not rehearse their arguments here or rebut them in detail. I note merely that there is one question they do not address. If the Constitution is not law, law that, with the usual areas of ambiguity at the edges, nevertheless tolerably tells judges what to do and what not to do — if the Constitution is not law in that sense, what authorizes judges to set at naught the majority judgment of the representatives of the American people? If the Constitution is not law, why is the judge's authority superior to that of the President, the Congress, the armed forces, the departments and agencies, the governors and legislatures of the states, and that of everyone else in the nation? No answer exists.

The answer that is attempted is usually that the judge must be guided by some form of moral philosophy. Not only is moral philosophy wholly inadequate to the task but, more fundamentally, there is no reason for the rest of us, who have our own moral visions, to be governed by the judge's moral predilections. Those academics who think the Constitution is not law ought to draw the only conclusion that intellectual honesty leaves to them: that judges must abandon the function of constitutional review. I have yet to hear that suggested. The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments.

It is important to be plain at the outset what intentionalism means. It is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the framers. In so narrow a form the philosophy is useless. Since we cannot know how the framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.

There is a version that is adequate to the task. Dean John Hart Ely has described it:

> What distinguishes interpretivism [or intentionalism] from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there — because the situation is not likely to have been foreseen — is generally common ground.

J. Ely, *Democracy and Distrust* 1-2 (1980).

In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee. Courts perform this function all of the time. Indeed, it is the same function they perform when they apply a statute, a contract, a will, or, indeed, a Supreme Court opinion to a situation the framers of those documents did not foresee.

Thus, we are usually able to understand the liberties that were intended to be protected. We are able to apply the first amendment's free press clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the fourth amendment's prohibition on unreasonable searches and seizures to electronic surveillance; we apply the commerce clause to state regulations of interstate trucking.

Does this version of intentionalism mean that judges will invariably decide cases the way the framers would if they were here today? Of course not. But many cases will be decided that way and, at the very least, judges will confine themselves to the principles the framers put into the Constitution. Entire ranges of problems will be placed off-limits to judges, thus preserving democracy in those areas where the framers intended democratic government. That is better than any nonintentionalist theory of constitutional adjudication can do. If it is not good enough, judicial review under the Constitution cannot be legitimate. I think it is good enough.

There is one objection to intentionalism that is particularly tiresome. Whenever I speak on the subject someone invariably asks, "But why should we be ruled by men long dead?" The question is never asked about the main body of the Constitution where we really are ruled by men long dead in such matters as the powers of Congress, the President, and the judiciary. It is asked about the amendments that guarantee individual freedoms. The answer as to those is that we are not governed by men long dead unless we wish to cut back those freedoms, which the questioner never does. We are entirely free to create all the additional freedoms we wish by legislation, and the nation has done that frequently. What the questioner is really driving at is why judges, not the public but judges, should be bound to protect only those freedoms actually specified by the Constitution. The objection underlying the question is not to the rule of dead men but to the rule of living majorities.

Moreover, when we understand that the Bill of Rights gives us major premises and not specific conclusions, the document is not at all anachronistic. The major values specified in the Bill of Rights are timeless in the sense that

they must be preserved by any government we would regard as free. For that reason, courts must not hesitate to apply old values to new circumstances. A judge who refuses to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty.

But there is the opposite danger. Obviously, values and principles can be stated at different levels of abstraction. In stating the value that is to be protected, the judge must not state it with so much generality that he transforms it. When that happens the judge improperly deprives the democratic majority of *its* freedom. The difficulty in choosing the proper level of generality has led some to claim that intentionalism is impossible.

Thus, in speaking about my view of the fourteenth amendment's equal protection clause as requiring black equality, Professor Paul Brest of Stanford said,

> The very adoption of such a principle, however, demands an arbitrary choice among levels of abstraction. Just what *is* "the general principle of equality that applies to all cases"? Is it the "core idea of *black* equality" that Bork finds in the original understanding (in which case Alan Bakke did not state a constitutionally cognizable claim), or a broader principle of "*racial* equality" (so that, depending on the precise content of the principle, Bakke might have a case after all), or is it a still broader principle of equality that encompasses discrimination on the basis of gender (or sexual orientation) as well?
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> The fact is that all adjudication requires making choices among levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decisionmaking can be salvaged if its legitimacy depends on satisfying Bork's requirements that principles be "neutrally derived, defined and applied."

Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,* 90 Yale L.J. 1063, 1091-92 (1981) (footnotes omitted). I think that is wrong and that an intentionalist can do what Brest says he cannot. Let me use Brest's example as a hypothetical — I am making no statement about the truth of the matter. Assume for the sake of the argument that a judge's study of the evidence shows that both black and general racial equality were clearly intended, but that equality on matters such as sexual orientation was not under discussion.

The intentionalist may conclude that he must enforce black and racial equality but that he has no guidance at all about any higher level choice that

prohibits certain forms of sexual behavior. That result follows from the principle of acceptance of democratic choice where the Constitution is silent. The same sort of analysis could be used to determine whether the amendment imposes black equality only or the broader principle of racial equality. In short, the problem of levels of generality may be solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support.

The power of extreme generalization was demonstrated by Justice William O. Douglas in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). In that case the Court struck down the state's anti-contraception statute. Justice Douglas created a constitutional right of privacy that invalidated the state's law against the use of contraceptives. He observed that many provisions of the Bill of Rights could be viewed as protections of aspects of personal privacy. He then generalized these particulars into an overall right of privacy that applies even where no provision of the Bill of Rights does. By choosing that level of abstraction, the Bill of Rights was expanded beyond the known intentions of the Framers. Since there is no constitutional text or history to define the right, privacy becomes an unstructured source of judicial power. I am not now arguing that any of the privacy cases were wrongly decided. That is a different question. My point is simply that the level of abstraction chosen makes a generalized right of privacy unpredictable in its application. A concept of original intent, one that focuses on each specific provision of the Constitution rather than upon values stated at a high level of abstraction, is essential to prevent courts from invading the proper domain of democratic government.

That proposition is directly relevant to the subject of economic rights and the Constitution. Article I, Section 10, provides that no state shall pass any law impairing the obligations of contracts. The fifth and fourteenth amendments between them prevent either the federal or any state government from taking private property for public use without paying just compensation. The intention underlying these clauses has been a matter of dispute and perhaps they have not been given their proper force. But that is not my concern here because few deny that original intention should govern the application of these particular clauses.

My concern is with the contention that a more general spirit of libertarianism pervades the original intention underlying the fourteenth amendment so that courts may review all regulations of human behavior under the due process clause of that amendment. As Learned Hand understood, economic freedoms are philosophically indistinguishable from other freedoms. Judicial review would extend, therefore, to all economic regulations. The burden of justification would be placed on the government so that all such regulations would start with a presumption of unconstitutionality. Viewed from the standpoint of economic philosophy and of individual freedom the idea has many

attractions. But viewed from the standpoint of constitutional structures the idea works a massive shift away from democracy and toward judicial rule.

Professor Siegan has explained what is involved.

> In suits challenging the validity of restraints, the government would have the burden of persuading a court . . ., first, that the legislation serves important governmental objectives; second, the restraint imposed by government is substantially related to the achievement of these objectives, that is, . . . the fit between means and ends must be close; and third, that a similar result cannot be achieved by a less drastic means.

B. Siegan, *Economic Liberties and the Constitution* 324 (1980).

This method of review is familiar to us from case law. It has merit where the court is examining legislation that appears to threaten a right or a value specified by a provision of the Constitution. But when employed as a formula for the general review of all restrictions on human freedom without guidance from the historical Constitution, the court is cut loose from any external moorings and required to perform tasks that are not only beyond its competence but beyond any function that can conceivably be called judicial. That assertion is true, I submit, with respect to each of the three steps of the process described.

The first task assigned the government's lawyers is that of carrying the burden of persuading a court that the "legislation serves important governmental objectives." That means, of course, objectives the court regards as important, and importance also connotes legitimacy. It is well to be clear about the stupendous nature of the function that is thus assigned the judiciary. That function is nothing less than working out a complete and coherent philosophy of the proper and improper ends of government with respect to all human activities and relationships. This philosophy must cover all questions social, economic, sexual, familial, political, etc.

It must be so detailed and well-articulated, all the major and minor premises in place, that it allows judges to decide infinite numbers of concrete disputes. It must also rest upon more than the individual preferences of judges in order not only that internal inconsistency be avoided but also that the legitimacy of forcing the chosen ends of government upon elected representatives, who have other ends in mind, can be justified. No theory of the proper ends of government that possesses all of these characteristics is even conceivable. Certainly no philosopher has ever produced a generally acceptable theory of the sort required, and there is no reason to suppose that such a universal theory is just over the horizon. Yet, to satisfy the requirements of adjudication and the premise that a judge may not override democratic choice without an authority

other than his own will, a theory with each of the qualities mentioned is essential.

Suppose that in meeting a challenge to a federal minimum wage law the government's counsel stated that the statute was the outcome of interest group politics, or that it was thought best to moderate the speed of the migration of industry from the north to the south, or that it was part of a policy to aid unions in collective bargaining. How is a court to demonstrate that none of those objectives is important and legitimate? Or, suppose that the lawyer for Connecticut in *Griswold v. Connecticut*, the decision striking down the state's law against the use of contraceptives, stated that a majority, or even a politically influential minority, regarded it as morally abhorrent that couples capable of procreation should copulate without the intention, or at least the possibility, of conception. Can the court demonstrate that moral abhorrence is not an important and legitimate ground for legislation? I think the answer is that the court can make no such demonstration in either of the supposed cases. And, though it may be only a confession of my own limitations, I have not the remotest idea of how one would go about constructing the philosophy that would give the necessary answers — for judges. I am quite clear how I would vote as a citizen or a legislator on each of these statutes.

This brings me to the second stage of review, in which the government bears the burden of persuading the court that the challenged law is "substantially related to the achievement of [its] objectives." In the case of most laws about which there is likely to be controversy, the social sciences are simply not up to the task assigned. Should the government insist upon arguing that a minimum wage law is designed to improve the lot of workers generally, microeconomic theory and empirical investigation may be adequate to show that the means do not produce the ends. The requisite demonstration will become more complex and eventually impossible as the economic analyses grow more involved. It is well to remember, too, that judge-made-economics has not been universally admirable. Much that has been laid down under the antitrust laws testifies to that.

Moreover, microeconomics is the best, the most powerful, and the most precise of the social sciences. What is the court to do when told that a ban on the use of contraceptives in fact reduces the amount of adultery in the population? Or if it is told that slowing the migration of industry to the Sun Belt is good because it is more painful to lose jobs than not to get new jobs? The substantive due process formulation does not directly address cost-benefit analysis, but one might suppose a court employing this kind of review would also ask whether the benefits achieved were worth the costs incurred. Perhaps that is included in the concept of a substantial relationship between ends and means. If so, that introduces into the calculus yet another judgment that can only be legislative and impressionistic.

The third step — that the government must show that a "similar result cannot be achieved by a less drastic means" — is loaded with ambiguities and disguised tradeoff decisions. A "similar" result may be one along the same lines but not the full result desired by the government. Usually, a lesser, though "similar," result can be achieved by a lesser amount of coercion. A court undertaking to judge such matters will have no guidance other than its own sense of legislative prudence about whether the greater result is or is not worth the greater degree of restriction.

There are some general statements by some framers of the fourteenth amendment that seem to support a conception of the judicial function like this one. But it does not appear that the idea was widely shared or that it was understood by the states that ratified the amendment. Such a revolutionary alteration in our constitutional arrangements ought to be more clearly shown to have been intended before it is accepted. This version of judicial review would make judges platonic guardians subject to nothing that can properly be called law.

The conclusion, I think, must be that only by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure that the Constitution is law. For the subject of economic rights, that means we must turn away from the glamor of abstract philosophic discourse and back to the mundane and difficult task of discovering what the framers were trying to accomplish with the contract clause and the takings clause.

APPENDIX E

"HOW THE CONSTITUTION DISAPPEARED"

by

Lino A. Graglia

How the Constitution Disappeared

Lino A. Graglia

ATTORNEY GENERAL Edwin Meese's recent statement in a speech to the American Bar Association that judges should interpret the Constitution to mean what it was originally intended to mean probably did not strike most people as controversial. Nevertheless it brought forth immediate denunciation by a sitting Supreme Court Justice as "doctrinaire," "arrogant," and the product of "facile historicism." "It is a view," Justice William J. Brennan, Jr. said in a speech at Georgetown University,* "that feigns self-effacing deference to the specific judgments of those who forged our original social compact," but that "in truth . . . is little more than arrogance cloaked as humility" because it is not possible to "gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." The view is not only mistaken, but misguided, Justice Brennan continued, because it would require judges to "turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance."

To state that judges should interpret the Constitution as intended by those who wrote and ratified it ("the Framers") is only to state the basic premise of our political-legal system that the function of judges is to apply, not to make, the law. Indeed, it would be difficult to say what interpretation of a law means if not to determine the intent of the lawmaker. Justice Brennan's angry attack on the obvious as if it were disreputable, soon joined by the attacks of his colleague Justice John Paul Stevens and a legion of media commentators, makes evident that much is at stake in this debate on a seemingly esoteric matter of constitutional interpretation. What is at stake is nothing less than the question of how the country should be governed in regard to basic issues of social policy: whether such issues should be decided by elected representatives of the people, largely on a state-by-state basis, or, as has been the case for the last three decades, primarily by a majority of the nine Justices of the United States Supreme Court for the nation as a whole.

The modern era of constitutional law began with the Supreme Court's 1954 decision in *Brown v. Board of Education*, holding compulsory school racial segregation and, it soon appeared, all racial discrimination by government, unconstitutional. The undeniable rightness of the decision as a matter of social policy, in effect ending legally-imposed second-class citizenship for blacks, and its eventual acceptance by the public and ratification by Congress and the President in the 1964 Civil Rights Act, gained for the Court a status and prestige unprecedented in our history. The moral superiority of decision-making by judges to decision-making by mere "politicians" seemed evident. The result was to enable the Court to move from its historic role as a brake on social change to a very different role as the primary engine of such change.

In the years since *Brown*, nearly every fundamental change in domestic social policy has been brought about not by the decentralized democratic (or, more accurately, republican) process contemplated by the Constitution, but simply by the Court's decree. The Court has decided, on a national basis and often in opposition to the wishes of a majority of the American people, issues literally of life and death, as in its decisions invalidating virtually all restrictions on abortion and severely restricting the use of capital punishment. It has decided issues of public security and order, as in its decisions greatly expanding the protection of the criminally accused and limiting state power to control street demonstrations and vagrancy, and issues of public morality, as in the decisions disallowing most state controls of pornography, obscenity, and nudity. The Court has both prohibited the states from making provision for prayer in the schools and disallowed most forms of aid, state or federal, to religious schools.

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* "The Constitution of the United States: Contemporary Ratification," delivered at a "Text and Teaching Symposium," October 12, 1985.

