

IT IS A CONSTITUTION WE ARE EXPOUNDING

*Collected Writings on Interpreting
Our Founding Document*

FOREWORD BY LAURENCE H. TRIBE



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TABLE OF CONTENTS

Foreword..... 7

Introduction 10

Framework

1. *from* Laurence H. Tribe, *American Constitutional Law*,
Chapter 1, “Approaches to Constitutional Analysis” 20

Text and Structure

2. *from* Lawrence Lessig, “Fidelity in Translation” 36

3. *from* *McCulloch v. Maryland*, 17 U.S. 316 (1819),
opinion of Chief Justice Marshall 51

4. *from* Akhil Reed Amar, “Intratextualism” 57

History

5. *from* Robert H. Bork, *The Tempting of America*:
The Political Seduction of the Law, Chapter 7,
“The Original Understanding” 74

6. *from* Richard A. Posner, “Bork and Beethoven” 85

7. *from* Jack M. Balkin, “Abortion and Original Meaning” 100

8. *from* Mitchell N. Berman, “Originalism and its Discontents
(Plus a Thought or Two About Abortion)” 114

9. *from* Anthony G. Amsterdam,
“Perspectives on the Fourth Amendment” 122

10. *from* Suzanna Sherry, “The Founders’ Unwritten Constitution” 128

Values

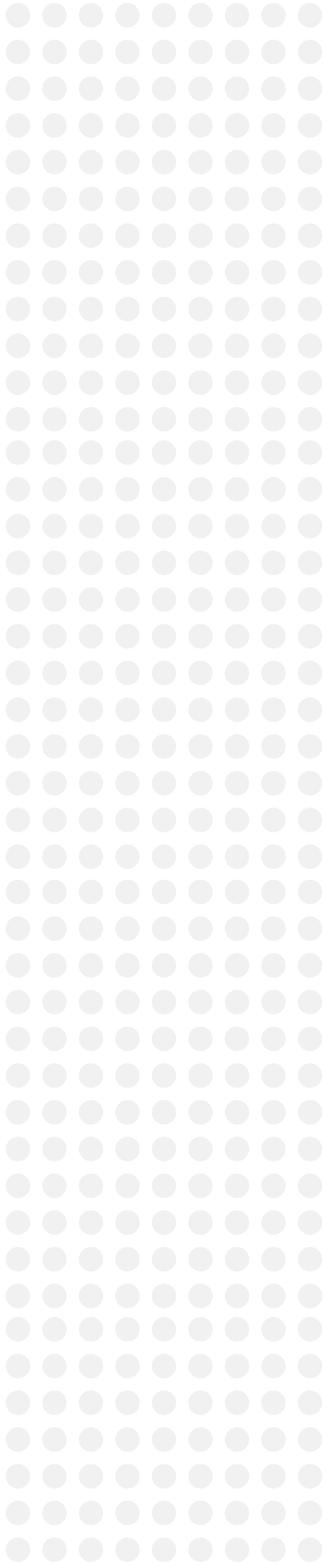
11. Thurgood Marshall, “Reflections on the Bicentennial
of the U.S. Constitution” 142

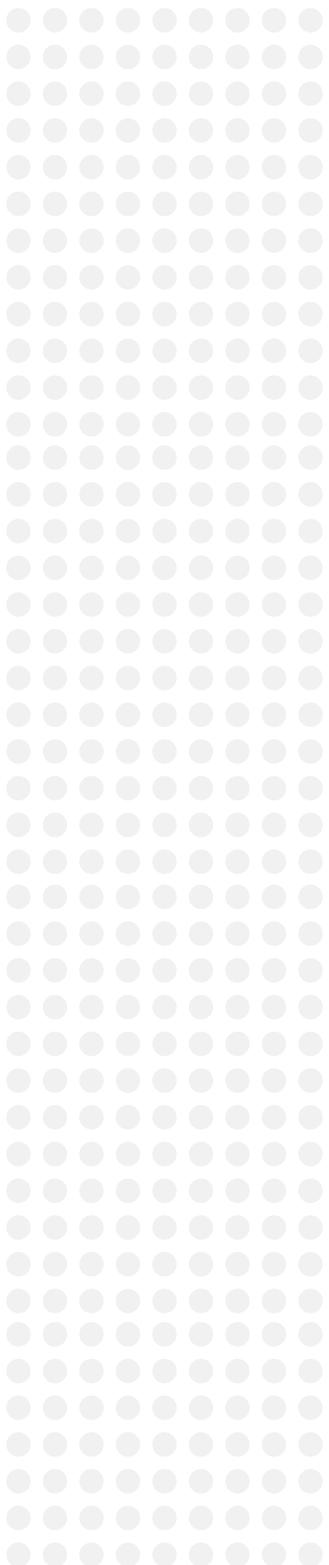
12. *from* William J. Brennan, Jr., “The Constitution of the
United States: Contemporary Ratification” 147

Precedent

13. *from* David Strauss, “Common Law
Constitutional Interpretation” 158

14. *from* *Lawrence v. Texas*, 539 U.S. 558 (2003),
opinion of Justice Kennedy 172





Consequences

15. *from Parents Involved in Community Schools v. Seattle School District No. 1, et al.*, 551 U.S. 701 (2007),
dissenting opinion of Justice Breyer.....178

Judging

16. *from* Alexander Hamilton, Federalist No. 78 184
17. *from* Stephen Breyer, “Judicial Review:
A Practicing Judge’s Perspective” 187
18. *from* Ruth Bader Ginsburg,
“*Looking Beyond Our Borders: The Value of a
Comparative Perspective in Constitutional Adjudication*” 195

Conclusion

19. *from* Geoffrey R. Stone, “The Roberts Court, *Stare Decisis*,
and the Future of Constitutional Law” 204

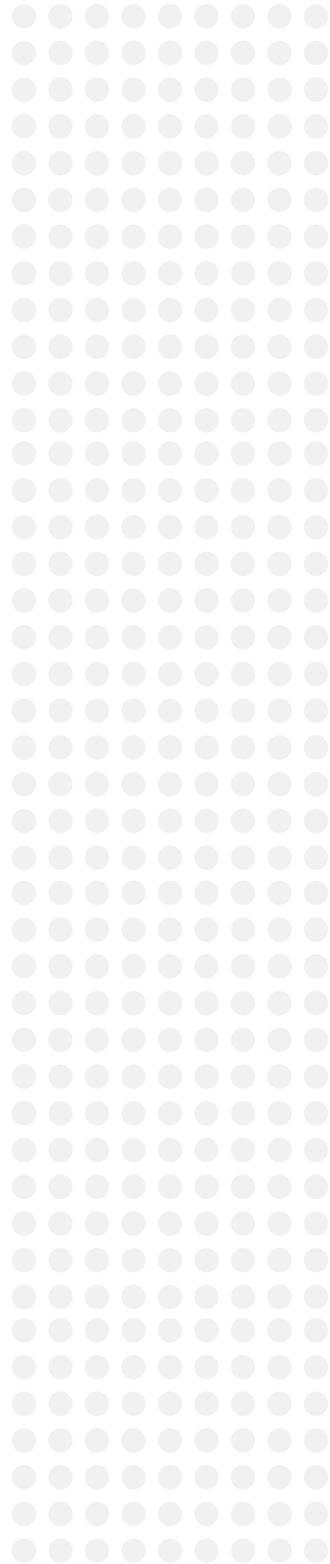
Appendix: The Constitution of the United States 215

Credits 239

Foreword

Our Constitution is written in broad, even majestic language that was intended to endure through the ages. Although it of course includes a number of highly specific provisions dealing with the mechanics of government, for the most part it bears no resemblance to a detailed tax code or a zoning ordinance, or any other regulatory scheme meant to address, to the degree possible, every imaginable application, with the understanding that it is to be amended constantly as new circumstances arise. The framers conceived the Constitution of the United States as a basic charter, marking core principles and general outlines that would be elucidated over the years, enabling succeeding generations to meet the new and largely unforeseeable challenges they would face. As Chief Justice Marshall famously wrote in 1819 in *McCulloch v. Maryland*, “we must never forget that it is a *constitution* we are expounding.”

How, then, should we go about interpreting the Constitution’s great, undefined concepts like “freedom of speech,” “liberty,” “due process of law,” “equal protection,” “cruel and unusual punishment,” or “unreasonable searches and seizures”? Like most hard questions, this one has answers that are simple, superficially appealing—and wrong. One such answer is “strict constructionism,” an approach to constitutional interpretation that consists of narrowly parsing the text of the document and nothing more. Most judges and constitutional scholars—nearly everyone, in fact—would agree that the constitutional text is a necessary starting point for constitutional interpretation and that, on occasion, the text furnishes both the beginning and the end of the inquiry. But examination of the words alone frequently yields little guidance, because the meanings of the Constitution’s most important phrases are anything but self-evident and are often endlessly contestable. Literal readings tied to a term’s original understanding also run the risk of freezing the Constitution in an earlier century and rendering it obsolete, as when the Supreme Court read the Fourth Amendment’s stricture against unreasonable “searches” and “seizures” as wholly inapplicable to wiretapping and electronic eavesdropping simply because



those techniques of information-gathering involved no trespass into a constitutionally protected physical space and thus did not precisely resemble the kinds of intrusions that the amendment's authors and ratifiers had in mind when they crafted the provision.

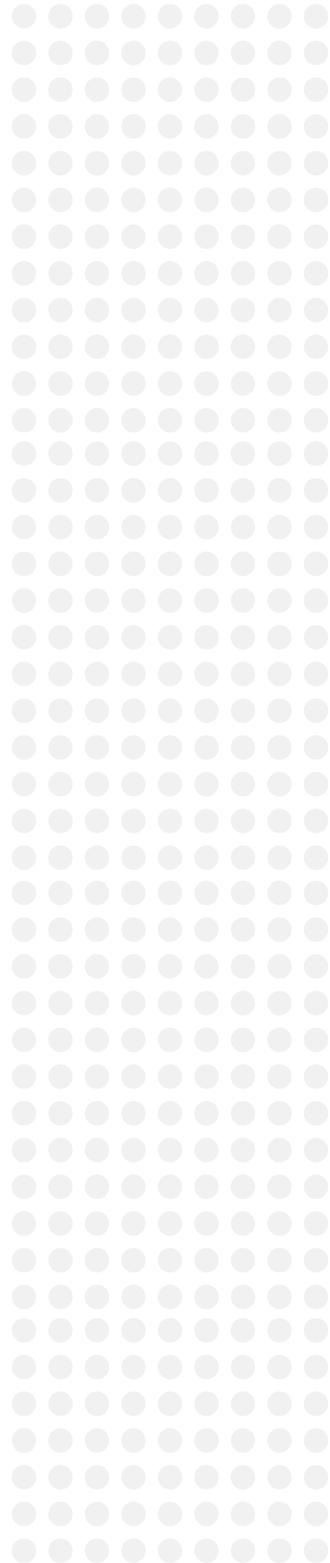
A related fallacy is the notion that ambiguous or open-ended language in the Constitution can always be explained by divining the original intent or purpose of the Constitution's authors. Even such relatively sophisticated "originalism," focusing on abstract intentions rather than on concrete expectations, often is flawed in part because the Constitution's framers, drafters, and ratifiers did not always share a single purpose or set of purposes for the language chosen, and in part because the historical record of such intentions and aims as they did share is often dramatically inconclusive and at times downright contradictory. More fundamentally, an originalist argument that insists on applying the Constitution only in the ways that the framers consciously intended is—ironically—unfaithful to the most fundamental intentions of the framers, most of whom seem to have envisioned a far less constricted approach. But since much has been written elsewhere about the limitations of these arguments (and the inconsistency with which they are applied even by their proponents), that is not the principal focus of this publication.

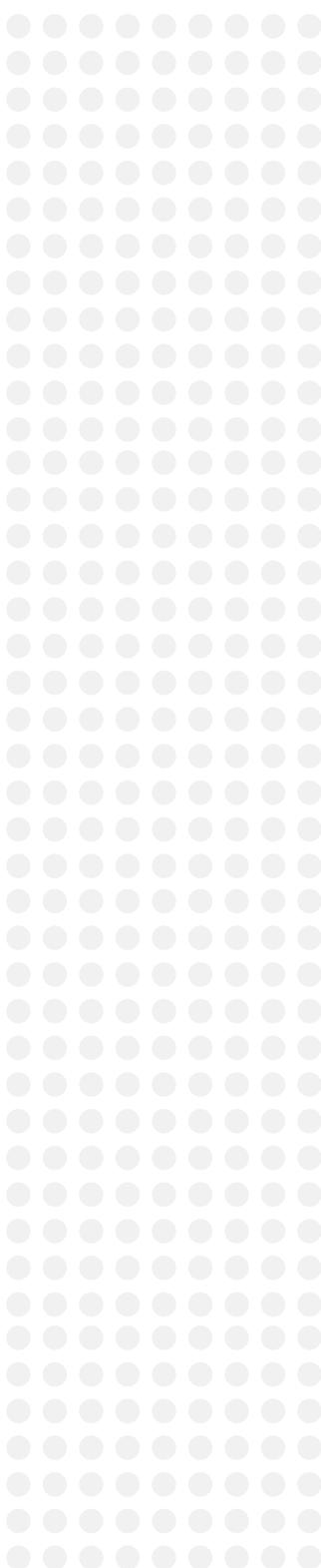
What this volume demonstrates is that there are compelling alternatives to these facile theories. Numerous scholars, Supreme Court Justices past and present, and others who have thought deeply about the matter, have articulated methods and tools of constitutional interpretation that have intellectual integrity and that offer workable options worthy of serious consideration. The approaches they offer are faithful to the document's language, structure, and history, while ensuring that it will retain its vitality over time. As Justice Brennan put it in a 1983 speech excerpted here, "The genius of our Constitution rests . . . in the adaptability of its great principles to cope with current problems and present needs." Instead of stopping at a nearsighted examination of text or a cramped review of original intent, the authors represented here start with the Constitution's text and history but go on to examine a number of additional sources to explicate the Constitution's substance, such as its structure and organization; major developments in American social and political history; values and ideals central to the nation's culture and heritage; and deeply established lines of judicial precedent. And others, prominently including Justice Breyer, suggest ways in which the process of construing the Constitution can be illuminated, and at times rendered more fully determinate, by close attention to how the real world consequences of a proposed interpretation would either advance or undercut the deeper aims of the constitutional provisions involved.

By assembling a selection of some of the finest writing on constitutional interpretation in one accessible volume, the American Constitution Society performs a valuable service. Any lawyer, law student, judge, or member of the public who believes that “strict constructionism” or “originalism” is the only way, or the best way, to read the Constitution will learn a great deal from the writings collected here.

And how fitting for ACS to make this contribution to the debate on these issues. In just a few short years, ACS has become a major legal institution. It is establishing itself as a leading engine of progressive ideas on the Constitution, law, and public policy. With this publication, it adds to its growing library of “must read” literature for those interested in understanding and advancing a vibrant vision of the law.

Laurence H. Tribe
Carl M. Loeb University Professor and
Professor of Constitutional Law,
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Introduction

[W]e 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. The ambiguity, of course, calls for interpretation, the interaction of reader and text.

—Justice William Brennan¹

How a reader of the Constitution should interact with its text—the appropriate methodology for interpreting our nation’s founding document—is the subject of this collection. As is hardly necessary to explain, this is a controversial and important topic that has generated extensive academic, judicial, and popular debate. It has also become a salient political issue that directly informs the judicial nomination and confirmation process. As a result, views about the appropriate methods of constitutional interpretation, in addition to views about the meaning of particular constitutional provisions, now have a direct effect on the kinds of judges and Justices that sit on our courts.

This collection does not purport to provide a single definitive theory of constitutional interpretation. Indeed, many of the authors collected here might well doubt that any single theory *could* provide a methodology adequate to answer all constitutional questions. Instead, the excerpts in this collection explore a variety of interpretive resources that can help

¹ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 433 (1986).

illuminate the Constitution's meaning. These include the Constitution's text and structure; information about the historical context in which the Constitution was drafted and amended over time; the shared American political and moral values the Constitution embodies; and the long-standing lines of case law that have developed around particular constitutional provisions. By collecting outstanding writing on these subjects, this volume demonstrates the range of considerations that may legitimately inform the answers to constitutional questions.

Despite the diversity of the writings gathered here, it is possible to identify at least three recurring themes. First, with the exception of Judge Bork's defense of originalism, the excerpts all implicitly or explicitly reject the view that the Constitution's text and history, by themselves, are sufficient to answer all constitutional questions. As Professor Tribe notes in his Foreword, nearly everyone agrees that the constitutional text is the appropriate starting point for constitutional analysis—after all, a key feature that distinguished the U.S. Constitution from the English constitution familiar to the Framers was the fact that U.S. Constitution was, at least in broad strokes, written down. And as both lawyers and non-lawyers have recognized, when confronted with a historical text, it is usually a good idea to know, to the extent possible, what its authors thought it meant, and to understand the historical context in which it was written.²

But the authors represented here generally reject the idea that these tools are sufficient to answer most—let alone all—difficult constitutional questions. As Professor Tribe also suggests, many of the Constitution's key provisions are deliberately ambiguous or general. Even a close reading of their text and history frequently fails to reveal how they should apply in particular situations. Further, even when text and history can be used to provide putative answers to constitutional questions, these answers are sometimes far from definitive, and may even be obviously unsatisfactory, doing violence to the way the Framers intended the Constitution to operate and the purposes it was intended to fulfill. (Professor Tribe's example, the idea that "search and seizure" does not include electronic surveillance, is a good illustration.) Many of the excerpts collected here therefore seek to identify sources beyond text and history that can help determine constitutional meaning; and those excerpts that discuss text and history do so in a manner that treats them, appropriately, as two important tools among many, not as exclusive sources of meaning that provide objective, definitive answers to every constitutional question.

² See, e.g., Quentin Skinner, *The Foundations of Modern Political Thought* (1978); John Dunn, "The History of Political Theory," in *The History of Political Theory and Other Essays* (1996).

Second, with the possible exception of the excerpt from Federalist No. 78, the writings collected here can all be understood, to some degree, as discussions or demonstrations of the constraints imposed on judges by various tools of constitutional interpretation. This is least surprising with respect to the excerpts that discuss text and history: the idea that constitutional text and history constrain judicial discretion is a familiar (and frequently highly overstated) claim. It is less common to think of other tools of interpretation, such as structure, precedent, or (most of all) the political and moral values embodied in the Constitution, as critical “constraints” on interpretation. But considered and applied in good faith, *all* of the interpretive tools explored in this collection will lead judges to conclusions about constitutional interpretation that are independent of, and may well differ from, their own policy preferences. Put differently, the excerpts collected here all recognize that constitutional interpretation is frequently difficult, and that where the plain text fails to provide clear answers to constitutional questions, the answer is not to put the Constitution aside and resort to free-form theorizing, but rather to look to additional tools of constitutional *interpretation*: to identify and explore further sources of guidance and meaning rooted in the Constitution itself.

Third, as an essential complement to this emphasis on constraints, several of the excerpts collected here recognize that the Constitution also confers affirmative obligations on judges. The political prominence of originalism and textualism can lead one to think about the Constitution almost exclusively in terms of constraining and limiting judicial discretion. That is certainly one of the Constitution’s important functions. But as a sole focus, it obscures essential features of the judicial role within the constitutional scheme. For example, in an article excerpted here, Justice Brennan explores the importance of the judge’s obligation to speak for the community—the current community—in interpreting the Constitution. Other writers, including Anthony Amsterdam, Alexander Hamilton in Federalist No. 78, and Geoffrey Stone in the concluding excerpt, emphasize the Constitution’s charge to judges to protect individual rights and dignity against infringement by the majority (a subject also discussed by Justice Brennan). This theme—that the Constitution actually gives judges and Justices certain substantive duties, in addition to imposing certain constraints—is perhaps less pronounced than the first two in the writings collected here, but it is clearly discernable, and critical. Conceiving of constitutional interpretation solely in terms of “constraints” can ultimately cause judges to abdicate some of the most crucial elements of their constitutional role.

The collection begins, in Chapter One, with an excerpt from Professor Laurence Tribe’s renowned treatise *American Constitutional Law*. This excerpt provides a brief, systematic overview of each of the basic modes of constitutional interpretation identified above: textualism, the “determined and primary focus on constitutional language, whether or not to the exclusion of other interpretive sources;” structure, the “effort to discern meaning through constitutional structure and the architecture of government established by the Constitution;” history, the “supplementation of text and structure with historical considerations including various forms of inquiry into original meaning or ‘original intent;’” values, “the elucidation of meaning through attempts to discern which interpretation best accords with the ethos or moral and political character and identity of the nation;” and precedent or *stare decisis*, the “judicial elaboration of decisional doctrine to derive answers to constitutional questions.”

Taking this overview as a basic framework, the collection then presents various excerpts that discuss these modes of interpretation. (The groupings are approximate: most, if not all, of the excerpts collected here touch on topics in multiple categories.) The first section, made up of Chapters Two through Four, focuses on questions concerning the use of text and structure in constitutional analysis. As Professor Tribe notes in his overview, while the Constitution’s text is generally taken as “paramount,” “[w]hat it means for something to be contrary to the text . . . is often no simple matter.”

Picking up on this theme, Chapter Two—an excerpt from Professor Lawrence Lessig’s article “Fidelity in Translation”—explores one central difficulty confronting anyone attempting to apply faithfully a constitutional text written more than two centuries ago. The most straightforward understanding of “fidelity” to the Constitution’s text might seem to be to understand the text to mean exactly what it meant when it was written, and to apply it accordingly. But that approach, Lessig suggests, ignores the numerous intervening changes in the legal and non-legal context in which Constitutional provisions are actually applied. Accordingly, Lessig suggests, it may be necessary to adopt a changed reading of a constitutional provision in order to make its meaning or effect in the contemporary world the same as it would have been in the world in which it was enacted. Even if one’s goal is fidelity to the original text, it may be necessary to adopt changed readings of the text in order to preserve its original meaning.

Chapter Three, an excerpt from Chief Justice John Marshall’s opinion in *McCulloch v. Maryland*, illustrates how one of the Constitution’s great interpreters confronted a Constitutional question to which there was no plain textual answer. The question facing Marshall in the portion of the case excerpted below is whether Congress had the power to incorporate a national bank. The power to do so is not among the “enumerated powers”

the Constitution gives to Congress. Nonetheless, Marshall concludes, that power forms part of Congress' general power to make "all laws which shall be necessary and proper[] for carrying into execution" the powers enumerated elsewhere. In reaching this conclusion, Marshall famously explains that the Constitution's "nature . . . requires[] that only its great outlines should be marked, [and] its important objects designated." The "minor ingredients" that make up those important constitutional objects must "be deduced from the nature of the objects themselves." When analyzing the Constitution's text, in other words, "we must never forget that it is a *constitution* we are expounding."

Chapter Four turns to a discussion of one of the many techniques interpreters use to "squeeze meaning" from the Constitution's text. In an excerpt from his article "Intratextualism," Professor Akhil Amar explores the interpretive potential in the fact that "various words and phrases recur" throughout the Constitution. This fact, Amar argues, permits interpreters to "read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase," thereby giving interpreters "yet another set of clues as they search for constitutional meaning."

The next section, Chapters Five through Ten, turns to the role of history in constitutional adjudication, including historical evidence of the Founders' original intent and the Constitution's original meaning. Chapter Five is an excerpt from Judge Bork's prominent and influential defense of originalism. Chapter Six, an excerpt from Judge Posner's famous article "Bork and Beethoven," responds to Judge Bork's exposition by analyzing the intellectual limitations of originalism as a theory of constitutional interpretation. Judge Posner argues that defenders of originalism, including Judge Bork, have failed to produce convincing reasons why society should want its judges to adopt originalism as an interpretive methodology in constitutional cases, and explains why originalism cannot be justified either in terms of democratic legitimacy or as a purported method of curbing judicial discretion.

Chapters Seven and Eight, a pair of articles by Professors Jack Balkin and Mitchell Berman, consider the degree to which there can usefully be such a thing as "progressive" originalism. Professor Balkin offers a critique of originalism as defined and explained by Justice Scalia, and then proposes an alternative form of originalism, which he calls the method of "text and principle." This method, he explains, consists in faithfulness to the original *principles* embodied in the Constitution, rather than the particular applications of those principles the Framers would have expected. Professor Berman, responding to Professor Balkin's article, argues that few contemporary originalists think constitutional interpretation should be

guided by the original expected application of constitutional provisions, and claims that Professor Balkin's method of "text and principle" is in fact the basic method most academic originalists embrace. Professor Berman further contends that most progressives believe constitutional interpreters may adopt principles that are consistent with the Constitution's text even if they are *not* the specific principles the Framers had in mind when they drafted particular constitutional provisions—something Professor Balkin's proposed method would not permit.

Chapter Nine, an excerpt from Professor Anthony Amsterdam's article "Perspectives on the Fourth Amendment," demonstrates some of the limits on history as an interpretive tool. Professor Amsterdam shows how neither the Fourth Amendment's text nor its history are much help in developing a "general theory" of the Amendment's scope. Rejecting the view that we ought to take the "specific historical experiences that preceded the adoption of the amendment" as "the measure of the evils that the [F]ourth [A]mendment curbs," he argues that it is "implausible in the extreme" that the amendment's "guarantees of liberty," which are "written with the broadest latitude," were only meant to create narrow "hedgies against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas."

Chapter Ten, an excerpt from Professor Suzanna Sherry's article "The Founders' Unwritten Constitution," both illuminates some of the historical distance that separates us from the founding generation and casts doubt on the historical pedigree of interpretive philosophies that focus exclusively on the Framers' original intent. Professor Sherry examines the historical context in which the Constitution was drafted and, on that basis, argues that its drafters intended it to supplement, rather than displace, natural law as a source of fundamental law. As a result, she concludes, "the modern Court's insistence on textual constitutionalism as the sole technique of judicial review is . . . inconsistent with the intent of the founding generation." Further, it is clear that "the framers intended something independent of their own intent to serve as a source of constitutional law."

The collection next turns to two excerpts that address the importance of interpreting the Constitution in light of the evolving values of American society. Chapter Eleven, an excerpt from Justice Thurgood Marshall's "Reflection on the Bicentennial of the U.S. Constitution," emphasizes the degree to which the Constitution as we know it today has been altered and changed not simply by amendment, but by social movements and the evolution of societal mores since its enactment. His article underscores the importance of a society's ethical and moral commitments in the development of the Constitution to date, and the importance of continuing to recognize the relevance of such considerations in the future.

Similarly, in Chapter Twelve, Justice Brennan, discussing his own method of constitutional interpretation, emphasizes the importance of the relationship between the values of contemporary society and the Constitution. While it is important for current Justices to “look to the history of the time of framing and to the intervening history of interpretation” in interpreting the Constitution, “the ultimate question must be: What do the words of the text mean in our time?” This approach is consistent, he asserts, with 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.”

The collection then turns, in Chapters Thirteen and Fourteen, to a discussion of the importance of precedent in constitutional interpretation. In Chapter Thirteen, “Common Law Constitutional Interpretation,” Professor David Strauss develops the view that constitutional interpretation and constitutional law itself is best explained not, as is normally thought, as a form of statutory interpretation, but rather through an analogy with common-law methods of adjudication. “[W]hen people interpret the Constitution,” he argues, “they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years.” On this view, “textualism and originalism remain inadequate models for understanding American constitutional law.” “[I]t is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by ‘we the people,’” he argues, “that best explains, and best justifies, American constitutional law today.”

Chapter Fourteen, an excerpt from Justice Anthony Kennedy’s majority opinion in *Lawrence v. Texas*, shows constitutional precedent in action. In the excerpted passage from the case, Justice Kennedy places a prior decision, *Bowers v. Hardwick*, in the context of prior and subsequent decisions interpreting the Due Process Clause of the Fourteenth Amendment, demonstrating how *Bowers* was inconsistent with this surrounding precedent, and why it should therefore be overruled.

Chapter Fifteen, a brief excerpt from Justice Stephen Breyer’s dissenting opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, moves beyond the modes of interpretation set out in Professor Tribe’s overview and suggests a further tool of constitutional interpretation: consideration of the practical consequences a particular interpretation or decision is likely to have. In the passage excerpted, which comes near the end of his dissent, Justice Breyer argues that the majority’s decision striking down a public school desegregation plan under the Equal Protection Clause is legally unsound in part because it would seriously hamper the ef-

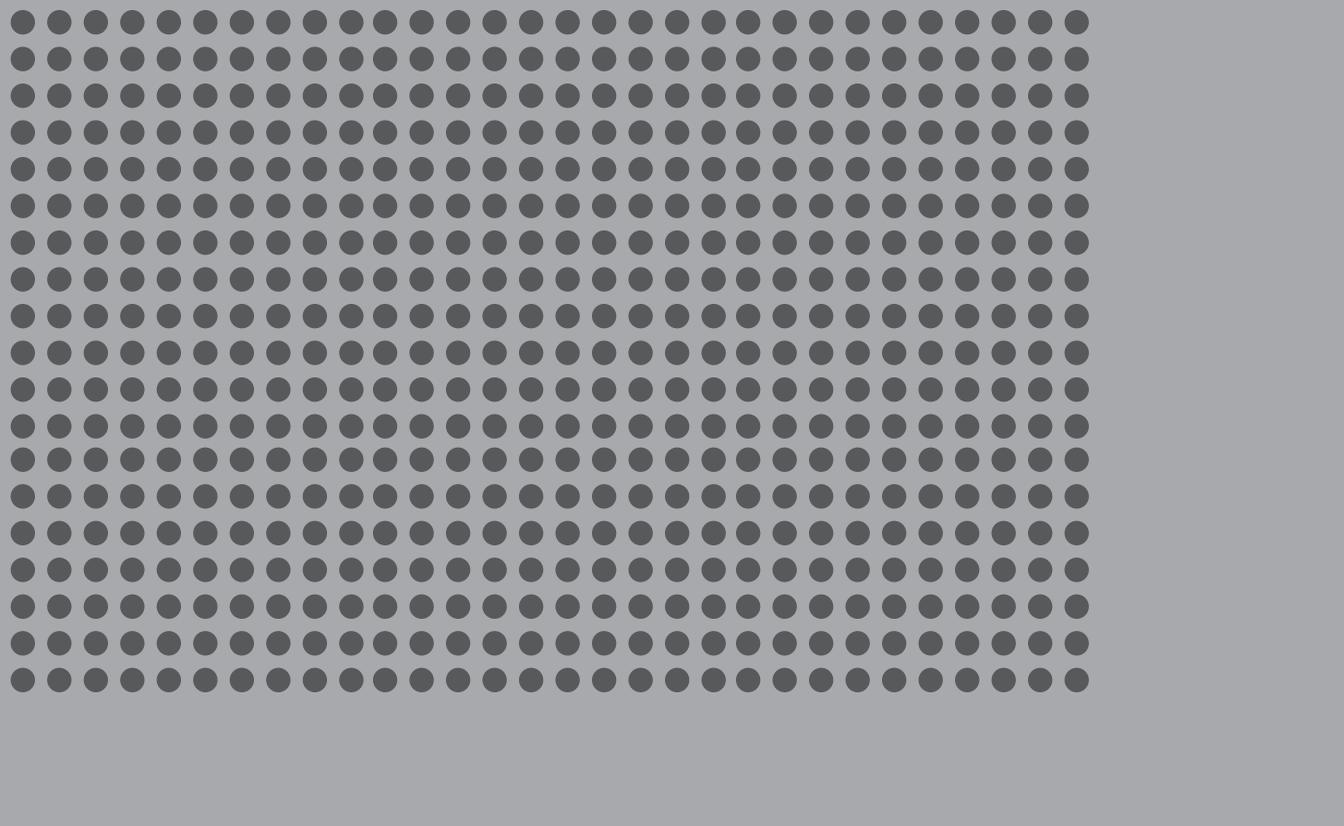
forts of school boards across the country to ensure that their public schools are integrated.

The final section, Chapters Sixteen through Eighteen, consider the question of constitutional interpretation from the standpoint of judges. Chapter Sixteen, an excerpt from Alexander Hamilton's Federalist Paper No. 78, shows how one of the Constitution's original advocates explained the importance of the independent judiciary in the constitutional scheme, emphasizing in particular judges' critical role in protecting minorities against "unjust and partial laws" enacted by the majority.

In Chapter Seventeen, an excerpt from Justice Breyer's article on judicial review, Justice Breyer makes clear that the professional activity of judging itself constrains the discretion of judges or Justices as they interpret the Constitution. He provides a sense of how many of the constraints discussed in prior sections—such as constitutional language, history, and precedent—work together in practice to inform and constrain a judge's constitutional decisions. He also discusses the approach illustrated in Chapter Fifteen, observing that judges may find an additional constraint in the need to take into account the likely consequences of an opinion—its "real-world impact (its effect, not its popularity), considered in light of basic constitutional objectives."

In Chapter Eighteen, Justice Ruth Bader Ginsburg discusses the possibility that judges, in grappling with constitutional questions, may benefit from a measured look at experiences in other countries with similar values and constitutional traditions or structures. Using foreign constitutional experience to inform U.S. constitutional adjudication (whether as a point of similarity or a point of contrast) has generated significant controversy. Justice Ginsburg offers a defense of a modest and careful use of a comparative perspective in constitutional adjudication.

The collection concludes with an excerpt from Professor Stone's recent lecture at Tulane Law School. Cataloging various forms of conservative constitutional interpretation, he argues that none is adequate to the purposes of the Constitution or the role the Framers envisioned judges and Justice would play in the constitutional system. He advocates instead an approach he calls "constitutionalism," and whose "central mission" is to "embrace the responsibility the Framers imposed upon the judiciary to serve as a check against the inherent dangers of democratic majoritarianism and to maintain the vitality of fundamental individual liberties in a constantly changing world."



Framework

“All of the methodologies that will be discussed, properly understood, figure in constitutional analysis as opportunities: as starting points, constituent parts of complex arguments, or concluding evocations....”

— Laurence H. Tribe, in *American Constitutional Law*,
Chapter 1: *Approaches to Constitutional Analysis*

from

AMERICAN CONSTITUTIONAL LAW

CHAPTER 1: *Approaches to Constitutional Analysis*Laurence H. Tribe¹**Expounding the Constitution:
The Modes of Construction**

. . .