It has required that children be excluded from their neighborhood public schools and bused to more distant schools in order to increase school racial integration; ordered the reapportionment of state and federal legislatures on a "one-man-one-vote" basis; invalidated most of the law of libel and slander; and disallowed nearly all legal distinctions on the basis of sex, illegitimacy, and alienage. The list could easily be extended, but it should be clear that in terms of the issues that determine the nature and quality of life in a society, the Supreme Court has become our most important institution of government.

Since his appointment to the Court by President Eisenhower in 1956, Justice Brennan has participated in all of the Court's major constitutional decisions, has consistently voted in favor of Court intervention in the political process, and often was a leader on the Court in reaching the decision to intervene. Indeed, he has ordinarily differed with the Court only in that he would often go even farther in disallowing political control of some issues; he would, for example, go farther than the Court has in disallowing state regulation of the distribution of pornographic material and he would prohibit capital punishment in all cases. If the Court has been our most important institution of government for the past three decades, Justice Brennan—although his name is probably unknown to the great majority of his fellow citizens—has surely been our most important government official. To argue that the Supreme Court should confine itself or be confined to interpreting the Constitution as written is to undermine the basis of this status and challenge the legitimacy of his life's work.

CONSTITUTIONAL law is as a practical matter the product of the exercise of the power of judicial review, the power of judges, and ultimately of Supreme Court Justices, to invalidate legislation and other acts of other officials and institutions of government as inconsistent with the Constitution. The central question presented by constitutional law—the only question the great variety of matters dealt with under that rubric have in common—is how, if at all, can such a power in the hands of national officials who are unelected and effectively hold office for life be justified in a system of government supposedly republican in form and federalist in organization? The power is not explicitly provided for in the Constitution and had no precedent in English law—where Parliament, not a court, is said to be supreme—which could well be taken as reason enough to assume that no such power had been granted. Alexander Hamilton argued for the power in *Federalist 78*, however, and Chief Justice John Marshall established it in *Marbury v. Madison* in 1803 on the ground that it is inherent in a written constitution that declares itself to be supreme law. The argument is hardly unanswerable—other nations have written constitutions without judicial review—but judicial review limited to interpretation of the Constitution in accordance with the Framers' intent does obviate the problem of policy-making by judges.

Constitutional limitations on popular government are undoubtedly undemocratic, even if they were themselves democratically adopted by a supermajority, but the only function of judges in exercising judicial review on the basis of a written constitution with determinate meaning would be the entirely judicial one of enforcing the Constitution as they would any other law. The judges, Hamilton assured the ratifying states, would have neither "force nor will"; able to "take no active resolution whatever" in enforcing the Constitution, their power would be "next to nothing." "Judicial power," Marshall reiterated, "has no existence. Courts are mere instruments of the law, and can will nothing." The notion that a court has "power to overrule or control the action of the people's representatives," Justice Owen Roberts confirmed during the New Deal constitutional crisis, "is a misconception"; the Court's only function in a constitutional case is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

Even Justice Brennan purports to recognize what, as he notes, Alexander Bickel called "the counter-majoritarian difficulty" presented by judicial review. "Our commitment to self-governance in a representative democracy must be reconciled," Justice Brennan concedes, "with vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law." Supreme Court Justices, he acknowledges at the beginning of his speech, echoing Judge Learned Hand, "are not platonic guardians appointed to wield authority according to their personal moral predilections." At several points he even seems to offer the standard justification for judicial review, that the judges merely interpret the written Constitution. He states, for example, that the duty of the judge is to "draw meaning from the text" and "remain faithful to the content" of the Constitution and that "the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation." These statements are consistent with the remainder of his speech, however, only if reading or interpreting a document is considered indistinguishable from composing or rewriting it.

Unfortunately, however, the debate is not about how judges should read or interpret the text of the Constitution, but about whether that is what they should in fact confine themselves to doing in deciding constitutional cases. The view that the duty of judges is to read and interpret the Constitution—to attempt to determine what the

Framers intended to say—is precisely the view that Justice Brennan seeks to rebut and derides as uninformed and misguided. The whole point of his speech is that judges should not be confined to that task, for so to confine them would be to give them much too limited a role in our system of government and leave us insufficiently protected from the dangers of majority rule.

Justice Brennan is far from alone today in his view of the proper role of judges in exercising judicial review and of the essential irrelevance of the Constitution to constitutional law. It is, indeed, the view taken by most contemporary constitutional-law scholars, who share the political ideology of the modern-era Supreme Court and see it as their professional duty to legitimize the fruits of that ideology. Because it has become increasingly difficult—in fact, impossible—to justify the Court's controversial decisions as the result of constitutional interpretation, the bulk of modern constitutional-law scholarship consists of the invention and elaboration of "non-interpretivist" or "non-originalist" theories of judicial review—justifications for a judicial review that is not confined to constitutional interpretation in any sense that would effectively restrain judicial choice. Because the product of this review is nonetheless always called "constitutional law" and attributed in some way to the Constitution, the result is the paradox of non-interpretivist constitutional interpretation, constitutional law without the Constitution.

That more and more constitutional scholars, and now a Supreme Court Justice, should come to recognize and acknowledge that the Supreme Court's constitutional decisions of recent decades cannot be justified on any other basis—that they are not in fact based on the Constitution—can be taken as a hopeful sign. Although the effort today in an increasing flood of books, articles, and speeches is to justify those decisions nonetheless, the inevitable failure of such efforts must, it would seem, eventually cause the enterprise to be abandoned and the fact that they cannot be justified in a system of self-government to be also generally recognized and acknowledged. Justice Brennan has performed a public service by bringing this extremely important and little understood issue to greater public attention, conveniently summarizing the standard arguments for "non-interpretivist" or "non-originalist" review—i.e., what is popularly referred to as "judicial activism"—and stating his own position with unusual, even if not total, clarity and candor.

DEFENDERS of judicial activism face the dilemma that, on the one hand, judicial policy-making cannot be defended as such in our system—the Justices, even Justice Brennan must concede, are not authorized to enact their "personal moral predilections" into law and must therefore claim that their decisions derive somehow from the Constitution. On the other hand, it happens that the Constitution is most ill-suited as a basis for substantial judicial policy-making by frequent judicial intervention in the political process in the name of protecting individual rights from majority rule. The central difficulty is that although the Constitution does create some individual rights, they are actually rather few, fairly well-defined, and rarely violated. The first task of the defender of judicial activism, therefore, is to dispose of the Constitution as unhelpful, inadequate, or irrelevant to contemporary needs. Reasons must be found why the Constitution cannot be taken to mean what it rather clearly is known to mean—especially when read, as all writings must be, in historical context—or, even better, to have any determinate meaning at all.

After disposing of the Constitution by depriving it of its historic meaning, the next task of defenders of judicial activism is to imagine a much more expansive, elevated, and abstract constitution that, having no specific meaning, can be made to mean anything and serve therefore as simply a mandate for judges to enact their versions of the public good. In response to the objection that the very thinly veiled system of government by judges thus achieved is obviously inconsistent with democracy, the argument is made that the value of democracy is easily overrated and its dangers many. The "very purpose of a Constitution," as Justice Brennan states the standard argument, is to limit democracy by declaring "certain values transcendent, beyond the reach of temporary political majorities." In any event, no real inconsistency with democracy is involved, the argument concludes, because the judges, though unrestrained by the actual text of the Constitution, will continue to be restrained by its principles, the adaptation of which to changing circumstances is the true and indispensable function of judges. Justice Brennan's speech can serve as a textbook illustration of each of these moves.

Justice Brennan's attack on the notion of a constitution with a determinable historic meaning could hardly be more thorough. First of all, he finds that the Court's "sources of potential enlightenment" as to the intended meaning are often "sparse or ambiguous." Even more serious, the search for meaning is likely to be futile in any event because even the Framers, he believes, usually did not know what they meant: "Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality." Then there is the question of "whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states?" Indeed, there is the most basic question of all, whether the very notion of intent makes sense, "whether the idea of an original intention is a coherent way of thinking about a jointly drafted document

drawing its authority from a general assent of the states." It is almost as if the Constitution and its various provisions might have been drafted and adopted with no purpose at all. Finally, there is the problem that "our distance of two centuries cannot but work as a prism refracting all we perceive." For all these reasons, the idea that judicial review is legitimate only if faithful to the intent of the Framers can be held only by "persons who have no familiarity with the historical record."

Justice Brennan has still another, although it would seem unnecessary, nail to put in the coffin of the now demolished Constitution. Should any shred of constitutional meaning somehow survive the many obstacles he sees to finding it, he would accord it little or no value. The world of the Framers is "dead and gone," and it would not do, he believes, to hold the Constitution captive to the "anachronistic views of long-gone generations." "[A]ny static meaning" the Constitution "might have had" in that dead world must, therefore, be of dubious relevance today. In any event, "the genius of the Constitution rests," in his view, not in any such meaning but in "the adaptability of its great principles to cope with current problems and current needs," strange as it may seem that a writing can be great apart from its meaning and solely by reason of its supposed ability to mean anything.

Most of Justice Brennan's objections regarding the difficulties of constitutional interpretation have some basis, but they could also be made in regard to interpretation of almost any law. For example, one can almost always wish for a clearer or more detailed legislative history, and it is always true that legislators cannot foresee and agree on every possible application of a law. If these difficulties made the effort to determine legislative intent futile, a system of written law would hardly be possible. In any event, from the premise of an unknowable or irrelevant Constitution, the conclusion should follow that judges have no basis or justification for declaring laws unconstitutional, not that they are therefore free to invalidate laws on some other basis and still claim to be interpreting the Constitution.

Most important, whatever the difficulties of legal interpretation, they have little or no relevance to actual constitutional decision-making by the Supreme Court because no issue of interpretation, no real dispute about the intended meaning of the Constitution, is ordinarily involved. For example, the Constitution contains no provision mentioning or apparently in any way referring to the authority of the states to regulate the practice of abortion. However one might undertake to defend the Court's abortion decisions, it does not seem possible to argue that they are the result of constitutional interpretation in any non-fanciful sense. As another example, although the Constitution does mention religion, no process that could be called interpretation permits one to go from the Constitution's protection of religious freedom from federal interference to the proposition that the states may not provide for prayer in the schools.

A constitution so devoid of ascertainable meaning or contemporary relevance would seem quite useless as a guide to the solution of any contemporary problem and certainly as a written law enforceable by judges. The judges might as well be told to enforce a document written in an unknown language or, more in keeping with Justice Brennan's view, in disappearing ink. Having effectively eliminated the actual Constitution, however, Justice Brennan proceeds to remedy the loss—judicial activism cannot proceed with no constitution at all—by imagining and substituting a much more impressive, inspiring, and usefully uncertain one.

THE constitution of Justice Brennan's vision is undoubtedly a wonderful thing, one of "great" and "overarching" principles and "majestic generalities and ennobling pronouncements [that] are both luminous and obscure." It is nothing less grand than the embodiment of "the aspiration to social justice, brotherhood, and human dignity that brought this nation into being," "a sublime oration on the dignity of man," and "a sparkling vision of the supremacy of the human dignity of every individual." Justice Brennan accurately reflects current constitutional-law scholarship, here as throughout his speech, by seeing the Constitution as simply "the lodestar for our aspirations." It is a source of constant wonderment that scholars and judges of otherwise the most secular and rationalist turn of mind can grow mystical when discussing the Constitution.

The temptation is strong, of course, to dismiss Justice Brennan's rapturous statements as mere flights of poetic fancy or utopian ecstasy, obviously not meant as serious descriptions or explanations of the Constitution. The fact remains, however, that this view of the Constitution is the only justification offered by him, or other contemporary defenders of judicial activism, for the Court's assumption and exercise of enormous government power. Fanciful as it may seem, a constitution that is simply the embodiment of "our," or at least his, aspirations accurately describes the constitution he has been enforcing for nearly three decades to override the will of the people of this country on issue after issue. It cannot be too strongly emphasized, therefore, that the Constitution we actually have bears almost no relation to, and is often clearly irreconcilable with, the constitution of Justice Brennan's vision. No more is necessary to rebut all contemporary defenses of judicial activism than that a copy of the Constitution be kept close at hand to demonstrate that the defenders of judicial activism are invariably relying on something else.

Although it may come as something of a dis-

appointment to some, an "aspiration for social justice, brotherhood, and human dignity" happens not to have been what brought this nation, or at least the government founded on the Constitution, into being. The convention to revise the Articles of Confederation was called and the Constitution was drafted and ratified not to provide additional protections for human rights—on the contrary, the stronger national government created by the Constitution was correctly seen as a potential danger to human rights—but almost entirely for commercial purposes. The primary motivating force for the creation of a stronger national government was the felt need of a central authority to remove state-imposed obstacles to interstate trade. How little the Constitution had to do with aspirations for brotherhood or human dignity is perhaps most clearly seen in its several provisions regarding slavery. It provides, for example, that a slave was to be counted as three-fifths of a free person for purposes of representation and that slaves escaping to free states were nonetheless to be returned to their masters. It is not, as Justice Brennan would explain this, that part of the "egalitarianism in America has been more pretension than realized fact," but that there was at the time the Constitution was adopted very little pretension to egalitarianism, as is illustrated by, for example, the widespread use of property qualifications for voting.

GIVEN the original Constitution's limited and mundane purposes, it is not surprising that it provides judges with little to work with for the purpose of advancing their personal notions of social justice. The Constitution is, first of all, a very short document—easily printed, with all twenty-seven Amendments and repealed matter, on fewer than twenty pages—and apparently quite simple and straightforward, not at all like a recondite tome in which many things may be found with sufficient study. The original Constitution is almost entirely devoted to outlining the structure of the national government and setting forth the sometimes complicated methods of selection, and the responsibilities, of members of the House of Representatives, Senators, the President, and Supreme Court Justices. It contains few provisions protecting individual rights from the national government—federalism, i.e., limited national power and a high degree of local autonomy, was considered the principal protection—and even fewer restrictions on the exercise of state power. As to the national government, criminal trials are to be by jury, treason is narrowly defined, the writ of habeas corpus is protected, and bills of attainder and ex-post-facto laws are prohibited. The prohibition of bills of attainder and ex-post-facto laws is repeated as to the states, which are also prohibited from discriminating against citizens of other states. Finally and by far the most important in terms of actual challenges to state laws, the Framers, nicely illustrating their lack of egalitarian pretension, undertook to protect creditors from debtor-relief legislation by prohibiting the states from impairing contract rights.

The first eight of the first ten Amendments to the Constitution, the Bill of Rights adopted in 1791, provide additional protections of individual rights, but only against the federal government, not the states, and these, too, are fewer than seems to be generally imagined and certainly fewer than is typical of later declarations of rights, such as in the United Nations Charter. In terms of substantive rights, the First Amendment prohibits Congress from establishing or restricting the free exercise of religion—the main purpose of which was to leave matters of religion to the states—and from abridging the freedom of speech, press, or assembly. In addition, a clause of the Fifth Amendment prohibits the taking of private property without just compensation; the Second Amendment, rarely mentioned by rights enthusiasts, grants a right to bear arms; and the Third Amendment, of little apparent contemporary significance, protects against the forced quartering of troops in private homes. The Seventh Amendment, requiring jury trials in civil cases involving more than twenty dollars, is hard to see today as other than an unnecessary inconvenience. The remaining provisions (search and seizure, grand-jury indictment, double jeopardy, privilege against self-incrimination, due process, jury trial, right to counsel and to confront adverse witnesses, and cruel and unusual punishment) are related to criminal procedure.

Additional protections of individual rights are provided by the post-Civil War Amendments. The Thirteenth Amendment prohibits slavery and the Fifteenth prohibits denial of the right to vote on grounds of race. The great bulk of constitutional litigation concerns state law and nearly all of that litigation purports to be based on a single sentence of the Fourteenth Amendment and, indeed, on one or the other of two pairs of words, "due process" and "equal protection." If the Constitution is the embodiment of our aspirations, it must have become so very largely because of those four words. The clear historic purpose of the Fourteenth Amendment, however, was to provide federal protection against certain state discriminations on the basis of race, historically our uniquely intractable problem, but not otherwise to change fundamentally the constitutional scheme. Finally, the Nineteenth Amendment protects the right to vote from denial on grounds of sex, and the Twenty-seventh from denial on grounds of age for persons over eighteen.

The Constitution's protections of individual rights are not only few but also, when read in historical context, fairly clear and definite. State and federal legislators, all of whom are American citizens living in America and generally at least

as devoted as judges to American values, have, therefore, little occasion or desire to violate the Constitution. The result is that the enactment of a clearly unconstitutional law is an extremely rare occurrence; the clearest example in our history perhaps is a 1933 Minnesota debtor-relief statute plainly prohibited by the contract clause, although, as it happens, the Supreme Court upheld it by a five-to-four decision. If judicial review were actually confined to enforcing the Constitution as written, it would be a much less potent force than the judicial review argued for and practiced by Justice Brennan.

The Constitution is undoubtedly a great document, the foundation of one of the freest and most prosperous nations in history. It does not detract from that greatness to point out that it is not, however, what Justice Brennan would make of it, a compendium of majestic generalities and ennobling pronouncements luminous and obscure; indeed, its greatness and durability surely derive in large part from the fact that the Framers' aims were much more specific and limited. Far from intending to compose an oration to human dignity, the Framers would have considered that they had failed in their effort to specify and limit the power of the national government if the effect of the Constitution should be to transfer the focus of human-rights concerns from the state to the national level. The Framers' solution to the problem of protecting human freedom and dignity was to preserve as much as possible, consistent with national commerce and defense requirements, a system of decentralized democratic decision-making, with the regulation of social conditions and personal relations left to the states. Justice Brennan's solution, virtually unlimited Supreme Court power to decide basic social issues for the nation as a whole, effectively disenfranchising the people of each state as to those issues, is directly contrary to the constitutional scheme.

Judicial review on the basis of a constitution divorced from historical meaning and viewed, instead, as simply "the lodestar for our aspirations" is obviously a prescription for policy-making by judges. It should therefore be defended, if at all, as such, free of obfuscating references to "interpretation" of the Constitution. The only real question it presents is, why should the American people prefer to have important social-policy issues decided for the whole nation by the Supreme Court—a committee of nine lawyers unelected to and essentially unremovable from office—rather than by the decentralized democratic process? Justic Brennan's answer to this question is, in essence, why not? The argument that judicial interpretation of the Constitution in accordance with the Framers' intent is essential for "depoliticization of the judiciary," he points out, has its own "political underpinnings"; it "in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right," which involves "a choice no less political than any other."

Justice Brennan is certainly correct that the presumption of constitutionality accorded to challenged acts of government officials has a political basis, but it is surprising that he should find "far from clear what justifies such a presumption." What justifies it is the basic premise of democratic government that public-policy issues are ordinarily to be decided through the electoral process, not by unelected judges; that constitutional restrictions on representative government—even if, unlike judge-made restrictions, they were once democratically adopted—are the exception, not the rule. To refuse to assume the validity of the acts of the electorally responsible officials and institutions of government is to refuse to assume the validity of representative self-government. It has, therefore, from the beginning been considered the bedrock of constitutional litigation that one who would have a court invalidate an act of the political branches must assume the burden of showing its inconsistency with the Constitution, ordinarily a most difficult task. By reversing the presumption of constitutionality, Justice Brennan would simply reject political decision-making as the norm and require elected representatives to justify their policy choices to the satisfaction of Supreme Court Justices, presumably by showing that those choices contribute to the Justices' notion of social progress.

Justice Brennan would justify the judicial supremacy he favors on the not entirely consistent grounds that, on the one hand, the Justices are the true voice of the people and, on the other, that the people are in any event not always to be trusted. "When Justices interpret the Constitution," Justice Brennan assures us, "they speak for their community, not for themselves alone" and "with full consciousness that it is, in a very real sense, the community's interpretation that is sought." Apart from the fact that no question of constitutional interpretation is in fact involved in most "constitutional" cases—the judges do not really decide cases by studying the words "due process" or "equal protection"—the community is, of course, fully capable of speaking for itself through the representatives it elects and maintains in office for that purpose. Justice Brennan does not explain why he thinks the community needs or wants unelected judges to speak for it instead or why the judges can be expected better to reflect or express the community's views.

The actual effect of most judicial rulings of unconstitutionality is, of course, not to implement, but to frustrate the community's views. For example, Justice Brennan would disallow capital punishment as constitutionally prohibited despite not only the fact that it is repeatedly provided for in the Constitution, but also the fact that it is favored by a large majority of the American

people. In some cases, however, he explains, a Justice may perceive the community's "interpretation of the text to have departed so far from its essential meaning" that he "is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path." On capital punishment, Justice Brennan hopes to "embody a community striving for human dignity for all, although perhaps not yet arrived." Interpreting an aspirational constitution apparently requires prescience as well as a high degree of self-confidence.

THE foundation of all defenses of judicial activism, however, is not any fanciful notion that the judges are the true voice of the people, but on the contrary, the conviction that the people, and their elected representatives, should not be permitted to have the last word. Rarely has this conviction, common among our intellectual elite, been expressed with more certainty than in Justice Brennan's speech. Judicial acceptance of the "predominant contemporary authority of the elected branches of government" must be rejected, he argues, for the same reason he rejects judicial acceptance of the "transcendent historical authority of the Framers." That reason, it now appears, is not so much that original intent is unknowable or irrelevant as that its acceptance as authoritative would be inconsistent with his notion of "proper judicial interpretation" of the Constitution because it would leave judges with too little to do. "Faith in the majoritarian process," like fidelity to original intent, is objectionable, he is frank to admit, simply because it "counsels restraint." It would, he points out, lead the Court generally to "stay its hand" where "invalidation of a legislature's substantive policy choice" is involved. Justice Brennan's confidence that his university audience shared his suspicion of democracy and distrust of his fellow citizens was such as to put beyond need of argument the unacceptability of a counsel of restraint by Supreme Court Justices in deciding basic issues of social policy.

Legislative supremacy in policy making is derided by Justice Brennan as the "unabashed enshrinement of majority will." "Faith in democracy is one thing," he warns, but "blind faith quite another." "The view that all matters of substantive policy should be resolved through the majoritarian process has appeal," he concedes, but only "under some circumstances," and even as so qualified "it ultimately will not do." It will not do because the majority is simply not to be trusted: to accept the mere approval of "a majority of the legislative body, fairly elected," as dispositive of public-policy issues would be to "permit the imposition of a social-caste system or wholesale confiscation of property," a situation "our Constitution could not abide." How a people so bereft of good sense, toleration, and foresight as to adopt such policies could have adopted the Constitution in the first place is not explained. Justice Brennan seems to forget that if the Constitution prohibits such things—indeed, if it is an oration to human dignity, as he maintains—it must be because the American people have made it so and therefore, it would seem, can be trusted. It cannot be Justice Brennan's position that political wisdom died with the Framers and that we are therefore fortunate to have their policy judgments to restrain us; he rejects those judgments as unknowable or irrelevant. Like other defenders of judicial activism, however, he seems to view the Constitution not as an actual document produced by actual people but as a metaphysical entity from an extraterrestrial source of greater authority than the mere wishes of a majority of the American people, which source, fortunately, is in effective communication with Supreme Court Justices.

The social-caste system feared by Justice Brennan would probably be prohibited by the post-Civil War Amendments, without undue stretching, and confiscation of property by the national government—though not by the states—would be prohibited by the just-compensation clause of the Fifth Amendment. (These constitutional provisions, it may be noted in passing, would operate as impediments to such policies, providing grounds for opposing arguments, even if they were not judicially enforceable.) The real protection against such fears, however—and columnist Anthony Lewis's similar fear that without activist judicial review Oregon might establish the Reverend Sun Myung Moon's Unification Church as the official state religion—is simply the good sense of the American people. No extraordinary degree of confidence in that good sense is necessary in order to believe that these and similarly outrageous policies that are invariably offered as providing an unanswerable justification for judicial activism are so unlikely to be adopted as not to be a matter of serious concern. If they should be a matter of concern nonetheless—if, for example, it is truly feared that the people of some state might establish a church and believed that no state should be free to do so—the appropriate response would be the adoption of a constitutional amendment further limiting self-government in the relevant respects. To grant judges an unlimited power to rewrite the Constitution, Justice Brennan's recommended response, would be to avoid largely imaginary dangers of democratic misgovernment by creating a certainty of judicial misgovernment.

JUDICIAL activism is not necessary to protect us from state-established churches, favored by almost no one, but it does operate to deprive the people of each state of the right to decide for themselves such real issues as whether provision should be made for prayer in the public schools. In any event, the issue presented by contemporary judicial activism is not whether major-

ity rule is entirely trustworthy—all government power is obviously dangerous—or even whether certain specific constitutional limitations on majority rule might not be justifiable; the issue is whether freewheeling policy-making by Supreme Court Justices, totally centralized and undemocratic, is more trustworthy than majority rule.

Defenders of judicial activism invariably match their skepticism about democratic policy-making with a firm belief in the possibility and desirability of policy-making on the basis of principle. To free judicial review from the constraint of a constitution with a determinate meaning is not to permit unrestrained judicial policy-making in constitutional cases, it is argued, for the judges will continue to be constrained by the Constitution's principles, which, like the smile of the Cheshire cat, somehow survive the disappearance of the Constitution's text. According to this argument, judicial activism amounts to nothing more than the adaptation and application of these basic principles to changing circumstances, a necessary task if the Constitution is to remain a "living document" and a contributor rather than an obstacle to the national welfare. Thus, judicial activism is necessary in Justice Brennan's view, as already noted, if we are not to "turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance" and because the genius of the Constitution rests not in what, if anything, the Framers actually intended to provide, but in the "adaptability of its great principles to cope with current problems and current needs."

The argument that judges are constrained by constitutional principles, even though not by the constitutional text, bears no relation to reality. In the first place, it is not possible to formulate useful constitutional principles apart from or beyond the Constitution's actual provisions. The Constitution protects certain interests to a certain extent, from which fact the only principle to be derived is that the Constitution does just that. An even more basic fallacy is the argument's assumption that the solution of social problems lies in the discovery, adaptation, and application of preexisting principles to new situations. Difficult problems of social choice arise, however, not because of some failure to discern or adapt an applicable principle, but only because we have many principles, many interests we regard as legitimate, and they inevitably come into conflict. Some interests have to be sacrificed or compromised if other interests are to be protected—for example, public demonstrations will have to be regulated at some point in the interest of maintaining public order—and there is no authoritatively established principle, rule, or generality that resolves the conflict. If there were such a principle, the conflict would not present a serious problem, but would be a matter that has already been decided or that anyone can decide who can read and reason. Value judgments have to be made to solve real policy issues, and the meaning of self-government is that they are to be made in accordance with the collective judgment of those who will have to live with the results.

There is also very little basis for Justice Brennan's apparent belief that judicial review confined to the Constitution as written would somehow be incompatible with social progress—unless social progress is simply defined as the enactment of his views. The Constitution does contain several provisions that we would probably be better off without, for example, the Seventh Amendment's requirement of a jury trial in federal civil cases involving more than twenty dollars and the Twenty-second Amendment's limitation of Presidents to two terms. Apart from the fact, however, that the Constitution, of course, provides procedures for its amendment—it can be updated if necessary without the Court's help—judicial activism has not generally served to alleviate the undesirable effects of such provisions. In any event, the Constitution's restrictions on self-government are, as already noted, relatively few and rarely such as a legislature might seek to avoid. Rarely if ever will adaptation of the Constitution's overarching principles, if any, be necessary in order to permit a legislature to implement its views of social progress.

Indeed, on the basis of our actual constitutional history—which includes the Supreme Court's disastrous decision that Congress could not prohibit the extension of slavery and, after the Civil War that decision helped bring on, the decision that Congress could not prohibit racial segregation in public places—it is possible to believe that social progress might go more smoothly without the Court's supposed adaptations of principles. If the Constitution can be said to have an overarching principle, the principle of federalism, of decision-making on most social-policy issues at the state level, is surely the best candidate, and that principle is not adapted or updated but violated by the Court's assertion of power to decide such issues. Far from keeping the Constitution a "living document," judicial activism threatens its demise.

Whatever merit Justice Brennan's justifications for judicial activism might have in theory, they do not seem relevant to the judicial activism actually practiced by the Supreme Court for the past three decades. It would be very difficult to justify the Court's major constitutional decisions during this period, and particularly its most controversial decisions, on any of the grounds Justice Brennan suggests. It would not seem possible to argue, for example, that the Justices spoke for the community, not for themselves, in reaching their decisions on abortion, busing, criminal procedure, and prayer in the schools. Nor does it seem that any of those decisions can be justified as providing a needed pro-

tection from a possible excess of democracy, as merely delaying effectuation of the aberrational enthusiasms of "temporary political majorities" until they could return to their senses. Judicial review may, as Chief Justice Harlan Fiske Stone put this standard rationalization, provide the people with an opportunity for a "sober second thought," but no amount of thought or experience is likely to change the view of the vast majority of the American people that, for example, their children should not be excluded from their neighborhood public schools because of their race or that no new protections of the criminally accused should be invented with the effect of preventing the conviction and punishment of the clearly guilty.

Finally, the contribution of most of the Court's constitutional decisions of recent decades to social progress—for example, its decision that California may not prohibit the parading of vulgarity in its courthouses or that Oklahoma may not impose a higher minimum drinking age on men than on women—is at best debatable. Very few of these decisions, it seems, could be used to illustrate the adaptation of overarching constitutional principles or transcendent constitutional values to changing circumstances. They could probably more easily be used to illustrate that, rather than helping us to cope with current problems and current needs, the Court's constitutional decisions have often been the cause of those problems and needs.