By its very nature, the ongoing debate about competing modes of [constitutional] interpretation and their proper relationship is not one in which provably “correct” answers are likely ever to emerge and vanquish all competing approaches. We certainly cannot afford to await a supposed outcome to this debate—either before deciding particular constitutional cases or controversies, or before commenting on how a series of cases has been decided. Nonetheless, it has become apparent that a systematic, even if not exhaustive, treatment of this interpretive issue ought to be included in this treatise

The sections that follow will address: first, textualism—the determined and primary focus on constitutional language, whether or not to the exclusion of other interpretive sources; second, the effort to discern meaning through constitutional structure and the architecture of government established by the Constitution, and through the inferences to which these give rise; third, the supplementation of text and structure with historical considerations, including various forms of inquiry into original meaning or “original intent,” as well as consideration of potentially relevant post-enactment developments; fourth, the elucidation of meaning through attempts to discern which interpretation best accords with the ethos or moral and political character and identity of the nation; fifth, reliance on *stare decisis*—that is, on the judicial elaboration of decisional doctrine to derive answers to constitutional questions; and sixth, the search for meaning through a deliberately eclectic combination of the above, based on the view that there exists no external point from which, in the name of the Constitution, one might establish a hierarchy among the separate modes of interpretation here enumerated.

. . .

All of these discussions, at one level, will sound a common theme. No one mode of interpretation can claim always to take priority or to be

¹ Laurence H. Tribe, *American Constitutional Law* (3d ed. 2000).

necessarily decisive. This is not a negative conclusion. All of the methodologies that will be discussed, properly understood, figure in constitutional analysis as opportunities: as starting points, constituent parts of complex arguments, or concluding evocations—just like the various models implicit in constitutional texts and Supreme Court opinions. All of these methodologies, moreover, are also always available as grounds of criticism. This does not mean that constitutional law is simply a mish-mash. In whatever way the United States Constitution is pertinent in the particular instance, the subject and substance of constitutional law in the end remains the language of the United States Constitution itself and the decisions and opinions of the United States Supreme Court. Modes of interpretation are means—however intricate—of explicating this subject and substance.

Expounding the Constitution: The Importance of Text

In the beginning was the word. In stark contrast to modes of interpretation that place tradition and authority at the center of belief stands the mode that centers on text as the most obviously authentic embodiment of constitutional truth. To treat text as paramount in this way seems all but inevitable if the Constitution is to be seriously regarded as law—and seems invulnerable to major objection provided one does not pretend that the text answers all questions of meaning. There is, of course, always the need to face, here as elsewhere, the ordinary problems of reading: issues of ambiguity, vagueness, obscurity, and the like. Moreover, giving text pride of place need not entail asserting that the Constitution consists of nothing *but* the text. Few textualists would deny, for example, that the Constitution forbids secession from the Union by any state—the axiom over which the Civil War was fought—even though that principle of national indissolubility is nowhere written into our fundamental charter. Similarly, not even the strictest textualist would question the proposition that Congress is without authority simply to take over the operations of all branches of a state’s government, installing a federal “governor general” to manage the state as a colony. . . .

Indeed, the Constitution’s own text specifies that, in several specific instances, the text of that document cannot be read as self-contained and therefore itself exhaustive. Article III, Section 2, begins its list of the heads of jurisdiction of federal courts, for example, by stating that “The Judicial Power shall extend to all Cases, in Law and Equity” “Law and Equity” are not constitutionally-defined terms; their meaning, we know, was the subject of an enormous and already extant jurisprudence whose principles the Constitution presupposed—and thus plainly did not originate. “Due process of law,” the famous phrase found in both the Fifth and Fourteenth Amendments, also appears to be a kind of cross-reference, even if unclear

To take text as primary, and as ultimately authoritative whenever it speaks to a proposition, is not necessarily to take text as exclusive, and as filling up the available space for constitutional authority.

and often controversial. The Ninth Amendment . . . is the most dramatic illustration. It expressly states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Understood as a rule of construction, this directive appears to address the precise situation in which a putative right “retained by the people” is not enumerated—not textually expressed—anywhere in the Constitution, and appears to provide that the absence of the right from the text may not count as an argument against that right’s existence—assuming, of course, that its existence may otherwise be established, by appropriate inferences from the Constitution’s structure, history, or overarching aims. The Ninth Amendment is but one unusually explicit recognition within the constitutional text itself of the more general proposition, repeatedly confirmed in any careful reading of the Constitution as a whole, that the authoritative terms of the text do not, in general, posit the existence of a kind of legal vacuum—in which the absence of text entails the absence of law, or at least of any law constraining majority rule. The Constitution’s text is authoritative but not exhaustive or, even within its sphere, necessarily self-defining.

Whether justified by its treatment as implicit in the constitutional structure, or by its grounding in history, or the nation’s ethos, or doctrine, a proposition of constitutional law, in short, need not find its most obvious support in the Constitution’s text in order to be deemed part of the supreme law of the land—even by a reader whose ultimate lodestar is the text. Is there a paradox here? Not really. To take text as primary, and as ultimately authoritative whenever it speaks to a proposition, is not necessarily to take text as exclusive, and as filling up the available space for constitutional authority.

...

Within this treatise, as in the Supreme Court’s opinions, it will only occasionally be the case that constitutional text figures as itself definitive—as properly both first and last word. In all of what follows, the constitutional text is taken as *authoritative* in the sense that anything flatly contrary to it cannot stand, even if not as invariably *exhaustive* of the universe of constitutional meaning.

What it means for something to be contrary to the text, to be sure, is often no simple matter. Nor is it obvious how one should go about deciding what the text means whenever, as is so often the case, its message appears ambiguous or even self-contradictory. Nor, finally, is it self-evident what to do when one reading of the text seems more plausible than another, but that other reading fits better with structure, with history, or with some other facet of constitutional construction. All of these difficulties, however, are obviously textual—reminders once more that, in

practice and as a practice, American constitutional law is—even if it rarely is only—constitution-reading.

One basic point warrants special emphasis: Interpreting the Constitution’s *text* requires close attention to linguistic *context*—that is, to surrounding language; to how the relevant word or phrase is used elsewhere in the document; and to how it was used, or what appeared in its stead, in prior drafts of the Constitution or, indeed, in the Articles of Confederation. . . . The importance of textual context in interpreting constitutional language has grown with the passage of time, as amendments to the Constitution have increased the need to consider the relationships among various parts of the document’s text.

“Reading” Across Words: Interpreting Constitutional Structure

. . . . The Constitution is (or has become) a hypertext—a text and a gloss—not unlike a medieval manuscript. Most of us at some level sense that an adequate embodiment of constitutional meaning would have to be multi-dimensional; would have to make possible the display and observation of numerous links and feedback loops; would have to be viewable from more than a single angle; would benefit from exploration through various cross-sectional transparencies; would be coded so one could tell at a glance when each part of the whole was proposed and when ratified; would include some means of indicating which provisions had been superceded or rendered inoperative by subsequent amendments (as a matter of logic even if not by express repeal); would employ links permitting one to see in an instant where else in the text a given word or phrase appears and what the possibly analogous phrases or words were in the Articles of Confederation and other arguably relevant surrounding texts such as the Declaration of Independence; would come equipped with suitable annotations so that one could tell what lines of institutional practice and what lines of decisional authority had given each provision or constellation of related provisions a specific substantive gloss; and would contain a further set of annotations pointing to features of the national ethos and identity helping to orient and give direction to various combinations of constitutional clauses and provisions.

Of special importance in this list is an aspect of the Constitution that is particularly elusive yet indisputably central—its structure. The Constitution’s “structure” is (borrowing Wittgenstein’s famous distinction) that which the text shows but does not directly say. Diction, word repetitions, and documentary organizing forms (e.g., the division of the text into articles, or the separate status of the preamble and the amendments), for example, all contribute to a sense of what the Constitution is about that is

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as obviously “constitutional” as are the Constitution’s words as such. The idea of “separation of powers” is textually confirmed, literally, only in the Constitution’s organization. The idea that the Constitution includes a Bill of Rights limiting otherwise constitutionally-granted governmental powers receives textual expression only in the formal accumulation of the first eight (or nine, or perhaps ten) amendments as a separate, gathered-together “part” of the constitutional text. . . . [O]ne should not hesitate to take structural considerations with utmost seriousness as a source of authoritative insight into the Constitution’s content, and thus into its implications for particular contested practices by the states or the federal government.

Then-Justice Rehnquist, for example, employed structural analysis in his dissent from the Supreme Court’s holding, in *Nevada v. Hall*, that citizens may sue a state without its consent in the courts of another state. He reasoned that a constitution is necessarily “built on certain postulates or assumptions,” drawing “on shared experience and common understanding.”² Thus, “when the Constitution is ambiguous or silent on a particular issue”—by which the Justice meant when the *text* is silent or ambiguous—the Court has often had to rely “on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning.”³ Acknowledging that the Eleventh Amendment’s text does not itself assure the sort of state sovereignty for which he was arguing in *Nevada v. Hall*, Justice Rehnquist noted how prior cases had protected principles beyond the Constitution’s “literal terms”⁴ and concluded that the Court should get beyond literalism and protect “important concepts of sovereignty . . . which are of constitutional dimension because their derogation would undermine the logic of the constitutional scheme.”⁵ It is not essential to agree with the Justice Rehnquist’s specific conclusion about state sovereign immunity in order to appreciate the force of his structural analysis.

Structural analysis is appropriate not only in order to flesh out the contours and content of federalism-based limits on the national government or to fill in the elements of the separation of powers, but also in order to give shape and substance to “unenumerated” rights. . . . Supreme Court

² *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

³ *Id.*

⁴ *Id.* at 439.

⁵ *Id.*

opinions both past and present . . . reveal persuasive uses of rights structuralism. The Court’s use of provisions of the Bill of Rights to give substantive content to the Fourteenth Amendment Due Process Clause, as well as its use of the Fourteenth Amendment Equal Protection Clause in reading the Fifth Amendment Due Process Clause, are obvious examples.⁶ Justice Harlan’s oft-quoted observation that the rights identified in the Bill of Rights are not isolated points but form part of a “rational continuum”—and that it is the duty of courts in essence to connect the dots when deciding cases about aspects of liberty that do not fit precisely on the existing “chart” of freedoms⁷—became the platform on which Justice Souter proposed, in his separate concurring opinion in *Washington v. Glucksberg*, to construct an approach to substantive due process. In essence, Harlan and Souter were suggesting that the Constitution’s structure (as well as its history)—the way it was put together—reveal that the gaps between the rights-defining provisions enumerated in the Bill of Rights are only apparent and do not represent substantively empty space but instead serve to juxtapose, in an almost Impressionist fashion, individual commitments in combinations also showing additional guarantees. . . . To see the matter otherwise is to see government power everywhere except in those finite and isolated recesses where the rights of individuals have been expressly recognized. And that in turn is to assume a structure in which government has all power unless specifically told otherwise, a structure as alien to the logic of limited government as its counterpart on the federal-state stage would be alien to the logic of limited national power.

. . .

The upshot is that modes of understanding and inference that are willing to “connect the dots,” to draw an image again from Justice Harlan, and to argue from the layout and logic of the Constitution and of the institutions it creates as well as the freedoms and norms it presupposes, should be recognized as legitimate, and honored for the light those modes of understanding may shed, in every aspect of constitutional law, both in elaborating the architecture of separated and divided powers and in discerning the boundaries of government power and the rights of individuals.

Illuminating Text and Structure With History: Original Meaning and Beyond

. . . What weight should we give to what we know of “original” understandings of constitutional language?

⁶ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁷ See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

Original meaning as starting point. Regardless of how committed one might be to the notion of the Constitution as fluid and evolving, it seems clear that interpretation of its provisions—or, indeed, of its design—must at least begin with the question of what those provisions, or that design, meant at the time they were conceived and, later, at the time they became law. Absent some extremely persuasive justification, it would be nonsensical to begin by treating a phrase in the Constitution as meaning one thing when, to those who wrote or ratified or read it at the time, it would have meant something entirely different. At a minimum, the linguistic community within which a piece of constitutional text is initially composed, communicated, and understood must provide the frame of reference with which interpretation starts. Even when a case can be made that intervening events ultimately justify reading the constitutional phrase or provision in question to mean something other than what it meant when enacted, it is understandable that the burden of justification should be placed on whoever seeks to argue for such a changed meaning.

The principal means of discharging that burden consistent with an originalist starting point is to demonstrate that the constitutional clause or provision in question ought to be understood at a higher than literal level of abstraction or generality, and that the specific words employed in the clause or provision—if they are to *retain* the larger meaning that is their essence—must be translated into a concrete form different from the one they assumed at the time of writing or ratification: fidelity to the basic vision being expressed by the framers or ratifiers may thus require some revision in how one understands the rule or requirement set forth in the text.

...

The inescapability of a moderate originalism. If there is a brand of originalism in which the ostensible intentions of the framers or ratifiers with respect to a given matter are to prevail over the explicit text of the Constitution when there is a direct conflict between the two, it would be hard to find anyone—judge, lawyer, or scholar—who would plead guilty to it. Thus, attacking originalism on the ground that it subordinates ratified and enacted constitutional text to the purely subjective and unenacted intentions (or other mental states) of a group of people who have long been dead accomplishes little. Such attacks take aim at a tempting target—easy to hit, and quite defenseless—but, when the target has been evaporated, behind it is exposed, still standing and unscathed, any of several much more defensible versions of originalism.

Similarly, it is difficult to imagine finding a non-originalist so thoroughgoing as to be wholly unconcerned with what a term or phrase or provision of the Constitution meant to those who wrote it, or to those who ratified it, or to the general populace of the time. Thus even a legal

philosopher as removed from originalist premises as Ronald Dworkin writes that “if, incredibly, we learned that ‘cruel’ was invariably used to mean expensive in the eighteenth century,” then we would have to read the Eighth Amendment differently.⁸ Professor Dworkin may overstate the case a bit: After the nation had consistently constructed an elaborate constitutional practice two centuries old on the foundation of a radically different reading, from the very outset, of the phrase “cruel and unusual,” it is by no means clear that the practice would or should be jettisoned upon accidentally discovering “that is not what [they] meant at all. That is not it, at all.”⁹ Considerations of *stare decisis* or arguments of a normative character might well suffice to overcome the claims of original meaning in such a case, but if those considerations did overcome original meaning, it would only be after a considerable struggle over whether such a departure was justified. To the degree that original meaning would at least establish a baseline and create a presumption to be overcome, its gravitational pull remains undeniable.

...

Construing the Constitution in Accord With the Nation’s Values: The Place of Normative and Pragmatic Argument in Constitutional Interpretation

Recall Chief Justice Marshall’s reminder that the Constitution is more than just another law, more even than the supreme law, for it is in a way “the whole American fabric.”¹⁰ The point, of course, is that we seek through our Constitution, and through the process of interpreting it, not only to understand the original meaning of whatever consensus the text represented at its birth and through the periods of its amendment, not only to attain the stability and predictability that constitutional doctrine and the rule of law can provide, but also to articulate “our common commitment to the flourishing of the mutual enterprise of nationhood.”¹¹ Interpretation in search of our deepest national values may suggest a “liberal” tilt and may bring to mind appeals to the spirit of unfettered dialogue, to the nourishment of human dignity, and to the celebration of cultural and ethnic diversity, but in fact such interpretation “need not have [a] specifically liberal cast . . . [but] can be used by those who stress the constitutional priority of democratic decision-making and hence who emphasize judicial caution

⁸ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 291 (1996).

⁹ T.S. Eliot, *The Love Song of J. Alfred Prufrock*, in *Collected Poems, 1909–1935*, at 16 (1930).

¹⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

¹¹ Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 36 (1995).

Ideally, any values to which an interpreter appeals directly or that underlie an interpretive mode the interpreter uses will be values in some sense embodied in the Constitution itself or at least in our nation's constitutional heritage.

and prudence, as well as by those who stress the constitutional primacy of individual rights. It has commonly been used by judges and scholars of both the Right and the Left.”¹²

Indeed, although an interpretive approach that appeals *directly* to values or ideals the interpreter takes to be central to the Constitution or to the nation's constitutional heritage might seem peculiarly open to the charge of being inappropriately subjective, that criticism loses at least some of its force when it is recognized that the choice of *any* interpretive method necessarily reflects the embrace of some substantive values not necessarily and unambiguously enacted by the constitutional text and the rejection of others potentially consistent with that text. With respect to each of the modes of interpretation described in this chapter, the decision to utilize that mode—singly or in conjunction with other modes—reflects a comparative valuation of, for example, commitments to the binding nature of legal texts, to the consensual political undertakings of the past, or to “rule of law” principles such as stability and predictability, even when the interpreter is quite oblivious to the ways in which particular norms are implicitly directing that interpreter's reading of the Constitution. When this point is recognized, an interpretive approach that appeals directly to values deemed by the interpreter to be worthy not simply because they are the interpreter's own, but because the interpreter is prepared to defend them as the quintessential American values reflected in the Constitution itself, seems eminently defensible. . . .

Ideally, any values to which an interpreter appeals directly or that underlie an interpretive mode the interpreter uses will be values in some sense embodied in the Constitution itself or at least in our nation's constitutional heritage. The interpreter who is self-conscious about, and candid in describing, just what “better angels of our nature”¹³ are carrying that interpreter aloft is less likely to pursue an idiosyncratic vision unrooted in our national experience and constitutional traditions, and less likely to produce an opaque and unconvincing reading of the constitutional materials, than are the interpreters who are secretive about the vision driving their analysis or the interpreters who are genuinely unconscious that any such vision is at work and unaware of what its contents are as it invisibly shapes their reading of the Constitution.

To be sure, the project of interpretation cannot be divorced entirely from values or influences extrinsic to the document being interpreted; any attempt to create a document fully containing within itself all rules for

¹² *Id.* at 37.

¹³ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* *Speeches and Writings, 1859–1865*, at 215, 224 (Library of Am. 1989).

its own interpretation, including the values that are to guide interpretive choices, is bound ultimately to fail on some level, for the familiar reason that self-reference leads to infinite regress. Nevertheless, any interpretive mode will be most convincing as a basis for construing the Constitution one way rather than another to the extent that it draws upon something deep in the nation's ethos that is reflected in, or that manifestly sheds light on, the Constitution. Thus, norms and aspirations embodied in common law or in other more or less organic, bottom-up rather than top-down expressions of enduring and evolving national values make a fair claim for inclusion in the criteria by which we define such constitutional phrases as "cruel and unusual punishments" (prohibited by the Eighth Amendment) or "due process of law" (commanded by the Fifth and Fourteenth Amendments).

Finally, a value-driven reading of the Constitution is inevitable, undergirding as it must every other mode of interpreting the document. If, for example, the Constitution is not itself regarded as reflecting a commitment to the binding nature of legal texts, then textualism runs the risk of becoming little more than an empty formalism. Similarly, if the Constitution itself reflects no national commitment to respecting the agreements of the past, then talk of the Constitution's history and of its original meaning may feel aimless. And if we are not deeply committed, through the Constitution itself, to the "rule of law" values of stability, predictability, and reliance that following and elaborating upon prior judicial decisions helps ensure, then *stare decisis*—at least when the precedent one is asked to follow seems contrary to text or history as one would see them afresh—is bound to seem a departure from constitutional values rather than a way, perhaps imperfect but nonetheless understandable, of implementing such values.

...

There is much to be said for the proposition that appeals to values and commitments are not properly part of constitutional law unless they are ultimately translatable in a plausible way either into the language of constitutional provisions as such or into understandable characterizations of constitutional structure or history. American constitutional law has not, by and large, treated the Constitution as simply one source of fundamental values among many, but has instead treated the Constitution itself as *law*, controlling within its reach all other bodies of secular law. Appeals to values and norms, therefore—like all other forms of constitutional argument—must satisfy legal subject-matter expectations and, like all other forms of constitutional argument, become vulnerable to criticism for falling short in this respect. This does not mean that extra-constitutional analyses cannot properly inspire or motivate interpretation

of constitutional provisions. But it does mean that the final form of constitutional argument must always adequately accommodate text. Justice Holmes famously asserted in *Lochner v. New York*: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”¹⁴ He could not have meant that Supreme Court Justices (or other participants in the enterprise of constitutional law) should not read Social Darwinists or other social theorists like Spencer: Holmes may have been the only Justice then sitting on the Supreme Court who actually did! He must have meant, instead, that a constitutional argument cannot pass muster if it cannot draw convincingly upon constitutional language, structure, or history. His dismissive epigram remains vital—not because constitutional law cannot encompass references “outside” to values and commitments of the American polity, and *not* because constitutional law can ever be wholly self-contained and unaided by any such references, but because the use of such references in constitutional argument must acknowledge the primacy of the Constitution and must therefore undertake the burden of explaining the way in which such references illuminate, or help to make concrete, the meaning of the Constitution itself. . . .

Construing the Constitution in Accord With Judicial Precedent: Judicial Re-examination versus *Stare Decisis*, the Rule of Law, and Legal Doctrine as a Reliable Source of Stability and Order

Constitutional law, this treatise assumes, consists not only of the provisions of the United States Constitution, but also of the large number of opinions of the United States Supreme Court in which that Court brings to bear, and in the process interprets, those provisions. These opinions, therefore, are in a sense a second set of constitutional texts. These opinions are also notable, in many famous instances, for their changes of course. *Swift v. Tyson* gives way to *Erie R. Co. v. Tompkins*. *Brown v. Board of Education* repudiates *Plessy v. Ferguson*.

It is not difficult to explain, and indeed defend, this inconstancy. Insofar as Justices of the Supreme Court work with the Court’s own prior formulations—its glosses and elaborations of constitutional language—they learn, under the pressure of particular cases, which glosses illuminate, and which only exacerbate, constitutional questions. Just as we would expect common law judges to reframe their terms from time to time given their experience using the language of prior cases, we should not be surprised

¹⁴ 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

that Supreme Court Justices assess the success or failure of their own efforts, and occasionally change their approaches substantially. Much constitutional argument, in practice, concerns itself with just this unremarkable, if remarkably fertile, enterprise.

Why change? A constitutional text that the Supreme Court read one way during an earlier period may be read by the Court to say something different in a later period. “Corrections” of this sort do not revise the underlying constitutional provision or structure itself. They aim, instead, to preserve the basic meaning of the Constitution by improving one’s reading of its terms. It is not only failures of judicial formulas, of course, that bring on such change. “The course of human events”—in any of its political, economic, or social dimensions—is capable of teaching lessons that seem to compel one to read the same text in a new way. Such lessons sometimes lead to the conclusion that the new reading—the one required in order to be faithful to the Constitution’s meaning—ought to have been the reading of the text all along, not that the older reading was fine when announced whereas the new one is now required in light of altered circumstances. At other times, one concludes that the earlier reading was entirely appropriate in its day but has been overtaken by events. And, on yet other occasions, changed readings reflect a mix of both—a confession of past error, and a recognition of changed conditions.

...

Any number of important examples—the impact of the Civil War on prior conceptions of the federal-state relationship, the effect of the Great Depression on constitutional theories of freedom of contract and interstate commerce, the effect of the Jim Crow experience on claims that racial segregation by force of law does not deny any race equal protection or the equal dignity that such protection represents are just a few among many—have at least this in common: They all reflect a recognition—especially dramatic because evident in the constitutional formulations of the Supreme Court—that the bare words of the Constitution’s text, and the skeletal structure on which those words were hung, only *begin* to fill out the Constitution as a mature, ongoing system of constitutional law. The life the nation leads under that Constitution—containing some chapters that actually change the constitutional text itself and others that leave the text unchanged but transform our understanding of what it means—gradually and continually alters the Constitution and our perception of it. This is not a remarkable proposition. If, from the perspective of constitutional law, we are a nation of readers reading, circumstances could not be otherwise.

There are, however, limits to this open-ended process. Central to *Marbury v. Madison’s* conception of the Constitution was . . . the idea that the Constitution is law—“it is emphatically the province and duty of the

A constitutional text that the Supreme Court read one way during an earlier period may be read by the Court to say something different in a later period. “Corrections” of this sort do not revise the underlying constitutional provision or structure itself. They aim, instead, to preserve the basic meaning of the Constitution by improving one’s reading of its terms.

judicial department to say what the law is.”¹⁵ It thus follows, John Marshall claimed, that the Supreme Court must be supreme expositor of the law of the Constitution. The idea of the “constitution as hard law, law written in virtually capital letters (LAW), law as meaning reliable law,” has seemed to some “by far the most important idea of the Constitution.”¹⁶ But “if the Constitution predominates because it is law, its interpretation must be constrained by the values of the rule of law, which means that courts must construe it through a process of reasoning that is replicable, that remains fairly stable, and that is consistently applied.”¹⁷ In the American legal system, given its common law character, the principle of *stare decisis* has been at the very heart of the rule of law. It has also been valued for its place in a Burkean accretion of traditions and values, an accretion sometimes honored for its own sake and at other times valued for its supposed capacity to distill wisdom from experience in a way that would defy the ability of any single lawgiver, whether legislative or judicial. Henry Monaghan, among the most astute students of *stare decisis* in constitutional adjudication, has stressed its functions in legitimating the constitutional order and in contributing to the reality and the appearance of the law as impersonal if not altogether objective.¹⁸ . . .

In order for it to have any meaning, the principle of *stare decisis* must with some frequency require a judge to follow, and indeed to extend when principled adjudication so requires, constitutional precedents that the same judge would overrule if free to interpret text, draw inferences from structure and history, and pursue constitutional values, all unconstrained by the pull of previously decided cases. Thus those who see themselves as pursuing an interpretive philosophy of original meaning will, if adhering to *stare decisis* in all but the highly exceptional case, end up building on precedents that cannot be squared with that originalist philosophy. Justice Scalia, who takes *stare decisis* quite seriously in light of his strong views about the rule of law, and who accepts the proposition that “[o]riginalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*,”¹⁹ justifies the departures that doctrine requires from his originalist views by remarking that “*stare decisis* is not part of [his] originalist philosophy; it is a pragmatic exception to

¹⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁶ William W. Van Alstyne, *The Idea of the Constitution as Hard Law*, 37 J. Legal Educ. 174, 179 (1987).

¹⁷ Post, *supra* note 10, at 30 (footnote omitted).

¹⁸ See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 749-53 (1988).

¹⁹ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 138-39 (Amy Guttmann, ed., Princeton Univ. Press 1997).

it.”²⁰ But it is a necessary exception—one without which the Constitution could not be translated into a working system of law, characterized by values of predictability, regularity, and stability that themselves have deep constitutional roots.

To take seriously the obligation to be guided by constitutional precedent, in other words, is not to make some utterly unprincipled concession to the shortness of life or to some other exogenous constraint; rather, it is to pursue a vision of constitutional values more complex than nailing down, and securing against change (short of a constitutional amendment), the concrete understandings of the founding generation. It is only because construing the Constitution in accord with whatever theory one believes correct, and putting in place a system of legal rules to implement whatever constitutional construction one advances, are *both* key dimensions of constitutionalism that an adherent of any given philosophy of constitutional interpretation can, and indeed must, sometimes “say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”²¹ The upshot is that the Constitution’s text, and historical material relevant to the text’s proper understanding, will almost invariably recede into the background behind a parade of precedents, until the Constitution itself begins to seem “rather like . . . a remote ancestor who came over on the Mayflower.”²² As Robert Post has rightly observed, beginners in constitutional law are often amazed by how little of the Constitution they find in constitutional opinions, which tend to be filled with the elaboration and application of various doctrinal “tests” extracted from prior judicial decisions.²³

...

When Constitutional Worlds Collide: Can the Constitution Arbitrate Among Competing Modes of Interpretation From a Point External to the Interpretive Process?

... [M]any of the most serious conflicts posed by constitutional questions are bound to be intramodal, and not solely intermodal. Whether the conflicts in analysis occur within or across modes, or both, there is a temptation to minimize the significance of such conflicts or at least to insist that they can be “managed” without endangering the methodical and orderly nature of the attempt to categorize, systematize, and, in a sense, detoxify

²⁰ *Id.* at 140.

²¹ *Id.* at 139.

²² Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 234 (1980).

²³ Post, *supra* note 10 at 32.

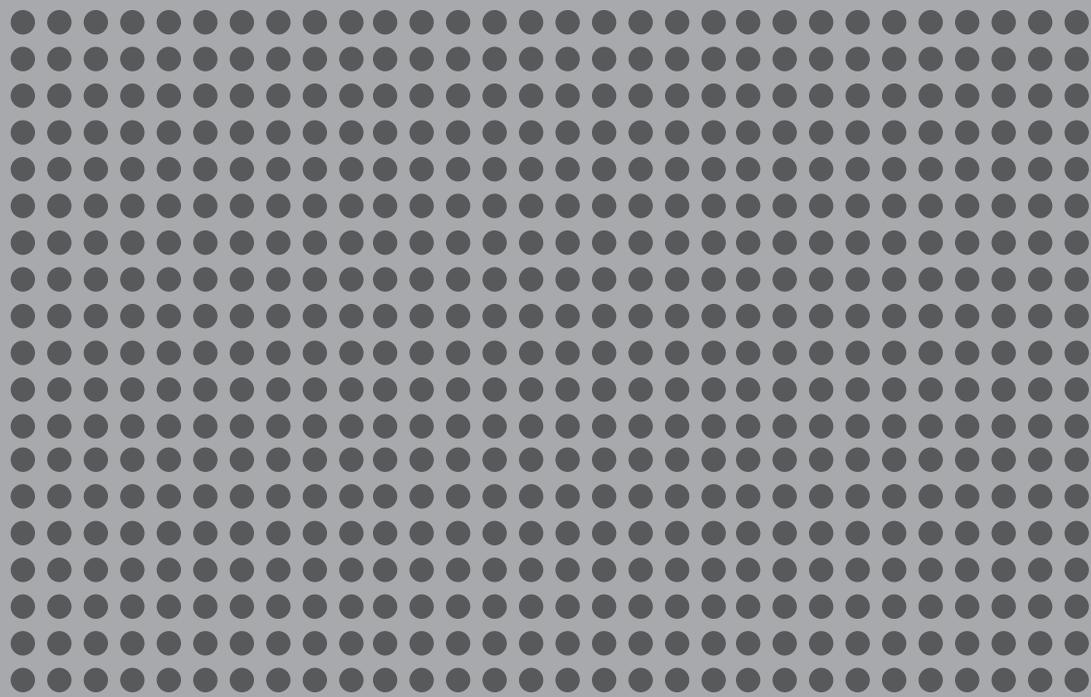
the potentially unruly and emotion-laden universe of constitutional interpretation. . . .

. . .

Ultimately, the quest for a grand unified theory, or at least an overarching metamode or metaprinciple, seems a vain one both as a practical matter and as a matter of principle. The appeal of all grand syntheses to the “puzzled and uncertain”²⁴ has been all too familiar a feature of the intellectual landscape throughout history. Although it cannot satisfy the hunger for certitude and clarity, only a “candid avowal of the limits of originalism,” of every other interpretive technique, and of every effort to blend the techniques into an integrated, determinate whole, “can open the process of constitutional interpretation to the full public debate without which it partakes only of miracle, mystery, and unquestioned authority.”²⁵

²⁴ Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1225 (1987).

²⁵ Laurence H. Tribe, *The Holy Grail of Original Intent*, 7 Humanities 23, 25 (1986).



Text and Structure

*“[W]e must never forget that it is
a constitution we are expounding.”*

— Chief Justice John Marshall, in *McCulloch v.
The State of Maryland*, et al., 17 U.S. 316 (1819)

from

FIDELITY IN TRANSLATION

Lawrence Lessig¹

I. Introduction

...
 . . . In an article published in this review just last year, Nicholas Zeppos divided the world of interpretive practice (for statutes at least) into three parts.² At the core is a practice of originalism, a commitment to “fidelity” needed to “counter anxiety over judicial lawmaking.” Originalism, said Zeppos, “resolves interpretive questions in statutory cases by asking how the enacting Congress would have decided the question.” Quoting Richard Posner, Zeppos continued, “[T]he judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him.” . . .

As method, of course, originalism is not unchallenged, and Zeppos contrasts its two main competitors. The first, what Zeppos called “dynamic” or “public values theories,” urges “courts to decide cases by applying current public values or practical considerations.” These public values schools teach that judges need to “focus on the current needs or values of society,” that their method should be “‘nautical’ (not archeological) and ‘dynamic’ (not static),” and that “[t]he views, beliefs, or values of a Congress long gone and unaware of the current structure of society are unlikely to provide a useful or meaningful guide for decision.” Thus, the public values theories “openly acknowledge[] a role for evolutionary considerations and societal values in the interpretive process.” The second competitor of originalism, what we all call “textualist” theories, are more ascetic, working to reduce the discretion of the originalist judge by reducing the “potentially wide array of originalist sources.” Like originalists, “textualists envision no role for the judiciary in updating statutory law,” but unlike originalists, textualists abstain from a broad view of the context within which a statute is written, fearing the judges cannot be trusted with all that context may allow.

That is the claim—that interpretive theory divides into these three schools, only the first of which (originalism) may claim for itself the virtue of fidelity. Dynamic and textualist theories depart from fidelity, even if they depart for good reason. Or so Zeppos suggests.

¹ Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993).

² See Nicholas S. Zeppos, *The Uses of Authority in Statutory Interpretation: An Empirical Analysis*, 70 Tex L. Rev. 1073 (1992).

...
 . . . [According to Zeppo], [*c*]onstancy is the virtue of originalism; *change* the vice (even if the necessary vice) of dynamism. Thus, in Zeppos's scheme, once we know that readings are changed readings, different from those the originals would have given, we are already on to justification, not of the readings, but of our act of interpretive infidelity. With changed reading comes our expulsion from the domain of faithful interpreters. Fidelity requires constancy; change betrays infidelity.

. . . [Zeppos] captures what I believe is a common understanding about the relationship between interpretive change and interpretive fidelity, and one which I believe is, in important ways, mistaken.

The mistake is suggested by the following: We emerge from a generation where the badge of infidelity was affixed to those who desired to keep the Constitution "in tune with the times." So charged the great fidelitist Justice Black, and before his righteousness have covered the Constitution's tuners, defending their "adjustments" on grounds of necessity, meekly attacking his rigidity with claims of impossibility.³

But just think of the image that Black's metaphor evokes. Is "tuning" unfaithful? A concert pianist plays a series of outdoor concerts. On the third night, the temperature falls dramatically, causing the piano to fall "out of tune." Is it more faithful to Beethoven to leave the piano out of tune? Would tuning the piano be the same kind of infidelity as adding a couple of bars to the end of the first movement? Is there no difference between tuning so the music sounds "the same" (the same?) and changing the tempo or cutting some particularly dark passages so the music sounds better? Is it really "tuning" when one makes the music sound better? Is it really infidelity when one changes the music to make it sound the same?