Whatever the merits of the Supreme Court's constitutional decisions of the past three decades, they have as to the issues decided deprived us of perhaps the most essential element of the human dignity Justice Brennan is concerned to protect, the right of self-government, which necessarily includes the right to make what others might consider mistakes. It is not the critics of judicial activism but the activist judges who can more properly be charged with being doctrinaire and arrogant, for it is they who presume to know the answers to difficult questions of social policy and to believe that they provide a needed protection from government by the misguided or ignorant. An opponent of judicial activism need not claim to know the answer to so difficult a question of social policy as, say, the extent, if any, to which abortion should be restricted to know that it is shameful in a supposedly democratic country that such a question should be answered for all of us by unelected and unaccountable government officials who have no special competence to do so.

Liberalism and Zionism

Edward Alexander

"LIBERALISM is always being surprised." That was how Lionel Trilling used to describe the characteristic liberal failure to imagine what reason and seductive common sense appeared to gainsay. During the past century, few things have surprised and offended the liberal imagination more than the weird persistence of the Jewish nation.

Liberal friends of the Jews expected that their emancipation would put an end to Jewish collective existence. Count Stanislas de Clermont-Tonnerre, the French revolutionary, told the French National Assembly in 1789 that "the Jews should be denied everything as a nation, but granted everything as individuals." Wilhelm von Humboldt, the great liberal reformer of Prussia, whose ethical idealism is celebrated in John Stuart Mill's *On Liberty*, considered the disappearance of the Jews as a distinct group a condition for taking up the cause of their emancipation.

When the Jews failed to live up to their sponsors' expectations, the reaction against them could be fierce. George Eliot wrote in 1878 that modern English resentment of Jews for maintaining themselves in moral isolation from their fellow citizens was strongest among "liberal gentlemen" who "usually belong to a party which has felt itself glorified in winning for Jews . . . the full privileges of citizenship." George Eliot had herself once belonged to that party, and in 1848, when her revolutionary ardor was at its height, predicted that the Jews as a "race" were "plainly destined to extermination." But between 1848 and 1874, when she began to write *Daniel Deronda*, her liberalism had been tempered by a wider experience of mankind and a deeper reflection on the meaning of nationality in general and of the organized memory of Jewish national consciousness in particular.

George Eliot came to cherish the idea of "restoration of a Jewish State planted on the old ground," not only because it would afford the Jews a center of national feeling and a source of dignifying protection, but because it would contribute to the councils of the world "an added form of national genius," and one of transcendent (though not Christian) meaning. At the conclusion of her essay on the Jewish problem ("The Modern HEP! HEP! HEP!"), she pleads with John Stuart Mill's liberal disciples to enlarge their master's ideal of individuality to nations: "A modern book on Liberty has maintained that from the freedom of individual men to persist in idiosyncrasies the world may be enriched. Why should we not apply this argument to the idiosyncrasy of a nation, and pause in our haste to hoot it down?"

The relation among liberalism, democracy, and the Jewish nation is directly addressed in two ambitious new books by liberals on Zionism and Israel. In one of these, Bernard Avishai, author of *The Tragedy of Zionism** and self-styled elegist of Zionism, has cast himself in the role of Epimenides coming to Athens or Plato to Syracuse, sternly ignoring the contemptible traditional and local idiosyncrasies of the natives in order to bestow upon them the blessings of the "British liberal tradition," "secular democracy," "liberal decency," and "a written constitution."

In his prologue Avishai describes how, in 1972, he and his wife left Canada to become Israelis. But by 1978 they began to feel that they were victims of "cultural enslavement" whose "English spirit" was being blotted out by Hebrew. The instrument of their deconversion from Zionism was American and English television programs which revealed to them that they were "living among foreigners" and that their true home, to which they soon returned, was Canada and the English language. Although he momentarily blamed himself for failing to become an Israeli, Avishai quickly decided that the blame lay with Israel, which, if you are American, turns your children into strangers, and with Zionism, which, "like old *halakhic* [Jewish legal] norms," represses "individual life . . . equivocation, sexuality," desiderata of the "culture of liberalism" that he now pursues as a teacher of writing at MIT.

Five pages after describing how he saved himself from the clearest and most dangerous siren

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* Farrar, Straus & Giroux, 389 pp., $19.95.

APPENDIX F

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES

by

Joseph Story

1833

COMMENTARIES

ON THE

CONSTITUTION OF THE UNITED STATES;

WITH

A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION.

BY JOSEPH STORY, LL.D.

IN TWO VOLUMES.

VOL. I.

FIFTH EDITION,

BY MELVILLE M. BIGELOW, PH.D.

"Magistratibus igitur opus est; sine quorum prudentiâ ac diligentiâ esse civitas non potest; quorumque descriptione omnis Reipublicæ moderatio continetur."
CICERO, DE LEG., lib. 3, cap 2

"Government is a contrivance of human wisdom to provide for human wants"
BURKE.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1891.

CHAPTER V.

RULES OF INTERPRETATION.

§ 397. In our future commentaries upon the Constitution we shall treat it, then, as it is denominated in the instrument itself, as a CONSTITUTION of government, ordained and established by the people of the United States for themselves and their posterity.[1] They have declared it the supreme law of the land. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of certain powers, and reserved all others to the States or to the people. It is a popular government. Those who administer it are responsible to the people. It is as popular, and just as much emanating from the people, as the State governments. It is created for one purpose, the State governments for another. It may be altered and amended and abolished at the will of the people. In short, it was made by the people, made for the people, and is responsible to the people.[2]

§ 398. In this view of the matter, let us now proceed to consider the rules by which it ought to be interpreted; for if these rules are correctly laid down it will save us from many embarrassments in examining and defining its powers. Much of the difficulty which has arisen in all the public discussions on this subject has had its origin in the want of some uniform rules of interpretation expressly or tacitly agreed on by the disputants. Very different doctrines on this point have been adopted by differ-

[1] "The government of the Union," says Mr. Chief Justice Marshall, in delivering the opinion of the court in McCulloch v. Maryland, 4 Wheat. 316, "is emphatically and truly a government of the people. It emanates from them; its powers are granted by them, and are to be exercised directly on them and for their benefit." Id. 404, 405; see also Cohens v. Virginia, 6 Wheat. R. 264, 413, 414.

"The government of the United States was erected," says Mr. Chancellor Kent, with equal force and accuracy, "by the free voice and the joint will of the people of America for their common defence and general welfare." 1 Kent's Comm. Lect. 10, p. 189.

[2] I have used the expressive words of Mr. Webster, deeming them as exact as any that could be used. See Webster's Speeches, pp. 410, 418, 419; 4 Elliot's Debates, 338, 343.

ent commentators; and not unfrequently very different language held by the same parties at different periods. In short the rules of interpretation have often been shifted to suit the emergency; and the passions and prejudices of the day or the favor and odium of a particular measure have not unfrequently furnished a mode of argument which would on the one hand leave the Constitution crippled and inanimate, or, on the other hand, give it an extent and elasticity subversive of all rational boundaries.

§ 399. Let us, then, endeavor to ascertain what are the true rules of interpretation applicable to the Constitution; so that we may have some fixed standard by which to measure its powers, and limit its prohibitions, and guard its obligations, and enforce its securities of our rights and liberties.

§ 400. I. The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties. Mr. Justice Blackstone has remarked that the intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law.[1] He goes on to justify the remark by stating, that words are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar as their general and popular use; that if words happen to be dubious, their meaning may be established by the context, or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject-matter with reference to which the expressions are used; that the effect and consequence of a particular construction is to be examined, because, if a literal meaning would involve a manifest absurdity, it ought not to be adopted; and that the reason and spirit of the law, or the causes which led to its enactment, are often the best exponents of the words, and limit their application.[2]

[1] 1 Black. Comm. 59, 60. See also Ayliffe's Pandects, B. 1, tit. 4, p. 25, &c.; 1 Domat, Prelim. Book, p. 9; Id. Treaties on Laws, ch. 12, p. 74.

[2] Id. See also Woodes. Elem. of Jurisp. p. 36. Rules of a similar nature will be found laid down in Vattel, B. 2, ch. 17, from § 262 to § 310, with more ample illustrations and more various qualifications. But not a few of his rules appear to me to want accuracy and soundness. Bacon's Abridg. title, Statute I. contains an excellent summary of the rules for construing statutes. Domat, also, contains many valuable rules in respect to interpretation. See his treatise on Laws, ch. 12, p. 74, &c., and Preliminary Discourse, tit. 1, § 2, p. 6 to p. 16.

§ 401. Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation.(a) It is only when there is some ambiguity or doubt arising from other sources that interpretation has its proper office. There may be obscurity as to the meaning, from the doubtful character of the words used, from other clauses in the same instrument, or from an incongruity or repugnancy between the words and the apparent intention derived from the whole structure of the instrument or its avowed object. In all such cases interpretation becomes indispensable.

§ 402. Rutherforth[1] has divided interpretation into three kinds, literal, rational, and mixed. The first is, where we collect the intention of the party from his words only, as they lie before us. The second is, where his words do not express that intention perfectly, but exceed it, or fall short of it, and we are to collect it from probable or rational conjectures only. The third is, where the words, though they do express the intention, when they are rightly understood, are themselves of doubtful meaning, and we are bound to have recourse to the like conjectures to find out in what sense they are used. In literal interpretation the rule observed is, to follow that sense in respect both of the words and of the construction of them which is agreeable to common use, without attending to etymological fancies or grammatical refinements. In mixed interpretation, which supposes the words to admit of two or more senses, each of which is agreeable to common usage, we are obliged to collect the sense partly from the words and partly from conjecture of the intention. The rules then adopted are, to construe the words according to the subject-matter, in such a sense as to produce a reasonable effect, and with reference to the circumstances of the particular transaction. Light may also be obtained in such cases from contemporary facts or expositions; from antecedent mischiefs; from known habits, manners, and institutions; and

[1] Book 2, ch. 7, § 3.

(a) In such cases the words are to be taken in the sense which they naturally bear on their face. Lake v. Rollins, 130 U. S. 662; Doggett v. Florida R. Co., 99 U. S. 72. Hence legislation operates prospectively unless a different intention is perfectly manifest; and the same is true of constitutions. Shreveport v. Cole, 129 U. S. 36. Further, see Tennessee v. Whitworth, 117 U. S. 129; Henderson v. Wickham, 92 U. S. 259.

from other sources almost innumerable, which may justly affect the judgment in drawing a fit conclusion in the particular case.

§ 403. Interpretation also may be strict or large; though we do not always mean the same thing when we speak of a strict or large interpretation. When common usage has given two senses to the same word, one of which is more confined, or includes fewer particulars than the other, the former is called its strict sense, and the latter, which is more comprehensive or includes more particulars, is called its large sense. If we find such a word in a law, and we take it in its more confined sense, we are said to interpret it strictly. If we take it in its more comprehensive sense, we are said to interpret it largely. But whether we do the one or the other, we still keep to the letter of the law. But strict and large interpretations are frequently opposed to each other in a different sense. The words of a law may sometimes express the meaning of the legislator imperfectly. They may, in their common acceptation, include either more or less than his intention. And as, on the one hand, we call it a strict interpretation where we contend that the letter is to be adhered to precisely, so, on the other hand, we call it a large interpretation where we contend that the words ought to be taken in such a sense as common usage will not fully justify, or that the meaning of the legislator is something different from what his words in any usage would import. In this sense a large interpretation is synonymous with what has before been called a rational interpretation. And a strict interpretation in this sense includes both literal and mixed interpretation; and may, as contradistinguished from the former, be called a close, in opposition to a free or liberal, interpretation.[1]

§ 404. These elementary explanations furnish little room for controversy; but they may nevertheless aid us in making a closer practical application when we arrive at more definite rules.

§ 405. II. In construing the Constitution of the United States, we are, in the first instance, to consider what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts. Where its words are plain, clear, and determinate

[1] The foregoing remarks are borrowed almost in terms from Rutherforth's Institutes of Natural Law (B. 2, ch. 7, § 4 to § 11), which contains a very lucid exposition of the general rules of interpretation. The whole chapter deserves an attentive perusal.

they require no interpretation; and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. Where the words admit of two senses each of which is conformable to common usage, that sense is to be adopted which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design, of the instrument. Where the words are unambiguous, but the provision may cover more or less ground according to the intention, which is yet subject to conjecture, or where it may include in its general terms more or less than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for controversy;(*a*) and the argument from inconvenience will probably have different influences upon different minds. Whenever such questions arise, they will probably be settled each upon its own peculiar grounds; and whenever it is a question of power, it should be approached with infinite caution, and affirmed only upon the most persuasive reasons. In examining the Constitution, the antecedent situation of the country and its institutions, the existence and operations of the State governments, the powers and operations of the confederation, in short, all the circumstances which had a tendency to produce or to obstruct its formation and ratification, deserve a careful attention. Much, also, may be gathered from contemporary history and contemporary interpretation to aid us in just conclusions.[1]

§ 405 *a*. It will probably be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins,

[1] The value of contemporary interpretation is much insisted on by the Supreme Court, in Stuart *v.* Laird, 2 Cranch, 299, 309, in Martin *v.* Hunter, 1 Wheat. R. 304, and in Cohens *v.* Virginia, 6 Wheat. R. 264, 418 to 421. There are several instances, however, in which the contemporary intepretations by some of the most distinguished founders of the Constitution have been overruled. One of the most striking is to be found in the decision of the Supreme Court of the suability of a State by any citizen of another State (Chisholm *v.* Georgia, 2 Dall. 419); and another in the decision by the executive and the Senate, that the consent of the latter is not necessary to removal from office, although it is for appointments. The Federalist, No. 77.

(*a*) Where unconstitutional purposes are completely mingled with what alone would be proper, the whole must be rejected. Allen *v.* Louisiana, 103 U. S. 80. *Secus*, if they can be separated. Florida R. Co. *v.* Schutte, ib. 118; Albany *v.* Stanley, 105 U. S. 305; Keokuk Packet Co. *v.* Keokuk, 95 U. S. 80.

and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise, of opposing interests and opinions, that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And perhaps the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.[1]

§ 406. It is obvious, however, that contemporary interpretation must be resorted to with much qualification and reserve. In the first place, the private interpretation of any particular man or body of men must manifestly be open to much observation. The Constitution was adopted by the people of the United States, and it was submitted to the whole upon a just survey of its provisions as they stood in the text itself. In different States and in different conventions, different and very opposite objections are known to have prevailed, and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies to remove local objections, or to win local favor. And there can be no certainty, either that the different State conventions in ratifying the Constitution gave the same uniform interpretation to its language, or that even in a single State convention the same reasoning prevailed with a majority, much less with the whole of the supporters of it. In the interpretation of a State statute, no man is insensible of the extreme danger of resorting to the opinions of those who framed it or those who passed it. Its terms may have differently impressed different minds. Some may have implied limitations and objects which others would have rejected. Some may have taken a cursory view of its enactments, and others have studied them with profound attention. Some may have been governed by a temporary interest or excitement, and have acted upon that exposition which most favored their present views. Others may

[1] Per Mr. Justice Story in Prigg v. The Commonwealth of Pennsylvania, 16 Peters's S. C. R. 210.

have seen lurking beneath its text what commended it to their judgment against even present interests. Some may have interpreted its language strictly and closely; others, from a different habit of thinking, may have given it a large and liberal meaning. It is not to be presumed that, even in the convention which framed the Constitution, from the causes above mentioned and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself; and the judgment of no one could be, or ought to be, conclusive upon that of others. The known diversity of construction of different parts of it, as well as of the mass of its powers in the different State conventions, the total silence upon many objections which have since been started, and the strong reliance upon others which have since been universally abandoned, add weight to these suggestions. Nothing but the text itself was adopted by the people. And it would certainly be a most extravagant doctrine to give to any commentary then made, and *à fortiori*, to any commentary since made, under a very different posture of feeling and opinion, an authority which should operate as an absolute limit upon the text, or should supersede its natural and just interpretation.

§ 407. Contemporary construction is properly resorted to, to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those by whom it was given, is the credit to which it is entitled. It can never abrogate the text, it can never fritter away its obvious sense, it can never narrow down its true limitations, it can never enlarge its natural boundaries.[1] We shall

[1] Mr. Jefferson has laid down two rules, which he deems perfect canons for the interpretation of the Constitution. The first is, "The capital and leading object of the Constitution was, to leave with the States all authorities which respected their own citizens only, and to transfer to the United States those which respected citizens of foreign or other States; to make us several as to ourselves, but one as to all others. In the latter case, then, constructions should lean to the general jurisdiction, if the words will bear it; and in favor of the States in the former, if *possible* to be so construed." 4 Jefferson's Corresp. 373; Id. 391, 392; Id. 396. Now the very theory on which this canon is founded is contradicted by the provisions of the Constitution itself. In many instances authorities and powers are given which respect citizens of the respective States without reference to foreigners or the citizens of other States. 4 Jefferson's Corresp. 391, 392, 396. But if this general theory were true, it would furnish no just rule of interpretation, since a particular clause might form an exception to it; and, indeed, every clause

have abundant reason hereafter to observe, when we enter upon the analysis of the particular clauses of the Constitution, how many loose interpretations and plausible conjectures were hazarded at an early period, which have since silently died away, and are

ought at all events to be construed according to its fair intent and objects, as disclosed in its language. What sort of a rule is that, which, without regard to the intent or objects of a particular clause, insists that it shall, if *possible* (not if *reasonable*), be construed in favor of the States, simply because it respects their citizens? The second canon is, "On every question of construction [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." Now, who does not see the utter looseness and incoherence of this canon? How are we to know what was thought of particular clauses of the Constitution at the time of its adoption? In many cases, no printed debates give any account of any construction; and where any is given different persons held different doctrines. Whose is to prevail? Besides, of all of the State conventions, the debates of five only are preserved, and these very imperfectly. What is to be done as to the other eight States? What is to be done as to the eleven new States, which have come into the Union under constructions which have been established against what some persons may deem the meaning of the framers of it? How are we to arrive at what is the most probable meaning? Are Mr. Hamilton and Mr. Madison and Mr. Jay, the expounders in the Federalist, to be followed? Or are others of a different opinion to guide us? Are we to be governed by the opinions of a few, now dead, who have left them on record? Or by those of a few now living, simply because they were actors in those days (constituting not one in a thousand of those who were called to deliberate upon the Constitution, and not one in ten thousand of those who were in favor of or against it, among the people)? Or are we to be governed by the opinion of those who constituted a majority of those who were called to act on that occasion, either as framers of or voters upon the Constitution? If by the latter, in what manner can we know those opinions? Are we to be governed by the sense of a majority of a particular State, or of all the United States? If so, how are we to ascertain what that sense was? Is the sense of the Constitution to be ascertained, not by its own text, but by the "*probable meaning*" to be gathered by conjectures from scattered documents, from private papers, from the table-talk of some statesman, or the jealous exaggerations of others? Is the Constitution of the United States to be the only instrument which is not to be interpreted by what is written, but by probable guesses, aside from the text? What would be said of interpreting a statute of a State legislature by endeavoring to find out, from private sources, the objects and opinions of every member, how every one thought, what he wished, how he interpreted it? Suppose different persons had different opinions, what is to be done? Suppose different persons are not agreed as to "the probable meaning" of the framers or of the people, what interpretation is to be followed? These, and many questions of the same sort, might be asked. It is obvious that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text; but the words are to be bent and broken by the "probable meaning" of persons whom they never knew, and whose opinions and means of information may be no better than their own? The people adopted the Constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men. The opinions of the latter may sometimes aid us in arriving at just results;

now retained in no living memory, as a topic either of praise or blame, of alarm or of congratulation.

§ 408. And, after all, the most unexceptionable source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed, and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solemn argument, *pro re nata* upon a doubt raised, upon a *lis mota*, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to present action, in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument, from their exquisite genius, their comprehensive learning or their deep meditation upon the absorbing topic. How light, compared with these means of instruction, are the private lucubrations of the closet, or the retired speculations of ingenious minds, intent on theory or general views, and unused to encounter a practical difficulty at every step! (*a*)

§ 409. III. But to return to the rules of interpretation arising *ex directo* from the text of the Constitution. And first the rules to be drawn from the nature of the instrument. 1. It is to be construed as a *frame* or *fundamental law* of government established by the PEOPLE of the United States according to their own free pleasure and sovereign will. In this respect it is in no wise distinguishable from the constitutions of the State governments. Each of them is established by the people for their own purposes, and each is founded on their supreme authority. The powers

but they can never be conclusive. The Federalist denied that the President could remove a public officer without the consent of the Senate. The first Congress affirmed his right by a mere majority. Which is to be followed?

(*a*) That a practical exposition of the Constitution long acquiesced in will not be departed from, see Stewart *v.* Laird, 1 Cranch, 299; McCulloch *v.* Maryland, 4 Wheat. 316; Briscoe *v.* Bank of Kentucky, 11 Pet. 257; West River Bridge Co. *v.* Dix, 6 How. 507; Bank of United States *v.* Halstead, 10 Wheat. 63; Ogden *v.* Saunders, 12 Wheat. 290; Union Ins. Co. *v.* Hoge, 21 How. 66; United States *v.* Gilmore, 8 Wall. 330: Hughes *v.* Hughes, 4 T. B. Monr. 42; Burgess *v.* Pue, 2 Gill, 11; Coutant *v.* People, 11 Wend. 511; Norris *v.* Clymer, 2 Penn. St. 277; Pike *v.* Megoun, 44 Mo. 499; Britton *v.* Ferry, 14 Mich. 66; State *v.* Parkinson, 5 Nev. 15; Hedgecote *v.* Davis, 64 N. C. 652; Plummer *v.* Plummer, 37 Miss. 185; Chambers *v.* Fisk, 22 Texas, 504.

APPENDIX G

EXCERPTS FROM

GOVERNMENT BY JUDICIARY
THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT

by

Raoul Berger

Government by Judiciary

The Transformation of the Fourteenth Amendment

Raoul Berger

Harvard University Press
Cambridge, Massachusetts
and London, England
1977

Mechanical repetition over the years—like a child's unthinking daily pledge of allegiance—has dulled the significance of the rule of law; it has been called a "useful fiction."[25] For the Framers, however, it was the essence of constitutional government. "The government of the United States," said Chief Justice Marshall in one of his earliest decisions, "has been emphatically termed a government of laws and not of men."[26] That the judiciary, too, was meant to stay within bounds was spelled out in the 1780 Massachusetts Constitution, which ordained that the legislature should never exercise judicial power, and never should the judiciary exercise legislative power, so that this may be a "government of laws and not of men."[27] Even more plainly, judges were not left free to exercise the supreme "legislative power" of the people, to revise the Constitution in accordance with their own predilections. As the Massachusetts House wrote to the Earl of Shelburne in 1768, "There are, my Lord, fundamental rules of the Constitution . . . which neither the supreme Legislative nor the supreme executive can alter. In all free states, the *constitution is fixed;* it is from thence,

ing and Noon 69 (1965). Lusky suggests that some of the Court's decisions may be inexplicable "except on the premise that the Justices *consider themselves to be above the law*—to be wholly unconstrained by pre-existing principle." Lusky 101. Precisely this won praise from admirers of the Warren Court. Supra at note 11, and notes 11 and 13. See also Levy, supra Chapter 14 at note 136.

In defense of President Ford's pardon of Richard Nixon, Assistant Secretary of Transportation Roger W. Hooker, Jr., stated, "I have never been entirely comfortable with the shibboleth [!] that ours is a nation of laws, not of men. It is true that for the most part it is and should be, but in times of extreme moral crisis throughout history, strong leadership has emerged to supersede the letter of the law and deliver us from the evils of vindictiveness." Hooker, "A 'Quiet, Undramatic' Leader," *The New York Times*, August 19, 1976, at 39. In short, Ford acted above the law to save us from an "extreme moral crisis"!

25. Miller and Howell, supra note 8 at 695.

26. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

27. Massachusetts Constitution of 1780, Article XXX, 1 Poore 960, more fully quoted supra Chapter 14 note 5. The Framers made plain that the judiciary was not to exercise legislative power. Infra Chapter 16 at notes 8–12.

that the legislative derives its authority; therefore it cannot change the constitution without destroying its own foundation."[28] This was addressed to an "omnipotent" Parliament and the Crown under an unwritten Constitution; it was an article of faith among the colonists and Founders.[29] In substituting a written Constitution and expressly providing for change by amendment, they evidenced that they had created a "fixed" Constitution, subject to change by that process alone.[30] That "fixity" was meant to serve as a bulwark for cherished liberties, not a mere parchment. "Our peculiar security," Jefferson declared, "is the possession of a written Constitution. Let us not make it a blank paper by construction."[31] The written Constitution was thus the highest expression of the "rule of law," designed to limit the exercise of power and to make the agents of the people accountable. Once limits are prescribed, Chief Justice Marshall stated, they may not "be passed at pleasure." It was because constitutions were bulwarks against oppression that, in his words, "written constitutions have been regarded with so much reverence."[32]

The Constitution represents fundamental choices that have been made by the people, and the task of the Courts is to effec-

28. H. S. Commager, *Documents of American History* 65 (7th ed. 1963).

29. "The colonials shared Bolingbroke's belief in the fixity of the constitution." Julius Goebel, *Antecedents and Beginnings to 1801, History of the Supreme Court of the United States,* vol. 1, p. 89 (1971). "The principle that government must be conducted in conformity with the terms of the constitution became a fundamental political conception." Id. 95.

In 1785 Madison stated that rulers "who overleap the great barrier which defends the rights of the people . . . are tyrants." 2 James Madison, *Writings of James Madison* 185 (G. Hunt ed. 1900–1910). In the Connecticut Convention Oliver Ellsworth stated, Congress may not "overleap their limits." 2 Elliot 196. For other citations, see Berger, supra note 4 at 13–14.

30. Madison stated in the Convention that "it would be a novel and dangerous doctrine that a legislature could change the constitution under which it held its existence." 2 Farrand 92. See infra Chapter 17 at notes 15–22.

31. 8 *Writings of Thomas Jefferson* 247 (P. L. Ford ed. 1892–1899).

32. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

tuate them, "not [to] construct new rights."[33] When the judiciary substitutes its own value choices for those of the people it subverts the Constitution by usurpation of power. No dispensation was given to the Court to step outside its powers; it is no less bound by constitutional limits than are the other branches, as the historical evidence makes plain. First, it was clearly excluded from participation in the making of policy, the function of the legislature.[34] No agent, said Hamilton, "can new-model his commission,"[35] and the most benign purpose does not authorize the judiciary to remodel its powers. Indeed, we need to be rid of "the illusion that personal power can be benevolently exercised."[36] The Founders knew, in Jacob Burckhardt's phrase, that "Power is of its nature evil, whoever wields it."[37] They knew, as Madison stated, that all "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."[38] "Judicial power," Justice Frankfurter remarked, "is not immune against this human weakness";[39] and the Court's progressive intrusion over the years into the domain of policymaking, from which it was plainly excluded, points the moral. Second, as Chief Justice Warren recognized, "We are oath-bound to defend the Constitution. This obligation requires that congressional enactments

33. R. J. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 8 (1971); see infra Chapter 17 at notes 34–35.

34. See infra Chapter 16 at notes 8–13.

35. "Letters of Camillus," 6 Alexander Hamilton, *Works of Hamilton* 166 (Lodge ed. 1904). This was said of the President by the foremost advocate of a "strong" presidency. See also supra note 30.

36. Thurman Arnold, "Professor Hart's Theology," 73 Harv. L. Rev. 1298, 1311 (1960).

37. Quoted in Gertrude Himmelfarb, *Victorian Minds* 185 (1968).

38. Federalist No. 48 at 321, quoted more fully supra Chapter 14 note 7.

39. Trop v. Dulles, 356 U.S. 86, 119 (1958), dissenting opinion. Justice Black stated, "The history of governments proves that it is dangerous to freedom to repose such [law-making] powers in courts." Katz v. United States, 389 U.S. 347, 374 (1967), dissenting opinion. See also supra Chapter 14 note 7, and John Dickinson, infra Chapter 16 at note 12.

be judged by the standards of the Constitution."[40] Substituted judicial made-to-order "standards" are not really the "standards of the Constitution,[41] as the State "reapportionment" cases plainly evidence. The significance of the judicial oath is illuminated by that of the President, who does not swear to defend the nation, but to "preserve and defend the Constitution,"[42] on the inarticulate premise that the life of the nation hangs on the preservation of the Constitution. Third, conclusive evidence that the judiciary was designed only to police constitutional boundaries, not to exercise supraconstitutional policymaking functions, was furnished by Hamilton. In Federalist No. 78 he stressed that the courts were to serve as "bulwarks of a limited Constitution against legislative encroachments"—a note repeatedly sounded in the subsequent Ratification Conventions.[43] The word "encroachments" posits prior legislative action; it excludes judicial policymaking initiatives on ground of legislative inaction. This is confirmed by Hamilton's statement that the judiciary "can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment."[44] Chief Justice Marshall rephrased this in unmistakable terms: the Court was only to give "effect to the

40. Trop v. Dulles, 356 U.S. at 103.

41. "[T]he choice was made by the Framers," Justice Douglas declared, "a choice which sets a standard . . . The Framers made it a standard." Rochin v. California, 342 U.S. 165, 178–179 (1952), concurring opinion. Justice Black stated that "when a 'political theory' embodied in our Constitution becomes outdated . . . a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional theory than the people of this country proceeding in the manner provided by Article V." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 678 (1966), dissenting opinion. Yet both Black and Douglas joined in the "reapportionment" decisions.