What Black's metaphor misses is a distinction between fidelity and change, a distinction that is the subject of this essay: Can an interpretive change be interpretive fidelity and, if so, how can we know when? For we all know that sometimes fidelity to an original meaning requires doing something different, and that, in those cases, doing the same thing done before would be to change the meaning of what was done before. Take a simple example to make the point: If a diplomat is ordered to "be polite" while in Iraq (where belching after eating signals approval) and belches loudly at the end of her meal, it would not be *fidelity* to her order to belch loudly at the end of her next meal with the British Monarch, even though (in an importantly impolite sense) she would have done the *same thing* as before. . . .

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³ See, e.g., *Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting).

Yet despite this that we all know, much of the debate over fidelity in constitutional theory proceeds as if all this were forgotten. While originalists sometimes say that we must apply the principles of the Framers and Ratifiers to the circumstances of today, they more often behave as if the question were simply (and always), “How would the originals have answered this question then?” And while non-originalists usually claim that weight should be given to the historical meaning of the Constitution, rarely do they suggest just how this should be done. Thus, the extremism of the strict originalist (decide cases now as they would have been decided then) invites the extremism of the non-originalist (decide cases now as would be now morally the best), and in between these extremes is lost our understanding of what fidelity might be.

In this essay, I suggest we rethink our ideas of fidelity and change with what is by now quite an old trope: translation. . . . The translator’s task is always to determine how to change one text into another text, while preserving the original text’s meaning. And by thinking of the problem faced by the originalist as a problem of translation, translation may teach something about what a practice of interpretive fidelity might be. . . .

My aim in this essay is not to argue for or against fidelity as an interpretive ideal. Instead my tack is internal. I take as given the judiciary’s (at least feigned) commitment to fidelity as its goal and ask simply what, given what we know about meaning and change, a practice of fidelity would have to be. I conclude that a practice of fidelity would have to be something like the practice of translation sketched below.

...

II. Changed Readings and Fidelity

. . . Words are written in context. If they have meaning, contextualists would say, they have meaning because of this context. Their meaning *depends* on this context: The nature of the context affects the text’s meaning, and likewise changes in the context can affect the text’s meaning. . . .

Because meaning depends on context—or more simply, because meaning depends on more than text alone—it should follow that the *same* text written in two different contexts can mean quite *different* things (“Meet me in Cambridge” written in England can mean something very different from “Meet me in Cambridge” written in Massachusetts). Likewise, a *different* text written in two different contexts can mean the *same* thing (“Meet me in Cambridge, Mass.” written in England can mean the same thing as “Meet me in Cambridge” written in Massachusetts). . . .

Context matters, then—at least in writing. But if context matters in writing, it must also matter in reading. . . .

Between the context of writing and the context of reading, . . . there may arise an interpretive gap. And it is this gap that suggests the general problem that gives rise to the subject of this essay. When the interpretive gap is small—when the context of writing is very similar to the context of reading—the confusion caused by differences between contexts may also be quite small. Reading can proceed as if context did not matter. Judges can say interpretation begins as always with the text read as if interpretation really did involve just a text that is read. When contexts remain alike they may also remain invisible.

But when the gap is not small—when the differences between contexts become quite large—then reading cannot proceed as if context did not matter. Or at least it cannot so proceed if contextualism is correct and the aim of the reader is something like interpretive fidelity. For if contextualism is correct, and a change in context is ignored, the reader may rewrite the writer’s original meaning.

. . . .

. . . For our purposes “context” . . . is just that range of facts, or values, or assumptions, or structure, or patterns of thought that are . . . arguably relevant to an author’s use of words to convey meaning.

. . . .

. . . We can say that in a particular text the most significant [elements of context] are not just relevant to an author’s use, but are indeed relied upon by the author when using the text—relied upon in just the sense that *had they been other than they were when the author first used these words, then the author would have used words other than she did*. . . . I will call the elements of a context relied upon in the sense just described a *presupposition[s]* of the author’s use of a text.

. . .

III. Step One of Fidelity: Contextualists

Turn now from the question of how meaning may change and consider the notion of fidelity—the promise to constrain the range within which meaning may change. . . .

Our discussion of contextualism suggests that if the aim is fidelity, then the initial step must be to read the text in its originating context, finding its meaning there first. . . .

Thus among fidelitists, the first step of reading is contextual. But after this first step, practices separate. Indeed, two very different approaches have emerged, one that I will call “one-step fidelity,” and the other “two-step fidelity.” . . . [W]ith this first step, the one-step believes the problem of fidelity both begins and ends—that once we find meaning in the originating context (the context of writing) we simply apply that meaning in the

context of application (the context of reading) as if any differences between the context of writing and the context of reading just did not matter. Fidelity, the one-step believes, means applying the original text *now* the same as it would have been applied *then*. As Robert Bork puts it: “What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law’s enactment.”⁴

....

What distinguishes the two-step fidelitist from the one-step is that the two-step seeks a way to preserve the meaning of the *application* in just the way the one-step agrees we should preserve the meaning of the *text*. The one-step and two-step read a text against its original context so that its meaning in the original context is preserved; the two-step reads the meaning of the application *as applied in the current context* so that the meaning of the application is the same in the original and current context. Thus, while the one-step applies the text now and here just as it would have been then and there, the two-step asks how to apply the text now and here so as to preserve the meaning of an application then and there—how, that is, to make the meaning of the current application equivalent to the meaning of an original application, or alternatively, how to *translate* the original application into the current context.

...

IV. Step Two of Fidelity: Translation

One-step fidelity—originalism in some of its forms—fails to preserve meaning across interpretive contexts. It fails because, although sensitive to the effects of context upon meaning in the *original* context, it is blind to the effects of context upon the *application* meaning in the *application* context. If context counts in one case, it ought to count in both, or so the two-step argues.

....

What the two-step needs is a method to neutralize the effect of changed context on an application’s meaning. As we shall soon see, the method the two-step suggests is a device called *translation*.

....

A. Step Two: The Link to Translation

In its commonsense meaning, translation is that process by which texts in one language are transformed into texts of another language, by constructing a text in the second language with the same meaning as the text in

⁴ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 144 (The Free Press 1990).

the first. As one commentator has put it, “To translate from one language into another is to express in one language what is said in the other. This involves the formulation of sentences in one language which have the same meaning as sentences of the other.” How can this commonplace practice answer the two-step’s need?

The two-step seeks a process that neutralizes the effect of *changed context* on a text’s meaning; translation is a practice that neutralizes the effect of *changed language* on a text’s meaning, where language is just one part of context, and changed language is just one kind of change in context. If translation is a device developed to accommodate contextual changes of one type (language), the two-step suggests, perhaps it can be adapted to contextual changes of other types as well.

...

B. Step Two: The Practice of Translation

To understand what can be learned from the practice of translation, we need to look more extensively at that practice itself. . . .

...

. . . [T]he practice of translation [in the linguistic context is] the result of two distinct processes (two steps): first, the understanding of the material to be translated (a process of finding *familiarity*), and second, the process under which sameness in meaning is found (a process of finding *equivalence*). . . .

...

. . . [In seeking equivalence, a translator faces a] duty of creativity; [that is], the duty to work *creatively* with the text translated to preserve as much meaning as context will allow. . . .

...

. . . [In seeking equivalence, a translator also faces a duty of *humility*; that is, an] ethic cautioning the translator that even though empowered to be creative, she should not ‘improve’ the text translated, or that if she does improve it, she has not translated it. . . .

...

V. Two-Step Fidelity: Finding Equivalence

As sketched so far, the practice of translation moves in two stages: first, understanding the contexts between which the translator must move; and second, locating something called an equivalence between the two contexts. In finding equivalence, the practice must first specify the sense in which translations for that practice are equivalent; it must acknowledge the necessity of creativity; and finally, it may have reasons to constrain creativity with an ethic of humility.

Like the interlanguage translation of texts, interpretation in law proceeds first by understanding the sense or meaning of the text at issue in its original context (familiarity); the problem of fidelity is how to preserve that significance in the current context (equivalence).

Using this sketch, I will outline below a model of judicial translation for interpretive questions in the law. Already, though, the similarity in the interpretive problems should be apparent. Like the interlanguage translation of texts, interpretation in law proceeds first by understanding the sense or meaning of the text at issue in its original context (familiarity); the problem of fidelity is how to preserve that significance in the current context (equivalence). Like interlanguage translation, ordinary notions of interpretation in law reflect the relativity of the concept of equivalence and echo both the requirements of creativity and the limitations of humility. The aim of the subparts that follow is to build on this similarity to develop a model of translation applicable to law.

A. Two-Step Fidelity: A Model

The first step of fidelity is familiarity, both with the context of *authorship* and with the context of *application*. As Jefferson Powell states: “We can understand the original meaning of the Constitution . . . only by ‘plunging [ourselves] into the systems of communication in which [the Constitution] acquired meaning.’”⁵ Familiarity, then, is the common step of both the one- and two-step fidelitists—the practice of the contextualist. As Justice Scalia describes,

Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material. . . . And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day.⁶

Obviously the needed degree of familiarity is a function of the cultural distance that the translation is to cover. If that distance is great, then so too must the exploration of the originating context be great; if it is small, then so may the exploration be as well.

Disagreement among fidelitists begins in the second stage, the process of finding equivalence. The translator’s second step is to reconstruct a text in the application context that replicates the meaning of the application in

⁵ H. Jefferson Powell, *Rules for Originalists*, 73 Va. L. Rev. 659, 675 (1987).

⁶ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856–57 (1989).

the original context. But here emerge the two most obvious differences in the translative practices. First: for the interlanguage translator, this reconstructed text is a *different text* in a different language; for the legal translator, the reconstructed text is an *application* of the text in a different context; for the interlanguage translator, the source text is an original text in a foreign language; for the legal translator, the source text is a first (or first hypothetical) application. Therefore, while for the interlanguage translator it is the meaning of the two texts that must be preserved, for the legal translator it is the meaning of the two applications that must be equivalent.

A second difference between interlanguage translation and legal translation is more difficult to accommodate. For the interlanguage translator, there is a relatively clear signal that translation is required when the languages are “different.” For the legal translator, differences in language are not so clear, and thus there is no clear way to identify the predicate for an act of translation. Always there will be some change, but perhaps only rarely will change merit translation.

To remedy this, the legal translator needs a way to speak of those changes that remark the need for translation. Based on the previous discussion of how context changes meaning, I will use the device of the changed presupposition to identify those cases where meaning between two contexts has changed. Where we imagine that those who first used the text would have used a different text if some fact of the original context changed, then we will understand that fact as a presupposition, and focus on how that changed presupposition engenders a problem of translation. . . .

The method that I outline begins by identifying presuppositions that have changed between the two contexts and constructing an accommodation to account for that change. Often (always?) there will be more than one possible accommodation—more than one way to restructure the application to preserve its meaning. . . . Among the possible accommodations, I assume that the translator has a duty to select the change that is most *conservative*. The translator is to find the accommodation that makes the *smallest* possible change in the legal material and still achieves fidelity.

. . .

B. Two-Step Fidelity: Translations

The . . . examples that follow apply this model of translation to the law. . . .

. . .

[1]. Legal Presuppositions: The Exclusionary Rule (Mapp).

. . . [U]nder current Supreme Court doctrine, (some) violations of the Fourth Amendment entitle the criminal defendant to the exclusion from her trial of any evidence which is the fruit of that violation. Under the

Fourth Amendment as originally understood, no such exclusion was implied. Indeed, no remedy for Fourth Amendment violations is mentioned at all. Thus, the question for the fidelitist is whether creating this remedy today can be understood as an act of fidelity.

To say that the original Fourth Amendment specified no constitutional remedy for its violation is not to say that there indeed was no remedy for a Fourth Amendment violation. When originally enacted there was at least one remedy for what we would think of as violations of the Fourth Amendment: the common law of trespass. And we might presume that when enacted, the common law of trespass was viewed as sufficient to guard against government intrusion into private spheres. But to see how the remedy was sufficient, we must rehearse briefly some history of the common law.

As many have agreed, the aim of the Fourth Amendment as originally conceived was not to define the scope of privacy that the Constitution guaranteed to the individual, but rather to limit the kinds of *immunity* the federal government could grant federal officials against state common-law causes of action arising out of their official acts of search and seizure. The warrant was one such immunity: with it a state actor was protected from civil actions for damages arising out of any trespass committed in the course of his official duties. If the constable had a warrant, he was privileged from suit; without a warrant, he was strictly liable for trespass unless he actually found contraband in the course of his search or had *ex ante* a good reason for the search—that is, he was liable unless he could convince a jury that the search was reasonable. The aim of the Fourth Amendment’s Warrant Clause was to limit the grounds upon which a warrant could be issued—limit them, that is, to probable cause, and thereby to make unavailable the general warrant.

Thus, as many originalists have argued, in its present incarnation the Fourth Amendment has little apparent relation to this original aim. But to understand whether the appearance is merely appearance, we must look more closely at the original presuppositions of the amendment.

Essential to the Fourth Amendment was a structural incentive, one built in by the common law. As originally conceived, the police (or their equivalents) had a very strong personal incentive to secure a warrant before searches or seizures, for without a warrant, they were liable personally for their trespass. And of course essential to this incentive was a common-law system of remedies that actually made it true that the police had an incentive—that is, a common-law system through which the wronged citizen could get damages for the wrongful search or seizure by the state official. As [Akhil] Amar notes, “The structure of these cases is illustrative of the myriad ways in which constitutional ‘public law’ protections are intricately

bound up with—indeed, presuppose—a general backdrop of ‘private law’ protections. . . .”⁷

Now again, as originally structured the Fourth Amendment applied to the federal government, not the states, but the common-law remedy of trespass was a state remedy. Thus, as originally structured, there was no opportunity for the government restricted (the federal government) to undermine the effect of this restraint (a limitation on possible immunity from trespass actions) by redefining the trespass action itself to exclude governmental officials: the federal government, that is, had no power to define state trespass actions, and hence had no ability to interfere with the protection trespass actions provided. Its power was restricted by a common-law protection, which it had no power to limit, either by granting itself immunity or by redefining the underlying common-law right.

But obviously, once incorporation occurred, this critical division of power was undermined. For now the government restricted (the state), though limited in the *immunity* that it can erect against plaintiffs, has the power to redefine the cause of action of trespass itself. Unlike the federal government before incorporation, the state government can change the constitutional protection itself in spite of incorporation, not by expanding the defenses to a trespass action (by expanding immunity), but by changing the common-law action of trespass itself. After incorporation it is possible that the state could escape the restrictions of the incorporated amendment by a formalistic trick: rather than authorizing general warrants, or granting an immunity from prosecution to its own police, the state could simply redefine the right against trespass to extend only against private actors—trespass by state actors would be defined not to be “trespass.” The state could escape the Fourth Amendment limitations on the immunity it can grant its officials from violations of individual rights simply by redefining those rights not to extend to state officials.

Of course so much is simply a *reductio ad absurdum* on the premise of the exercise—for as incorporated, it would make little sense to understand the amendment as leaving unreviewed the scope of power that a state has to redefine its trespass protections. If the existing common-law system was integral to the proscription of the Fourth Amendment as applied to the federal government, and an essential presupposition of that scheme was the inability of the federal government to control the state’s definition of trespass, then it should follow that as incorporated against the states, a state could not, by redefining the common-law right, eliminate all liability of state actors for illegal searches and seizures. Just as the original Fourth Amendment had a structural protection in the division of federal and state

⁷ Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1507 (1987).

power, such that the federal could not control the state grant of rights, so too must the incorporated Fourth Amendment include a limitation on the state's power to control the scope of the rights protected. Were a state to grant itself immunity by redefining the right, then a central legal presupposition of the original amendment would have been undermined and its essential structural incentive eliminated. A translator aiming to preserve the meaning of the original structure would have to find other means to preserve the common-law remedy—an alternative remedy, for example—so that the structural incentives originally settled by that amendment could be preserved.

Return now to reality. In this world, the states have not redefined “trespass;” no state *action* or rule such as I describe works to immunize directly state officials from liability for wrongful invasions of privacy. Nonetheless, state *inaction* may have effectively achieved the same result. For if the costs of seeking a common-law remedy for state violations of liberty exceed any possible recovery, and if the state has not enacted cost-shifting measures to permit those costs to be avoided, then the state has *in effect* granted an immunity to state actors for their wrongful invasion of privacy by depriving victims of any possible incentive to pursue protection of their rights. It is as if the state has eliminated the common-law right itself. And if the right has in effect been eliminated by the changing availability of a common-law remedy, then we can say the state has in essence removed a central presupposition of the Fourth Amendment's protection. It is against this background that the extension of the exclusionary rule to state proceedings begins to make sense—not as the creation of new rights, but as the creation of a different remedy, a translation aimed to preserve old protections in a new legal context.

This, at least, was the rationale of *Mapp v. Ohio*,⁸ which extended the protection of the exclusionary rule to the states. As the *Mapp* Court claimed, no longer was the common law a sufficient remedy for illegal state action, and consequently, an alternative remedy was required to restore the original constitutional balance. The Court selected the exclusionary rule, no doubt an imperfect and systematically biased remedy, as an alternative remedy to fill in the gaps left by the eroded common law. Thus, while in 1791, the amendment would not have been read to imply an exclusionary remedy, in light of the transformed social and legal context—transformed by the loss of a presupposition essential to the original design—a different application of the amendment is now required, one that substitutes a remedy where the state has withdrawn the old remedy.

⁸ 367 U.S. 643 (1961).

If it is true that the incorporation of the exclusionary rule is justified because of the continued need for a supplemental remedy, then this provides a clear test of my thesis that the extension of such a remedy is best understood as an act of translation. For imagine that a state enacted the equivalent of a workers' compensation statute for violations of privacy by state actors—providing, say, a simple and cheap remedy for wrongful searches and seizures. With this alternative remedy in place, the state petitions the Supreme Court to exempt it from the requirements of the exclusionary rule. In support of its petition, the state points to evidence demonstrating that the remedial effect of its statute far exceeds the remedial effect of the exclusionary rule, and does so at less social cost. More illegal searches are prevented, that is, through the use of remedies that impose fewer costs on society. Faced with such a petition, the Court would have little reason not to rule in favor of the state, if in fact the extension of the exclusionary rule was grounded on a fidelitist's commitment to the original structure of incentives. For the fidelitist, once the state acts to restore the original structure, there is no continued sanction for an alternative remedial prophylactic.

So understood, a central enigma for conservatives can be reconceived as a fidelitist's response to the change in the structure of incentives underlying the Fourth Amendment. Moreover, such a reconception identifies a means for eliminating the constitutional justification for the prophylactic exclusionary rule. If the exclusionary rule is understood as an act of translation, then translation suggests a means by which it can or should be replaced.

[2]. Nonlegal Presuppositions: Safeguards Against Self-Incrimination (Miranda).

[The previous example] tracked translation in the context of changes in legal presuppositions. But unless law were absolutely autonomous, there should also be examples of translation engendered by changes in nonlegal presuppositions. . . . [In the example that follows], a translation is made in light of a change in a nonlegal presupposition of the originating context. Again, by nonlegal presupposition, I simply mean a fact about the social context not primarily constructed by or constituted by legal norms. Of course, no sharp line divides the two types of presuppositions, and the . . . example discussed below comes close to the border, appearing alternatively as a legal and nonlegal presupposition. Nonetheless, for reasons that should emerge, I will treat it here as a nonlegal presupposition.

Few decisions of the Warren Court have attracted the derision of the originalists as has *Miranda v. Arizona*. Out of whole cloth, it is said, the Court constructed this constitutional “right” to an arbitrary set of warnings, a construction unprecedented in our constitutional history. It was a “*trompe l’oeil*,” in the words of Justice Harlan, and “[a]t odds with American

and English legal history” according to Justices White, Harlan, and Stewart. But for its amazing constitutional entrenchment, as well as broad acceptance by law enforcement officials, *Miranda* would be the first sacrifice in the originalist’s crusade. Its very heresy, however, makes it an irresistible subject for a fidelitist’s review of changed constitutional readings. Can *Miranda* too be understood as translation rather than free verse?

Professor Yale Kamisar has for some time sketched the argument that suggests *Miranda*’s translative pedigree, and . . . we can recast his argument quite easily.⁹ What has changed to justify the change of *Miranda*?

As Kamisar argues, quite a lot, but to see just what we should return to what was before. At the time the protections of the Fifth Amendment were carved into the constitutional text, there was no generalized bureaucracy of investigation of the sort we know today as the police. The powers of the common-law police analogs were quite limited and distinct: they were empowered to quell disturbance and restore order, and to secure offenders for presentment to a court and later a magistrate. As Kamisar describes, it was a time “when ‘local prosecuting officials were almost unknown,’ and a ‘primitive constabulary . . . , consisting of watchmen rather than police officers and wanting in any detective personnel, attempted little in the way of interrogation of the persons they apprehended.’” Or, as Kamisar further describes:

[T]here were simply no “police interrogators” to whom the privilege could be applied. . . . “[C]riminal investigation by the police, with its concomitant of police interrogation, is a product of the late nineteenth century;” in eighteenth-century America . . . “there were no police [in the modern sense] and, though some states seem to have had prosecutors, private prosecution was the rule rather than the exception.”¹⁰

So if not the police, who were the interrogators? First note, as we seem long to have forgotten, that before the time of the Founding, the English common law forbade the defendant from testifying at trial as a witness *at all*, whether to confess or claim his innocence. Thus, if the text of the Fifth Amendment (“nor shall be compelled in any criminal case to be a witness against himself”) is read in its most limited sense (as applying to witnesses at trial), it had no application when adopted, since, again, when adopted criminal defendants could not be witnesses. As Dean Griswold argues,

⁹ See Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 Mich. L. Rev. 59 (1966), reprinted in Yale Kamisar, *Police Interrogation and Confessions* 41 (1980).

¹⁰ Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *Criminal Justice in Our Time* 1, 36 (A.E. Dick Howard ed., 1965), reprinted in Yale Kamisar, *Police Interrogation and Confessions* 27, 36 (1980).

“the *importance* of the privilege against self-incrimination [at the time of adoption] was in investigations, in inquiries, and with respect to questioning of the defendant by the judge in criminal cases, such as had been made notorious by Judge Jeffries.”¹¹ Thus, concludes Kamisar, the privilege is given sufficient content if it is viewed as protecting “an accused *not sworn as a witness* from interrogation by prosecutor or judge at the trial . . . or as protecting an accused from questioning *before trial*.” Thus the primary locus of interrogation against which the clause was directed was either at trial by the judge, or before trial by magistrates. The world of the Framers has dramatically changed. As Kamisar describes, “[e]ventually, ‘but *wholly without express legal authorization*,’ interrogation became the function of the emerging organized police and prosecuting forces.” Slowly investigation shifted outside the control of the court, into the control of the police, an increasingly bureaucratic purgatory—an interregnum between liberty and judicial process. With this shift there opened a crucial gap in constitutional protection. At the Founding, the privilege protected at least that place where the vast amount of the wrong to be avoided (interrogation) occurred (at trial). But now the place where the wrong to be avoided occurs (the stationhouse) has changed. And the question becomes how the fidelitist is to account for this drastic change—whether to ignore it or to incorporate it into existing constitutional norms. Kamisar argues that *Miranda* represents one response of fidelity: as the locus of investigation shifted from the courtroom, to the preliminary investigation by the magistrate, to the bureaucratic police, the protection of the Fifth Amendment too must (and did) shift, if the same protection afforded by the Founders is to be afforded to the Founders’ progeny. As Kamisar quotes, “If the police are permitted to interrogate an accused under the pressure of compulsory detention to secure a confession . . . , they are *doing the very same acts which historically the judiciary was doing* in the seventeenth century but which the privilege against self-incrimination abolished.” Only by extending the privilege to interrogation by police does one preserve the original meaning of the privilege.

Miranda’s translative pedigree thus rests upon at least one critical change in the interpretive context between the Founding and today—the locus of interrogation. The two-step would claim that to preserve the meaning of the original protection in this fundamentally changed context requires something like the *Miranda* accommodation. Indeed, *Miranda*’s accommodation only appears odd to us because we are focused on reading the Fifth Amendment’s text out of context—today, a criminal defendant can be a

¹¹ Erwin N. Griswold, *The Individual and the Fifth Amendment*, *The New Leader*, Oct. 29, 1956, at 20, 22 (emphasis in original).

*Blind to the
effect of context
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constitutional
meaning.*

witness, and today, investigation and interrogation occur both within and without the judicial process; thus today, a text that required that no one “shall be compelled . . . to be a witness against himself” would reasonably be limited to the courtroom (giving the witness the choice to testify) and not apply to the police. But this out-of-context reading does not yield the text’s meaning, for when written its protections were complete, given the practice of the time.

The question for the two-step resolves to this: Given the protection the Fifth Amendment provided in context, and assuming the presupposition of the primary locus of investigation was then as it is now, would the Framers have accommodated this difference by making clear the broad application of their protection? And if one could believe that they would, *Miranda’s* claim would be made.

...

[VI]. Conclusion

Readings of the Constitution have changed, but standing alone, that says nothing about fidelity. Readings of the Constitution have remained the same, but again, standing alone, that says nothing about fidelity. Changed readings are neither necessary nor sufficient conditions of infidelity or fidelity. So much I have tried to argue.

There is a practice of interpretation that could conceivably meet a legal system’s demands for fidelity. That practice is one I have called translation. Translation is distinct from one-step originalism. For reasons tied to how meaning changes across contexts, one-step originalism as a practice must systematically defeat any ideal of fidelity. Blind to the effect of context on meaning, originalism allows context to change constitutional meaning.

Unlike one-step originalism, arguments from translation accommodate changes in context so as to preserve meaning across contexts. . . .

. . . What two-step fidelity adds to our ordinary understanding of originalism is a way to understand how originalism can be dynamic without it being unfaithful. . . .

...

*from***MCCULLOCH V. THE STATE
OF MARYLAND, ET AL.,**

17 U.S. 316 (1819)

Opinion of Chief Justice John Marshall for the Court

[In this case, a plaintiff suing on behalf of himself and the State of Maryland brought an action against James McCulloch, the cashier of the Baltimore branch of the Bank of the United States, alleging that McCulloch had failed to pay state taxes assessed by the state of Maryland. The case presented the Court with two questions: whether Congress had the constitutional authority to incorporate a national bank; and, assuming it did, whether Maryland could constitutionally impose a tax on the bank's Maryland branch. The Court concluded that Congress did have the power to create a bank, and that Maryland could not constitutionally tax it. The following excerpt is from the Court's analysis of the first question in the case.]

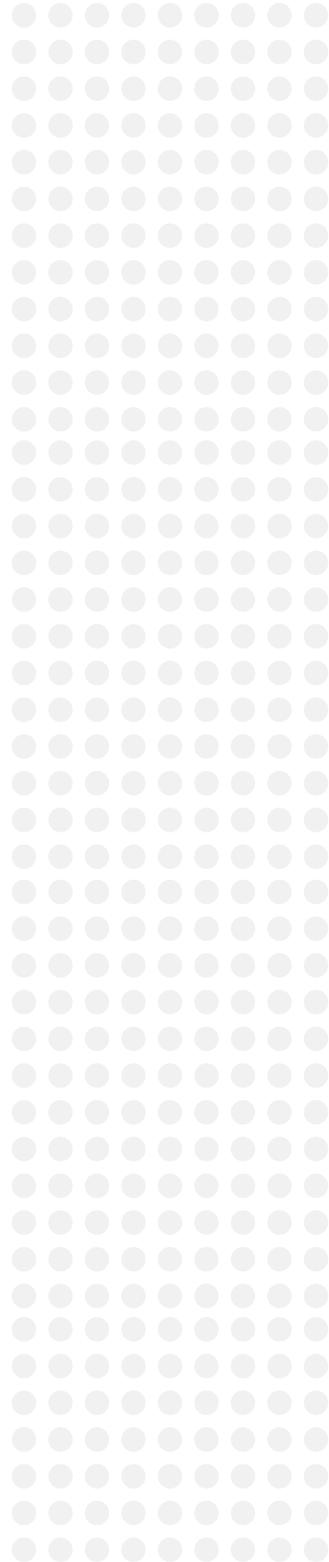
In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. . . .

The first question made in the cause is, has Congress power to incorporate a bank?

. . .

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, “this constitution, and the laws of the United States, which shall be made in pursuance thereof,” “shall be the supreme law of the land,” and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution,



A constitution... requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.

form the supreme law of the land, “any thing in the constitution or laws of any State to the contrary notwithstanding.”

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the [Constitution] which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the *10th amendment* . . . omits the word “expressly,” and declares only that the powers “not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;” thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding.

Although, among the enumerated powers of government, we do not find the word “bank” or “incorporation,” we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. . . . [I]t may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by

withholding the most appropriate means. . . . The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

. . .

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "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 thereof.”

...

. . . [T]he argument on which most reliance is placed [by counsel for the State of Maryland], is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be “necessary and proper” for carrying them into execution. The word “necessary,” is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word “necessary” is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word “necessary” is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying “imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,” with that which authorizes Congress “to make all laws which shall be necessary and proper

for carrying into execution” the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word “necessary,” by prefixing the word “absolutely.” This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. 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. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. . . .

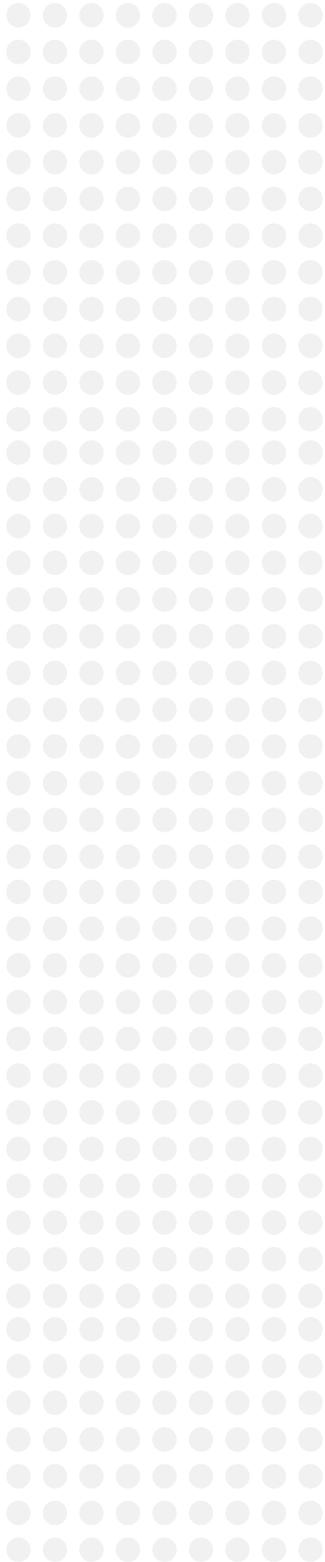
. . .

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. . . .

. . .

[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

*This provision
[the Necessary
and Proper
Clause] is made
in a constitution
intended to endure
for ages to come,
and, consequently,
to be adapted to
the various crises
of human affairs.*



...

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

...

from

INTRATEXTUALISM

Akhil Reed Amar¹

...

Interpreters squeeze meaning from the Constitution through a variety of techniques—by parsing the text of a given clause, by mining the Constitution’s history, by deducing entailments of the institutional structure it outlines, by weighing the practicalities of proposed readings of it, by appealing to judicial cases decided under it, and by invoking the American ideals it embraces. Each of these classic techniques extracts meaning from some significant feature of the Constitution—its organization into distinct and carefully worded clauses, its embedment in history, its attention to institutional architecture, its plain aim to make good sense in the real world, its provision for judicial review (and thus judicial doctrine), and its effort to embody the ethos of the American people. Here is another feature of the Constitution: various words and phrases recur in the document. This feature gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation. I call this technique intratextualism.

In deploying this technique, the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.

...

In what follows, I illustrate, critique, and apply the classic but underappreciated technique of intratextualism across a wide range of constitutional questions.

I. Cases . . .

...

1. *McCulloch*. — Let us begin with what many would deem the most central case in our constitutional canon: *McCulloch v. Maryland*. *McCulloch*’s claim to primacy can of course be challenged—*Marbury*, *Brown*, and *Roe* probably stand as the three other leading contenders today . . . Together these four cases mark the basic outlines of conventional constitutional doctrine, characterized by judicial review of both legislative and executive action (*Marbury*); broad but theoretically finite federal power (*McCulloch*) that states may not obstruct (*McCulloch*, again, along with its cousin, *Martin*

Here is another feature of the Constitution: various words and phrases recur in the document. This feature gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation. I call this technique intratextualism.

¹ Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999).

v. Hunter's Lessee); emphatic norms against governmental efforts to subordinate or stigmatize racial minorities (*Brown* and its companion *Bolling*); and broad protection of judicially defined fundamental rights that may or may not be clearly stated in constitutional text (*Roe*). *McCulloch's* claim to canonical primacy, however, rests on more than its doubly significant substance affirming generous congressional power in the first half of the opinion and important limits on state governments in the second half. Perhaps uniquely among the four top contenders, *McCulloch* commands our attention not merely for what it says but for how it says, featuring a richer mixture of elegant constitutional arguments of various types than its rivals. To read *McCulloch* is to see (and for many beginning students, to learn) how to do constitutional argument.

(a) *McCulloch* and constitutional argument generally. — Before we examine *McCulloch's* use of intratextual argument, it may be useful to review how Chief Justice Marshall's masterpiece deploys other, more familiar, types of constitutional argument. Consider first an argument exemplifying textualism in its classic clause-bound form. Maryland apparently claimed that the Necessary and Proper Clause, "though in terms a grant of power, is not so in effect; but is really restrictive," requiring the Court to construe the various enumerated powers in Article I more strictly than it otherwise would in the absence of this clause. In response to this claim, Marshall trumpets the text. Had the clause been designed to restrict rather than to enlarge or to confirm the broad construction otherwise appropriate for enumerated powers, its text would have been worded differently. Instead of affirmatively declaring that "Congress shall have the power . . . to make all laws which shall be necessary and proper," the clause would have been negatively written "in terms resembling these[:] . . . 'no laws shall be passed but such as are necessary and proper.' Had the intention been to make this clause restrictive, it would unquestionably have been so in [grammatical and syntactical] form as well as in effect."

Marshall buttresses this narrow textual argument with a narrow historical argument. The friends of the Constitution in 1787, he notes, faced their main opposition from localists fighting the proposed federal government as too strong, not from ultranationalists attacking the new central regime as too weak. Had the Framers designed the Necessary and Proper Clause as a restriction on Congress, they would have openly advertised it as such to win their critics over: "No reason has been, or can be assigned for . . . concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it." Other passages in *McCulloch* also feature important historical arguments. For example, Marshall opens his substantive analysis of congressional power with a broad-brush narrative

of the process by which the American people ordained and established the Constitution. A few paragraphs later, Marshall notes that even the Tenth Amendment does not limit Congress to powers “expressly” conferred, and he again turns to history for explanation: “The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word [‘expressly’] in the articles of confederation, and probably omitted it to avoid those embarrassments.”

Intertwined with Marshall’s appeals to text and history are sturdy structural arguments rooted in federalism and populism. Because the Constitution is not merely a league or treaty between sovereign states, federal powers should not be grudgingly construed, as were the powers conferred by the earlier Articles of Confederation. (Here we see the relevance of Marshall’s broad-brush narrative of the Founding process, aimed at disproving the notion that the Constitution was in effect a mere compact created by sovereign governments.) Because the Constitution derives directly from the people, in whose name it speaks (“We, the People”) and to whom it speaks, it must speak in broad terms. By its very nature as a populist document, a constitution cannot “partake of the prolixity of a legal code”—for such a code “would probably never be understood by the public” whose assent makes a constitution the supreme law. Thus Marshall argues that the nature of the document repels the idea that every conceivable federal power—such as the power to create a bank—must be spelled out in minute detail rather than implied by and subsumed within the general structure of broadly crafted enumerated powers. Perhaps certain treaties should be strictly construed in a manner leaving nothing to implication—and so too perhaps for some legal codes. But for reasons of federalism and populism, Marshall is emphatic that the document at hand is inherently different from a treaty or a code: “we must never forget, that it is a constitution we are expounding.” Structural arguments also loom large in the second half of *McCulloch*, in which Marshall proclaims that Maryland may not tax the charter of a lawfully established federal bank. Where, a critic might ask, does the Constitution say that? Nowhere in so many words, Marshall cheerfully admits, but as a matter of general structural logic, surely the part cannot control the whole. Surely Maryland may not tax those whom Maryland does not represent. If Maryland may lawfully tax the federal bank a little, surely she may lawfully tax the federal bank a lot; if she may tax a federal bank, surely she may tax all other federal instrumentalities; if she may pass tax laws, surely she may pass other obstructing laws. This structural logic nicely echoes the rallying cries of the American Revolution: “No taxation without representation!” and “No tax on tea!” (To the colonial patriots, the power of Parliament to pass a tiny tea tax implied the power to tax without limit, which in turn implied plenary parliamentary

power in America.) *McCulloch* also illustrates how structural argument often goes hand in hand with a certain kind of pragmatic argument. Stingy construction of the Constitution, Marshall argues, would offend the nature of the Constitution not merely as a suitably nationalist and populist document, but also as an inherently practical document. The Constitution was meant to work—and to work over long stretches of time, and vast reaches of space:

[A] constitution [is] 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. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur... [The restrictive approach is] so pernicious in its operation that we shall be compelled to discard it . . .

. . .

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples . . .

Hear the voice of the pragmatist, weighing various readings by their consequences. For Marshall, the key fact for the case at hand is the huge sweep of the nation, ranging “from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific.” Armies may be required to defend such an immense expanse, and soldiers must be paid wherever they may go. (As a Revolutionary War veteran who endured the winter at Valley Forge, Marshall viscerally understood the obvious practical importance of keeping soldiers well supplied and well paid, lest they desert or mutiny.) A highly convenient way to assure that federal soldiers will be paid on time and on site is to establish a system of federal banks with branches stretching across the continent. Because the Constitution plainly contemplates a federal army and federal fiscal operations of taxing and spending, federal ATMs (or their nineteenth-century equivalent) are appropriate—they are subsumed within and implied by the great powers of “the sword and the purse” to tax, spend, regulate commerce, declare war, and raise and support armed forces.

Let us now turn to another form of constitutional analysis: doctrinal argument, based on judicial precedent. Many readers have noticed that Marshall cites no cases by name. However, in the first paragraph of his analysis of the first question in the case, Marshall reminds us that “the judicial department, in cases of peculiar delicacy,” has repeatedly treated the statute creating a federal bank as “a law of undoubted obligation.” A casual reader might wonder what Marshall means here, but the answer is clear from *McCulloch*’s oral argument. Judges in earlier cases had upheld criminal convictions for various frauds upon the bank, actions that would arguably have been immune from criminal sanction if the bank itself were an unconstitutional entity. Why did Marshall soft pedal these precedents? Perhaps because the constitutionality of the bank was never explicitly raised as a defense in these earlier criminal cases. A good doctrinal judge pays exquisite attention to fine doctrinal distinctions between square holdings and less than square ones, and between holdings and dicta. When seen in this light, Marshall’s handling of caselaw in *McCulloch* seems not cavalier, but deft—ever so softly invoking precedents that, as precedents go, were ever so soft. Later in his opinion, Marshall again shows his sensitivity to the dictates of doctrinal argument, this time as a precedent-setter rather than a precedent-follower. The rule to be laid down in the case at bar must be capable of being followed by lower courts and a later Court. Awkward attempts to judicially measure the precise degree of a law’s pragmatic necessity should be avoided. They will not work, doctrinally, and will make judges look silly, as would efforts to draw principled doctrinal lines between small taxes that are permissible and large ones that are not. Legislators may be free to draw ad hoc lines, but doctrinally minded judges must respect the limits of principled adjudication and attend to the issue of justiciability:

To undertake here to inquire into the degree of [an appropriate law’s] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

...

... We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.

Text, history, structure, prudence, and doctrine—these are the basic building blocks of conventional constitutional argument. But Philip Bobbitt suggests that a sixth form of constitutional argument exists and merits

attention—what he calls “ethical argument.”² By “ethical,” Bobbitt has in mind not an argument from morality pure and simple, but an argument from the ethos, or character, of the American people and the American experience. In the vernacular, an ethical argument might declare a practice unconstitutional because it is “unAmerican,” or might affirm the constitutionality of a contested practice because it is part of “the American way.” We have already encountered an argument in *McCulloch* that might be seen as ethical: the idea of “no taxation without representation” is basic to the American identity and the American experience. Additional traces of ethical argument surface earlier in Marshall’s exposition. He opens his opinion by reminding us that the 1791 bill creating the first bank was supported by “minds as pure and as intelligent as this country can boast.” The reference here is to the sainted Washington, who added his name to the bill and thus made it law only after satisfying himself of its constitutionality. To contest this three decades later, Marshall hints, is to stain the name of our First Man—to be, if not unAmerican, at least unWashingtonian. If this rhetorical gesture strikes us as too personal to qualify as a proper ethical argument, Marshall later offers up another ode to the American experience that rings more true to modern ears, attuned as we are to an even more graceful expression of the same ethical argument some twoscore years later. “The government of the Union,” says Marshall, “is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” As a lawyer named Lincoln would distill Marshall’s ethical point at a place called Gettysburg, America’s is a “government of the people, by the people, and for the people.”

(b) *McCulloch* and intratextualism. — So much then for *McCulloch*’s use of the most familiar techniques of constitutional interpretation. Let us now trace its equally adroit use of the technique of intratextualism. We have already noted that even before he turns to the Necessary and Proper Clause, Marshall argues that the earlier Article I, Section 8 “great powers” of “the sword and the purse” are ample enough to sustain the creation of a federal bank. But Maryland’s counterargument, interpreted most charitably, is that the various enumerated powers should be construed far more strictly than Marshall has proposed, and that the specific words of the Necessary and Proper Clause confirm the imperative of strict construction. Congress should enjoy only those implied incidental powers that are logically “necessary” to carry out its express powers. A federal bank might be useful and convenient, but it is not logically “necessary” to have a federal bank to, say,

² [See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982).]

have a federal army. As a matter of logic, one can imagine an army without a bank. Thus a bank is, strictly speaking, not necessary. In response, Marshall concedes that the word “necessary” is sometimes used as a term of logic or math meaning strictly indispensable, *sine qua non*. But, Marshall counters, the word does not invariably (a wag might say “necessarily”) mean this: “If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful . . . to another.” If the word were invariably a term of math or logic, it could never be modified by an adverb of degree. And yet, Marshall argues, in ordinary language, such adverbs do modify the word: “[A] thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases.”

Thus far, Marshall’s analysis seems methodologically unremarkable. It is a standard clause-bound exegesis appealing to plain meaning, ordinary language, and (perhaps implicitly) original intent. Ordinary Americans ratified the Constitution, and the word “necessary” should be understood in its ordinary sense as confirmed by usage “in the common affairs of the world, or in approved authors.” But at precisely this point, Marshall makes an intriguing methodological turn. Rather than pointing to, say, Samuel Johnson’s dictionary to prove his philological point, he turns to another passage in the Constitution itself, in effect using the Constitution as its own dictionary:

This comment on the word [“necessary”] is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying “imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,” with that which authorizes Congress “to make all laws which shall be necessary and proper for carrying into execution” the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word “necessary,” by prefixing the word “absolutely.”

With pointed italics (a font that he uses exceedingly sparingly in the opinion), Marshall shows that the Constitution itself proves that “necessary” is not always a term of math or logic; that it sometimes takes an adverb that can modify its strictness; and that without an adverb such as “absolutely,” the word as used in the Necessary and Proper Clause can be read flexibly not strictly, practically not mathematically. Here then we see a classic

*Textual argument
as typically
practiced today
is blinkered
... , focusing
intently on the
words of a given
constitutional
provision in
splendid isolation.
By contrast,
intratextualism
always focuses
on at least two
clauses and
highlights the link
between them.*

example of intratextualism: establishing the meaning of a word in one constitutional clause by analyzing its use in another constitutional clause.

Though Marshall does not mention the point, other constitutional clauses using the word “necessary” confirm his claim that the term is regularly used in a practical, nonmathematical way. In Article V, for example, Congress is empowered, “whenever two thirds of both Houses shall deem it necessary,” to propose constitutional amendments. Context here seems to make abundantly clear that the test is practical not logical. Most of the first twelve amendments on the books at the time of *McCulloch* could not be deemed mathematically necessary and indispensable, but they could all be considered useful or convenient. Textually, if “necessary” here truly means logically required, then talk of “deeming” seems obtuse. As a matter of math and logic, either something is necessary or it is not. A similar analysis applies to Article II, Section 3, which empowers the President to recommend to Congress “such Measures as he shall judge necessary and expedient.” Here too, we have a clear recognition—and in the Constitution itself, as a kind of dictionary—that “necessary” can often mean useful.

Marshall has another intratextual ace in hand, and he gracefully plays it, with a bit less flourish, over the next few pages. First, he nonchalantly reminds us that the word “necessary” is synonymous with the word “needful.” Then, a few paragraphs later, he quietly shows us his trump card by directing our attention, without any italics, to Article IV, Section 3:

The power to “make all needful rules and regulations respecting the territory or other property belonging to the United States,” is not more comprehensive, than the power “to make all laws which shall be necessary and proper for carrying into execution” the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a territorial corporation is “needful” under one clause of the Constitution, Marshall needles, why isn’t a bank corporation similarly “necessary” under another clause of that very same document? If “necessary” in Article I and “needful” in Article IV are synonymous in ordinary language and constitutional context, surely they should be construed the same way. And when we accept Marshall’s invitation to inspect the Necessary and Proper and Territorial Clauses side by side, we see further parallels of style and substance at work. Stylistically, both clauses open with absolutely identical phraseology (“The Congress shall have power”), a parallelism suggesting that the clauses are indeed designed as intratextual counterparts of sorts. Substantively, the first clause confirms broad congressional power in the existing states, and the second clause snugly complements it by conferring

broad congressional power in the states-to-be. The two clauses are, as a fancy lawyer might say, virtually in haec verba and in pari materia. Or to put the point in more popular prose, what's sauce for the Article IV, Section 3 goose should be sauce for the Article I, Section 8 gander. Here too, Marshall uses the document itself as a kind of dictionary and concordance, and to good effect.

...

II. Theory

A. *The Distinctiveness of Intratextualism*

Is intratextualism methodologically distinct from the other standard forms of constitutional argument? In important respects, yes. Textual argument as typically practiced today is blinkered . . . , focusing intently on the words of a given constitutional provision in splendid isolation. By contrast, intratextualism always focuses on at least two clauses and highlights the link between them. Clause-bound textualism paradigmatically stresses what is explicit in the Constitution's text: "See here, it says X!" By contrast, intratextualism paradigmatically stresses what is only implicit in the Constitution's text: "See here, these clauses fit together!" . . . Clause-bound textualism reads the words of the Constitution in order, tracking the sequence of clauses as they appear in the document itself. By contrast, intratextualism often reads the words of the Constitution in a dramatically different order, placing textually nonadjoining clauses side by side for careful analysis. In effect, intratextualists read a two-dimensional parchment in a three-dimensional way, carefully folding the parchment to bring scattered clauses alongside each other.

Clause-bound textualism itself comes in different varieties, but neither of the two main strands of textualism looks quite like intratextualism. A plain-meaning textualist might look to today's dictionaries to make sense of a contested term like "commerce" or "cruel" or "privileges" or "process," whereas an original intent textualist might look to eighteenth-century dictionaries. But intratextualism tries to use the Constitution as its own dictionary of sorts, yielding a third distinct approach. An intratextualist might read mid-nineteenth-century constitutional phrases like "due process" or "privileges or immunities of citizens" in light of similar constitutional phrases written in the late eighteenth century, or vice versa. Another example: does the Twenty-Sixth Amendment, ratified in 1971, protect the "right" of eighteen-year-olds to "vote" in juries as well as in ordinary elections? Plain-meaning and original-intent textualists would both consult the word "vote" in modern usage and modern dictionaries, but an intratextualist would use the Constitution as its own dictionary

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here. On no less than four occasions—the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments—the Constitution uses the same highly elaborate set of words, “the right of citizens of the United States . . . to vote,” and an intratextualist would be inclined to read these provisions in *pari materia*. Their strongly parallel language is a strong (presumptive) argument for parallel interpretation. If it seems clear (as, in fact, it does) that the Fifteenth Amendment, ratified in 1870, was drafted to encompass the political right of citizens to serve and “vote” on juries, this fact about word usage and constitutional meaning in 1870 would be relevant to an intratextualist confronting a different (but parallel) amendment adopted 100 years later.

For similar reasons, intratextualism also seems distinct from standard forms of argument based on history and original intent. An intratextualist might say that the words “due process of law” in the Fifth Amendment contain an equality component even though none of the Amendment’s drafters or ratifiers in the 1780s and 1790s thought so. True, those who framed and ratified the Fourteenth Amendment did think that the Fifth Amendment phrase implied an equality component, but clause-bound practitioners of standard original intent analysis would not ordinarily look to the Fourteenth to construe the Fifth. And even though the framers of the Fourteenth Amendment incorporated their understanding of the words “due process of law” in a clarifying gloss, the equal protection words they drafted do not explicitly apply to federal action. (Here we see again the differences between standard clause-bound textualism and intratextualism.) We should also note that intratextualism draws inferences from the patterns of words that appear in the Constitution even in the absence of other evidence that these patterns were consciously intended. Just as intratextualism, as a variant of textual argument, often focuses on what is merely implicit in the text, so too intratextualism, as a variant of historical argument, may highlight what is only presumed to be the specific intent. It might be thought that intratextualism stands as a paradigmatic species of structural argument. However, the most typical forms of structural argument focus not on the words of the Constitution, but rather on the institutional arrangements implied or summoned into existence by the document—the relationship between the Presidency and the Congress, or the balance between the House and the Senate, or the interplay among sister states, or the direct bond between citizens and the federal government. . . .

Of course, in important respects intratextualism does share much in common with its sister forms of argument. Like clause-bound textualism, it focuses on the words of the document. (And some forms of clause-bound

textualism—like negative-implication arguments based on the interpretive maxim, *expressio unius est exclusio alterius*—do squeeze meaning from what is merely implied, rather than explicitly stated by the words themselves.) Like historical argument, intratextualism often makes claims about the implicit intent of the Framers based on their utterances. Like Blackian structuralism, intratextualism seeks to identify and draw meaning from larger constitutional patterns at work. Like doctrinal argument, it seeks to promote a certain coherence in interpretation and avoid the appearance of *ad hoc* adjudication; absent a good reason for doing otherwise, similar constitutional commands should be treated similarly for reasons analogous to the doctrinal principle that like cases should be treated alike.

In the end, so long as we recognize intratextualism as a valuable and important interpretive technique, while also recognizing its limitations, it may not matter how we formally classify it. Indeed, instead of viewing intratextualism as one distinct form of argument apart from six others, it may be useful to consider intratextualism as a cluster of at least three different kinds of constitutional claims.

B. The Types of Intratextualism

1. Using the Constitution as a Dictionary: Intratextualism as Philology. — Understood most literally, the idea of using the Constitution as a dictionary can be seen as serving a linguistic function. A dictionary tells us what a word can mean, with examples drawn from usage. Although the Constitution itself rarely defines a contested word self-consciously the way a dictionary does, the Constitution does illustrate word usage, and thus serves a basic dictionary function. . . .

. . .

2. Using the Constitution as a Concordance: Intratextualism as Pattern Recognition. — If philologic intratextualism is best at proving what a word or phrase might mean, a different brand of intratextualism tries to show what the document as a whole is best read as meaning. Intratextualism allows the Constitution to function not merely as a special kind of dictionary, but also as a special kind of concordance, enabling and encouraging us to place nonadjoining clauses alongside each other for analysis because they use the same (or very similar) words and phrases. Once we accept the invitation to read noncontiguous provisions together, we may see important patterns at work. This will not always be the case—various all-purpose words may pop up in a random assortment of clauses that have little in common with each other, and upon reflection we may even say that certain chameleon words should sensibly mean different things in different clauses. But other times, the intratextual word link will be a sur-

Although the Constitution itself rarely defines a contested word self-consciously the way a dictionary does, the Constitution does illustrate word usage, and thus serves a basic dictionary function. . . .

face sign of a much deeper thematic connection, a sympathetic vibration evidencing a rich harmony at work. . . .

. . .

3. Using the Constitution as a Rulebook: Intratextualism as Principle-Interpolation. — A final species of intratextualism demands that two (or more) similarly phrased constitutional commands be read in *pari materia*. What’s sauce for one must be sauce for the other, and so a principled interpreter must, for example, construe the Vesting Clauses of Articles I, II, and III with equal generosity, or the four voting rights amendments as co-extensive in scope. Here we are dealing not merely with a recurring word, or even a recurring word-cluster, but with a complete, carefully elaborated command that appears in identical language with a single variation that (presumptively) should make no legal or moral difference: “The [fill in the blank] power shall be vested . . .” and “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 [fill in the blank].”

. . .

To oversimplify slightly: dictionary-like intratextualism tells us what the Constitution could mean; concordance-like intratextualism tells us what it should mean; and rulebook-like intratextualism tells us what it must mean.

C. Some Strengths of Intratextualism

Perhaps the greatest virtue of intratextualism is this: it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses. To modify Marshall, it is a (single, coherent) Constitution we are expounding. . . .

. . .

D. Some Weaknesses of Intratextualism

Carried to extremes, intratextualism may lead to readings that are too clever by half—cabalistic overreadings conjuring up patterns that were not specifically intended and that are upon deep reflection not truly sound but merely cute (if pro is the opposite of con, what is the opposite of progress?) or mystical. . . . What’s more, unless complemented by other tools of analysis, intratextualism may be too self-referential, even autistic. It highlights the document’s intratextual links, but casts no light on its possibly illuminating intertextual links to other documents, such as the English Bill of Rights, state constitutions, the Declaration of Independence, and the Articles of Confederation. . . .

...

... Another possible weakness of intratextualism is that it invites strong [and potentially misleading] inferences about constitutional meaning from the document's grammar and syntax. . . . [H]owever, . . . many of these criticisms of intratextualism as an interpretive tool may prove too much—they also apply to other traditional techniques of constitutional interpretation. . . . But each tool can be a lens through which to read, an imperfect but still useful lens whose reading must be checked against readings generated by other lenses. . . .

III. Cases Again

...

[A]. *Free Speech*

... [C]onsider the bright light that an intratextual approach could shed on many murky areas of current free speech doctrine.

In the most celebrated speech case ever decided, the Supreme Court famously proclaims that the First Amendment must be read “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Elsewhere, *New York Times v. Sullivan* emphasizes the need “for free political discussion to the end that government may be responsive to the will of the people,” notes that the case at hand implicates “expression critical of the official conduct of public officials” concerning “one of the major public issues of our time,” and proclaims that suppression of antigovernment speech by the infamous Sedition Act of 1798 violated “the central meaning of the First Amendment.” The grand themes of this grand opinion resonate with the First Amendment approach of Alexander Meiklejohn, emphasizing the centrality of political speech, the intimate connection between free speech and democratic self-government, and the special need to protect political criticism of incumbent officialdom.³

Today's Court, however, is drifting off course, away from the Meiklejohnian polestar. In a recent case involving liquor ads, for example, several Justices appear eager to shrink the doctrinal difference between the protections accorded to political debate on the one hand and mere commercial advertising on the other. In a concurring opinion, Justice Thomas goes even further: “[There is no] philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.

³ [See Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960).]

Indeed, some historical materials suggest to the contrary.²⁴ The move here is subtle but profound. The Justices are beginning to detach the First Amendment from democracy and to graft it onto property, moving from free speech to free markets. A similar trend is at work in cases involving cable television and campaign finance, with the Free Speech and Press Clause beginning to resemble the Fifth Amendment Takings Clause (property) more than the Article IV Republican Government Clause (equality and democracy). If free speech is not, at its core, about democracy—and therefore equality—then there is simply no constitutional problem when Ross Perot, Steve Forbes, and Bill Gates get to talk more than the rest of us put together if they own more than the rest of us put together. The First Amendment would prevent government from censoring those who can pay for their speech, but would inspire no obligation to provide public fora at government expense, where poor folks would have a turn at the mike. On this view—which reflects the instincts of at least a sizeable minority of the current Court, and sometimes a majority—free speech is not, well, free. So what exactly does the First Amendment prohibit, according to the emerging paradigm? Not merely laws that discriminate against speakers on the basis of their political viewpoint, as did the Sedition Act, but all laws that treat speakers differently on the basis of their content. The current Court’s general drift is constitutionally troubling, and intratextualism can help us see why.

Begin with Justice Thomas’s claim in *44 Liquormart, Inc. v. Rhode Island* that there is no “philosophical or historical basis” for treating commercial speech as less constitutionally worthy than political speech. Wrong. There is an obvious philosophical and historical basis—in the philosophy and history of the Constitution itself, a philosophy and history encoded in the words of the document. Justice Thomas obviously cares about the document and the words in it, as is evident from many of his thoughtful and disciplined opinions. But in *Liquormart* he fails to read these words for all they are worth.

Consider how a typical clause-bound reader might view the words of the First Amendment: “Congress shall make no law . . . abridging the freedom of speech, or of the press.” These words make no distinction between different types of “speech.” And in ordinary language, “speech” typically includes more than political discourse. If we consult ordinary dictionaries, commercial speech and political speech are both subspecies of the same genus “speech,” and neither seems linguistically privileged as more central or paradigmatic than the other. Granted, the grammatical absolutism of

⁴ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring).

the First Amendment (“Congress shall make no law”) is a textual embarrassment, and we cannot take it seriously, as all sophisticated lawyers know—“fire” in a crowded theater and all that. But whatever nonabsolute doctrinal structure judges fashion to translate the First Amendment into practice, this structure need not discriminate between different types of speech, which are all equally worthy, textually speaking. So might say a clause-bound reader. However, the words when read in clause-bound isolation do not tell the full story. We must also read them intratextually.

Begin with the phrase “Congress shall make no law.” To the sophisticated clause-bound textualist, these words seem embarrassing in their naive absolutism. Thus, they must be quickly thrust aside, for surely no meaning can be squeezed from such an unpromising phrase. But the intratextualist is not afraid of or embarrassed by these words. She has seen them before. With her computer-generated concordance in hand, the intratextualist ponders the possible link between the opening words of the First Amendment and the words of the Necessary and Proper Clause: “Congress shall have Power . . . To make all Laws . . .” Is the linguistic link here—“Congress,” “shall,” “make,” and “law” in the same order in two places—a clue or a dead end? When we consult the history of the First Amendment with clue in hand, we find that in the debates leading up to the Constitution’s ratification, Federalists uniformly claimed that Congress lacked enumerated power to suppress free speech in the states. Nervous Anti-Federalists were skeptical: suppose Congress tried to use the Necessary and Proper Clause? The First Amendment was drafted to reassure all concerned that Congress lacked enumerated power to restrict speech and press (or to regulate religion, for that matter) in the states, notwithstanding the Necessary and Proper Clause. Thus the textual interlock between the First Amendment and the Necessary and Proper Clause was no coincidence but part of a deep design.

But note what this means. If everyone thought that Congress simply lacked all enumerated power to restrict “speech” in the states, the “speech” they all had in mind must obviously have been political discourse as opposed to mere commercial advertising. For no one denied that Congress did indeed have broad power to regulate commercial things for purely commercial purposes (so long as the commerce involved goods or services crossing state lines). Using the Constitution as a dictionary, we are quickly led to the idea that “speech” means something more precise than what ordinary dictionaries might suggest.

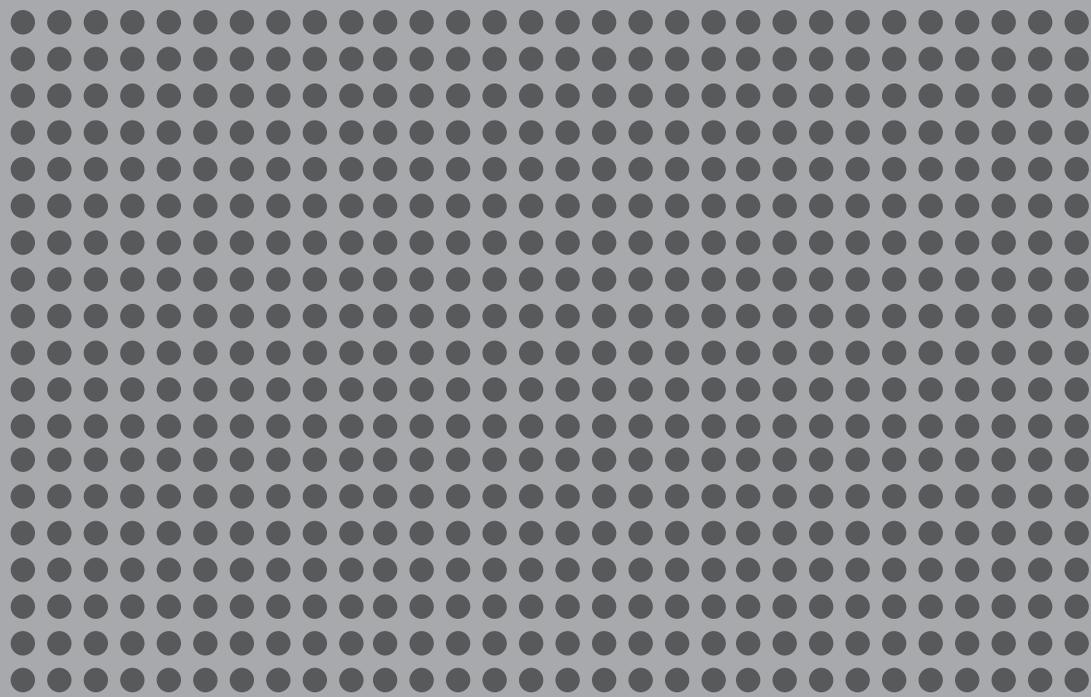
Intratextualism can offer still more precision, as we proceed to ponder what “speech” in the First Amendment might or might not mean at its core. Here, too, the intratextualist has seen the word before. With concordance in hand, she points to Article I, Section 6 protecting congressional

“Speech or Debate.” Is this, too, a clue? Might there be an analytic link here that can clarify constitutional thought? Indeed yes. When we turn to other important historical antecedents of the Constitution—reading intertextually to supplement our intratextual analysis—we find that the phrase “freedom of speech” first appears in the landmark English Bill of Rights of 1689: “the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.” And here are the words of the Articles of Confederation: “Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress.” Political speech is the core idea here. Parliament—from the French *parler*, to speak—is a speaking spot. But it is the home of a particular kind of speech: political discourse. A Parliament is a place for a *parley*—a political conference. So too with Congress. If a Senator takes the floor to advertise the low beer prices at his liquormart, such “speech” might be protected by a broad reading of Article I, Section 6—but surely we would say that it was at the outer periphery of protection, as “speech” of distinctly lower value, constitutionally.

On this intratextual and intertextual view, the “freedom of speech” in the First Amendment is likewise about political discourse at its core. It is a reminder that in America, the people, not Congress, are sovereign. Our highest Parliament—our most exalted *parley* place—is not confined by Capitol walls. Under the Speech and Debate Clause, our servants in Congress may criticize their political adversaries free from outside censorship; symmetrically, under the other Speech Clause (the First Amendment), their adversaries may criticize incumbents free from inside censorship. This, of course, is the deep insight of the great case of *New York Times v. Sullivan*.

...

... [Intertextualism’s] largest value lies, quite simply, in enabling us to squeeze more meaning from the document that inscribes our highest and most popular law. Good interpreters need to know when and how to read between the lines.



History

“The conversation between past commitments and present generations is at the heart of constitutional interpretation.”

— Jack M. Balkin, in *Abortion and Original Meaning*

*from***THE TEMPTING OF AMERICA**CHAPTER 7: *The Original Understanding***Robert H. Bork¹**

What was once the dominant view of constitutional law that a judge is to apply the Constitution according to the principles intended by those who ratified the document is now very much out of favor among the theorists of the field. In the legal academies in particular, the philosophy of original understanding is usually viewed as thoroughly passé, probably reactionary, and certainly the most dreaded indictment of all outside the mainstream. That fact says more about the lamentable state of the intellectual life of the law, however, than it does about the merits of the theory.

In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the design of the American Republic.

The Constitution as Law: Neutral Principles

When we speak of “law,” we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires. Otherwise there would be no need to agree on procedures for changing the rule. Statutes, we agree, may be changed by amendment or repeal. The Constitution may be changed by amendment pursuant to the procedures set out in article V. It is a necessary implication of the prescribed procedures that neither statute nor Constitution should be changed by judges. Though that has been done often enough, it is in no sense proper.

What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law’s enactment. Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. . . . All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is

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¹ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (The Free Press 1990).

thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like. Almost no one would deny this; in fact almost everyone would find it obvious to the point of thinking it fatuous to state the matter—except in the case of the Constitution. Why our legal theorists make an exception for the Constitution is worth exploring.

The search for the intent of the lawmaker is the everyday procedure of lawyers and judges when they must apply a statute, a contract, a will, or the opinion of a court. To be sure, there are differences in the way we deal with different legal materials, which was the point of John Marshall's observation in *McCulloch v. Maryland* that "we must never forget, that it is a constitution we are expounding."² By that he meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a document that could not, by its nature and uses, "partake of the prolixity of a legal code." But he also wrote there that it was intended that a provision receive a "fair and just interpretation," which means that the judge is to interpret what is in the text and not something else. . . . Thus, questions of breadth of approach or of room for play in the joints aside, lawyers and judges should seek in the Constitution what they seek in other legal texts: the original meaning of the words.

. . .

If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. . . . It is here that the concept of neutral principles, which Wechsler said were essential if the Supreme Court was not to be a naked power organ, comes into play. . . .

The Court cannot, however, avoid being a naked power organ merely by practicing the neutral application of legal principle. The Court can act as a legal rather than a political institution only if it is neutral as well in the way it derives and defines the principles it applies.

Neutrality in the Derivation of Principle

When a judge finds his principle in the Constitution as originally understood, the problem of the neutral derivation of principle is solved. The judge accepts the ratifiers' definition of the appropriate ranges of majority and minority freedom. . . .

This means, of course, that a judge, no matter on what court he sits, may never create new constitutional rights or destroy old ones. Any time he does so, he violates not only the limits to his own authority but, and

² 17 U.S. (4 Wheat.) 316, 407 (1819).

for that reason, also violates the rights of the legislature and the people. To put the matter another way, suppose that the United States, like the United Kingdom, had no written constitution and, therefore, no law to apply to strike down acts of the legislature. The U.S. judge, like the U.K. judge, could never properly invalidate a statute or an official action as unconstitutional. The very concept of unconstitutionality would be meaningless. The absence of a constitutional provision means the absence of a power of judicial review. But when a U.S. judge is given a set of constitutional provisions, then, as to anything not covered by those provisions, he is in the same position as the U.K. judge. He has no law to apply and is, quite properly, powerless. In the absence of law, a judge is a functionary without a function.

This is not to say, of course, that majorities may not add to minority freedoms by statute, and indeed a great deal of the legislation that comes out of Congress and the state legislatures does just that. The only thing majorities may not do is invade the liberties the Constitution specifies. In this sense, the concept of original understanding builds in a bias toward individual freedom. Thus, the Supreme Court properly decided in *Brown [v. Board of Education]* that the equal protection clause of the fourteenth amendment forbids racial segregation or discrimination by any arm of government, but, because the Constitution addresses only governmental action, the Court could not address the question of private discrimination. Congress did address it in the Civil Rights Act of 1964 and in subsequent legislation, enlarging minority freedoms beyond those mandated by the Constitution.

Neutrality in the Definition of Principle

The neutral definition of the principle derived from the historic Constitution is also crucial. The Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words alone might suggest. The first amendment states that “Congress shall make no law . . . abridging the freedom of speech,” but no one has ever supposed that Congress could not make some speech unlawful or that it could not make all speech illegal in certain places, at certain times, and under certain circumstances. . . .

But the question of neutral definition remains and is obviously closely related to neutral application. Neutral application can be gained by defining a principle so narrowly that it will fit only a few cases. Thus, [in] *Griswold* [a case in which the Supreme Court invalidated a Connecticut law that prohibited the use of contraceptives], we can make neutral application possible by stating the principle to be that government may not prohibit the use of contraceptives by married couples. But that tactic raises doubts

as to the definition of the principle. Why does it extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior in the home, only to sex? There may be answers, but if there are, they must be given.

Thus, once a principle is derived from the Constitution, its breadth or the level of generality at which it is stated becomes of crucial importance. The judge must not state the principle with so much generality that he transforms it. . . .

. . .