42. Article II, §1(8). Note John Adams' insistence on "exact" observance of the "fundamental principles of the constitution," supra at note 18, by which he surely included the text and the Framers' explanations.

43. Federalist at 508; Berger, supra note 4 at 12–16.

44. Federalist No. 78 at 504.

will of the legislature."[45] Hamilton rejected the argument that the courts were empowered "to construe the laws according to the *spirit* of the Constitution";[46] "penumbras formed by emanations"[47] were not for him. What he meant is made quite clear by his rejection of the notion "that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature,"[48] a statement, Louis Lusky notes, that "is hard to square with anticipation of judicial constitution-making power."[49] Finally, well aware that there existed considerable distrust of the proposal for judicial review, Hamilton sought to allay it in Federalist No. 81 by calling attention to the

> important constitutional check which the power of instituting impeachments . . . would give to that body [Congress] upon the members of the judicial department. This is alone a complete security. There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it.[50]

45. Infra Chapter 16 at note 41.

46. Federalist No. 81 at 524.

47. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Justice Douglas held that "specific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees, that give them life and substance." Webster, as A. T. Mason points out, "defines *penumbra* as a 'marginal region or borderland of partial obscurity.'" "The Burger Court in Historical Perspective," 47 N. Y. State Bar J. 87, 89 (1975). It is an odd conceit that "obscure borderland regions" lend "life and substance" to explicit guarantees. Nor does a region of "partial obscurity" offer the solid footing required for a novel intrusion into the relations of a State with its citizens that the Tenth Amendment protects.

48. Federalist No. 78 at 507. Justice Frankfurter explained that "The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process." Board of Education v. Barnette, 319 U.S. 624, 650 (1943), dissenting opinion.

49. Lusky 72.

50. Federalist at 526–527. When I first considered this provision in 1969, it was in the context of the congressional power to make "exceptions" to the

These were no idle words, for both the English and the Founders regarded "usurpation" or subversion of the Constitution as the most heinous of impeachable offenses.[51]

Today there is a tendency to reduce the Constitution to the status of a "symbol" of continuity and unity,[52] but for the Founders it was a living reality. They swore the President to "preserve and defend the Constitution" because it represented a "bulwark" of their liberties, not a mere symbol. They indited a charter which delegates power to the "servants and agents of the people,"[53] with "limits," "checks and balances" to guard against its abuse. It bears witness to the creation of a *government by consent* of the sovereign people; "just government," stated the Declaration of Independence, "is founded on the consent of the governed." The terms of that consent are spelled out in the Constitution. "The people," averred James Iredell, one of the ablest of the Founders, "have chosen to be governed under such

Supreme Court's appellate jurisdiction, while arguing that that power could not have been designed to curb judicial "excesses," citing Hamilton's statement that the impeachment provision "is the only provision on the point which is consistent with the necessary independence of the judicial character." Federalist No. 79 at 514. When I went on to quote James Wilson's statement that judges were not to be "impeached, because they decide an act null and void, that was made in defiance of the Constitution," Berger, supra note 4 at 290–291, I did not, because the point was not involved, draw the distinction between an exercise by the Court of its jurisdiction to police constitutional boundaries (infra Chapter 16 at notes 5–6, 26–27), which neither the impeachment nor the "exceptions" power can correct, and the usurpation of "legislative power," which is an impeachable offense. The meaning of usurpation was made clear by Iredell: "If Congress, under pretense of executing one power, should in fact usurp another, they will violate the Constitution." 4 Elliot 179. A congressional usurpation can be set aside by the Court; a judicial usurpation, as Hamilton stated, can be met by impeachment.

51. Raoul Berger, *Impeachment: The Constitutional Problems* 33, 39, 86 (1973).

52. A. Bickel, *The Least Dangerous Branch* 31 (1962).

53. "Those in power," said Iredell, are "servants and agents of the people." 4 Elliot 9. Archibald Maclaine stated in the North Carolina Convention that the people can "delegate power to agents." Id. 161. See Hamilton, supra at note 35.

and such principles. They have not chosen to be governed or promised to submit upon any other."[54] Substitution by the Court of its own value choices for those embodied in the Constitution violates the basic principle of government by consent of the governed. We must therefore reject, I submit, Charles Evans Hughes' dictum that "the Constitution is what the Supreme Court says it is."[55] No power to revise the Constitution under the guise of "interpretation" was conferred on the Court; it does so only because the people have not grasped the reality—an unsafe foundation for power in a government by consent.

Too much discussion of constitutional law is centered on the Court's decisions, with not enough regard for the text and history of the Constitution itself. We need to recall Justice Gibson's great statement in 1825:

> in questions of this sort, precedents ought to go for absolutely nothing. The Constitution is a collection of fundamental laws, not to be departed from in practice nor altered by judicial decision, and in the construction of it, nothing would be so alarming as the doctrine of *communis error,* which offers a ready justifica-

54. 2 McRee, supra note 19 at 146. This was powerfully stated in the First Congress by Alexander White of Virginia: "This is a Government constituted for particular purposes only; and the powers granted to carry it into effect are specifically enumerated . . . If these powers are insufficient . . . it is not . . . within our power to remedy. The people who bestowed them must grant further powers . . . This was the ground on which the friends of the Government supported the Constitution . . . [otherwise] the Constitution would never have been ratified" in Virginia. 1 *Annals of Congress* 514–515.

55. Embarrassed by this incautious remark, Hughes explained that he was not picturing interpretation "as a matter of judicial caprice." *The Autobiographical Notes of Charles Evans Hughes* 143 (D. J. Danielski and J. S. Tulchin eds. 1973). One need not charge Justices Field and Pierce Butler with "caprice"; it suffices that they sincerely identified their own predilections with constitutional dogma. Professor Frankfurter wrote to President Franklin Roosevelt that it is the Justices "who speak and not the Constitution." *Roosevelt and Frankfurter: Their Correspondence 1928–1945* 383 (M. Freedman ed. 1967).

> tion for every usurpation that has not been resisted *in limine* . . . the judge who asserts [the right of judicial review] ought to be prepared to maintain it on the principles of the Constitution.[56]

Like Chief Justice Burger and Justices Douglas and Frankfurter, I assert the right to look at the Constitution itself, stripped of judicial incrustations,[57] as the index of constitutional law and to affirm that the Supreme Court has no authority to substitute

56. Eakin v. Raub, 12 S. & R. 330 (Pa. 1825), dissenting opinion. That view was expressed by Justice Holmes and quoted by Justice Brandeis in Erie Ry. Co. v. Tompkins, 304 U.S. 64, 79 (1938) when the doctrine of Swift v. Tyson, 40 U.S. (16 Pet.) 1 (1842), was branded "an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

Justice Gibson's opinion is often regarded as impugning judicial review in the federal courts; but Gibson was careful to distinguish between the Pennsylvania Constitution (of 1790, 2 Poore 1548), which contained neither a "supremacy clause" (Article VI, §2), nor an "arising under" clause (Article III, §2), and the federal Constitution, which does. 12 S. & R. at 345, 346, 347, 356, 357. Although Gibson spoke in the context of state powers and duties, federal judges too are "bound" only by "laws" of Congress that are "consistent with the Constitution." Infra Chapter 19 at notes 18–21. Moreover, Gibson made no reference to expressions by the Founders in both the Federal and State Conventions that judicial review was contemplated, infra Chapter 19 at notes 25–28, presumably because they were not germane to the Pennsylvania Constitution under adjudication, and because they had not yet been published.

57. Chief Justice Burger "categorically" rejected the "thesis that what the Court said lately controls over the Constitution . . . By placing a premium on 'recent cases' rather than the language of the Constitution, the Court makes it dangerously simple for future Courts using the technique of interpretation to operate as a 'continuing Constitutional Convention.'" Coleman v. Alabama, 399 U.S. 1, 22–23 (1970). Justice Douglas wrote, a judge "remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put upon it." "Stare Decisis," 49 Colum. L. Rev. 735, 736 (1949). Justice Frankfurter stated that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. O'Keefe, 306 U.S. 466, 491–492 (1939), concurring opinion.

an "unwritten Constitution" for the written Constitution the Founders gave us and the people ratified.

Constitutionalism—limited government under the rule of law—was a paramount aim, not to be warped in order to achieve some predilection of any given bench. Solicitor General, later Justice, Robert H. Jackson, perceived, as Chief Justice Warren did not, that "the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy."[58] Even a celebrant of the Warren era, Thurman Arnold, stated that without a continuing pursuit of "the ideal of the rule of law we would not have a civilized government." But although he labeled it as of "tremendous importance," he viewed it as "unattainable."[59] That is a romantic view which can be invoked to shirk the attainable. Effectuation of the Fourteenth Amendment's decision to leave suffrage to the States, for example, was not "unattainable"; attainment was balked only by the Court's drive to restructure the Constitution. For the Founders "the rule of law" was no "unattainable" ideal, but a basic imperative. And so it must remain. As Charles McIlwain wrote, "The two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the

58. Jackson, *The Struggle for Judicial Supremacy* 322 (1941). And as Justice, one of the most gifted that served on the Court, Jackson "took the notion of a rule of law seriously," G. E. White, *The American Judicial Tradition* 248 (1976); he deemed it inappropriate for judges "to seize the initiative in shaping the policy of the law." And he "attacked the 'cult of libertarian judicial activists' on the Court whose attitude, he felt, 'encourage[d] a belief that judges may be left to correct the results of public indifference to the issues of liberty.'" White, id. 246.

To "engage in result-oriented jurisprudence," Leonard Levy wrote, is to leave "far behind the idea of the rule of law enforced by impersonal and impartial judges." Levy, *Against the Law* 438. Wallace Mendelson stated, "we must begin again the unending struggle for the Rule of Law, for government by something more respectable than the will of those who for the moment hold high office." *The Supreme Court: Law and Discretion* 40 (1967).

59. Arnold, supra note 36 at 1311.

legal limits to arbitrary power and a complete responsibility of government to the governed."[60]

If this be arid legalism, it was shared by Washington, who stated in his Farewell Address:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.[61]

It is because Americans continue to regard the Constitution as the bulwark of their liberties that they hold it in reverence. "[E]very breach of the fundamental laws, though dictated by necessity," said Hamilton, "impairs the sacred reverence which ought to be maintained in the breasts of the rulers towards the constitution."[62]

60. *Constitutionalism: Ancient and Modern* 146 (rev. ed. 1947).
61. 35 G. Washington, *Writings* 228–229 (J. Fitzpatrick ed. 1940).
62. Federalist No. 25 at 158.

APPENDIX H

"THE CONSTITUTION OF THE UNITED STATES: CONTEMPORARY RATIFICATION"

Presentation of
William J. Brennan, Jr.

Associate Justice
Supreme Court of the United States

Text and Teaching Symposium
Georgetown University
Washington, D.C.
October 12, 1985

TEXT AND TEACHING SYMPOSIUM

I am deeply grateful for the invitation to participate in the "Text and Teaching" symposium. This rare opportunity to explore classic texts with participants of such wisdom, acumen and insight as those who have preceded and will follow me to this podium is indeed exhilarating. But it is also humbling. Even to approximate the standards of excellence of these vigorous and graceful intellects is a daunting task. I am honored that you have afforded me this opportunity to try.

It will perhaps not surprise you that the text I have chosen for exploration is the amended Constitution of the United States, which, of course, entrenches the Bill of Rights and the Civil War amendments, and draws sustenance from the bedrock principles of another great text, the Magna Carta. So fashioned, the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text. The encounter with the Constitutional text has been, in many senses, my life's work.

My approach to this text may differ from the approach of other participants in this symposium to their texts. Yet such differences may themselves stimulate reflection about what it is we do when we "interpret" a text. Thus I will

attempt to elucidate my approach to the text as well as my substantive interpretation.

Perhaps the foremost difference is the fact that my encounters with the constitutional text are not purely or even primarily introspective; the Constitution cannot be for me simply a contemplative haven for private moral reflection. My relation to this great text is inescapably public. That is not to say that my reading of the text is not a personal reading, only that the personal reading perforce occurs in a public context, and is open to critical scrutiny from all quarters.

The Constitution is fundamentally a public text—the monumental charter of a government and a people—and a Justice of the Supreme Court must apply it to resolve public controversies. For, from our beginnings, a most important consequence of the constitutionally created separation of powers has been the American habit, extraordinary to other democracies, of casting social, economic, philosophical and political questions in the form of law suits, in an attempt to secure ultimate resolution by the Supreme Court. In this way, important aspects of the most fundamental issues confronting our democracy may finally arrive in the Supreme Court for judicial determination. Not infrequently, these are the issues upon which contemporary society is most deeply divided. They arouse our deepest emotions. The main burden of my twenty-nine Terms on the Supreme Court has thus been to wrestle with the Constitution in this heightened public context, to draw meaning from the text in order to resolve public controversies.

Two other aspects of my relation to this text warrant mention. First, constitutional interpretation for a federal judge is, for the most part, obligatory. When litigants approach the bar of court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions. Unlike literary critics, judges cannot merely savor the tensions or revel in the ambiguities inhering in the text—judges must resolve them.

Second, consequences flow from a Justice's interpretation in a direct and immediate way. A judicial decision respecting the incompatibility of Jim Crow with a constitutional guarantee of equality is not simply a contemplative exercise in defining the shape of a just society. It is an order—supported by the full coercive power of the State—that the present society change in a fundamental aspect. Under such circumstances the process of deciding can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge. We Justices are certainly aware that we are not final because we are infallibe; we know that we are infallible only because we are final. One does not forget how much may depend on the decision. More than the litigants may be affected. The course of vital social, economic and political currents may be directed.

These three defining characteristics of my relation to the constitutional text—its public nature, obligatory character, and consequentialist aspect—cannot help but influence the way I read that text. When Justices interpret the Constitution they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought. Justices are not platonic guardians appointed to wield authority according to their personal moral predelictions. Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate. The source of legitimacy is, of course, a wellspring of controversy in legal and political circles. At the core of the debate is what the late Yale Law School professor Alexander Bickel labeled "the counter-majoritarian difficulty." Our commitment to self-governance in a representative democracy must be reconciled with vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law. Because judicial power resides in the authority to give

meaning to the Constitution, the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation.

There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can guage accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states?—or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states. And apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive. One cannot help but speculate that the chorus of lamentations calling for interpretation faithful to "original intention"—and proposing nullification of interpretations that fail this quick litmus test—must inevitably come from persons who have no familiarity with the historical record.

Perhaps most importantly, while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should not escape notice. A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in

effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation—if there is such a thing as the "nature" of interpretation—commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the minority to rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.