The role of a judge committed to the philosophy of original understanding is not to “choose a level of abstraction.” Rather, it is to find the meaning of a text—a process which includes finding its degree of generality, which is part of its meaning—and to apply that text to a particular situation, which may be difficult if its meaning is unclear. With many if not most textual provisions, the level of generality which is part of their meaning is readily apparent. The problem is most difficult when dealing with the broadly stated provisions of the Bill of Rights. . . . In dealing with such provisions, a judge should state the principle at the level of generality that the text and historical evidence warrant. The equal protection clause was adopted in order to protect the freed slaves, but its language, being general, applies to all persons. . . . Without meaning to suggest what the historical evidence in fact shows, let us assume we find that the ratifiers intended to guarantee that blacks should be treated by law no worse than whites, but that it is unclear whether whites were intended to be protected from discrimination in favor of blacks. On such evidence, the judge should protect only blacks from discrimination, and Alan Bakke [the plaintiff in the challenge to affirmative action in *Regents of the University of California v. Bakke*] would not have had a case. The reason is that the next higher level of generality above black equality, which is racial equality, is not shown to be a constitutional principle, and therefore there is nothing to be set against a current legislative majority’s decision to favor blacks. Democratic choice must be accepted by the judge where the Constitution is silent. The test is the reasonableness of the distinction, and the level of generality chosen by the ratifiers determines that. If the evidence shows the ratifiers understood racial equality to have been the principle they were enacting, Bakke would have a case. In cases concerning gender and sexual orientation, however, interpretation is not additionally assisted by the presence of known intentions. The general language of the clause, however, continues to subject such cases to the test of whether statutory distinctions are reasonable. Sexual differences obviously make some distinctions reasonable while others have no apparent basis. That has, in fact, been the rationale on which the law has developed. Society’s treatment of sexual orientation is based upon

In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the design of the American Republic.

moral perceptions, so that it would be difficult to say that the various moral balances struck are unreasonable.

Original understanding avoids the problem of the level of generality in equal protection analysis by finding the level of generality that interpretation of the words, structure, and history of the Constitution fairly supports. This is a solution generally applicable to all constitutional provisions as to which historical evidence exists. There is, therefore, a form of constitutional decision making that satisfies the requirement that principles be neutrally defined.

...

Neutrality in the Application of Principle

The neutral or nonpolitical application of principle . . . is a requirement, like the others, addressed to the judge's integrity. Having derived and defined the principle to be applied, he must apply it consistently and without regard to his sympathy or lack of sympathy with the parties before him. This does not mean that the judge will never change the principle he has derived and defined. Anybody who has dealt extensively with law knows that a new case may seem to fall within a principle as stated and yet not fall within the rationale underlying it. As new cases present new patterns, the principle will often be restated and redefined. There is nothing wrong with that; it is, in fact, highly desirable. But the judge must be clarifying his own reasoning and verbal formulations and not trimming to arrive at results desired on grounds extraneous to the Constitution. This requires a fair degree of sophistication and self-consciousness on the part of the judge. The only external discipline to which the judge is subject is the scrutiny of professional observers who will be able to tell over a period of time whether he is displaying intellectual integrity.

An example of the nonneutral application of principle in the service of a good cause is provided by *Shelley v. Kraemer*, a 1948 decision of the Supreme Court striking down racially restrictive covenants. Property owners had signed agreements limiting occupancy to white persons. Despite the covenants, some whites sold to blacks, owners of other properties sued to enforce the covenants, and the state courts, applying common law rules, enjoined the blacks from taking possession.

The problem for the Supreme Court was that the Constitution restricts only action by the state, not actions by private individuals. There was no doubt that the racial restrictions would have violated the equal protection clause of the fourteenth amendment had they been enacted by the state legislature. But here state courts were not the source of the racial discrimination, they merely enforced private agreements according to the terms

of those agreements. The Supreme Court nonetheless held that “there has been state action in these cases in the full and complete sense of the phrase.”

...
... The impossibility of applying the state action ruling of *Shelley* in a neutral fashion may easily be seen. Suppose that a guest in a house becomes abusive about political matters and is ejected by his host. The guest sues the host and the state courts hold that the property owner has a right to remove people from his home. The guest then appeals to the Supreme Court, pointing out that the state, through its courts, has upheld an abridgment of his right of free speech guaranteed by the first amendment and made applicable to the states by the fourteenth. The guest cites *Shelley* to show that this is state action and therefore the case is constitutional. There is no way of escaping that conclusion except by importing into the rule of *Shelley* qualifications and limits that themselves have no foundation in the Constitution or the case. Whichever way it decided, the Supreme Court would have to treat the case as one under the first amendment and displace state law with constitutional law.

It is necessary to remember that absolutely anything, from the significant to the frivolous, can be made the subject of a complaint filed in a state court. Whether the state court dismisses the suit out of hand or proceeds to the merits of the issue does not matter; any decision is, according to *Shelley*, state action and hence subject to constitutional scrutiny. That means that all private conduct may be made state conduct with the result that the Supreme Court will make the rules for all allowable or forbidden behavior by private individuals. That is not only a complete perversion of the Constitution of the United States, it makes the Supreme Court the supreme legislature. The result of the neutral application of the principle of *Shelley v. Kraemer* would be both revolutionary and preposterous. Clearly, it would not be applied neutrally, and it has not been, which means that it fails Wechsler’s test.

Shelley was a political decision. As such, it should have been made by a legislature. It is clear that Congress had the power to outlaw racially restrictive covenants. Subsequently, in fact, in a case in which as Solicitor General I filed a brief supporting the result reached, the Supreme Court held that one of the post-Civil War civil rights acts did outlaw racial discrimination in private contracts. That fact does not, however, make *Shelley* a proper constitutional decision, however much its result may be admired on moral grounds.

...

The Original Understanding of Original Understanding

The judicial role just described corresponds to the original understanding of the place of courts in our republican form of government. . . .

The structure of government the Founders of this nation intended most certainly did not give courts a political role. The debates surrounding the Constitution focused much more upon theories of representation than upon the judiciary, which was thought to be a comparatively insignificant branch. There were, however, repeated attempts at the Constitutional Convention in Philadelphia to give judges a policymaking role. The plan of the Virginia delegation, which, amended and expanded, ultimately became the Constitution of the United States, included a proposal that the new national legislature be controlled by placing a veto power in a Council of Revision consisting of the executive and “a convenient number of the National Judiciary.” That proposal was raised four times and defeated each time. Among the reasons, as reported in James Madison’s notes, was the objection raised by Elbridge Gerry of Massachusetts that it “was quite foreign from the nature of the office to make them judges of policy of public measures.” Rufus King, also of Massachusetts, added that judges should “expound the law as it should come before them, free from the bias of having participated in its formation.” Judges who create new constitutional rights are judges of the policy of public measures and are biased by having participated in the policy’s formation.

The intention of the [Constitutional] Convention was accurately described by Alexander Hamilton in *The Federalist* No. 78: “[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”³ The political rights of the Constitution are, of course, the rights that make up democratic self-government. Hamilton obviously did not anticipate a judiciary that would injure those rights by adding to the list of subjects that were removed from democratic control. Thus, he could say that the courts were “beyond comparison the weakest of the three departments of power,” and he appended a quotation from the “celebrated Montesquieu”: “Of the three powers above mentioned [the others being the legislative and the executive], the **JUDICIARY** is next to nothing.” This is true because judges were, as King said, merely to “expound” law made by others.

Even if evidence of what the founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick

³ *The Federalist* No. 78, at 465–66 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1961).

Even if evidence of what the founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the Constitution’s words. . . . [W]e would have to invent the approach of original understanding in order to save the constitutional design. No other method of constitutional adjudication can confine courts to a defined sphere of authority. . . .

to the original meaning of the Constitution's words. . . . [W]e would have to invent the approach of original understanding in order to save the constitutional design. No other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters, perhaps radically, the design of the American Republic. The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution.

The Claims of Precedent and the Original Understanding

The question of precedent is particularly important because, as Professor Henry Monaghan of Columbia University law school notes, "much of the existing constitutional order is at variance with what we know of the original understanding."⁴ Some commentators have argued from this obvious truth that the approach of original understanding is impossible or fatally compromised, since they suppose it would require the Court to declare paper money unconstitutional and overturn the centralization accomplished by abandoning restrictions on congressional powers during the New Deal. There is in these instances a great gap between the original understanding of the constitutional structure and where the nation stands now. But the conclusion does not follow. To suppose that it does is to confuse the descriptive with the normative. To say that prior courts have allowed, or initiated, deformations of the Constitution is not enough to create a warrant for present and future courts to do the same thing.

All serious constitutional theory centers upon the duties of judges, and that comes down to the question: What should the judge decide in the case now before him? Obviously, an originalist judge should not deform the Constitution further. Just as obviously, he should not attempt to undo all mistakes made in the past. Whatever might have been the proper ruling shortly after the Civil War, if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian. At the center of the philosophy of original understanding, therefore, must stand some idea of when the judge is bound by prior decisions and when he is not.

Many people have the notion that following precedent (sometimes called the doctrine of *stare decisis*) is an ironclad rule. It is not, and never has been. . . .

⁴ [Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 727 (1988).]

The practice of overruling precedent is particularly common in constitutional law, the rationale being that it is extremely difficult for an incorrect constitutional ruling to be corrected through the amendment process. Almost all Justices have agreed with Felix Frankfurter's observation that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."⁵ But that, of course, is only a partial truth. . . . [W]hat "the Constitution itself" says may, as in the case of paper money, be irretrievable, not simply because of "what [the Justices] have said about it," but because of what the nation has done or become on the strength of what the Court said.

. . .

The law currently has no very firm theory of when precedent should be followed and when it may be ignored or overruled. . . . No question arises, of course, unless the judge concludes that the prior constitutional decision, which is urged as controlling his present decision, was wrong. In making that determination, particular respect is due to precedents set by courts within a few decades of a provision's ratification since the judges of that time presumably had a superior knowledge of the original meaning of the Constitution. Similarly, precedents that reflect a good-faith attempt to discern the original understanding deserve far more respect than those that do not. . . .

But if the judge concludes that a prior decision was wrong, he faces additional considerations. The previous decision on the subject may be clearly incorrect but nevertheless have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now. This is a judgment addressed to the prudence of a court, but it is not the less valid for that. Judging is not mechanical. Many rules are framed according to predictions of their likely effects, and it is entirely proper for a decision to overrule or not to overrule to be affected by a prediction of the effects likely to flow from that. Thus, it is too late to overrule not only the decision legalizing paper money but also those decisions validating certain New Deal and Great Society programs pursuant to the congressional powers over commerce, taxation, and spending. To overturn these would be to overturn most of modern government and plunge us into chaos. No judge would dream of doing it. It was never too late to overrule the line of cases represented by *Lochner*, because they were unjustifiable restrictions on governmental power, and allowing additional regulation of economic matters did not produce any great disruption of institutional arrangements. Similarly, it will probably never be too late to

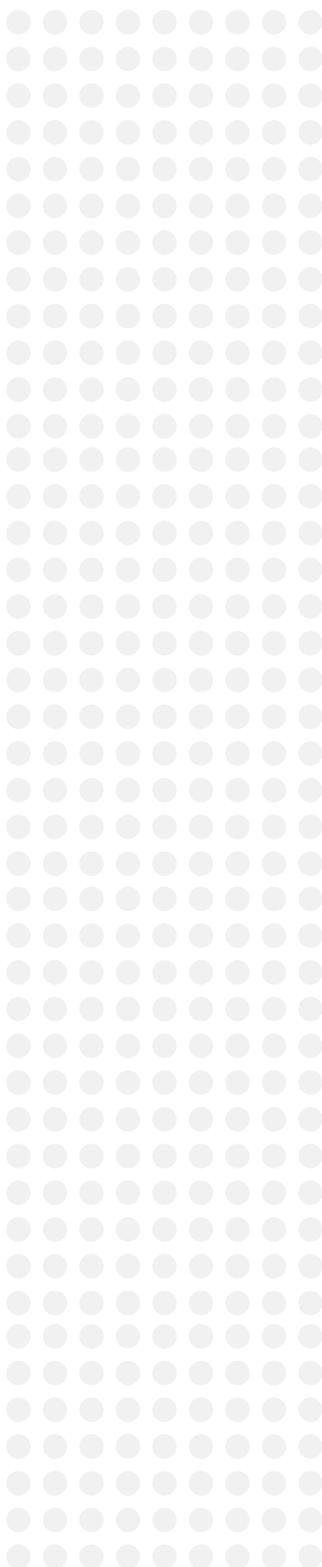
⁵ *Graves v. New York*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

overrule the right of privacy cases, including *Roe v. Wade*, because they remain unaccepted and unacceptable to large segments of the body politic, and judicial regulation could at once be replaced by restored legislative regulation of the subject.

To say that a decision is so thoroughly embedded in our national life that it should not be overruled, even though clearly wrong, is not necessarily to say that its principle should be followed in the future. Thus, the expansion of Congress's commerce, taxing, and spending powers has reached a point where it is not possible to state that, as a matter of articulated doctrine, there are any limits left. That does not mean, however, that the Court must necessarily repeat its mistake as congressional legislation attempts to reach new subject areas. Cases now on the books would seem to mean that Congress could, for example, displace state law on such subjects as marriage and divorce, thus ending such federalism as remains. But the Court could refuse to extend the commerce power so far without place but not giving generative power to the faulty principle by which that legislation was originally upheld. It will be said that this is a lawless approach, but that is not at all clear. The past decisions are beyond reach, but there remains a constitutional principle of federalism that should be regarded as law more profound than the implications of the past decisions. They cannot be overruled, but they can be confined to the subject areas they concern. . . . There are times when we cannot recover the transgressions of the past, when the best we can do is say to the Court, "Go and sin no more."⁶

The interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people. Only that approach can lead to what Felix Frankfurter called the "fulfillment of one of the greatest duties of a judge, the duty not to enlarge his authority. That the Court is not the maker of policy but is concerned solely with questions of ultimate power, is a tenet to which all Justices have subscribed. But the extent to which they have translated faith into works probably marks the deepest cleavage among the men who have sat on the Supreme Bench. The conception of significant achievement on the Supreme Court has been too much identified with largeness of utterance, and too little governed by inquiry into the extent to which judges have fulfilled their professed role in the American constitutional system." Without adherence to the original understanding, even the actual Bill of Rights could be pared or eliminated. It is asserted nonetheless, and sometimes on high authority, that the judicial philosophy of original understanding is fatally defective in any number

⁶ See R. Berger, *Death Penalties* 82-83 n.29 (1982)



of respects. If that were so, if the Constitution cannot be law that binds judges, there would remain only one democratically legitimate solution: judicial supremacy, the power of courts to invalidate statutes and executive actions in the name of the Constitution, would have to be abandoned. For the choice would then be either rule by judges according to their own desires or rule by the people according to theirs. Under our form of government, under the entire history of the American people, the choice between an authoritarian judicial oligarchy and a representative democracy can have only one outcome. But this is a false statement of alternatives, for judicial interpretation of the Constitution according to its original understanding is entirely possible. When that course is followed, judges are not a dictatorial oligarchy but the guardians of our liberties. . . .

from

BORK AND BEETHOVEN

Richard A. Posner¹

Commentary magazine is distinguished for the lucidity and forthrightness of its articles and for its singleminded advocacy of a “neoconservative” philosophy built around the related themes of conservative social and cultural values, aggressive anti-Communism, and determined opposition to the egalitarian programs espoused by liberal Democrats and university radicals. I have been a faithful reader of the magazine for many years and my strong impression is that it does not knowingly publish articles that deviate from this party line. Yet the February 1990 issue contains two articles that take opposite positions on the issue of “originalism”—that is, interpretive fidelity to a text’s understanding by its authors. The tension between the articles is masked by the fact that one is about Robert Bork and the other is about musical performance and by the further fact that both embrace the neoconservative creed. Nevertheless there is a deep and illuminating fissure between them.

Bork Revisited, by Terry Eastland,² public relations director of the Department of Justice for most of the Reagan era, including the period of Bork’s unsuccessful run for the Supreme Court, discusses three books about the Bork debacle, including Bork’s own. Eastland’s main purposes are to show that there really was an unprecedented as well as unsavory left-wing campaign against Bork’s confirmation, and that the Justice Department should not be blamed for Bork’s defeat, since the handling of the confirmation process had been assigned to the White House staff rather than to the Department. The latter point, while important to Eastland’s *amour propre*, is of no general interest, not least because Bork would have been defeated (it is clear in hindsight) even if his campaign had been handled more adroitly, which the Department of Justice might or might not have done. It is a fact that Bork was the target of a scurrilous scare campaign orchestrated by left-wingers, but Eastland is wrong to suppose that this is something new. Notably vicious political battles over Supreme Court nominees took place at the very outset of our constitutional history. This should matter to an originalist, and therefore to Eastland. He describes Bork’s book as “the best single volume we have on the great constitutional issues that now divide

¹ Richard A. Posner, *Bork and Beethoven*, 42 *Stan. L. Rev.* 1365 (1990).

² *Commentary*, Feb. 1990, at 39.

A theory of constitutional interpretation that ignores consequences is no more satisfactory than one that ignores the importance of building a bridge between the contemporary judge's pronouncement and some authoritative document from the past.

the nation,”³ and applauds it for its effort “to rescue the integrity and independence of the law from those who would politicize it.”⁴ The project of this book he loves is the defense of originalism; in Eastland’s paraphrase of Bork, the “recovery of the once dominant view of constitutional law, which is that courts should apply the Constitution according to the principles intended by those who ratified the document.”⁵

One might expect reinforcement of the originalist approach from “Cutting Beethoven Down to Size,” by Commentary’s music critic, Samuel Lipman.⁶ For it is an article about the authentic-performance movement, which is to musical interpretation what originalism is to legal interpretation. The movement involves “the required employment of original instruments—instruments resembling as closely as possible those on which the music was to be played at the time of its composition”; “reliance on what remains of the composer’s original text, freed of all inadvertent error in transmission and publication, and of all subsequent editorial emendation”; and “the use of original performance styles—the complete observance of the composer’s explicit indications, and an untiring attempt to recover all that can be known of the unwritten, customary, and taken-for-granted methods of deciphering and implementing his written notation.”⁷ Thus, “[i]n authentic performances the sought-after styles, including details of rhythmic execution, instrumental techniques, and concert pitch, are those contemporaneous with the composer—the exact way a composer might have heard his works when they were first rendered, at the time of their composition or shortly thereafter, by the best and most representative executants of the day.”⁸

This sounds much like Bork’s originalism, yet it soon becomes apparent that Lipman hates the authentic-performance movement. “Whereas the new approach is based on the use of scholarship to recapture a lost material reality of physically existing instruments, written texts, and definable styles, the best that has gone on over the past century and more in concert halls and opera houses has stressed spiritual insight—the empathic projection of the minds and talents of performers into the creative souls of great composers.”⁹ Lipman’s particular *bete noire* is the English conductor Roger Norrington, whose performances of Beethoven’s symphonies are short-winded, the music does not breathe. Because the music does not breathe,

³ *Id.* at 39.

⁴ *Id.* at 42.

⁵ *Id.* at 43 (paraphrasing [Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143 (The Free Press 1990)]).

⁶ Commentary, Feb. 1990, at 53.

⁷ *Id.*

⁸ *Id.* at 54.

⁹ *Id.* at 57.

this quintessentially passionate music conveys no passion. . . . These performances are, in short, consistently bad—and what is bad about them is precisely the result of the fleshing-out of all the absurd musico-intellectual pretensions of the authentic performance movement.

. . .

. . . It is no defense . . . to adduce Beethoven’s metronome markings as justification for these musical crimes. Any musician with experience in playing music by living composers knows that of all their performance directions, metronome markings are the least viable, consistent, and trustworthy.

The reasons for the unreliability of living composers’ metronome markings, reasons that Lipman thinks equally applicable to Beethoven, include distance in time from the work’s actual composition, inexperience with the requirements of performance, a frequent disdain for the very fact of performance, and above all the composer’s preexisting and complete knowledge of the content and structure of the music, a knowledge which no audience—and few performers either—can be expected to possess.

A striking feature of Lipman’s essay—redeeming it for *Commentary* orthodoxy—is his attributing the authentic-performance movement not, as one might expect, to cultural conservatism but instead to cultural radicalism, aesthetic relativism, and the egalitarian obsessions of intellectuals. Norrington’s “all-out attack on the foundations of Beethoven’s greatness” is part of “the postmodern effort to humble once-mighty artists, thinkers, and values.”¹⁰

I do not want to be understood as endorsing Lipman’s criticism of the authentic-performance movement. I am not competent to offer an evaluation. Nor do I believe that if one is an originalist in one domain of interpretation one must be an originalist in all. Another possibility, moreover, is that the originalist and nonoriginalist approaches to musical interpretation are equally valid; if so, they can coexist happily, and there is no need to choose between them, whereas if judges cannot agree on how to interpret statutes and the Constitution, laws will lack uniformity and predictability and the society will be in trouble. What I do contend is that originalism cannot be thought either the natural or the inevitable method of interpreting a given body of texts, or even the method of interpretation natural or inevitable for conservatives to follow.

It is time to confront directly Bork’s arguments on behalf of originalism in constitutional interpretation. Those arguments form the core of *The Tempting of America*. What follows is not a book review, but lest the critical tenor of my remarks be misunderstood, let me emphasize not only that I

¹⁰ *Id.* at 56.

Bork fails to produce convincing reasons why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases. At times, indeed, he seems to want to place the issue outside the boundaries of rational debate. How else to explain the religious imagery that permeates his discussion of originalism and its enemies?

have the highest personal and professional regard for the author but also that *The Tempting of America* is a fine book which deserves its best-sellerdom. It is beautifully written. It manages the nigh-impossible feat of presenting a scholarly thesis in a form accessible to the lay reader. It offers powerful criticisms of particular constitutional theories, doctrines, and decisions. It is free of rancor, even in the discussion (comprising the last quarter of the book) of the vicious and dishonest campaign that the American left waged against Bork's confirmation. And it makes as ringing a defense of originalism—the approach which teaches that to a judge interpreting the Constitution “all that counts is how the words used in the Constitution would have been understood at the time [of enactment]”¹¹—as we are likely to hear. The question I want to consider is whether it is a successful defense.

I think not. Bork fails to produce convincing *reasons* why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases. At times, indeed, he seems to want to place the issue outside the boundaries of rational debate. How else to explain the religious imagery that permeates his discussion of originalism and its enemies? It begins with the title of the book—*The Tempting of America*. Any doubt that the reference is to *the* temptation is dispelled by the title of chapter one—“Creation and Fall”—which begins, “The Constitution was barely in place when one Justice of the Supreme Court cast covetous glances at the apple that would eventually cause the fall.”¹² (This must have been the original constitutional sin.) Bork embraces the idea that the Constitution is “our civil religion,”¹³ and, he never tires of repeating, originalism is its “orthodoxy.”¹⁴ Naturally, then, Bork's opponents are guilty of “heresy,” a term he elucidates with quotations from the Catholic apologist Hilaire Belloc.¹⁵ Since it is heresy, “it is crucial . . . to root it out,”¹⁶ and therefore “no person should be nominated or confirmed [for the Supreme Court] who does not display both a grasp of and devotion to the philosophy of original understanding.”¹⁷ Bork adjures the Supreme Court to “go and sin no more,”¹⁸ calls Cardinal Newman and St. Thomas More to his aid along with Belloc, and in a surprising twist compares *himself* to the heretic: “If the philosophy of political judging is a heresy in the American system of government, it is the orthodoxy of the law schools and of the left-liberal

¹¹ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 144 (The Free Press 1990).

¹² *Id.* at 19.

¹³ *Id.* at 153.

¹⁴ *E.g., id.* at 6.

¹⁵ *E.g., id.* at 4, 11.

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 159.

culture. I would have done well to remember that in the old days nobody burned infidels, but they did burn heretics.”¹⁹

A summons to holy war is not an *argument* for originalism, and law’s commitment to reason precedes, both logically and temporally, its commitment to originalism. Bork’s militance and dogmatism will buck up his followers and sweep along some doubters but will not persuade the rational intellect. One especially wants a better ground than piety for genuflecting to originalism because Bork rightly if incongruously reminds us of the danger of “absolutisms” and “abstract principles,”²⁰ criticizes reliance in constitutional law on “history and tradition,”²¹ and implies in his interesting discussion of originalism’s historical roots that the nonoriginalist heresy may be part of the original understanding of the Constitution.²² Apparently there was no Eden.

Although the book has no chapter on the reasons why the judiciary should embrace originalism—a major and I think telling omission—several reasons are mentioned. The first is that it is implicit in our democratic form of government. Originalism is necessary in order to curb judicial discretion, and curbs on judicial discretion are necessary in order to keep the handful of unelected federal judges from seizing the reins of power from the people’s representatives. This argument founders on three shoals. The first is that, for excellent reasons, the democratic (really Bork means the populist) principle is diluted in our system of government. We do not have government by plebiscite or referendum. (Some states have referenda, but there are none at the federal level.) We have *representative* democracy. The actual policy decisions are made by agents of the people rather than by the people themselves—precisely so that raw popular desire will be buffered, civilized, guided, mediated by professionals and experts, and will be informed through deliberation. Even the representatives do not have a blank check. They are hemmed in by the Constitution—itself representing, to be sure, popular preferences, since the Constitution was ratified by popular vote; but they are the preferences of a sliver of a tiny population two centuries ago. The question posed by an originalist versus an activist or a pragmatic judiciary is not one of democracy or no democracy. It may not even be a question of more or less democracy—are nations like Great Britain that lack a constitutional court more democratic than the United States? It is a question of the *kind* of democracy we want, as Bork himself

A summons to holy war is not an argument for originalism, and law’s commitment to reason precedes, both logically and temporally, its commitment to originalism.

¹⁹ *Id.* at 343.

²⁰ *Id.* at 353.

²¹ *Id.* at 119.

²² *Id.* at 19–27.

makes clear in his perceptive criticism of the Supreme Court’s “one person, one vote” decisions.

Second, if democracy is the end, originalism is a clumsy means. This is apparent from Bork’s discussion of the Commerce Clause of the Constitution. As he points out, the Supreme Court in the wake of the *New Deal* read out of the Constitution the limitations that the clause places on the powers of the federal government. Bork’s originalism implies that the Court erred. But by erring it transferred power to the people’s representatives, who were in turn responding to an enormous and sustained tide of public opinion.

The third objection to Bork’s democracy-mongering is that, on the evidence of the book, Bork himself is not an admirer of popular government. And why should he be? His appointment to the Supreme Court was rejected by the Senate of the United States, which with all its manifest faults, well documented in Bork’s book, is a legislative body of above-average quality, albeit not so representative as many other such bodies (no “one person, one vote” there). And he was rejected because of a grass-roots political campaign that he devotes a quarter of the book to denouncing. The first page of the book warns against “the temptations of politics,” and laments that “politics invariably tries to dominate” the professions and academic disciplines “that once possessed a life and structure of their own.” Later Bork denounces “populism,”²³ although his implicit definition of democracy is populism—the conforming of public policy to the popular preferences that he is so distressed to find the courts now and then thwarting in the name of the Constitution. He does not explain how increasing the power of legislatures by diminishing that of judges trying to limit legislative power could be the antidote to the rampant politicization of American life that he deplors.

The second reason Bork offers in defense of originalism is that it is needed to preserve the effectiveness of the Supreme Court. He fears that those who succeed in ousting originalism “will have destroyed a great and essential institution,” namely the Court.²⁴ But on Bork’s account, the Court has wrought mainly mischief in its two centuries of existence, so one wonders why he is so passionate to preserve it. He points out that other Western nations, which do not have courts comparable to our Supreme Court, have roughly the same set of liberties that we have. The implication is that we could do quite nicely without a constitutional court.

However this may be, there is no evidence that the Court’s authority depends on adherence to originalism. Bork knows this, for he says (in great

²³ *Id.* at 132.

²⁴ *Id.* at 2; see also *id.* at 349.

tension with his remark about the destructibility of a great and essential institution) that “the Court is virtually invulnerable”; it “can do what it wishes, and there is almost no way to stop it, provided its result has a significant political constituency.”²⁵ This is a sensible observation; the Court’s survival and flourishing are indeed more likely to depend on the political acceptability of its results than on its adherence to an esoteric philosophy of interpretation. In fact the Court has never been consistently originalist, yet has survived; perhaps the Justices know more about survival than their critics do.

Bork argues that if the only criterion for evaluating the Supreme Court’s decisions is their political soundness, anyone who thinks the Court is politically wrong “is morally justified in evading its rulings whenever he can and overthrowing it if possible in order to replace it with a body that will produce results he likes.”²⁶ He adds ominously:

The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution capable of wielding power. If the Court will not agree with him, why not argue his case to some other group, say the Joint Chiefs of Staff, a body with rather better means for enforcing its decisions? No answer exists.²⁷

Well, there are plenty of answers, and one is that Bork is posing a false dichotomy: a court committed to originalism versus a court that is a “naked power organ”;²⁸ blind obedience versus rebellion. These dichotomies imply that the *only* method of justification available to a court, the only method of channeling judicial discretion and thus of distinguishing judges from legislators, is the originalist. No other method—one that emphasizes natural justice, sound justice, social welfare, or neutral (but not necessarily originalist) principles—so much as exists. There is no middle ground. Which surely is false.

And it may be doubted whether the forbearance of the Joint Chiefs of Staff to attempt a takeover of the government of the United States is dependent to even a tiny degree on the Supreme Court’s adherence to originalism. Judging by the evidence that Bork arrays, the Court has since the beginning strayed repeatedly from the originalist path, yet the Joint Chiefs (or their predecessors) have never tried to take over the government. Nor are they likely to try. It is not true that the Joint Chiefs have better means

²⁵ *Id.* at 77.

²⁶ *Id.* at 265.

²⁷ *Id.*

²⁸ *Id.* at 146.

of enforcing their decisions than the Supreme Court does. If the Joint Chiefs ordered the army to take over the government, their order would not be obeyed. Bork believes that the Court has issued a parallel order, “taking over” the government from the elected branches, and that its order *has* been obeyed. This implies correctly that, other than in times of general war, the Supreme Court is more powerful than the Joint Chiefs.

Bork’s invocation of the Joint Chiefs proves only that he is almost as fond of military as of religious imagery. He particularly likes the Leninist metaphor of seizing the “commanding heights” or “high ground.”²⁹ Military and religious terms are a common part of our speech (“war,” “coup d’etat,” “anathema,” “devotion,” and so forth); it is the *density* of these particular systems of imagery in Bork’s book that gives the book its militant and dogmatic tone, and a good deal of its polemical power. But that power is purchased at a price in accuracy.

Although Bork derides scholars who try to found constitutional doctrine on moral philosophy, it should be apparent by now that he is himself under the sway of a moral philosopher. His name is Hobbes, and he too thought the only source of political legitimacy was a contract among people who died long ago. This may have been a progressive idea in an era when kings claimed to rule by divine right, but it is an incomplete theory of the legitimacy of the modern Supreme Court. There are other reasons for obeying a judicial decision besides the Court’s ability to display, like the owner of a champion airedale, an impeccable pedigree for the decision, connecting it to its remote eighteenth-century ancestor. And Bork knows this, for he believes that judges should give great weight to precedents, even when a precedent rests on a mistaken interpretation of the Constitution.

I said that the idea of the Constitution as a binding contract is an incomplete theory of political legitimacy; I did not say that it is an unsound theory. A contract induces reliance that can make a strong claim for protection; it also frees people from the necessity for continually reexamining and revising the terms of their relationship. These values are independent of whether the original contracting parties are still alive. But a long-term contract is bound eventually to require, if not formal modification (which in the case of the Constitution can be accomplished only through the amendment process), then flexible interpretation, to cope effectively with altered circumstances. Modification and interpretation are reciprocal; the more difficult it is to modify the instrument formally, the more exigent is flexible interpretation. Bork is well aware of the practical impediments to amending the Constitution, but he is unwilling to draw the inference

²⁹ *E.g., id.* at 3, 338.

that flexible interpretation is therefore necessary to prevent constitutional obsolescence. The amendment process is too slow, too cumbersome, too easily thwarted to maintain a living Constitution.

In his advocacy of originalism Bork places considerable weight on what might be termed the argument from hypocrisy, defined for these purposes as the tribute that vice pays to virtue. The dominant rhetoric of judges, even activist judges, is originalist, for originalism is the legal profession's orthodox mode of justification. The judge is the oracle through which the god (Law) speaks. This stance may reflect a queasiness about the legitimacy—less grandly, the public acceptability—of nonoriginalist decisions; or it may simply be that judges, like everyone else, like to foist responsibility for difficult and unpopular decisions on others. The long-dead framers are a convenient group to whom to pass the buck, since they can't refuse it. But although judges are not immune from the all too human tendency to deny responsibility for actions that cause pain, the significance of this fact is another matter. It is a considerable paradox to suggest that the false reasons which uncandid judges give for their actions are the only legitimate grounds for judicial action.

If the result-oriented or activist judge is queasy about the pedigree or title deeds of his rulings, the originalist is (on the evidence of Bork's book, at any rate) queasy about the consequences of originalist rulings. And rightly so. A theory of constitutional interpretation that ignores consequences is no more satisfactory than one that ignores the importance of building a bridge between the contemporary judge's pronouncement and some authoritative document from the past. It is difficult to argue to Americans that in evaluating a political theory they should ignore its practical consequences. Bork is not prepared to make such an argument. He continually reassures the reader that originalism does not yield ghastly results, while at the same time denouncing judges who are "result-oriented." The argument from hypocrisy can be turned against originalism. Bork, as we are about to see, is not a practicing originalist.

1. The doctrine of incorporation holds that the fourteenth amendment makes some or all of the provisions of the Bill of Rights constraints on state governments. About the validity of the doctrine Bork says only: "There is no occasion here to attempt to resolve the controversy concerning the application of the Bill of Rights to the states."³⁰ Why not? The issue is central to determining the contemporary reach of the Constitution, and Bork is not elsewhere bashful about discussing controversial issues of constitutional interpretation. His diffidence here is all the more surprising because a rejection of incorporation is clearly entailed by his discussion of

³⁰ *Id.* at 93.

No constitutional theory that implies that *Brown v. Board of Education*...was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it was decided incorrectly.

the only two clauses of the fourteenth amendment that could be thought to incorporate the Bill of Rights. The Supreme Court has used the due process clause, but Bork is emphatic that all that this clause requires is that states use fair procedures in applying their substantive law. It could not, therefore, require the states to respect free speech or the free exercise of religion or any of the other substantive liberties in the Bill of Rights. As for procedural liberties, since the due process clause of the fifth amendment is, if it is purely a procedural clause, only one of the procedural clauses of the Bill of Rights, it is hardly likely, on an originalist construal, that transposed to the fourteenth amendment it stands for all the other procedural liberties in the Bill of Rights.