Another, perhaps more sophisticated, response to the potential power of judicial interpretation stresses democratic theory: because ours is a government of the people's elected representatives, substantive value choices should by and large be left to them. This view emphasizes not the transcendant historical authority of the framers but the predominant contemporary authority of the elected branches of government. Yet it has similar consequences for the nature of proper judicial interpretation. Faith in the majoritarian process counsels restraint. Even under more expansive formulations of this approach, judicial review is appropriate only to the extent of ensuring that our democratic process functions smoothly. Thus, for example, we would protect freedom of speech merely to ensure that the people are heard by their representatives, rather than as a separate, substantive value. When, by contrast, society tosses up to the Supreme Court a dispute that would require invalidation of a legislature's substantive policy choice, the Court generally would stay its hand because the Constitution was meant as a plan of government and not as an embodiment of fundamental substantive values.

The view that all matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do. Unabashed enshrinement of majority will would permit the imposition of a social caste system or wholesale confiscation

of property so long as a majority of the authorized legislative body, fairly elected, approved. Our Constitution could not abide such a situation. It is the very purpose of a Constitution—and particularly of the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities. The majoritarian process cannot be expected to rectify claims of minority right that arise as a response to the outcomes of that very majoritarian process. As James Madison put it:

> "The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority." (I Annals 437).

Faith in democracy is one thing, blind faith quite another. Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature. Obvious are the separation of powers; the privilege of the Writ of Habeas Corpus; prohibition of Bills of Attainder and ex post facto laws; prohibition of cruel and unusual punishments; the requirement of just compensation for official taking of property; the prohibition of laws tending to establish religion or enjoining the free exercise of religion; and, since the Civil War, the banishment of slavery and official race discrimination. With respect to at least such principles, we simply have not constituted ourselves as strict utilitarians. While the Constitution may be amended, such amendments require an immense effort by the People as a whole.

To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned funda-

mental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices. Each generation has the choice to overrule or add to the fundamental principles enunciated by the Framers; the Constitution can be amended or it can be ignored. Yet with respect to its fundamental principles, the text has suffered neither fate. Thus, if I may borrow the words of an esteemed predecessor, Justice Robert Jackson, the burden of judicial interpretation is to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century." (Barnette, 319 U. S. at 639).

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. This realization is not, I assure you, a novel one of my own creation. Permit me to quote from one of the opinions of our Court, *Weems* v. *United States*, 217 U. S. 349, written nearly a century ago:

> "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief

> which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice John Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophesy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.

Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War Amendments to the charter—abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote—we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of slave caste.

Having discussed at some length how I, as a Supreme Court Justice, interact with this text, I think it time to turn to the fruits of this discourse. For the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law. Some reflection is perhaps required before this can be seen.

The Constitution on its face is, in large measure, a structuring text, a blueprint for government. And when the text is not presribing the form of government it is limiting the powers of that government. The original document, before addition of any of the amendments, does not speak primarily of the rights of man, but of the abilities and disabilities of government. When one reflects upon the text's preoccupation with the scope of government as well as its shape, however, one comes to understand that what this text is about is the relationship of the individual and the state. The text

marks the metes and bounds of official authority and individual autonomy. When one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitution.

As augmented by the Bill of Rights and the Civil War Amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual. And this vision manifests itself most dramatically in the specific prohibitions of the Bill of Rights, a term which I henceforth will apply to describe not only the original first eight amendments, but the Civil War amendments as well. It is a vision that has guided us as a people throughout our history, although the precise rules by which we have protected fundamental human dignity have been transformed over time in response to both transformations of social condition and evolution of our concepts of human dignity.

Until the end of the nineteenth century, freedom and dignity in our country found meaningful protection in the institution of real property. In a society still largely agricultural, a piece of land provided men not just with sustenance but with the means of economic independence, a necessary precondition of political independence and expression. Not surprisingly, property relationships formed the heart of litigation and of legal practice, and lawyers and judges tended to think stable property relationships the highest aim of the law.

But the days when common law property relationships dominated litigation and legal practice are past. To a growing extent economic existence now depends on less certain relationships with government—licenses, employment, contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated before this century, when a man's

answer to economic oppression or difficulty was to move two hundred miles west. Now hundreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state.

In general, problems of the relationship of the citizen with government have multiplied and thus have engendered some of the most important constitutional issues of the day. As government acts ever more deeply upon those areas of our lives once marked "private," there is an even greater need to see that individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the "public good." And as government continues in its role of provider for so many of our disadvantaged citizens, there is an even greater need to ensure that government act with integrity and consistency in its dealings with these citizens. To put this another way, the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands, and this growth, in turn, heightens the need for constant vigilance at the collision points. If our free society is to endure, those who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage. Such recognition will not come from a technical understanding of the organs of government, or the new forms of wealth they administer. It requires something different, something deeper—a personal confrontation with the well-springs of our society. Solutions of constitutional questions from that perspective have become the great challenge of the modern era. All the talk in the last half-decade about shrinking the government does not alter this reality or the challenge it imposes. The modern activist state is a concomitant of the complexity of modern society; it is inevitably with us. We must meet the challenge rather than wish it were not before us.

The challenge is essentially, of course, one to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure. During the time of my public service this challenge has largely taken shape within the confines of the interpretive question whether the specific guarantees of the Bill of Rights operate as restraints on the power of State government. We recognize the Bill of Rights as the primary source of express information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundation of America's freedoms. Each is a protection with centuries of history behind it, often dearly bought with the blood and lives of people determined to prevent oppression by their rulers. The first eight Amendments, however, were added to the Constitution to operate solely against federal power. It was not until the Thirteenth and Fourteenth Amendments were added, in 1865 and 1868, in response to a demand for national protection against abuses of state power, that the Constitution could be interpreted to require application of the first eight amendments to the states.

It was in particular the Fourteenth Amendment's guarantee that no person be deprived of life, liberty or property without process of law that led us to apply many of the specific guarantees of the Bill of Rights to the States. In my judgment, Justice Cardozo best captured the reasoning that brought us to such decisions when he described what the Court has done as a process by which the guarantees "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorbtion ... [that] has had its source in the belief that neither liberty nor justice would exist if [those guarantees] ... were sacrificed." (Palko, 302 U. S., at 326). But this process of absorbtion was neither swift nor steady. As late as 1922 only the Fifth Amendment guarantee of just compensation for official taking of property had been given force against the states. Between then and 1956 only the First Amendment guarantees of speech and conscience and

the Fourth Amendment ban of unreasonable searches and seizures had been incorporated—the latter, however, without the exclusionary rule to give it force. As late as 1961, I could stand before a distinguished assemblage of the bar at New York University's James Madison Lecture and list the following as guarantees that had not been thought to be sufficiently fundamental to the protection of human dignity so as to be enforced against the states: the prohibition of cruel and unusual punishments, the right against self-incrimination, the right to assistance of counsel in a criminal trial, the right to confront witnesses, the right to compulsory process, the right not to be placed in jeopardy of life or limb more than once upon accusation of a crime, the right not to have illegally obtained evidence introduced at a criminal trial, and the right to a jury of one's peers.

The history of the quarter century following that Madison Lecture need not be told in great detail. Suffice it to say that each of the guarantees listed above has been recognized as a fundamental aspect of ordered liberty. Of course, the above catalogue encompasses only the rights of the criminally accused, those caught, rightly or wrongly, in the maw of the criminal justice system. But it has been well said that there is no better test of a society than how it treats those accused of transgressing against it. Indeed, it is because we recognize that incarceration strips a man of his dignity that we demand strict adherence to fair procedure and proof of guilt beyond a reasonable doubt before taking such a drastic step. These requirements are, as Justice Harlan once said, "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." (Winship, 397 U. S., at 372). There is no worse injustice than wrongly to strip a man of his dignity. And our adherence to the constitutional vision of human dignity is so strict that even after convicting a person according to these stringent standards, we demand that his dignity be infringed only to the extent appropriate to the crime and never by means of wanton infliction of pain or deprivation. I

interpret the Constitution plainly to embody these fundamental values.

Of course the constitutional vision of human dignity has, in this past quarter century, infused far more than our decisions about the criminal process. Recognition of the principle of "one person, one vote" as a constitutional one redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process. Recognition of so-called "new property" rights in those receiving government entitlements affirms the essential dignity of the least fortunate among us by demanding that government treat with decency, integrity and consistency those dependent on its benefits for their very survival. After all, a legislative majority initially decides to create governmental entitlements; the Constitution's Due Process Clause merely provides protection for entitlements thought necessary by society as a whole. Such due process rights prohibit government from imposing the devil's bargain of bartering away human dignity in echange for human sustenance. Likewise, recognition of full equality for women—equal protection of the laws—ensures that gender has no bearing on claims to human dignity.

Recognition of broad and deep rights of expression and of conscience reaffirm the vision of human dignity in many ways. They too redeem the promise of self-governance by facilitating—indeed demanding—robust, uninhibited and wide-open debate on issues of public importance. Such public debate is of course vital to the development and dissemination of political ideas. As importantly, robust public discussion is the crucible in which personal political convictions are forged. In our democracy, such discussion is a political duty; it is the essence of self government. The constitutional vision of human dignity rejects the possibility of political orthodoxy imposed from above; it respects the right of each individual to form and to expresses political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite. Recognition of these rights of expression and conscience also

frees up the private space for both intellectual and spiritual development free of government dominance, either blatant or subtle. Justice Brandeis put it so well sixty years ago when he wrote: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." (Whitney, 274 U. S., at 375).

I do not mean to suggest that we have in the last quarter century achieved a comprehensive definition of the constitutional ideal of human dignity. We are still striving toward that goal, and doubtless it will be an eternal quest. For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve.

Indeed, I cannot in good conscience refrain from mention of one grave and crucial respect in which we continue, in my judgment, to fall short of the constitutional vision of human dignity. It is in our continued tolerance of State-administered execution as a form of punishment. I make it a practice not to comment on the constitutional issues that come before the Court, but my position on this issue, of course, has been for some time fixed and immutable. I think I can venture some thoughts on this particular subject without transgressing my usual guideline too severely.

As I interpret the Constitution, capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. This is a position of which I imagine you are not unaware. Much discussion of the merits of capital punishment has in recent years focused on the potential arbitrariness that attends its administration, and I have no doubt that such arbitrariness is a grave wrong. But for me, the wrong of capital punishment transcends such procedural issues. As I have said in my opinions, I view the Eighth Amendment's probition of cruel and unusual punishments as embodying to a unique degree moral principles that substantively restrain the punishments

our civilized society may impose on those persons who transgress its laws. Foremost among the moral principles recognized in our cases and inherent in the prohibition is the primary principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. Death for whatever crime and under all circumstances is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the State from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, indeed, "cruel and unusual." It is thus inconsistent with the fundamental premise of the Clause that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity.

This is an interpretation to which a majority of my fellow Justices—not to mention, it would seem, a majority of my fellow countrymen—does not subscribe. Perhaps you find my adherence to it, and my recurrent publication of it, simply contrary, tiresome, or quixotic. Or perhaps you see in it a refusal to abide by the judicial principle of *stare decisis*, obedience to precedent. In my judgment, however, the unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of *stare decisis*. Because we are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive, again, to the anachronistic views of long-gone generations. I mentioned earlier the judge's role in seeking out the community's interpretation of the Constitutional text. Yet, again in my judgment, when a Justice perceives an interpretation of the text

to have departed so far from its essential meaning, that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path. On this issue, the death penalty, I hope to embody a community striving for human dignity for all, although perhaps not yet arrived.

You have doubtless observed that this description of my personal encounter with the constitutional text has in large portion been a discussion of public developments in constitutional doctrine over the last quarter century. That, as I suggested at the outset, is inevitable because my interpretive career has demanded a public reading of the text. This public encounter with the text, however, has been a profound source of personal inspiration. The vision of human dignity embodied there is deeply moving. It is timeless. It has inspired Americans for two centuries and it will continue to inspire as it continues to evolve. That evolutionary process is inevitable and, indeed, it is the true interpretive genius of the text.

If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. For the political and legal ideals that form the foundation of much that is best in American institutions—ideals jealously preserved and guarded throughout our history—still form the vital force in creative political thought and activity within the nation today. As we adapt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit is inherent in the aspirations of our people.

APPENDIX I

"THE FOURTEENTH AMENDMENT"

Address to

Section on Individual Rights and Responsibilities

American Bar Association

by

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August 8, 1986

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My subject today is the Fourteenth Amendment which, in the 119 years since it became a part of the fundamental law, "has become, practically speaking, perhaps our most important constitutional provision — not even second in significance to the original basic document itself. ... It is the amendment that served as the legal instrument of the egalitarian revolution that transformed contemporary American Society."[1] Its progenitor was, of course, Magna Carta, more particularly the famous Chapter 39 of the Great Charter providing that "no free man shall be taken, imprisoned, disseized, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers by the law of the land." Indeed, however, the Fourteenth Amendment is a more complete catalogue than the great Charter of the liberties we know today. Notably, nothing in the Great Charter concerned freedom of religion, of speech, or of the press. Nor is the Great Charter itself free of sex discrimination, providing as it does, that "no one shall be taken or imprisoned upon the appeal of a woman for the death of anyone except her husband."

Yes, once the Supreme Court recognized that every individual in our country possessed a domain of personal autonomy and dignity in which neither state nor federal government had any right to intrude, it was inevitable that the Fourteenth Amendment should be summoned to the service of the protection of a broad range of civil rights and liberties.

Is this mere hyperbole and exaggeration? I do not think so. Remember that "From the founding of the Republic to the end of the War Between the States, it was the states that were the primary guardians of their citizens' rights and liberties and they alone could determine the character and extent of such rights. This was true because the Bill of Rights was binding upon the federal government alone — not the states. With the Fourteenth Amendment, all this was altered. That amendment called upon the national government to protect the citizens of a state against the state itself. Thenceforth, the safeguarding of civil rights was to become primarily a federal function. . . ."[2] — at least until the discovery recently by state supreme courts of their state constitutions.