The other clause of the fourteenth amendment that might provide a vehicle for incorporation is the privileges and immunities clause, but Bork regards it as a “dead letter,”³¹ a “cadaver,”³² a “corpse,”³³ because its meaning is unascertainable. Even to an originalist, bound to respect the dead hand of the past, a corpse is not a seemly vehicle for imposing the Bill of Rights on the states; nor does Bork suggest that it could be used for this purpose. Among other objections to deriving the doctrine of incorporation from the privileges and immunities clause, it would make the due process clause superfluous.

Bork is unwilling to follow the logic of his analysis to its inevitable conclusion, which is that the doctrine of incorporation is thoroughly illegitimate. On the contrary, throughout most of the book he takes the doctrine for granted, as something he has no wish to disturb. He must realize that his originalist position would be rejected out of hand were it understood to make the Bill of Rights totally inapplicable to the states. He is being pragmatic, not originalist.

2. No constitutional theory that implies that *Brown v. Board of Education*—which held that public school segregation violates the equal protection clause of the fourteenth amendment—was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it *was* decided incorrectly. The language of the equal protection clause, which does not speak of legal equality but of equal protection of the laws (whatever they may be), and its background in the refusal of law enforcement authorities in southern states to protect the freedmen against the private violence of the Ku Klux Klan, suggest that all the clause forbids is the selective withdrawal of legal protection on racial grounds. A state cannot make black people outlaws by refusing to enforce the state’s criminal

³¹ *Id.* at 166.

³² *Id.* at 180.

³³ *Id.*

and tort law when the victims of a crime or tort are black. To the consistent originalist that should be the extent of the clause's reach. Bork points out that the framers and ratifiers of the fourteenth amendment did not intend to bring about social equality between the races and would not have cared if the failure to achieve such equality inflicted psychological wounds on blacks. And Bork objects to extracting from a constitutional provision "a concept whose content would so dramatically change over time that it would come to outlaw things that the ratifiers had no idea of outlawing."³⁴ Yet he shies away from concluding that *Brown* was wrong . . .

3. Bork would use the obscure, and usually assumed to be nonjusticiable, "guarantee" clause in article IV of the Constitution (guaranteeing each state the right to a republican form of government) to correct extreme forms of legislative malapportionment. This suggestion confuses republican with democratic and contradicts Bork's own statement that the clause left the states free to experiment with different forms of government, provided only that state governments did not become "aristocratic or monarchical."³⁵

4. Bork suggests that the guarantee clause might also be used to require states "to avoid egregious deviations from their own laws."³⁶ If adopted, this suggestion, by making federal judges the final arbiters of state law, would license a degree of judicial activism that would make the ghost of Earl Warren blush.

5. Bork notes with apparent approval the suggestion that "if anyone tried to enforce a law that had moldered in disuse for many years, the statute should be declared void by reason of desuetude."³⁷ He is referring to the statute banning contraceptives that was struck down in *Griswold v. Connecticut*, but the logic of "desuetude" applies equally to the long-unenforced sodomy statute upheld in *Bowers v. Hardwick*—a decision of which Bork thoroughly approves. He does not indicate where in the Constitution we should look for the desuetude clause.

6. Bork hints that there is a residual power, lurking in some unspecified provision of the Constitution, to invalidate "horrible" laws,³⁸ although he can find no constitutional basis for the decision in *Skinner v. Oklahoma*, which invalidated a statute, fairly describable as "horrible," that authorized the sterilizing of larcenists (but not embezzlers!), presumably on some notion of the heritability of criminal tendencies.

Bork is unwilling to follow the logic of his analysis to its inevitable conclusion, which is that the doctrine of incorporation is thoroughly illegitimate.

³⁴ *Id.* at 214.

³⁵ *Id.* at 87 (quoting Madison).

³⁶ *Id.* at 86 n.*.

³⁷ *Id.* at 96.

³⁸ *Id.* at 97.

7. Bork believes that courts have the power to create “buffer zone[s]” around constitutional rights “by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution.”³⁹ In other words, explicit constitutional rights create penumbras of further constitutional protection. Yet Bork is derisive about Justice Douglas’s use of the penumbra concept in *Griswold* and also says that a judge “may never create new constitutional rights.”⁴⁰

...

Originalism’s bark (at least this originalist’s bark), it appears, is worse than its bite. Originalism may indeed be completely plastic; for besides the examples I have given, apparently it is acceptable originalist argumentation to defend a statute that forbids defacing the American flag by pointing out that “[n]obody pledges allegiance to the Presidential seal or salutes when it goes by.”⁴¹ Originalism—at least Bork’s originalism—is not an analytic, but a rhetoric that can be used to support any result the judge wants to reach. The conservative libertarians whom Bork criticizes (Richard Epstein and Bernard Siegan) are originalists; his disagreement with them is not over method, but over result. The *Dred Scott* decision—to Bork, the very fount of modern judicial activism—is permeated by originalist rhetoric.

We should, of course, distinguish between good originalism and bad originalism. As Bork correctly notes, the key holding of the *Dred Scott* decision—that the Missouri Compromise was unconstitutional—was a straight application of substantive due process; and while Bork is not prepared to reject the possibility that the due process clause of the fourteenth amendment incorporated the Bill of Rights, he never wavers in his rejection of the possibility that the clause, in either the fifth or fourteenth amendments, might license the creation of new rights. Yet there is a lesson, in the bad originalism, that the good originalist may wish to ponder. Some of the most activist judges, whether of the right or of the left, whether named Taney or Black, have been among the judges most drawn to the rhetoric of originalism. For it is a magnificent disguise. The judge can do the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don’t argue with me, argue with Them. If originalist rhetoric could somehow be outlawed and a Taney forced to wrestle in the open with the pragmatics of the Missouri Compromise, maybe *Dred Scott* would have been decided differently.

I have hinted, with deliberate paradox, that the problem with Bork’s originalism may be that it is not originalist enough. As a public man, and

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³⁹ *Id.*

⁴⁰ *Id.* at 147.

⁴¹ *Id.* at 128.

one who quite properly tried to conciliate critics and reassure doubters at his confirmation hearing, Bork may have disabled himself from pressing originalism to its logical extreme; and perhaps the exigencies of writing a popular book preclude complete intellectual rigor. For a pure originalism, a consistent originalism, a rigorous originalism, we may have to turn elsewhere. But the impurities of Bork's originalism are a strength rather than a weakness of his book, for in his concessions to practicality and public opinion, and in other remarks scattered throughout the book, one can find materials for constructing an alternative to strict originalism. Call it pragmatism, not in its caricatural sense of deciding today's case with no heed for tomorrow, but in the sense of advocating the primacy of consequences in interpretation as in other departments of practical reason, the continuity of legal and moral discourse, and a critical rather than pietistic attitude toward history and tradition. Introducing Bork the pragmatist:

1. "Results that are particularly awkward, in the absence of evidence to the contrary, were probably not intended [by the framers]."⁴² Bork implies that such results can and should be avoided through flexible interpretation: "The Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words alone might suggest."⁴³

2. "Law will not be recognized as legitimate if it is not organically related to 'the larger universe of moral discourse that helps shape human behavior.'"⁴⁴

3. "[H]istory is not binding, and tradition is useful to remind us of the wisdom and folly of the past, not to chain us to either. . . . Our history and tradition, like those of any nation, display not only adherence to great moral principles but also instances of profound immorality."⁴⁵ So obedience to the past has its pitfalls: "[N]ot all traditions are admirable."⁴⁶

A judge whom Bork does not mention—Benjamin Cardozo—described the pragmatist creed in words that Bork might have done well to ponder: The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.

. . .

. . . Not the origin, but the goal, is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead. . . . The rule that functions well produces a title deed to recognition [T]he final principle of selection for judges . . . is one of fitness to an end.⁴⁷

⁴² *Id.* at 165.

⁴³ *Id.* at 147.

⁴⁴ *Id.* at 354 .

⁴⁵ *Id.* at 119 .

⁴⁶ *Id.* at 235.

⁴⁷ Benjamin N. Cardozo, *The Nature of the Judicial Process* 66, 102-03 (1921).

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The originalist faces backwards, but steals frequent sideways glances at consequences. The pragmatist places the consequences of his decisions in the foreground. The pragmatist judge does not deny that his role in interpreting the Constitution is interpretive. He is not a lawless judge. He does not, in order to do short-sighted justice between the parties, violate the Constitution and his oath, for he is mindful of the systemic consequences of judicial lawlessness. Original understanding is therefore a component of pragmatist constitutional adjudication, and a pragmatist may therefore share, for example, Bork's reservations regarding the Supreme Court's jurisprudence of sexual freedom ("privacy"). Like Samuel Lipman's ideal conductor, however, the pragmatist judge believes that constitutional interpretation involves the empathic projection of the judge's mind and talent into the creative souls of the framers rather than slavish obeisance to the framers' every metronome marking. In the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations are decisive; to the consistent originalist, they are irrelevant. Those consequences include, but they are not exhausted by, the consequences for such institutional values as maintaining the intelligibility of language as a medium of communication and preserving a stable balance among the branches of government.

And speaking of consequences, I think Bork misreads the lesson of his defeat in the Senate. He attributes it to the machinations of the "new class"—the "knowledge class"—of left-liberal academics and journalists.⁴⁸ That there is such a class, that it is predominant in American universities and the mass media, and that it played a role in Bork's defeat, all are true. But I do not think its role was decisive. The decisive factor, besides Reagan's being a lame duck crippled by the Iran-Contra affair and the Senate's being controlled by the Democrats, was that a large number of Americans (I do not say a majority—but passionate and articulate minorities can be very powerful in a system of representative government, and a number of otherwise conservative Democratic Senators from the South owed their seats to black voters) do not want the Constitution to be construed as narrowly as Bork would construe it. They do not think that states should be allowed to forbid abortion (*Roe v. Wade*, which Bork argues should be overruled) or to enforce racial restrictive covenants (*Shelley v. Kraemer*, which Bork argues was decided incorrectly). They do not think that the federal government should be free to engage in racial discrimination. (Bork thinks that *Bolling v. Sharpe*, which read a duty of equal protection into the due process clause of the fifth amendment, was erroneous too.) They do not think that states should be free to enact "savage" laws. They do not

⁴⁸ Bork, *supra* note 10, at 337, 339.

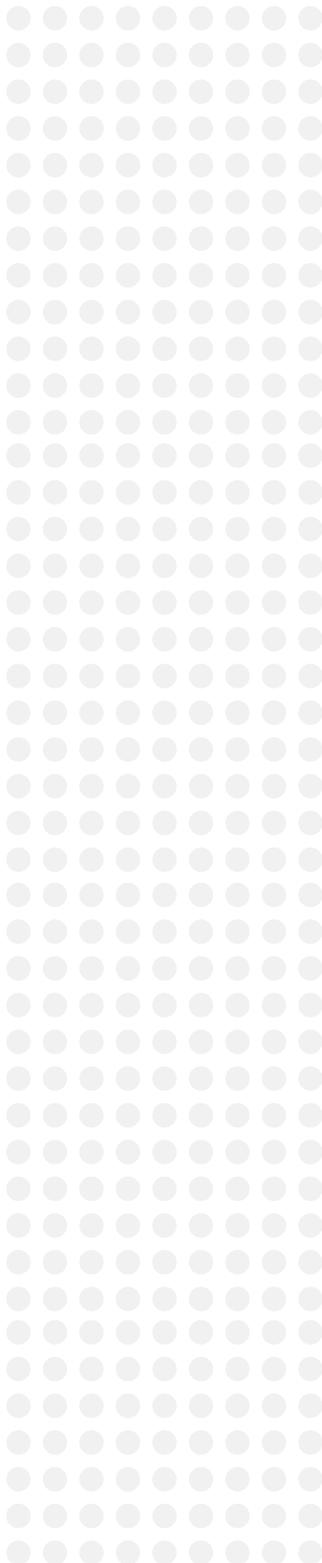
believe that a judge should practice “moral abstention,” as Bork urges.⁴⁹ They doubt whether minorities whose rights are not expressly protected by the Constitution should be left to the mercy of the prejudices of the majority. They are not upset that “No Justice renounces the power to override democratic majorities when the Constitution is silent.”⁵⁰ (Bork argues that no current member of the Supreme Court is a genuine originalist, and, so far as appears from the book, he does not believe that there has *ever* been a Supreme Court Justice who was a consistent originalist.) They do not believe that under chief Justice Rehnquist as under his predecessors “[t]he political seduction of the law continues apace.”⁵¹ They do not believe that the books should be closed on judicial innovation, preventing the creation of new rights (which is what Bork means when he tells the Supreme Court to sin “no more”). They think results are more important than theory and they don’t like the results that Bork would be likely, on the evidence of this book as well as of his previous writings, to reach. They may be morally or politically immature to think such things, and they may also have (I think they do have) an incomplete picture of the consequences of some of the decisions he criticizes. It is even possible that the conception of law held by lay people is incoherent, because they believe both that judges’ decisions should be dictated by positive law rather than by moral principles and that the decisions should yield results that conform to such principles, so that at one level they agree both with Bork and with his arch enemy, Ronald Dworkin and at another level they reject both. Finally, it is by no means clear that a majority of Americans agree with the particular views of policy that I have described.

But these are details. In a representative democracy, the fact that many (it need not be most) people do not like the probable consequences of a judge’s judicial philosophy provides permissible grounds for the people’s representatives to refuse to consent to his appointment, even if popular antipathy to the judge is not grounded in a well thought out theory of adjudication. The people are entitled to ask what the benefits to them of originalism would be, and they will find no answers in *The Tempting of America*. If, to echo Samuel Lipman again, originalism makes bad music despite or perhaps because of its scrupulous historicity, why *should* the people listen to it?

⁴⁹ *Id.* at 259.

⁵⁰ *Id.* at 240.

⁵¹ *Id.*



from

ABORTION AND ORIGINAL MEANING

Jack M. Balkin¹

I. Originalism versus Living Constitutionalism: A False Dichotomy

. . . It has become a commonly held assumption among [the critics of *Roe v. Wade*] that there is no constitutional basis for abortion rights or for a right of “privacy.” . . .

The conventional wisdom about *Roe*, however, is wrong. . . . In this essay I offer an argument for the right to abortion based on the original meaning of the constitutional text as opposed to its original expected application.

I argue, among other things, that laws criminalizing abortion violate the Fourteenth Amendment’s principle of equal citizenship and its prohibition against class legislation. . . .

A second, and larger purpose of my argument is to demonstrate why the debate between originalism and living constitutionalism rests on a false dichotomy. Originalists generally assume that if we do not apply the constitutional text in the way it was originally understood at the time of its adoption we are not following what the words mean and so will not be faithful to the Constitution as law. But in focusing on the original understanding, they have tended to conflate two different ideas—the expected application of constitutional texts, which is not binding law, and the original meaning, which is. Indeed, many originalists who claim to be interested only in original meaning, like Justice Antonin Scalia, have encouraged this conflation of original meaning and original expected application in their practices of argument. Living constitutionalists too have mostly accepted this conflation without question. Hence they have assumed that the constitutional text and the principles it was designed to enact cannot account for some of the most valuable aspects of our constitutional tradition. They object to being bound by the dead hand of the past. They fear that chaining ourselves to the original understanding will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation’s future. By accepting mistaken premises about interpretation—premises that they share with many originalists—living constitutionalists have unnecessarily

¹ Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291 (2007).

left themselves open to the charge that they are not really serious about being faithful to the Constitution's text, history and structure.

The choice between original meaning and living constitutionalism, however, is a false choice. I reject the assumption that fidelity to the text means fidelity to original expected application. I maintain instead that constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text. The task of interpretation is to look to original meaning and underlying principle and decide how best to apply them in current circumstances. I call this the method of text and principle. This approach . . . is faithful to the original meaning of the constitutional text, and the purposes of those who adopted it. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to make sense of the Constitution's words and principles. Although the constitutional text and principles do not change without subsequent amendment, their application and implementation can. That is the best way to understand the interpretive practices of our constitutional tradition and the work of the many political and social movements that have transformed our understandings of the Constitution's guarantees.

. . .

II. The Method of Text and Principle

A. *Original Meaning versus Original Expected Application*

Constitutional interpretation by judges requires fidelity to the Constitution as law. Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text. It follows from these premises that constitutional interpretation is not limited to those applications specifically intended or expected by the framers and adopters of the constitutional text. Thus, for example, the Eighth Amendment's prohibitions on "cruel and unusual punishments" bans punishments that are cruel and unusual as judged by contemporary application of these concepts (and underlying principles), not by how people living in 1791 would have applied those concepts and principles.

This marks the major difference between my focus on original meaning and the form of originalism that has been popularized by Justice Antonin Scalia and others. Justice Scalia agrees that constitutional fidelity requires fidelity to the original meaning of the constitutional text, and the meanings that words had at the time they were adopted.² He also agrees that

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2 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (Amy Gutman, ed., Princeton Univ. Press 1997).

the original meaning of the text should be read in light of its underlying principles. But he insists that the concepts and principles underlying those words must be applied in the same way that they would have been applied when they were adopted. As he puts it, the principle underlying the Eighth Amendment “is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel. It means not . . . ‘whatever may be considered cruel from one generation to the next,’ but ‘what we consider cruel today [i.e., in 1791]’; otherwise it would be no protection against the moral perceptions of a future, more brutal generation. It is, in other words, rooted in the moral perceptions of the time.”³ Scalia’s version of “original meaning” is not original meaning in my sense, but actually a more limited interpretive principle, what I call original expected application. Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art). When people use the term “original understanding,” and sometimes even “original meaning”—as Scalia does—they are actually talking about original expected application.

B. Mistakes and Achievements

Scalia realizes that his approach would allow many politically unacceptable results, including punishments that would shock the conscience of people today, so he often allows deviations from his interpretive principles, making him what he calls a “faint-hearted originalist.”⁴ For example, Scalia accepts the New Deal settlement that gave the federal government vast powers to regulate the economy that most people in 1787 would never have dreamed of and would probably have strongly rejected.

Scalia’s originalism must be “faint-hearted” precisely because he has chosen a unrealistic and impractical principle of interpretation, which he must repeatedly leaven with respect for *stare decisis* and other prudential considerations. The basic problem with looking to original expected application for guidance is that it is inconsistent with so much of our existing constitutional traditions. Many federal laws securing the environment, protecting workers and consumers—even central aspects of Social Security—go beyond original expectations about federal power, not to mention independent federal agencies like the Federal Reserve Board and the Federal Communications Commission, and federal civil rights laws that protect women and the disabled from private discrimination. Even the federal

3 Antonin Scalia, *Response, in A Matter of Interpretation: Federal Courts and the Law* 145 (Amy Guttmann, ed., Princeton Univ. Press 1997) (emphasis in original).

4 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 861–64 (1989).

government's power to make paper money legal tender probably violates the expectations of the founding generation. The original expected application is also inconsistent with constitutional guarantees of sex equality for married women, with constitutional protection of interracial marriage, with the constitutional right to use contraceptives, and with the modern scope of free speech rights under the First Amendment.

The standard response to this difficulty is that courts should retain non-originalist precedents (*i.e.*, those inconsistent with original expectation) if those precedents are well established, if they promote stability, and if people have justifiably come to rely on them. Interpretive mistakes, even though constitutionally illegitimate when first made, can be made acceptable because of our respect for precedent.

There are four major problems with this solution. First, it undercuts the claim that legitimacy comes from adhering to the original meaning of the text adopted by framers and that decisions inconsistent with the original expected application are illegitimate. It suggests that legitimacy can come from public acceptance of the Supreme Court's decisions, or from considerations of stability or economic cost.

Second, under this approach, not all of the incorrect precedents receive equal deference. Judges will inevitably pick and choose which decisions they will retain and which they will discard based on pragmatic judgments about when reliance is real, substantial, justified or otherwise appropriate. These characterizations are likely to conflate considerations of stability and potential economic expense with considerations of political acceptability—which decisions would be too embarrassing now to discard—and political preference—which decisions particularly rankle the jurist's sensibilities. Thus, one might argue that it is too late to deny Congress the power to pass the Civil Rights Act of 1964 under the Commerce Clause but express doubts about the Endangered Species Act. One might accept that states may not engage in sex discrimination but vigorously oppose the constitutional right to abortion or the unconstitutionality of anti-sodomy statutes. This play in the joints allows expectations-based originalism to track particular political agendas and allows judges to impose their political ideology on the law—the very thing that the methodology purports to avoid.

Third, allowing deviations from original expected application out of respect for precedent does not explain why these mistakes should not be read as narrowly as possible to avoid compounding the error, and with the idea of gradually weakening and overturning them, so as to return to more legitimate decision-making. If the sex equality decisions of the 1970's were mistakes, courts should try to distinguish them in every subsequent case with the goal of eventually ridding us of the blunder of recognizing equal constitutional rights for women.

Our political tradition does not regard decisions that have secured equal rights for women, greater freedom of speech, federal power to protect the environment, and federal power to pass civil rights laws as mistakes that we must unhappily retain; it regards them as genuine achievements of American constitutionalism and sources of pride.

This point leads naturally to the final, and more basic problem: Our political tradition does not regard decisions that have secured equal rights for women, greater freedom of speech, federal power to protect the environment, and federal power to pass civil rights laws as mistakes that we must unhappily retain; it regards them as genuine achievements of American constitutionalism and sources of pride. These decisions are part of how and why we understand ourselves to be a nation that has grown freer and more democratic over time. No interpretive theory that regards equal constitutional rights for women as an unfortunate blunder that we are now simply stuck with because of respect for precedent can be adequate to our history as a people. It confuses achievements with mistakes, and it maintains them out of a grudging acceptance. Indeed, those who argue for limiting constitutional interpretation to the original expected application are in some ways fortunate that previous judges rejected their theory of interpretation; this allows them to accept as a starting point nonoriginalist precedents that would now be far too embarrassing for them to disavow.

By contrast, a focus on text and principle views most, if not all of these achievements as plausible constructions of constitutional principles that underlie the constitutional text and that must be fleshed out in doctrine. . . . We need not regard decisions recognizing women's equal rights as mistakes: quite the contrary, they are our generation's attempt to make sense of and implement the text and its underlying principles. These decisions—and others like them—do not sacrifice constitutional fidelity on the altar of precedent; they demonstrate how development of judicial doctrine over time can implement and maintain constitutional fidelity. It is rather those who would retreat from the achievements of our constitutional tradition or accept them only grudgingly who lack fidelity, because they lack faith in the ability and the authority of succeeding generations to accept the Constitution as their Constitution and to make constitutional text and constitutional principles their own.

A central difference between expectations-based originalism and the method I advocate is that my approach recognizes the great achievements of our country's constitutional tradition as achievements and as signs of progress rather than as deviations and mistakes that sacrifice legitimacy and legality for the sake of stability and respect for precedent. A second important difference concerns how these two theories understand post-enactment history and the work of social movements. Original expectation originalism holds that social movements and political mobilizations can change constitutional law through the amendment process of Article V. They can also pass new legislation, as long as that legislation does not violate the original expected application—as much federal post-New Deal legislation might. But no matter how significant social movements like the

civil rights movement and the women's movement might have been in our nation's history, no matter how much they may have changed Americans' notion of what civil rights and civil liberties belong to them, they cannot legitimately alter the correct interpretation of the Constitution beyond the original expected application. For example, no matter how profoundly the second wave of American feminism altered our sense of what equality between men and women requires, it cannot change the original expected application of the Constitution, under which married women did not have equal civil rights. The federal government can pass civil rights laws (assuming that these do not run afoul of the original expected application of the Commerce Power). But judges are not authorized to subject sex discrimination to constitutional scrutiny. At best we might maintain the mistaken decisions of the 1970s that found sex equality guarantees in the Constitution because it would be politically impossible to reject them and because women have come to rely on them.

The model of text and principle views the work of social movements and post-enactment history quite differently. The original expected application of the constitutional text does not change without Article V amendment. But each generation of Americans can seek to persuade each other about how the text and its underlying principles should apply to their circumstances, their problems, and their grievances. And because conditions are always changing, new problems are always arising and new forms of social conflict and grievance are always being generated and discovered, the process of argument and persuasion about how to apply the Constitution's principles in new contexts is never-ending.

When people try to persuade each other about how the Constitution and its principles apply to their circumstances, they naturally identify with the generation that framed the constitutional text and they claim that they are being true to its principles. They can and do draw analogies between the problems, grievances and injustices the adopters feared or faced and the problems, grievances, and injustices of our own day. They also can and do draw on the experiences and interpretive glosses of previous generations—like the generation that produced the New Deal or the civil rights movement—and argue that they are also following in their footsteps.

Most successful political and social movements in America's history have claimed authority for change in just this way: either as a call to return to the enduring principles of the Constitution or as a call for fulfillment of those principles. Thus, the key tropes of constitutional interpretation by social movements and political parties are restoration on the one hand, and redemption on the other. Constitutional understandings change by arguing about what we already believe, what we are already committed

*Each generation
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Constitution their
Constitution
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principles and
arguing about
what they mean in
their own time.*

to, what we have promised ourselves, what we must return to and what commitments remain to be fulfilled.

When political and social movements succeed in persuading other people in the country that their interpretation is the right one, they replace an older set of implementing constructions and doctrines with a new one. These constructions and implementations may not be just or correct judged from the standpoint of later generations, and they can be challenged later on. But that is precisely the point. Each generation makes the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time. Interpreting the Constitution's text and principles is how each generation connects back to the past and forward to the future. Thus, it matters greatly, from the standpoint of text and principle, that there was a women's movement in the early 1960's and 1970's that convinced Americans that both married and single women were entitled to equal rights and that the best way to make sense of the Fourteenth Amendment's principle of equal citizenship was to apply it to women as well as men, despite the original expected application of the adopters. The equal protection decisions of the 1970's that gave heightened scrutiny to sex-based classifications are not "mistakes" that we must grudgingly live with. They are applications of text and principle that have become part of our constitutional tradition through the work of social movements and popular mobilizations. They might be good or bad applications; they might be incorrect or incomplete. That is for later generations to judge. But when people accept them, as Americans accept the notion of equality for women today, they are not simply doing so on the basis of reliance interests—i.e. that we gave women equal rights mistakenly in the 1970's, and now it's just too late to turn back. They are doing so in the belief that this is what the Constitution actually means, that this is the best, most faithful interpretation of constitutional text and principles.

Originalism based on original expected application fails because it cannot comprehend this feature of constitutional development except as a series of errors that it would now be too embarrassing to correct. Justice Scalia correctly and appropriately notes that his reliance on nonoriginalist precedents is not consistent with originalism, but rather a "pragmatic exception."⁵ And that is precisely the problem with his view: The work of social movements in our country's history is not a "pragmatic exception" to fidelity to the Constitution. It is the lifeblood of fidelity to our Constitution—as an ongoing project of vindicating text and principle in history. In this way, the theory of text and principle explains—in a way that original expectation originalism cannot—why the Constitution is more than

⁵ Scalia, *supra* note 2, at 140.

the dead hand of the past, but is a continuing project that each generation takes on. It is a great work that spans many lifetimes, a vibrant multi-generational undertaking, in which succeeding generations pledge faith in the constitutional project and exercise fidelity to the Constitution by making the Constitution their own.

None of this means that the original expected application is irrelevant or unimportant. It helps us understand the original meaning of the text and the general principles that animated the text. But it is important not as binding law but rather as an aid to interpretation, one among many others. It does not control how we should apply the Constitution's guarantees today, especially as our world becomes increasingly distant from the expectations and assumptions of the adopters' era. The concepts embodied by the words of constitutional text and the principles underlying the text, and not their original expected application, are the central concern of constitutional interpretation.

C. Implementing Text and Principles

Although the original expected application is not binding, the constitutional text is. That is because we have a written Constitution that is also enforceable law. We treat the Constitution as law by viewing its text and the principles that underlie the text as legal rules and legal principles. To do this we must ask what the people who drafted the text were trying to achieve in choosing the words they chose, and, where their words presume underlying principles, what principles they sought to endorse.

We look to the original meaning of the words because if the meaning of the words changed over time, then the words will embrace different concepts than those who had the authority to create the text sought to refer to. We look to underlying principles because when the text uses relatively abstract and general concepts, we must know which principles the text presumes or is attempting to embrace. If we read the text to presume or embrace other principles, then we may be engaged in a play on words and we will not be faithful to the Constitution's purposes. Just as we look to the public meaning of words of the text at the time of enactment, we discover underlying constitutional principles by looking to the events leading up to the enactment of the constitutional text and roughly contemporaneous to it. Sometimes the text refers to terms of art or uses figurative or non-literal language; in that case we must try to figure out what principles underlie that term of art or figurative or non-literal language.

Underlying principles are necessary to constitutional interpretation when we face a relatively abstract constitutional command rather than language that offers a fairly concrete rule, like the requirement that there are two houses of Congress or that the President must be 35 years of age.

Just as we look to the public meaning of words of the text at the time of enactment, we discover underlying constitutional principles by looking to the events leading up to the enactment of the constitutional text and roughly contemporaneous to it.... But where the text is abstract, general or offers a standard, we must look to the principles that underlie the text to make sense of and apply it.

When the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command. For example, the underlying goal of promoting maturity in a President does not mean that we can dispense with the 35 year age requirement. But where the text is abstract, general or offers a standard, we must look to the principles that underlie the text to make sense of and apply it. Because the text points to general and abstract concepts, these underlying principles will usually also be general and abstract. Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be fleshed out later on by later generations. Nevertheless recourse to underlying principles limits the direction and application of the text and therefore is essential to fidelity to the Constitution.

Some principles are directly connected to particular texts and help us understand how to apply those texts. Other principles are inferred from the constitutional structure as a whole. For example, there is no single separation of powers clause in the Constitution; rather we must derive the principle of separation of powers from how the various institutions and structures outlined in the constitutional text relate to each other. The principle of democracy—which includes the subprinciple that courts should generally defer to majoritarian decision-making—is nowhere specifically mentioned in the constitutional text, and yet it may be the most frequently articulated principle in constitutional argument. It is, ironically, the principle that people most often use to object to courts inferring constitutional principles not specifically mentioned in the text. Although the principle of democracy does not directly appear in the text, it is inferred from various textual features which presume democracy and from the basic character of our government as a representative and democratic republic.

Finally, many other materials gloss text and principles and help apply them to concrete circumstances. These include not only the original expected application but also post-enactment history, including the work of social movements that have changed our constitutional common sense, and judicial and non-judicial precedents. These materials offer interpretations about how to understand and apply the Constitution's structures and guarantees. They are entitled to considerable weight. Precedents in particular not only implement and concretize principles, they also help settle difficult legal questions where reasonable people can and do disagree. Precedents also help promote stability and rule of law values. However, because glosses and precedents accumulate and change over time, and because they often point in contrasting directions, they are not always dispositive of constitutional meaning.

Constitutional doctrines created by courts, and institutions and practices created by the political branches, flesh out and implement the constitutional text and underlying principles. But they are not supposed to replace them. Doctrines, institutions and practices can do the work of implementation well or poorly depending on the circumstances, and some implementations that seem perfectly adequate at one point may come to seem quite inadequate or even perverse later on. But the Constitution, and not interpretations of the Constitution, is the supreme law of the land. Therefore it is always available to later generations to assert—and to try to convince others—that the best interpretation of text and principle differs from previous implementing glosses, and that we should return to the correct interpretation of text and principle, creating new implementing rules, practices and doctrines that will best achieve this end. The tradition of continuous arguments about how best to implement constitutional meaning in our own time produces changes in constitutional doctrines, practices, and law. That is why, ultimately, there is no conflict between fidelity to text and principle and practices of constitutionalism that evolve over time. Indeed, if each generation is to be faithful to the Constitution and adopt the Constitution's text and principles as its own, it must take responsibility for interpreting and implementing the Constitution in its own era.

D. Fidelity and Institutional Constraints

Expectations-based originalists may object that the text-and-principle approach is indeterminate when the text refers to abstract standards like “equal protection” rather than concrete rules. Therefore it does not sufficiently constrain judges. That might be so if text and principle were all that judges consulted when they interpreted the Constitution. But in practice judges (and other constitutional interpreters) draw on a rich tradition of sources that guide and constrain interpretation, including pre- and post-enactment history, original expected application, previous constitutional constructions and implementations, structural and inter-textual arguments, and judicial and non-judicial precedents, to name only a few. In practice, judges who look to text and principle face constraints much like those faced by judges who purport to rely on original expected application. As we have seen, the latter cannot and do not use original expected applications for a very large part of their work, because a very large part of modern doctrine is not consistent with original expected application. So even judges who claim to follow the original understanding are, in most cases, guided and constrained by essentially the same sources and modalities of argument as judges employing the method of text and principle.

I think there is a deeper problem with the objection that the method of text and principle does not sufficiently constrain judges. Many theories

of constitutional interpretation conflate two different questions. The first is the question of what the Constitution means and how to be faithful to it. The second asks how a person in a particular institutional setting—like an unelected judge with life tenure—should interpret the Constitution and implement it through doctrinal constructions and applications. The first is the question of fidelity; the second is the question of institutional responsibility.

Theories about constitutional interpretation that conflate these two questions tend to view constitutional interpretation from the perspective of judges and the judicial role; they view constitutional interpretation as primarily a task of judges and they assess theories of interpretation largely in terms of how well they guide and limit judges. For example, one of the standard arguments for expectations-based originalism is that it will help constrain judges in a democracy. Alexander Bickel's theory of the passive virtues and Cass Sunstein's idea of "minimalism," although often described as theories of constitutional interpretation, are actually theories about the judicial role and how judges should interpret the Constitution. So, too, obviously, are other theories of "judicial restraint." From the perspective of these theories, non-judicial interpreters are marginal or exceptional cases that we explain in terms of the standard case of judicial interpretation.

I reject this approach. Theories of constitutional interpretation should start with interpretation by citizens as the standard case; they should view interpretation by judges as a special case with special considerations created by the judicial role. In like fashion, constitutional interpretations by executive officials and members of legislatures are special cases that are structured by their particular institutional roles. Instead of viewing constitutional interpretation by citizens as parasitic on judicial interpretation, we should view it the other way around.

Why emphasize the citizen's perspective? Each generation must figure out what the Constitution's promises mean for themselves. Many of the most significant changes in constitutional understandings (e.g., the New Deal, the civil rights movement, the second wave of American feminism) occurred through mobilizations and counter-mobilizations by social and political movements who offered competing interpretations of what the Constitution really means. Social and political movements often understand their grievances and their demands in constitutional terms—they argue for either a restoration of constitutional principles or a redemption of constitutional commitments. They make claims about how the Constitution's text and principles should be cashed out in present-day circumstances. Social and political movements argue that the way that the Constitution has been interpreted and implemented before—for example, by judges or other political actors—is wrong—and that we need either to

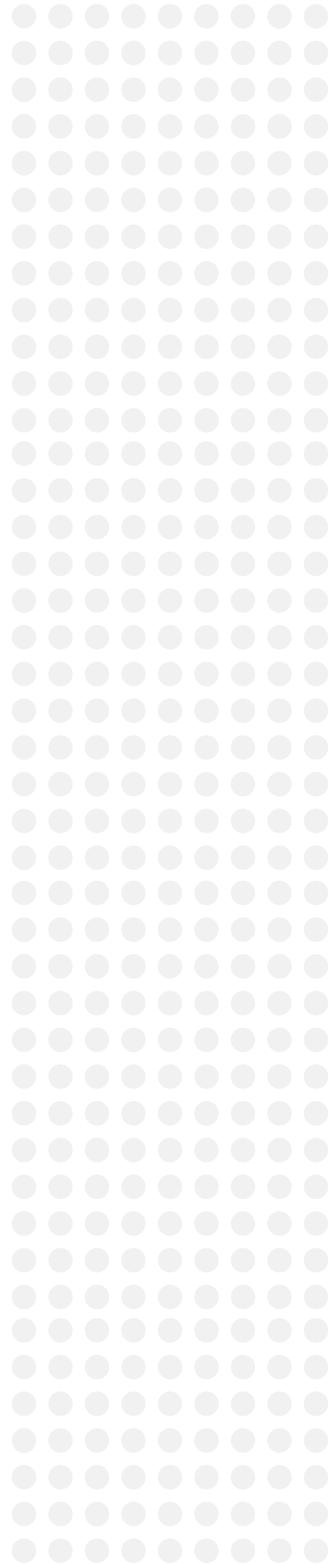
return to the Constitution's correct meaning and redeem the Constitution's promises in our own day.

Often people do not make these claims in lawyerly ways, and usually they are not constrained by existing understandings and existing doctrine in the way that we want judges to be constrained. In fact, when social movements initially offer their constitutional claims, many people regard them as quite radical or "off the wall." There was a time, for example, when the notion that the Constitution prohibited what we now call sex discrimination seemed quite absurd. Yet it is from these protestant interpretations of the Constitution that later constitutional doctrines emerge. Many of the proudest achievements of our constitutional tradition came from constitutional interpretations that were at one point regarded as crackpot and "off the wall."

I hasten to add that most of these arguments go nowhere. Only a few have significantly changed how we look at the Constitution. Successful social and political movements must persuade other citizens that their views are correct, or, at the very least, they must convince people to compromise and modify their views. If movements are successful, they change the minds of the general public, politicians and courts. This influence eventually gets reflected in new laws, in new constitutional doctrines, and in new constitutional constructions. Successful social and political mobilization changes political culture, which changes constitutional culture, which, in turn, changes constitutional practices outside of the courts and constitutional doctrine within them.

The causal influences, of course, do not run in only one direction. Judicial interpretations like those in *Brown v. Board of Education* or *Miranda v. Arizona* can become important parts of our constitutional culture; they can be absorbed into ordinary citizens' understandings of what the Constitution means, and they can act as focal points for citizen reaction. Nevertheless, we cannot understand how constitutional understandings change over time unless we recognize how social movements and political parties articulate new constitutional claims, create new constitutional regimes and influence judicial constructions.

To understand how these changes could be faithful to the Constitution, we must have a theory that makes the citizen's perspective primary. I do not claim that all social mobilizations that produce changes in doctrine are equally legitimate or equally admirable. But some are both legitimate and admirable, and a theory of constitutional interpretation—which is also a theory of constitutional fidelity—must account for them. The text-and-principle approach can offer a much better explanation of how successful social and political movements make claims that are faithful to the Constitution than expectations-based originalism can. Indeed, as we have seen,



expectations-based originalism is virtually useless for this purpose, because it views many of the most laudatory changes in our understandings of the Constitution as not faithful to the Constitution and therefore illegitimate.

For similar reasons, expectations-based originalism cannot really constrain judges because too many present-day doctrines are simply inconsistent with it; as a result judges must pick and choose based on pragmatic justifications that are exceptions to the theory. Because expectations-based originalism conflates the question of constitutional fidelity with the question of judicial constraint, it offers the wrong answer to both questions.

Constraining judges in a democracy is important. But in practice most of that constraint does not come from theories of constitutional interpretation. It comes from institutional features of the political and legal system. Some of these are internal to law and legal culture, like the various sources and modalities of legal argument listed above. Others are “external” to legal reasoning but nevertheless strongly influence what judges produce as a group.

First, judges are subject to the same cultural influences as everyone else—they are socialized both as members of the public and as members of particular legal elites. Second, the system of judicial appointments and the practices of partisan entrenchment determine and limit who gets to serve as a judge. Third, lower federal courts are bound to apply Supreme Court precedents. Fourth, the Supreme Court is a multi-member body whose decisions in contested cases are usually decided by the median or “swing” Justice. Over time, this keeps the Court’s work near the center of public opinion.

This combination of internal and external features constrains judicial interpretation in practice far more effectively than any single theory of interpretation ever could; it does much of the work in constructing which constitutional interpretations are reasonable and available to judges and which are “off the wall.” Equally important, this combination of internal and external factors keeps judicial decisions in touch with popular understandings of our Constitution’s basic commitments, continually translating, shaping and refining constitutional politics into constitutional law.

In short, we should not confuse the question of what it takes for actors in the system—including those actors who are not judges—to be faithful to the Constitution with the question of what features of the system constrain judicial interpretation. We must separate these questions to understand how constitutional fidelity occurs over time. When we do, we can also see why fidelity to original meaning and belief in a living Constitution are not at odds.

...

III. The Original Meaning of the Fourteenth Amendment

[Balkin's article goes on to discuss the Fourteenth Amendment, which guarantees all citizens "equality before the law," and the history of its application and interpretation by the courts. He argues that laws that criminalize abortion violate the Fourteenth Amendment because they are "class and subordinating legislation that helps maintain second-class citizenship for women." He concludes by suggesting a basis for the constitutional right to abortion that is, he argues, "more closely connected to the reasons why the right to abortion deserves constitutional protection" than the basis set forth in *Roe v. Wade*.]

IV. Conclusion

Roe v. Wade and the right to abortion have often been viewed as a controversial symbol of a "living constitution" that cuts itself adrift from the Constitution's text and history and, in the view of its critics, becomes no more than a question of contemporary politics exercised by the judiciary. This is a false portrait reflecting a false dichotomy between fidelity to the constitutional text and a living Constitution. The Constitution, and particularly the Fourteenth Amendment, was written with the future in mind. Its drafters deliberately chose broad language embracing broad principles of liberty and equality. Fidelity to the Constitution means applying its text and its principles, to our present circumstances, and making use of the entire tradition of opinions and precedents that have sought to vindicate and implement the Constitution. . . . Reasonable people may disagree on what those principles mean and how they should apply. But the larger point about constitutional interpretation remains. We decide these questions by reference to text and principle, applying them to our own time and our own situation, and in this way making the Constitution our own. The conversation between past commitments and present generations is at the heart of constitutional interpretation. That is why we do not face a choice between living constitutionalism and fidelity to the original meaning of the text. The two are opposite sides of the same coin.

The Constitution, and particularly the Fourteenth Amendment, was written with the future in mind.

from

ORIGINALISM AND ITS DISCONTENTS

(PLUS A THOUGHT OR TWO ABOUT ABORTION)

Mitchell N. Berman¹

In *Abortion and Original Meaning*,² Jack Balkin presents an intriguing new argument for the soundness of the result, though not the reasoning, of *Roe v. Wade*. Balkin is one of this generation's widest ranging and most consistently engaging legal theorists, and his analyses of the original principles undergirding the Fourteenth Amendment and how they bear on the debate over abortion is characteristically thought-provoking. But they are offered in service of a "larger purpose"—namely, "to demonstrate why the debate between originalism and living constitutionalism rests on a false dichotomy."³ Once we "reject the assumption that fidelity to the [constitutional] text means fidelity to original expected application," Balkin contends, we ought instead to agree that "constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text."⁴ In maintaining such fidelity, moreover, "[e]ach generation makes the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time."⁵ It follows, Balkin claims, that "[t]he choice between original meaning and living constitutionalism . . . is a false choice."⁶

I believe that Balkin mischaracterizes contemporary originalism. Although Justice Scalia constitutes a striking—but possibly only partial—counter-example, an overwhelming number of contemporary constitutional theorists who actively defend originalism have already rejected the assumption that Balkin asks them to reject. While there does exist a live intramural disagreement among originalists concerning whether to abide by the originally intended meaning of the framers (or ratifiers) of constitutional text or the text's original public meaning, almost nobody espouses fidelity to the originally expected applications.

¹ Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 Const. Comment. 383 (2007).

² Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comment. 291 (2007).

³ *Id.* at 292.

⁴ *Id.* at 293.

⁵ *Id.* at 301.

⁶ *Id.* at 293.

More important, though, is what follows once we all reject what Ronald Dworkin dubbed “expectation originalism.”⁷ Balkin’s conclusion that originalism and non-originalism present a false choice rests squarely on his argument that fidelity to the Constitution requires fidelity to its original meaning and precludes contemporary interpreters from interpreting its text in accordance with other principles that the text can bear. But non-originalists simply do not agree that fidelity to the Constitution requires fidelity to the original meaning “and the principles it was designed to enact.”⁸ And nothing in Balkin’s article, I will argue, should convince them that what they see as a true choice is in fact a false one. . . .

. . .

I. Originalism and Living Constitutionalism

A. Expectation Originalism: Not a True Opponent

According to Balkin, self-described originalists, along with their adversaries, believe that expected applications of constitutional provisions are binding on present-day interpreters. This, he argues, is an unsatisfactory view. I agree. The question, though, is whether it’s a live one. After all, the view was addressed at length a decade ago—and, I would have thought, demolished—in an important article by Mark Greenberg and Harry Litman.⁹ As they explained, “original meaning, properly understood, must contemplate the possibility that a traditional practice is unconstitutional.”¹⁰ In part, this is because, as they argued with care, “requiring fidelity to original practices is inconsistent with interpreting constitutional provisions to stand for principles.”¹¹ Not surprisingly, then, leading academic defenders of originalism have been disavowing expectation originalism for years. Writing . . . in the *Yale Law Journal*, for example, Michael Paulsen protested that it is “a caricature of originalism” to portray it as “a version of crude intentionalism that focuses on the specific subjective intentions or expectations of individuals as to how a provision might be applied.”¹² Michael McConnell was even more blunt. “[N]o reputable originalist, with the possible exception of Raoul Berger, takes the view that the Framers’ ‘assumptions and expectations about the correct application’ of their principles is

⁷ Ronald Dworkin, *Comment*, in *A Matter of Interpretation: Federal Courts and the Law* 115, 119 (Amy Gutman ed., Princeton Univ. Press 1997).

⁸ Balkin, *supra* note 1, at 293.

⁹ Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *Geo. L.J.* 569 (1998).

¹⁰ *Id.* at 570–71.

¹¹ *Id.* at 571.

¹² Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 *Yale L.J.* 2037, 2059 (2006).

controlling,” he argued a decade ago. “Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.”¹³ Swimming against this tide, Balkin asserts loosely that “[o]riginalists generally assume that if we do not apply the constitutional text in the way it was originally understood at the time of its adoption we are not following what the words mean and so will not be faithful to the Constitution as law,” and that “they have tended to conflate two different ideas—the expected application of constitutional texts, which is not binding law, and the original meaning, which is.”¹⁴ “Many originalists,” he adds, “have encouraged this conflation . . . [and] living constitutionalists too have mostly accepted this conflation without question.”¹⁵ But the evidence offered of this supposed general assumption and tendency toward conflation is sparse. In fact, the only originalist theorist Balkin discusses at any length is Justice Scalia who, says Balkin, “insists that the concepts and principles underlying [the constitutional text] must be applied in the same way that they would have been applied when they were adopted.”¹⁶

As I read him, Scalia’s relationship to expectation originalism is more complex. In response to [Ronald] Dworkin’s distinction between semantic and expectation originalism, after all, Scalia did expressly avow his allegiance to the original public meaning of the constitutional text and disavow fidelity to “the concrete expectations of lawgivers.”¹⁷ On the other hand, Balkin is surely correct that much of Scalia’s writing, both academic and judicial, does appear to endorse and rely upon the expectation originalism that he purports to reject. Because Scalia’s efforts to explain away the apparent disparity ring, to me at least, rather false, determining how best to make sense of Scalia’s conflicting signals is no mean feat. I won’t try. Despite my quibbling, then, I’m content for present purposes to accept Balkin’s description of Scalia as a proponent of expectation originalism. But even granting Scalia, who else? As best I could tell, Balkin cites only three other proponents of the expectations originalism that is his target—Robert Bork, Raoul Berger, and Clarence Thomas. Frankly, I am uncertain about Berger and Thomas But the inclusion of Bork on this list strikes me as mistaken—and revealingly so. . . . [I]n *The Tempting of America*, [Bork] . . . make[s] clear, in the face of apparently conflicting

¹³ Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 Ford. L. Rev. 1269, 1284 (1997).

¹⁴ Balkin, *supra* note 1, at 292.

¹⁵ *Id.* at 292–93.

¹⁶ *Id.* at 295.

¹⁷ Antonin Scalia, *Response*, in *A Matter of Interpretation: Federal Courts and the Law* 129, 144 (Amy Gutman ed., Princeton Univ. Press 1997).

views he had expressed two decades earlier, that he espouses original meaning originalism over original intent originalism; that is, he favors the original public meaning of the text over the subjective semantic intentions of any specific individuals. But this is not to espouse fidelity to the original expectations the framers or ratifiers might have had about how the textual meaning would apply.

Were there any real doubt about this, consider Bork's famously unpersuasive effort to establish that *Brown v. Board of Education* is consistent with originalism. That argument, most readers will recall, runs like this: the original understanding of the Equal Protection Clause incorporated the principle of "equality" or "equality before the law"; the ratifiers believed or assumed that racial segregation was consistent with such equality; and, when the inconsistency became apparent, the Court properly gave effect to the originally understood principle and not to the originally expected, though mistaken, application of that principle. Whatever the argument's faults, it rests squarely on Bork's rejection of expectation originalism and his endorsement of something very much like the meaning-and-principle originalism that Balkin favors—though admittedly without Balkin's emphasis on the plasticity, contestability or fluidity of underlying principles.

...

B. Balkinian Originalism and Living Constitutionalism: Not a False Choice

[R]eaders who agree that almost nobody of any seriousness accepts expectation originalism should recognize as well that almost everybody even among the originalists appreciates that correct applications of the constitutional meaning can change over time. Indeed, McConnell insisted on precisely this a decade ago.¹⁸ So if living constitutionalism is merely the view that correct applications of constitutional meaning can change over time—*i.e.*, that conduct constitutional at time t_1 can become unconstitutional at t_2 (or vice versa)—then, sure, originalism embraces living constitutionalism. But the near-universal assumption is that living constitutionalism accommodates diachronic change different in character and magnitude from what originalism permits. I assume that it is this contention that Balkin aims to deny when averring that originalism and living constitutionalism present "a false choice." And if that is his object, it must be accomplished not by his rejection of expectation originalism but by his affirmation of what he calls "the method of text and principle."¹⁹ So if Balkin's "false

¹⁸ See McConnell, *supra* note 12; see also, *e.g.*, Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan L. Rev.* 395, 396 (1995).

¹⁹ Balkin, *supra* note 1, at 293.

choice” claim is itself false, it will not be because originalists reject his method of text and principle but because living constitutionalists do. . . . The remainder of this Part argues: that living constitutionalists do reject Balkin’s method; . . . and that . . . much of Balkin’s focus on extrajudicial constitutional interpretation and the role of social movements (a right-ful and illuminating focus, in my view) should lead him to join the living constitutionalists in rejecting the method of text and principle that he advocates.

1.

What reason could anyone have for rejecting the method of text and principle? Could it really be that constitutional interpretation does not “re-quire[] fidelity to the original meaning of the Constitution and to the principles that underlie the text”? Much depends, I think, on what is meant by the recurring and ambiguous phrase: “the principles that under-lie the text.”

Taken in isolation, the phrase permits at least two distinct interpreta-tions: the principles that, in a Dworkinian vein, make best sense of the text or show it in its morally best light; or the principles that in actual histori-cal fact were intended by the framers, or understood by the ratifiers, to be captured by the chosen text. In fact, though, Balkin makes adequately clear that he means the latter, not the former. What we are searching for, he explains, are “the general principles that animated the text”²⁰—those that the people who drafted the text “sought to endorse,” “sought to refer to,” or “sought to establish.”²¹ Balkin’s method of text and principle, we might say, is a method of text and original principle. Living constitutionalists, in contrast, might be thought to employ a method of text and evolving or *contemporary* principle.

To appreciate the difference, consider any constitutional provision, T, that is most appropriately read as referring to a moral principle, not just to a legal rule or even a standard. Now suppose that T is sufficiently vague or ambiguous to accommodate or refer to two (or more) distinct moral prin-ciples, P1 and P2. Finally, imagine that an interpreter is convinced that P1 is the superior moral principle, both by her own lights and by the lights of a substantial majority of the contemporary populace, yet that, according to the best historical evidence, the framers and ratifiers of T sought to refer to P2. The question is whether our interpreter’s obligation of fidelity to the Constitution entails an obligation to adopt P2 as her constitutional inter-pretation—as her understanding, that is, of what the Constitution means.

²⁰ *Id.* at 302.

²¹ *Id.* at 303, 319.

*Living
constitutionalists...
might be thought
to employ a
method of text
and evolving or
contemporary
principle.*

Balkin's method of text and original principle seems to answer that she does. The living constitutionalist's interpretive method (or at least a possible method of living constitutionalism) answers that she does not.

This abstract problematic can be made more concrete. Consider, to start, the Free Exercise Clause. Whereas the framers might have sought thereby to endorse the principle that all religious believers ought to be entitled to worship as they choose, we might now pay more allegiance to the kindred—but distinct—moral principle that all persons, believers, agnostics and atheists alike, should be entitled to worship, or not, as they choose. The Free Speech Clause might have been drafted and ratified to endorse a principle related to democratic self-governance; today, perhaps, we understand it to embody a principle of individual self-realization. The framers and ratifiers of the Self-incrimination Clause might have aimed merely to outlaw a particular historical practice and not to refer to a moral principle at all; today, perhaps, we understand it to endorse a principle of human dignity.

While examples of this sort could be multiplied, we might finish by returning to our previous discussion of Bork's flimsy defense of *Brown*. The defense seems lame precisely because we do not think that equality, *simpliciter*, is an accurate rendering of the principle that the framers and ratifiers of the Fourteenth Amendment actually sought to endorse. We believe that the animating principle was more determinate than *that*—civil equality, or formal equality, or anti-subordination, or equal regard, or color-blindness, etc. Living constitutionalists would permit interpreters to eschew whatever equality-type principle the framers and ratifiers actually “sought to endorse” in favor of the equality-type principle—a principle, mind you, that the text can bear—that better suits our contemporary needs and moral values.

Balkin is far from the first scholar to conclude that a focus on constitutional *principles* effaces the originalism/non-originalism distinction. But because an approach of the sort just sketched plainly allows for greater flexibility of bottom-line result than does the Balkinian approach that permits interpreters to argue only about different *applications* of the *originally intended* principle, it seems to follow that originalism and living constitutionalism continue to offer a true, rather than false, choice.

2.

To conclude that the “false choice” thesis is itself false is not yet, of course, to suggest that the alternatives are equally attractive or even that the method favored by living constitutionalism ought to be considered truly eligible. Perhaps, that is, living constitutionalism offers no true choice as against originalism not because it directs interpreters to act just as originalism,

properly understood, does, but because the competing direction it provides cannot be defended. . . .

Addressing all the arguments that have been provided elsewhere against living constitutionalism would require a paper of its own. Here, I can offer only a much-condensed sketch of why Balkin's own trenchant analysis of social movements suggests that his proposed method of text and original principle is actually less faithful to our practice, and less attractive, than is the living constitutionalists' method of, let us say, text and evolving principle.

The basic tension in Balkin's account arises from his privileging of extra-judicial constitutional interpretation. "Theories of constitutional interpretation," he says, "should start with interpretation by citizens as the standard case."²² Social movements in particular serve as principal drivers of constitutional understandings, "constitutional culture," and "constitutional doctrine."²³ But social movements do not view their task as maintaining fidelity to the past. "Restoration" and "redemption" might be their "key tropes,"²⁴ but we should not confuse rhetoric with reality. The truth is that citizens, social movements, and political parties do more than argue about "how best to apply" originally intended constitutional principles in contemporary circumstances.²⁵ They argue as well about what the constitutional principles are—which is why those who would challenge a given movement's agenda often argue not that it applies the originally understood principle incorrectly, but that the principle it pushes is not of constitutional stature at all. This, for example, is how the defenders of affirmative action respond to the living constitutionalists (masquerading as crusaders for originalism, as living constitutionalists frequently do) who champion a constitutional principle of color-blindness.

And if a movement prevails in persuading the general public to accept the principle it puts forth as a constitutional one? Well, as far as I can tell, Balkin provides no reason why judicial interpretation should not follow suit, least of all that judicial resistance to a successful extrajudicial interpretation not predicated on historical fidelity is categorically mandated. To the contrary, that judicial interpretation may follow and endorse nonoriginalist but popularly accepted constitutional interpretations is, I take it, at least part of what it means for judicial interpretation to be "parasitic" upon extrajudicial interpretation.²⁶

²² *Id.* at 307.

²³ *Id.* at 308.

²⁴ *Id.* at 301.

²⁵ *E.g., id.* at 293.

²⁶ *Id.* at 307.

No doubt one could maintain that courts must refuse to sanction the new extrajudicial understanding of constitutional principle that the successful social movement has wrought on the grounds that understanding lacks historical fidelity and therefore legitimacy. But such an attitude would, I think, rest on either a bizarre misconception of what social movements are for—they serve, after all, as advocates for a vision of the political good, not as historians—or an unrealistic sense of how long courts might (or should) stand against successful popular mobilizations. It’s hard to see Jack Balkin falling into either error.

...

Conclusion

The debate over originalism concerns whether constitutional interpretation must be a search for the original understanding (or intent, or meaning, or the like). It is a debate over whether the correct meaning of the Constitution—and not just its case-specific applications—can change from t1 to t2 even absent constitutional amendment. It seems to me that there can be only two answers to this question—“yes” and “no”—and that they conflict. The analysis that would show these answers to present “a false choice” or to be “opposite sides of the same coin”²⁷ is not, I predict, in the cards. My answer to this central question—an answer that, admittedly, I have not defended here—is affirmative. That makes me a non-originalist. It seems to me that Balkin’s privileging of constitutional interpretation by social movements (which are compelled neither by logic nor by political morality to maintain historical fidelity), over interpretation by judges, ought to lead him to answer that question in the affirmative as well. But perhaps I’m mistaken. Perhaps Balkin really is an originalist. If so, I would be eager to see his reasons for concluding that the originalist answer is *better* than the non-originalist answer, rather than that the two answers are one.

²⁷ *Id.* at 348.

from
**PERSPECTIVES ON
THE FOURTH AMENDMENT**

Anthony G. Amsterdam¹

...
... What I should like to do [in these lectures] is not to articulate any single, comprehensive theory of the fourth amendment. It is rather to identify and to discuss a number of basic issues that complicate the development of a single, comprehensive fourth amendment theory. . . .

...
The Fourth Amendment to the Constitution provides:

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.

The words “searches and seizures” and the words “persons, houses, papers, and effects” are terms of limitation. Law enforcement practices are not required by the fourth amendment to be reasonable unless they are either “searches” or “seizures.” Similarly, “searches” and “seizures” are not regulated by the fourth amendment except insofar as they bear the requisite relationship to “persons, houses, papers, and effects.”

...

The Scope of the Fourth Amendment

I can think of few constitutional issues more important than defining the reach of the fourth amendment—the extent to which it controls the array of activities of the police. . . .

...

[Two] problems in developing a satisfactory general theory of the fourth amendment’s scope can be stated in one sentence. Its language is no help and neither is its history.

¹ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1973).

I hardly need justify the first half of that sentence. As applied to law enforcement activities, the terms “searches,” “seizures,” “persons,” “houses,” “papers” and “effects” could not be more capacious or less enlightening. The plain meaning of the English language would surely not be affronted if every police activity that involves seeking out crime or evidence of crime were held to be a search. When the policeman shines his flashlight in the parked car or listens at the tenement door, what else is he doing than searching? When he climbs up a telephone pole and peers beneath a second-story window shade, what on earth is he doing up that pole but searching? What is a police spy used for, but to search out suspected wrongdoing that would otherwise evade the scrutiny of the authorities? Unless history restricts the amplitude of language, no police investigative activity can escape the fourth amendment’s grasp.

To Mr. Justice Frankfurter we owe the observation, and the firmest insistence on the principle, that “the meaning of the Fourth Amendment must be distilled from contemporaneous history.”² But Justice Frankfurter looked to the history for a specific purpose, with a keen awareness of its limitations for other purposes. As he saw it—and as I see it—that history teaches three great lessons.

The first is that the amendment is not “a kind of nuisance, a serious impediment in the war against crime” or “an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society.”³ The second is that the amendment’s basic concern is to protect the people “against search and seizure by the police, except under the closest judicial safeguards.”⁴

...

The third lesson is that the principal check designed against the arbitrary discretion of executive officers to search and seize was the requirement of a “search warrant exacting in its foundation and limited in scope”;⁵ and consequently that “history decidedly does not leave the phrase ‘unreasonable searches and seizures’ at large,”⁶ but places upon it the “gloss . . . that a search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity.”⁷ . . . Justice Frankfurter drew from history only the conclusion that the fourth amendment did not license judges to sustain warrantless searches as “reasonable” under a vague and amorphous concept of general reasonableness that ignored the

² *Davis v. United States*, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting).

³ *Harris v. United States*, 331 U.S. 145, 157, 161 (1947) (Frankfurter, J., dissenting).

⁴ *Id.* at 161.

⁵ *Davis v. United States*, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting).

⁶ *Chapman v. United States*, 365 U.S. 610, 619 (1961) (Frankfurter, J., concurring).

⁷ *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

warrant clause. He did not suggest that anything in the history confined the scope of what were to be held “searches and seizures.” To the contrary, he approved *Boyd v. United States* [which held unconstitutional a statute compelling an individual to produce private papers so they could be used as evidence against him] as giving “legal effect to the broad historic policy underlying the Fourth Amendment,”⁸ rejected the notion that the amendment was directed to protecting only against trespasses and invasions of property rights, urged that *Olmstead* [which held that wiretapping was not a “search” within the meaning of the Fourth Amendment] be overruled, and echoed Mr. Justice Brandeis’ dissenting views in *Olmstead* that the fourth amendment broadly protected the “right to be let alone.”⁹

So Mr. Justice Frankfurter, who more than any other of the Justices sought the fourth amendment’s meaning in its history, found there no limitation of its sweeping term “searches and seizures,” nor of the “persons, houses, papers, and effects” that the amendment protects. Ought we nonetheless to do so? We are necessarily brought back to [a] large question[] that I raised yesterday: whether the specific historical experiences that preceded the adoption of the amendment—the conflicts over trespassory ransackings under general warrants in England and writs of assistance in the colonies—ought to be taken as the measure of the evils that the fourth amendment curbs? Or should we say at least that practices such as eavesdropping and the use of spies, known at the time of those conflicts but not implicated in them, should be held beyond the reach of the amendment?

I think the answer must be no to both forms of the question. I cannot find in the background of the amendment any justification for limiting its reach to the particular “mischief which gave it birth.”¹⁰ Nor do I think that provisions of the Bill of Rights, or the fourth amendment in particular, should be read as containing implied negative covenants running with the Bill. First, it is important to distinguish—as Justice Frankfurter did—between the use of background history to establish that the framers of the Bill of Rights meant to limit or forbid a particular evil, and the use of background history to support the negative inference that they did not. Even the former use of background history encounters the objection that it treats the framers as a collection of bodies having but one head; it assumes that from their common “living experience”¹¹ they drew but one conclusion. As soon as the question becomes one of generalizing beyond a particular evil, this hypostatic conception of “the framers” becomes still more dubious;

⁸ *Harris v. United States*, 331 U.S. 145, 160 (1947) (Frankfurter, J., dissenting).

⁹ *Davis v. United States*, 328 U.S. 582, 596 (1946) (Frankfurter, J., dissenting).

¹⁰ *Weems v. United States*, 217 U.S. 349, 373 (1910).

¹¹ *Davis v. United States*, 328 U.S. 582, 604 (1946) (Frankfurter, J., dissenting).

for generalization requires reference to the reasons for a prescription, and a variety of minds may agree upon a common prescription for a variety of reasons. When, in addition, the generalization is negative, the usefulness of seeking to construct the common thought of that variety of minds called “the framers” asymptotically approaches zero. The agreement of many minds upon the decision to disapprove particular practices does not signify the least agreement to approve other practices not upon the agenda.

Indisputably the “searches and seizures” on the agenda at the time the fourth amendment was written were the rummagings of the English messengers and colonial customs officers. We can reconstruct with some fair confidence what “the framers” thought of those. It is illusory to suppose that we can know what they thought of anything else. Nothing else was then in controversy.

...

What we do know, because the language of the fourth amendment says so, is that the framers were disposed to generalize to some extent beyond the evils of the immediate past. No other view is possible in light of the double-barreled construction of the amendment. The second clause, requiring probable cause and particularity in the issuance of warrants, was alone quite sufficient to forbid the general warrants and the writs of assistance that had been the exclusive focus of the preconstitutional history. But the framers went further. They added—not to diminish, as Justice Frankfurter reminds us, but to expand the warrant clause—a wide provision that the people should be secure in their persons, houses, papers and effects against unreasonable searches and seizures. Of course it is impossible to say from this what the axis or the principle of generalization was. Conceivably, “searches and seizures” might have meant warrantless ones having the same physical characteristics as those experienced under general warrants. But there is no evidence to support that conclusion, and I see no reason to draw it. Nor do I see a reason to conclude that the framers intended the fourth amendment, any more than the rest of the Bill of Rights or the Constitution, to state a principle like the dwarf in Gunter Grass’ *Tin Drum*, who suddenly and perversely decided to stop growing because growth was what grownups expected of him.

Growth is what statesmen expect of a Constitution. Those who wrote and ratified the Bill of Rights had been through a revolution and knew that times change. They were embarked on a perilous course toward an uncertain future and had no comfortable assurance what lay ahead. To suppose they meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas seems to me implausible in the extreme. I agree, of

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course, with Henry Friendly, that “[m]aximizing protection to persons suspected of crime was hardly their sole objective.”¹² But I also agree with Vince Lombardi that, while winning isn’t everything, losing is nothing. The revolutionary statesmen were plainly and deeply concerned with losing liberty. That is what the Bill of Rights is all about.

I myself would go a trifle further than this truism. My own view of the “Spirit of the Constitution”¹³ is not that far removed from Charles Beard’s. But I think that another spirit, sometimes warring, sometimes interweaving with the first, compelled the Constitution’s early amendment by the Bill of Rights. To be sure, the framers appreciated the need for a powerful central government. But they also feared what a powerful central government might bring, not only to the jeopardy of the states but to the terror of the individual. When I myself look back into that variegated political landscape which no observer can avoid suffusing with the color of his own concerns, the hues that gleam most keenly to my eye are the hues of an intense sense of danger of oppression of the individual.

I find that sense of danger all the more striking because so many of us in this country today have lost it. . . . From childhood we are reared to see government and law and law enforcement as benign. They pose no threat to us. But the authors of the Bill of Rights had known oppressive government. I believe they meant to erect every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit. And, to this end, it seems to me that the guarantee against unreasonable “searches and seizures” was written and should be read to assure that any and every form of such interference is at least regulated by fundamental law so that it may be “restrained within proper bounds.”¹⁴

But I do not ask that you follow me so far. I concur with Professor Samuel Krislov that the values which one finds in the history of the Bill of Rights are ineluctably one’s own:

¹² [Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 948 (1965).]

¹³ Charles Beard, *The Supreme Court and the Constitution* 74 (1912).

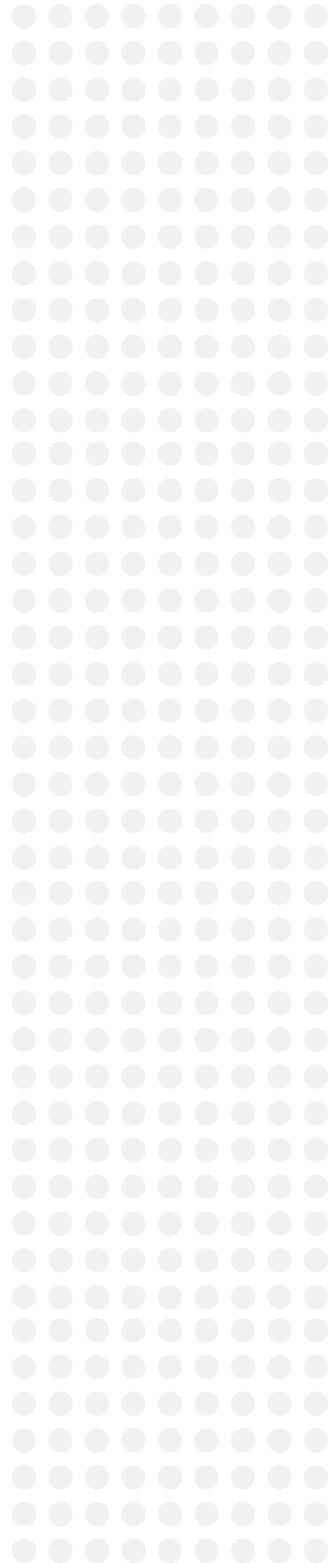
¹⁴ I borrow the phrase from Patrick Henry’s well-known speech in the Virginia Convention, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 448–49 (Jonathan Elliot, ed., 2d ed. 1891):

The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excitement may come in multitudes . . . They may, unless the general government be restrained by a bill of rights . . . go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds.