But the federal responsibility was not immediately shouldered by the federal courts upon adoption of the amendment in 1868. Rather, the amendment became a "Magna Carta for business, in place of the Great Charter for individual rights which its framers had intended. It is, indeed, one of the ironies of American constitutional history that, for the better part of a century [after its adoption], the Fourteenth Amendment was of little practical help to the very race for whose benefit it was enacted. For at the very time it was serving to

[1]The Fourteenth Amendment, Centennial Volume, N.Y.U. Press, p. 29

[2]*Id.*, p. 31

shield the excesses of expanding capital from governmental restraints. . . . The constitutional emphasis however . . . shifted in this century to one of ever-growing concern for 'life and liberty' as the really basic rights which the Constitution was meant to safeguard. The earlier stress upon the protection of *property* rights against governmental violations of due process gave way to one which increasingly focused upon *personal* rights. Under the newer approach, the Fourteenth Amendment would at last become (as it framers intended) the shield of individual liberties throughout the nation."[3] *Brown v. Board of Education* and *Baker* v. *Carr* are only the most visible proofs. Of equal — maybe even more — significance were the holdings that "the Fourteenth Amendment's requirement of due process . . . demands adherence by the states to most of the rights guaranteed in the Bill of Rights . . . our great unifying theme in these decisions was that of equality; equality as between races, between citizens, between rich and poor, between prosecutor and defendant."[4] effected the "most profound and pervasive revolution ever achieved by substantially peaceful means."[5] And in the area of political rights, it has been said that this "constitutional development brought more significant advances in the protection and advancement of political rights than all the rest of our constitutional history put together . . . voting rights were vastly enlarged, to the great advantage of Negro and Puerto Rican minority groups, and to the great benefit of the Nation; poll taxes were eliminated, first in federal elections by the Twenty-fourth Amendment, and then in state elections on equal protection grounds. Literacy tests that were used for discriminatory purposes were ruled invalid. . . . Perhaps most important of all, the distortions in the governing process caused by minority-controlled legislatures were put aside as malapportionment became a matter of history rather than a fact of present contentions."[6] And, importantly for champions of civil rights and liberties, under many decisions "the Fourteenth Amendment was the source for making the Constitution not only color-blind, but also creed-blind, status-blind, and sex-blind. The law regards man as man and takes no regard of those traits which are constitutional irrelevances."[7]

What accounts for the change? I agree with those who believe that the concern of the Supreme Court over the past 50 years for personal rights "represented a direct judicial reaction to the vast concentrations of power confronting the individual in our urbanized industrial society. In that society judges developed a countervailing emphasis upon preserving an area of personal right consistent with the maintenance of individual development. Such emphasis

[3] *Id.*, p. 31-32

[4] *Id.*, p. 33

[5] *Id.*, p. 34

[6] *Id.*, p. 70

[7] *Id.*, p. 37

... was vital if man was to continue to possess the essential attributes to humanity 'lacking which' as William Faulkner puts it, 'he cannot be an individual and lacking which individuality he is not worth the having or keeping."[8] Judges, like all of you, necessarily disturbed by the growth of authority, sought to "preserve a sphere for individuality even in a society in which the individual stands dwarfed, if not overwhelmed, in the face of the power concentrations that confront him in the contemporary community."[9]

Were there a list of principles fundamental to the functioning of a free republic, it would, in addition to guaranteeing that no citizen would be denied an education, a house, or a job on account of the color of his skin, certainly include an assurance that each citizen's vote would count no more or no less than that of any other citizen, that his government would take no voice in or interfere with his religion, that he would enjoy freedom of speech and a free press, and that the administration of criminal laws would adhere to civilized standards of fairness and decency. The Fourteenth Amendment has proved to be capable of assuring all of these things. In sum, it can function as the prime tool by which we as citizens can shape a society which truly champions the dignity and worth of the individual as its supreme value.

It is true that, in the first half century of its existence, its function as a document of human freedom lay dormant; it was employed instead as a weapon by which to censor and strike down economic regulatory legislation of the States. This was in step with the compromise which settled the Hayes-Tilden presidential election of 1876. That compromise postponed the enforcement of the Fourteenth Amendment in behalf of the Negro, a result furthered by the decisions of the Supreme Court which invalidated the Civil Rights Act of 1875 and held that separate but equal facilities satisfied the demands of the equal protection clause. In the last half century, however, the construction and application given the amendment by the federal judiciary started to put it back on the track and assure that it would come into its own.

For Congress left primarily to the federal judiciary the tasks of defining what constitutes a denial of "due process of law" or "equal protection of the laws" and of applying the amendment's prohibitions as so defined where compliance counted, that is, against the excesses of state and local governments. Congress saw that to accord state and local governments immunity from effective federal court review would be to render the great guarantees nothing more than rhetoric. Congress did not use its §5 powers to define the amendment's guarantees, but confined its role to the adoption of measures to enforce the guarantees as interpreted by the judiciary. And, of course, §5 grants

[8] *Id.*, p. 35

[9] *Id.*, p. 35

Congress no power to restrict, abrogate or dilute the guarantees as judicially construed.[10]

Congress' investiture of the federal judiciary with broad power to enforce the limits imposed by the amendment reflects acceptance of two fundamental propositions. First, it demonstrates a recognition that written guarantees of liberty are mere paper protections without a judiciary to define and enforce them. Second, it reflects acceptance of the lesson taught by the history of man's struggle for freedom that only a truly independent judiciary can properly play the role of definer and enforcer.

Contrast, for example, the Universal Declaration of Human Rights in the Charter of the United Nations, which expresses in ringing words moral condemnation of the tragedy suffered by countless human beings over the face of the globe who are deprived of their liberty without accusation, without trial, upon nothing but the fiat of sovereign government. The forthright prohibition of Article IX, solemnly joined by all the signatory powers, is that "No one shall be subject to arbitrary arrest, detention, or exile." But that has been no more than empty rhetoric, and must remain so, without an international tribunal and procedure to hold an offending signatory state to compliance with these great principles. As things stand, concepts of personal and territorial supremacy — national sovereignty — leave each member state free to grant its nationals only that measure of due process provided by its own laws, however far short that measure is of the standard of the Universal Declaration.

Contrast the way the declaration of similar substantive rights in the Fourteenth Amendment has been made meaningful by a system of judicial enforcement. Our concepts of due process in criminal proceedings are familiar to every American: a prompt and speedy trial, legal assistance (provided by government in the case of the indigent), prohibition of any kind of undue coercion or influence, freedom to conduct one's own defense, the right to a public trial and written proceedings, the presumption of innocence and the burden upon government to prove guilt beyond a reasonable doubt, and security against cruel and unusual punishments. Congress has ordained that the federal courts shall redress denial by any of the state of these standards of due process. In 1867, contemporaneously with its proposal of the Fourteenth Amendment to the states, Congress extended the ancient writ of *habeas corpus* — that most important writ to a free people, affording as it does a swift and imperative remedy in cases of illegal restraint of confinement — to any person claiming to be held in custody by a state in violation of the Constitution or laws or treaties of the United States.[11] The individual simply petitions a federal court to hear his

[10] *See Katzenbach* v. *Morgan*, 384 U.S. 643, 651, n. 10 (1966)

[11] 14 Stat. 385 (1867); see *Fay* v. *Noia*, 372 U.S. 391 (1963)

claim that his detention by a state is a violation of federal guarantees. It avails the state nothing that the detention does no violence to state law or the state constitution. The guarantees of the federal Constitution are the higher law. It is true that the federal court will not hear a state prisoner who has not first exhausted any available state remedies for decision of his federal claims. For upon the state courts equally with the federal courts rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States. However, the state prisoner is not precluded from seeking federal relief by any determination of a state court that his federal claim has no merit. The prisoner may seek review of that holding in the federal courts, including the Supreme Court of the United States. Since he seeks his release on a claim of unconstitutional denial or a right secured to him by the federal Constitution, the last word as to its merits is for federal and not state tribunals.

In other words, Congress has provided a suprastate procedure for vindicating the guarantees which are the foundation of our free society. A most important corollary effect of the existence of this suprastate remedy is the incentive given to the judiciaries of the several states to secure every person against invasion of the rights guaranteed him by the basic law of the land.

When Congress decided to rely on the federal judiciary to define and enforce the guarantees of the Fourteenth Amendment, it was in effect acknowledging the peculiar competence of that branch of government to perform such tasks.

The Constitutional Convention had overwhelmingly rejected a proposal which would have provided that judges "may be removed by the Executive on the application by the Senate and House of Representatives." We must, therefore, take it that the post-Civil War Congress, in enormously expanding federal judicial power to enable the federal courts effectively to enforce the new constitutional limits on state authority, fully expected that an independent federal judiciary would regard it a solemn duty to interpret and apply the new constitutional restraints in the spirit and sense intend by their framers, however unpopular with local authority or majority sentiment. Such expectation is, after all, the heart of our constitutional plan of judicially enforceable restraints.

The judicial task in defining and enforcing the Fourteenth Amendment was made particularly formidable by the patent ambiguity of the terms "due process of law" and "equal protection of the laws." By design, the great clauses of the Constitution had been broadly phrased to keep their noble principles adaptable to changing conditions and changing concepts of social justice, but "due process of law" and "equal protection of the law" were particularly empty vessels. In Cardozo's words, they are "of the greatest generality."

It is true that the term "due process of law" derives from Magna Carta. It is the equivalent of the term, the "law of the land." But the Supreme Court from the beginning rejected the notion that "due process of law," as used in either the Fifth or Fourteenth Amendments, embraced nothing except what constituted the "law of the land," as sanctioned by settled usage in England or in this country. In a case decided in 1884, when the amendment was but 16 years old, the Court said:

> . . . to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.
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> . . . it is better not to go too far back into antiquity for the best securities for our "ancient liberties." It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstance and situation of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.[12]

Congress had not yet chosen to exercise its power under section 5 of the amendment fully to enlighten us as to the constitutional goals that should be further in applying the amendment's restraints; nor is the judiciary confined to discovering how the framers would have construed and applied those restraints. In the word of Chief Justice Hughes,

> if by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carried its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning — "We must never forget that it is a *constitution* we are expounding" (*McCulloch* v. *Maryland* . . .) — "a constitution intended to endure for ages to come and consequently, to be adapted to the various *crises* of human affairs." . . . When we are dealing with the words of the Constitution, said this court in *Missouri* v. *Holland* . . . "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be

[12] *Hurtado* v. *California*, 110 U.S. 516, 529. 530 (1884)

> considered in the light of our whole experience and not merely in that of what was said a hundred years ago." [13]

In giving meaning to the term "due process of law" and "equal protection of the laws," federal judges have so far been aware, as Judge Learned Hand admonished,

> that there are before them more than verbal problems; more than final solution cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which makes [sic] it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined. [14]

This approach of the federal judiciary promised the country to make the Fourteenth Amendment a potent tool in the attack upon the central problem of the Twentieth Century in our country. Society's overriding concern today should continue to be, indeed *must* continue to be, providing freedom and equality, in a realistic and not merely formal sense, to all the people of this Nation. We know that social realities do not yet fully correspond to the promise of the Fourteenth Amendment. We do not yet have justice, equal and practical, for the poor, for the members of minority groups, for the criminally accused, for the displaced persons of the technological revolution, for alienated youth, for the urban masses, for the unrepresented consumer — for all, in short, who do not partake of the abundance of American life. Congress and the federal judiciary have done much in recent years to close the gap between promise and fulfillment, but who will deny that despite this great progress the goal of universal equality, freedom and prosperity is far from won and that ugly inequities continue to mar the face of our nation? We are surely nearer the beginning than the end of the struggle.

And the struggle is once again putting at stake the substance of the Fourteenth Amendment. It is a seething, roaring conflict in our society, and among judges. "The battle is fought, as always, as a conflict over the meaning of the great phrases of the amendment — due process, equal protection of the laws, and privileges and immunities of citizens of the United States; and it rages as a conflict over the respective powers of the national and state governments. . . . Throughout its [more than a] century of existence, the Fourteenth Amendment has meant many things to many men. Men of equal integrity, of equal devotion to freedom and liberty and patriotism, have arrive at fundamentally different interpretations of its words and principles. No one familiar with the judicial

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[13] *Home Building and Loan Assn* v. *Blaisdell*, 290 U.S. 398, 442 (1934)

[14] Hand, *Sources of Tolerance*, 79 U. Pa. L. Rev. 1, 13 (1930)

opinions or the scholarly literature would assert the contrary.[15] A reason for alarm is that in the face of signs of negation once again "one can't avoid thinking that perhaps there is a sad parallel between [the post-Civil War period] and now: Is the curve of events, this time, to retrace that which followed the Civil War?"[16] Then, at the same time the Supreme Court was engaged in major expansion of the amendment's scope on behalf of the property interests, it was involved in a drastic curtailment of its scope with respect to the amendment's intended beneficiaries — the Negroes or freedmen . . . we can hardly avoid a sigh of regret for what might have been: If the Supreme Court had not emasculated the amendment; if Justice Miller had voted the other way in the *Slaughterhouse* cases and thereby turned the majority around; if the elder Harlan's lone dissent in the *Civil Rights* cases had prevailed; if the Fourteenth Amendment had not lain substantially dormant as a document of human freedom until at least the 1930's. . . . If, rather, the amendment had been faithfully applied as it was intended; to insure by governmental action, national and local, that all men and women were secure — and secure equally — in their fundamental rights to life, li[1] rty and property; if this had been the course of history;[17] perhaps we would not have reason today uneasily to ask "Will the new commitment, begun most dramatically in 1954 to enforcement of fundamental and equal rights for all be reduced once again to a "feeble promise of maybe, sometimes and only in some respects."[18] Even though "the great command of the Fourteenth Amendment — equality under the rule of law, protecting the fundamental rights of humanity — is basic in our religious and ethical ideals,"[19] — and has been enforced primarily by the judicial branch — history can repeat itself; it has happened before — and more than once.

But if we do stand at the threshold of a time that "will usher in a new and savage struggle between freedom's believers and its destroyers"[20] the ultimate outcome may well depend on the response of the Bar — not only of you of this Section already committed to protection of individual rights, but also of lawyers throughout the land. I personally have faith that freedom will survive and that the Fourteenth Amendment's great principles will flourish." But they will successfully resist impending onslaught only as [lawyers] have the courage to understand and acknowledge their meaning; . . . have courage to acknowledge their ambiguities and uncertainties as well as their positive commands; only as they understand our history; and only as they and all of us have the faith and

[15] *The Fourteenth Amendment, supra,* n. 1, 100

[16] *Id.*, 112

[17] *Id.*, 102

[18] *Id.*

[19] *Id.*, at 112

[20] *Id.*, at 114

courage to defend freedom and justice and equality and to stand steadfastly and unmoving against those who, in whatever guise, seek nullification of the great principles of our American Constitution."[21]

And we must not be beguiled with thinking that, because state supreme courts are increasingly evaluating their state constitutions and concluding that those constitutions should be applied to confer greater civil liberties than their federal counterparts, we can safely ignore the deterioration being worked on Fourteenth Amendment protection. We can and should welcome this development in state constitutional jurisprudence — indeed, my own view is that this rediscovery by state supreme courts of the broader protection afforded their own citizens by their state constitutions — spawned in part certainly by dissatisfaction with the decisional law being announced these days by the United States Supreme Court — is probably the most important development in constitutional jurisprudence of our times. For state constitutional law will assume an increasingly more visible role in American law in the years ahead. Lawyers should take heed: Justice Hans Linde of the Oregon Supreme Court has said, for example: "A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice." Welsh & Collins, "Taking State Constitutions Seriously." The Center Mag. 6, 12 (Sept., Oct. 1981).

But this most welcome development does not mean that we can stop resisting cut-backs, particularly by the Supreme Court of the United States, of Fourteenth Amendment protection. One of the great strengths of our federal system is that it provides a double source of protection for the liberties of our citizens. Federalism is not served when the federal half of that protection is crippled.

[21] *Id.*

☆U.S. G.P.O. 1988-202-046:02154