The Founding Fathers . . . were libertarian, legalistic, conservative, or zealous largely in the image of the chronicler—much as we are told that English experimental psychologists observe matter-of-fact, pragmatic rats; Americans observe bustling rats; and Germans see copiously organized rats.¹⁵

Having shown you my kind of rat, I shall not ask you to prefer it to the others. I shall conclude only that history is a standoff: there is certainly nothing in it to suggest, let alone require, a narrow or a static view of the fourth amendment's broad language.

¹⁵ Samuel Krislov, *The Supreme Court and Political Freedom* 55–56 (1968).



from
**THE FOUNDERS’
 UNWRITTEN CONSTITUTION**

Suzanna Sherry¹

When fifty-five men met in Philadelphia in May of 1787 to write a constitution, their efforts inevitably reflected their political heritage.

In seeking to understand and interpret our written Constitution, judges and scholars have often focused on two related issues: how did the founding generation understand the Constitution they created, and to what extent should that understanding be relevant to modern constitutional interpretation? . . . I will suggest that the founding generation did not intend their new Constitution to be the sole source of paramount or higher law, but instead envisioned multiple sources of fundamental law. The framers thus intended courts to look outside the Constitution in determining the validity of certain governmental actions, specifically those affecting the fundamental rights of individuals. . . . [M]y conclusion makes clear that the framers intended something independent of their own intent to serve as a source of constitutional law.

. . .

I. Inherited Traditions

When fifty-five men met in Philadelphia in May of 1787 to write a constitution, their efforts inevitably reflected their political heritage. They were all well and widely read, and many were educated in the law. By 1787, they could draw on a rich tradition of English and American notions of fundamental or higher law and the courts’ role in applying such law. . . .

A. The Nature of Fundamental Law

The spirit of the English tradition of constitutionalism was best exemplified for the Americans in the theories of Coke and Bolingbroke. These theories rested on three distinct premises: first, that some form of higher law—the British constitution—existed and operated to make void Acts of Parliament inconsistent with that fundamental law; second, that this fundamental law, or constitution, consisted of a mixture of custom, natural law, religious law, enacted law, and reason; and third, that judges might use that fundamental law to pronounce void inconsistent legislative or royal enactments. These ideas were those of the opposition party in England, and thus were never accepted by those who held power in that country.

¹ Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987).

They were, however, tremendously influential upon the generation that framed the American constitution.

The first and third premises translate easily into a written constitution enforceable by means of judicial review, and thus are familiar enough to need little further explication. The idea of a form of law superior to royal or parliamentary enactments began as a defense against royal invasion of cherished privileges. By the seventeenth century, appeal to “the ancient constitution,” which had existed since “time immemorial,” was a standard political argument against royal or parliamentary invasions of rights.² The colonies relied heavily on this English opposition rhetoric in their fight for independence, and the new states translated it into action with early instances of judicial invalidation of legislative acts. It is thus unsurprising that in 1787 the men in Philadelphia could uniformly assume that the federal courts would exercise the power of judicial review, although a few disapproved of the practice.

A much less familiar ingredient in the English opposition ideology is the nature of the constitution or fundamental law. Neither a single written document nor a category of either natural or enacted law, the ancient constitution was an amorphous admixture of various sources of law. It was essentially custom mediated by reason. Bolingbroke defined it as “that Assemblage of Laws, Institutions and Customs, derived from certain fix’d Principles of Reason, directed to certain fix’d Objects of publick Good, that compose the general System, according to which the Community hath agreed to be govern’d.”³ Coke described as void any Act of Parliament that is “against common right and reason, or repugnant, or impossible to be performed.”⁴ Rutherford, another English influence on the colonists, held that “there does not seem to be any way of determining what form has been established in any particular nation, but by acquainting ourselves with the history and the customs of that nation. A knowledge of its present customs will inform us what constitution of government obtains now.”⁵ A *constitution* was simply the norms by which a people were *constituted* into a nation. Thus in the 1760s, an American revolutionary thinker could refer to “the constitution of things” and “the British constitution” with a clear relatedness of meaning. This natural

² J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* 16–18, 46 (1957).

³ Henry St. John Viscount Bolingbroke, *A Dissertation Upon Parties* (3d ed. 1735), *quoted in* Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 89 (1971).

⁴ *Dr. Bonham’s Case*, 8 Coke Rep. 107, 118a (1610), *quoted in* [Goebel, *supra* note 2, at 92].

⁵ Thomas Rutherford, *Institutes of Natural Law* 95 (1756).

The idea that certain fundamental rights could not be ceded away also colored the American view of fundamental law.

law tradition was also echoed in the thought of various continental influences on the Americans.⁶

Creating fundamental law thus did not require a single, extraordinary, extra-legislative act of the people. Fundamental law could be reflected in ordinary legislative enactments. Indeed, early American revolutionaries stressed that acquiescence to abhorrent Parliamentary actions was dangerous precisely because it threatened to ratify such actions as consistent with or part of fundamental law. After the mid-1760s, this legislative strand of fundamental law began to lose importance as the implications of the superiority of fundamental law over legislative enactments were worked out. The transition, however, was not complete by 1787. Nine of the eleven state constitutions adopted between 1776 and 1778 were enacted by ordinary legislative means, and the other two were drafted by specially elected conventions and implemented without popular ratification. Of the five of these early constitutions that made any provision for amendments, three provided for amendment by the legislature. Only two state constitutions adopted prior to the Federal Constitutional Convention in 1787—those of Massachusetts in 1780 and New Hampshire in 1784—were ratified by the people. The idea that fundamental law, in order to be fundamental, needed the approbation of more than the elected legislature was thus still open to debate in 1787.

The idea that certain fundamental rights could not be ceded away also colored the American view of fundamental law. Fundamental rights were God-given, and were rights “which no creature can *give*, or hath a right to take away.”⁷ They were, in the language of the Declaration of Independence, “inalienable.” Legislators could no more rewrite these laws of nature than they could the laws of physics. . . .

If these rights were thought to be inherent, what, then, was a legislature doing when it “enacted” enumerated and elaborate lists of fundamental rights and principles? It was merely *declaring* rights already in existence: the “*Magna Charta*, doth not *give* the privileges therein mentioned, nor doth our *Charters*, but must be considered as only declaratory of our rights, and in affirmance of them.”⁸ This separation of natural rights from positive law was more than mere rhetoric. . . .

[T]he language of the various declarations of rights—from the English Bill of Rights of 1689 through the Declaration of Independence and the

⁶ Daniel Shute, *An Election Sermon (1768)*, in *1 American Political Writing During the Founding Era, 1760-1805*, at 109, 116, 117, 128 (Charles S. Hyneman and Donald S. Lutz, eds., 1983).

⁷ Silas Downer, *A Discourse at the Dedication of the Tree of Liberty (1768)*, in *[1 American Political Writing During the Founding Era, supra note 5, at 97, 100]*.

⁸ [*Id.* at 100.]

state Declarations of Rights of 1776–1778—indicates that the authors of those documents believed that they were merely declaring existing, inalienable rights. The Bill of Rights of 1689 “declared” the “true, ancient, and indubitable rights and liberties” of Englishmen. The Declaration of Independence “declared” “self-evident truths.” Six state declarations of rights or constitutions explicitly referred to “natural,” “inherent,” “essential,” or “inalienable” rights.⁹ Another referred to “the common rights of mankind.”¹⁰ Three state constitutions specifically prohibited either amendment or violation of their declarations of rights.¹¹

Fundamental law might evolve, but not to the extent of depriving citizens of natural rights. Legislative accretion might add to, or interpret, these natural rights, but could not deny them altogether. As Alexander Hamilton wrote in 1775:

The sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.¹²

There was thus a complementary relationship between the more inclusive body of fundamental law as the legal framework of the community, and the inherent natural rights which formed an integral and unalterable part of the broader fundamental law.

To this combination of evolving fundamental law and inalienable rights, the newly independent states added a third idea: the constitution as a charter or form of government. Heavily influenced by the modern science of politics which envisioned a charter of government as a compact between a people and its rulers, but still clinging to the older tradition of fundamental law and inalienable rights, the new state constitutions reflected these three characteristics. The states declared natural rights, described with great precision the structure of the state government, and then incorporated by reference British and colonial tradition and common law.

⁹ [Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, 1889 (Mass. Declaration of Rights of 1780 art. I), 2453–54 (N.H. Declaration of Rights of 1784 arts. I–IV), 2625–26 (N.Y. Const. of 1777 preamble, quoting Declaration of Independence), 3082 (Pa. Const. of 1776 arts. I–II), 3813 (Va. Declaration of Rights of 1776 § 1); Bernard Schwartz, *The Bill of Rights: A Documentary History* 277 (Del. Declaration of Rights of 1776 § 2) (1980).]

¹⁰ [Thorpe, *supra* note 8, at 777 (Ga. Const. of 1777 preamble).]

¹¹ *Id.* at 568 (Del. Const. of 1776 art. 30), 2794 (N.C. Const. of 1776 art. XLIV), 3091 (Pa. Const. of 1776 § 46).

¹² *The Farmer Refuted &c.*, in 1 *The Papers of Alexander Hamilton* 81, 122 (Harold C. Syrett, ed., 1961).

B. Judicial Review

By the 1780s, then, the “constitution” of an American state consisted of its fundamental law (both positive and natural), the inherent and inalienable rights of man (whether declared or not), and the recipe for a governmental mixture that would best protect and preserve the fundamental law and natural rights. . . .

An examination of th[e] earliest American instances of judicial review confirms the existence and character of the different aspects of a “constitution” as well as the widespread recognition of their diverse sources. With one exception, the only time the court paid careful and exclusive attention to the language, structure and meaning of the written constitution was where the question before the court involved some question of separation of powers. Where the allocation of power among parts of the government was not at issue, the court instead referred almost indiscriminately to the constitution or charter, natural law, ancient custom, inalienable rights, and so on. Thus the written constitution or charter served as the sole source of fundamental law for determining the government’s internal structure, but not for describing its relationship to the citizenry.

. . .

II. Inventing the Constitution

By 1787, then, Americans had a clear vision of the nature of a constitution as a species of fundamental law. Like natural law and laws or traditions that had existed since time immemorial, it could be used to invalidate positive law, but again like natural law and those long-established laws and traditions, a constitution was not itself seen as positive, enacted law but rather as a declaration of first principles. Moreover, because of the constitution’s character as largely a declaration of indubitable truths and time-tested customs, its fundamentality did not depend on popular origin or approbation. The only exception to the non-positive nature of the constitution lay in its function as a charter of government or allocation of powers among parts of the government. . . .

The first drafts and early debates in the Convention suggest that most delegates still held these views of the character of a constitution. The Constitution they were drafting was, at the beginning, neither positive law nor popularly grounded. As the summer progressed, the delegates began to formulate and understand two concepts crucial to understanding the Constitution as a *sui generis* form of positive law: self-referential enforceability and extra-legislative origin. By self-referential enforceability I mean the notion that the Constitution declared itself to be fundamental law, thus suggesting that positive enactment rather than inherent nature made a written constitution fundamental. By extra-legislative origin, I mean the

notion that legislatures lacked power to enact fundamental law. Both of these concepts were in direct conflict with the English vision of a constitution as inherently fundamental and accretionally derived from natural law and unchallenged legislative acts.

. . .

[By the end of the Convention, the delegates had begun to understand the Constitution as a form of positive law that could “specify its own status as fundamental law” and could be grounded in popular ratification.]

. . . .

III. The Invented Constitution and Inherited Traditions

In creating the notion of the Constitution as popularly enacted positive law, the framers had invented an idea that perfectly suited their liberal needs. As one scholar has noted, the difference between prior constitutions and the framers’ new invention was the difference between government by consensus and government by command. The Constitution, although derived originally from the people, thus became a source of law to be imposed from above rather than dependent on the continuing support of the population. This transition, in turn, coincides with the transition from a unified “regime,” where law and morality are intertwined and formulated by the community, to a more limited “government,” which separates law (imposed on the community) from morality.¹³ This difference is the classic identifier of the transition from a classical republican outlook to a modern liberal one.

Had the framers intended their new Constitution to displace prior fundamental law, the transition would have been complete. . . . [However,] [t]he architects of our constitutional system assumed that appeals to natural law would continue despite the existence of a written Constitution. . . .

[T]he American invention of the Constitution was well underway by July 23, [1787,] and was largely complete by the end of the Convention in September. This invention consisted of the transition from envisioning a written constitution as merely a declaration of—and against a background of—older fundamental law, to recognizing the framing of the Constitution as an act creating fundamental law. If the invented Constitution is viewed as a substitute for natural law, this transition appears temporary. On July 21, and again on August 22, the debates in the Convention seem to move backward, reverting to earlier natural law concepts. Then in 1789, during legislative debates on the Bill of Rights, the same apparent reversion seems to occur. Finally, in a series of seminal Supreme Court cases between 1789

¹³ [Gary J. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* 31–32(1986).]

and 1819, the Constitution is once again relegated to merely a part of a broader fundamental law. This section will examine each of these examples in turn, and will suggest that rather than representing a view inconsistent with the Convention's invented Constitution, these examples indicate that the invented Constitution was intended merely to complement, not to replace, the earlier tradition. The innovation of the summer of 1787 was to explain why a written constitution was a part of fundamental law, not to redefine the whole of fundamental law.

A. The Convention and Fundamental Law

On August 22, . . . the delegates engaged in a debate that seems to undermine the vision of the Constitution as positively enacted fundamental law. Elbridge Gerry and James McHenry moved to prohibit the federal legislature from enacting bills of attainder or ex post facto laws. . . . The first part of the motion, prohibiting bills of attainder, was agreed to without debate or dissent. Since bills of attainder were common at that time, the delegates probably viewed the clause as effectively altering the status quo; rather than declaring a natural right, the clause enacted a positive right.

The debate over the ex post facto portion of the motion, however, reveals interesting assumptions regarding natural rights. All the delegates who spoke explicitly or implicitly regarded an ex post facto law as a violation of natural law, and most of them therefore thought it unnecessary to include such a basic natural law principle in the written constitution:

Mr. GOV'R MORRIS thought the precaution as to ex post fact laws unnecessary; but essential as to bills of attainder.

Mr. ELSEWORTH contended that there was no lawyer, no civilian who would not say that ex post facto laws are void of themselves. It can not then be necessary to prohibit them.

Mr. WILSON was against inserting any thing in the Constitution as to ex post facto laws. It will bring reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so

Doc'r JOHNSON thought the clause unnecessary, and implying an improper suspicion of the National Legislature.¹⁴

¹⁴ James Madison, Notes of Debates in the Federal Convention of 1787, at 510-11 (Adrienne Koch ed. 1966) (Aug. 22).

Those who defended the clause—and only three delegates did so, one of whom Madison simply reported as being “in favor of the clause”—did so on the ground that it might do some good, since state legislatures had in fact enacted ex post facto laws, and the existence of the clause might give judges something to “take hold of.”¹⁵ They did not seem to deny that the clause was not strictly necessary to make ex post facto laws void. There was thus an apparent consensus on this point, a conclusion further supported by the fact that members of both the nationalist and anti-nationalist factions spoke against the clause.

This exchange strongly suggests that the delegates, who by this time understood that they were enacting fundamental law, did not intend to enact positively all existing fundamental law, instead relying on unwritten natural rights to supplement the enacted Constitution. They apparently contemplated that laws not prohibited by the Constitution might still be invalid as contrary to natural law. This view is quite consistent with the contemporaneous cases of judicial review . . . , and suggests that while the framers may have discovered a new reason for a constitution’s status as fundamental law, they did not change its relationship to other sources of fundamental law. Written and unwritten sources of fundamental law might still be of equal importance.

[This discussion indicates] that at least some of the delegates to the Federal Convention did not view their task as reducing to writing the entire body of fundamental law. Instead, they drafted a Constitution they hoped would coexist with and complement other sources of fundamental law. This vision of the Constitution is even more clearly evident in the debates two years later in the House of Representatives, when that body considered the first set of amendments to the new Constitution.

B. The Congress and Fundamental Law

The clamor for a written bill of rights in the federal Constitution began at the very end of the Federal Convention itself, and gathered sufficient momentum during the ratification debates that five states submitted proposed amendments to the Constitution along with their ratifications. The Federalists had consistently maintained that a federal bill of rights was unnecessary in a government of limited powers, and might in fact be dangerous because it would furnish support for interpreting federal powers more broadly. They had also argued that the citizens of states lacking written bills of rights were no less free than citizens of those states that had them, and thus that the lack of a federal bill of rights was unimportant. However, when Rhode Island and North Carolina refused to ratify, and Virginia and

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¹⁵ *Id.* at 511 (Aug. 22).

then New York submitted calls for a second convention, the Federalists were forced to take seriously the demands for a bill of rights, and James Madison took on the task of pushing a bill of rights through Congress.

. . . [S]ome of the original opponents of a bill of rights—including Madison himself—had based their objections partly on the impossibility of enumerating all the rights of mankind. A limited enumeration, they argued, would inaccurately imply that the rights themselves were limited to those enumerated. James Wilson argued against a bill of rights on this ground before the Pennsylvania ratifying convention:

In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers reserved*. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.¹⁶

. . .

. . . The House solved that problem by including what became the ninth amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁷ The purpose of this language was quite clearly to avoid the negative implication from an enumeration of rights. Madison’s original language stressed that purpose:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹⁸

. . .

The inherent rights of the people, moreover, were not thought to be static. Edmund Pendleton suggested in 1788 that the “danger” of an enumeration of rights was that “in the progress of things, [we may] discover

¹⁶ 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 436 (Jonathan Elliot, ed., 1836) (October 28, 1787).

¹⁷ U.S.Const. amend. IX.

¹⁸ 1 Annals of Cong. at 452 [435] (June 8, 1789) .

some great and Important [right], which we don't now think of."¹⁹ Wilson wrote in his law lectures:

It is the glorious destiny of man to be always progressive. . . . Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. . . . In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the contemporary [*sic*] degree but will be calculated to produce, in future, a still higher degree of perfection.²⁰

All of these men clearly thought that certain rights existed whether or not they were declared. A number of influential men of the founding generation thus envisioned a source of fundamental rights beyond the written document, suggesting again that the Constitution was not intended to reduce to writing all of fundamental law.

...

Consideration of the sparse legislative history of the ninth amendment together with the debates over the rest of the Bill of Rights . . . suggests two related conclusions. First, both the ninth amendment itself and the debates over other amendments confirm that the founding generation envisioned natural rights beyond those protected by the first eight amendments. Second, the framers of the Bill of Rights did not expect the Constitution to be read as the sole source of fundamental law. Both of these conclusions are consistent with the pre-1787 natural law tradition, and, as the next section will show, both are consistent with early Supreme Court interpretations of the Constitution.

C. The Courts and Fundamental Law

Under a natural reading—even disregarding its natural law heritage—the ninth amendment lends itself to a traditional inherent rights interpretation. It might, therefore, have been used by judges interested in protecting inherent rights as a textual anchor for their decisions. In fact, in Supreme Court decisions during the first three decades after the adoption of the Constitution, most justices found some legislative enactments invalid by relying on natural law and related principles expressly, without resort to the mediating language of the ninth amendment. . . .

...

[T]he framers of the Bill of Rights did not expect the Constitution to be read as the sole source of fundamental law.

¹⁹ Letter from Edmund Pendleton to Richard Henry Lee, June 14, 1788, in 2 *The Letters and Papers of Edmund Pendleton, 1734–1803*, at 532–33 (David John Mays, ed., 1967).

²⁰ 1 *Works of James Wilson 126–27* (James DeWitt Andrews, ed., 1896).

. . . *Marbury v. Madison* provides a perfect illustration of the differing weight accorded to the written constitution depending on the nature of the question presented. In Marshall's own description, the case raised three questions: whether Marbury had a right to his commission, whether there was a remedy available to him, and whether that remedy was a writ of mandamus issuing from the Supreme Court. The first question raised only common law and statutory issues relating to appointments, ministerial functions, and the like, and Marshall unsurprisingly relied on common law and statutory doctrines.

It is in Marshall's treatment of the second and third questions in *Marbury* that the contrast between individual rights and allocation of power issues becomes most apparent. Marshall held, of course, that for every violation of right there exists a legal remedy. What is most interesting is that he supported this holding on only two bases: fundamental principles of natural law and Blackstone's *Commentaries*. He reasoned that legal remedies for violations of rights are "the very essence of civil liberty" and that providing such remedies is "[o]ne of the first duties of government."²¹ He then confirmed this by a brief quotation from Blackstone to the same effect. He made no mention of either the United States Constitution or the Judiciary Act of 1789, two potential positive sources of Marbury's right to a remedy. Individual rights, for Marshall, were derived not solely from positive enactments, but from unwritten fundamental law. When he turned to the third question, however, to decide whether the legislature could impel the judiciary to act in a particular manner, Marshall relied almost solely on the written Constitution, using reason only as a means of elucidating the nature of a written constitution. Again, there is a clear distinction between the Constitution as a blueprint for government and unwritten fundamental law as a guarantor of individual rights.

. . .

For Marshall, as for the Court and the country, reliance on natural law principles gradually gave way to a vision of the written Constitution as the sole source of fundamental law. By 1810, Marshall had begun the transition that would culminate in 1819 in the *Dartmouth College* case. His opinion in *Fletcher v. Peck* is described by David Currie—an avowed skeptic of the role of natural law in Supreme Court decisions—as "bristl[ing] with references suggesting unwritten limitations derived from natural law."²² Marshall ultimately relied on some unfathomable combination of unwritten law and the written Constitution. While scholars might dispute which ground was

²¹ [5 U.S. (1 Cranch) 137, 162-63 (1803).]

²² [David P. Currie, *The Constitution in the Supreme Court: State and Congressional Power, 1801-1835*, 49 U. Chi. L. Rev. 887, 892 (1982).]

of more dispositive relevance, I would suggest that, in the context of earlier and later cases, the presence of both types of argument signals a mind in transition. A similar phenomenon is observable in *McCulloch v. Maryland*; there the balance is more heavily weighted in favor of textual constitutionalism as a result of the intervening nine years since *Fletcher v. Peck*. Even in 1819, however, Marshall in *McCulloch* twice relied first on principles of general reasoning before noting that the Constitution did not leave the conclusion to general reasoning, but instead contained a clause directly relevant to the issue at hand. By later that term, in *Trustees of Dartmouth College v. Woodward*, all traces of references to natural law had disappeared from Marshall's opinion, despite Daniel Webster's eloquent defense of fundamental rights at oral argument. . . .

Marshall, because of his long tenure, best illustrates the transition from using multiple sources of fundamental law to the modern textual constitutionalists' use of the single written source. However, the same early reliance on unwritten fundamental law (especially in cases involving individual rights) may be seen in the opinions of other Justices. Justice Chase's justly celebrated opinion in *Calder v. Bull* contains numerous references to principles of natural law. . . .

. . .

Even more insistently than Chase or Marshall, Justices Johnson and Paterson wrote opinions resting squarely on extra-textual grounds. In *Ware*, Paterson spoke of nations confiscating property in time of war as "incompatible with the principles of justice and policy" and "the dictates of the moral sense," "right reason and natural equity."²³ In *Calder*, Paterson essentially agreed with Chase, but added that since "[t]he constitution of Connecticut is made up of usages" the way to determine the statute's constitutionality was to look to past practices.²⁴

. . .

From 1789 until almost 1820, then, the Supreme Court continued the traditions of Bolingbroke and the early state courts: looking to natural justice as well as to written constitutions. All of the influential or significant Supreme Court Justices, except Iredell, wrote opinions that contained at least some references to extra-textual principles, not merely as a method of interpreting the written constitution itself, but in order to judge the legality of the challenged statute or other governmental action. As in the pre-1787 state cases, references to principles of natural law are more frequently found in cases involving individual rights, and a careful examination of the written constitution is more often found in cases involving allocation of powers.

²³ [*Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 255 (1796).]

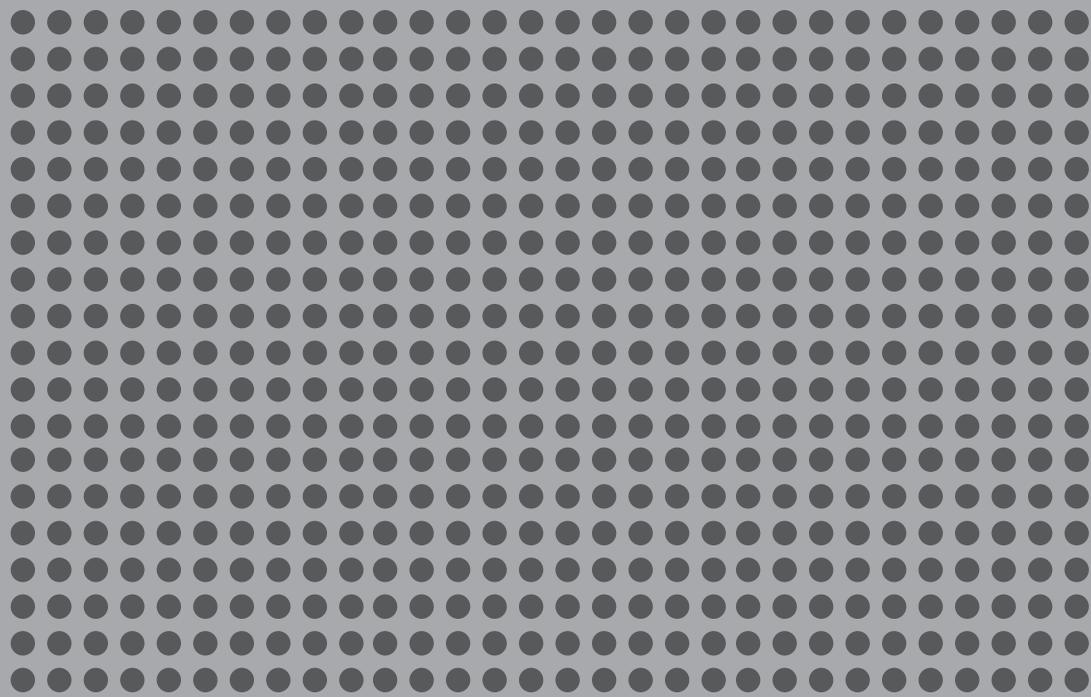
²⁴ [*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798).]

By approximately 1820, however, the reliance on natural law was waning, disappearing entirely within a few years. It is this nineteenth century rejection of the notions of natural rights that has most influenced modern constitutional law. After two brief flirtations with decisionmaking on the basis of natural law, the Supreme Court since 1937 has made a consistent and at least partially successful attempt to link all of its decisions to specific clauses of the Constitution, even when doing so stretches the language to the limits of credibility.

Conclusion

The formal analysis of modern constitutional law is pervaded by the legacy of legal positivism, which has all but eradicated notions of any link between constitutional law and natural law. The Supreme Court is careful to ground every constitutional decision on the written Constitution, at whatever cost. Especially in the cases furthest from the constitutional language, this tacit preference for textual constitutionalism over natural law concepts undermines the Court's decision by allowing critics to attack the decision using the Court's own criteria of decision making.

A careful examination of the historical context of the Constitution, however, suggests that it was never intended to displace natural law; the modern Court's insistence on textual constitutionalism as the sole technique of judicial review is thus inconsistent with the intent of the founding generation. The founding generation—from a few years before the Revolution to almost thirty years after the creation of the new government—instead expected the judiciary to keep legislatures from transgressing the natural rights of mankind, whether or not those rights found their way into the written Constitution.



Values

*“Our amended Constitution
is the lodestar for our aspirations.”*

— William J. Brennan, Jr., in *The Constitution
of the United States: Contemporary Ratification*

Reflections on the Bicentennial of the United States Constitution¹

Thurgood Marshall

The year 1987 marks the 200th anniversary of the United States Constitution. A Commission has been established to coordinate the celebration. The official meetings, essay contests, and festivities have begun.

The planned commemoration will span three years, and I am told 1987 is “dedicated to the memory of the Founders and the document they drafted in Philadelphia.”² We are to “recall the achievements of our Founders and the knowledge and experience that inspired them, the nature of the government they established, its origins, its character, and its ends, and the rights and privileges of citizenship, as well as its attendant responsibilities.”³

Like many anniversary celebrations, the plan for 1987 takes particular events and holds them up as the source of all the very best that has followed. Patriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the framers and reflected in a written document now yellowed with age. This is unfortunate—not the patriotism itself, but the tendency for the celebration to oversimplify, and overlook the many other events that have been instrumental to our achievements as a nation. The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the “more perfect Union” it is said we now enjoy.

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever “fixed” at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite

I do not believe that the meaning of the Constitution was forever “fixed” at the Philadelphia Convention.

¹ Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 Harv. L. Rev. 1 (1987). Text of a speech delivered by Justice Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii, on May 6, 1987. Footnotes are as they appear in the original text of Justice Marshall’s speech, except for changes made by the *Harvard Law Review* to conform citations to HARVARD LAW REVIEW ASSOCIATION, A UNIFORM SYSTEM OF CITATION (14th ed. 1986).

² COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, PREPARATION FOR A COMMEMORATION: FIRST FULL YEAR’S REPORT 6 (1986).

³ COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, FIRST REPORT 6 (SEPT. 17, 1985).

“The Constitution,” they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document’s preamble: “We the People.” When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America’s citizens. “We the People” included, in the words of the framers, “the whole Number of free Persons.”⁴ On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.⁵

These omissions were intentional. The record of the framers’ debates on the slave question is especially clear: the Southern states acceded to the demands of the New England states for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade. The economic interests of the regions coalesced: New Englanders engaged in the “carrying trade” would profit from transporting slaves from Africa as well as goods produced in America by slave labor. The perpetuation of slavery ensured the primary source of wealth in the Southern states.

Despite this clear understanding of the role slavery would play in the new republic, use of the words “slaves” and “slavery” was carefully avoided in the original document. Political representation in the lower House of Congress was to be based on the population of “free Persons” in each state, plus three-fifths of all “other Persons.”⁶ Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁷

It was not the first such compromise. Even these ringing phrases from the Declaration of Independence are filled with irony, for an early draft of what became that declaration assailed the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions.⁸ The final draft adopted in 1776 did not contain this criticism. And so again at the Constitutional Convention eloquent objections to the institution of slavery went unheeded, and its opponents eventually

⁴ U.S. CONST. art. 1, § 2 cl. 3.

⁵ See *id.* amend. XIX (ratified in 1920).

⁶ *Id.* art. 1, § 2, cl. 3.

⁷ The Declaration of Independence para. 1 (U.S. 1776).

⁸ See C. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* 147 (rev. ed. 1958).

consented to a document which laid a foundation for the tragic events that were to follow.

Pennsylvania's Gouverneur Morris provides an example. He opposed slavery and the counting of slaves in determining the basis for representation in Congress. At the Convention he objected that

the inhabitant of Georgia [or] South Carolina who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice.⁹

And yet Gouverneur Morris eventually accepted the three-fifths accommodation. In fact, he wrote the final draft of the Constitution, the very document the bicentennial will commemorate.

As a result of compromise, the right of the Southern states to continue importing slaves was extended, officially, at least until 1808. We know that it actually lasted a good deal longer, as the framers possessed no monopoly on the ability to trade moral principles for self-interest. But they nevertheless set an unfortunate example. Slaves could be imported, if the commercial interests of the North were protected. To make the compromise even more palatable, customs duties would be imposed at up to ten dollars per slave as a means of raising public revenues.¹⁰

No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.

The original intent of the phrase, "We the People," was far too clear for any ameliorating construction. Writing for the Supreme Court in 1857, Chief Justice Taney penned the following passage in the *Dred Scott* case,¹¹ on the issue of whether, in the eyes of the framers, slaves were "constituent members of the sovereignty," and were to be included among "We the People":

⁹ 2 The Records of the Federal Convention of 1787, at 222 (M. Farrand rev. ed. 1966).

¹⁰ U.S. CONST. art. 1, § 9, cl. 1.

¹¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

We think they are not, and that they are not included, and were not intended to be included. . . .

. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . ; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . .

. . . .

. . . [A]ccordingly, a negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such. . . . [N]o one seems to have doubted the correctness of the prevailing opinion of the time.¹²

And so, nearly seven decades after the Constitutional Convention, the Supreme Court reaffirmed the prevailing opinion of the framers regarding the rights of Negroes in America. It took a bloody civil war before the thirteenth amendment could be adopted to abolish slavery, though not the consequences slavery would have for future Americans.

While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws. And yet almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education, housing, and employment, and to have their votes counted, and counted equally. In the meantime, blacks joined America's military to fight its wars and invested untold hours working in its factories and on its farms, contributing to the development of this country's magnificent wealth and waiting to share in its prosperity.

What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.

While the Union survived the civil war, the Constitution did not.

“We the People” no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of “liberty,” “justice,” and “equality,” and who strived to better them.

¹² *Id.* at 405, 407-08.

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The men who gathered in Philadelphia in 1787 could not have envisioned these changes. They could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendent of an African slave. “We the People” no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of “liberty,” “justice,” and “equality,” and who strived to better them.

And so we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. Otherwise, the odds are that for many Americans the bicentennial celebration will be little more than a blind pilgrimage to the shrine of the original document now stored in a vault in the National Archives. If we seek, instead, a sensitive understanding of the Constitution’s inherent defects, and its promising evolution through 200 years of history, the celebration of the ‘Miracle at Philadelphia’¹³ will, in my view, be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.

Thus, in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled. I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights.

¹³ C. Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (1966).

from

The Constitution of the United States Contemporary Ratification

William J. Brennan, Jr.¹

The amended Constitution of the United States 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. What is it we do when we interpret the Constitution? I will attempt to elucidate my approach to the text as well as my substantive interpretation.

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. . . .

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

[T]he Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being.

¹ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433 (1986). [This article was originally delivered as a speech at Georgetown University in Washington, D.C. on October 12, 1983.]

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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 inherent 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. . . .

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 predilections. 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.”² 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 gauge accurately the intent of the

² Alexander Bickel, *The Least Dangerous Branch* 16 (1962).

Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment 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. 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 adaption 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 transcendent 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 majoritarianism would permit the imposition of a social caste system or wholesale confiscation of property so long as approved by a majority of the fairly elected, authorized legislative body. Our Constitution could not abide such a situation. It is the very purpose of our 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 stated:

The prescriptions in favor of liberty ought to be leveled 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 minority³

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. At least with respect to 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

³ 1 Annals of Cong. 437 (1789).

fundamental 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 . . .”⁴

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 the 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 a novel one of my own creation. To quote from one of the opinions of our Court, *Weems v. United States*,⁵ 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 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 prophecy can be made. In the applica-

[T]he 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.

⁴ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

⁵ 217 U.S. 349 (1910).

tion of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.⁶

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—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 the slave caste.

Having discussed at some length how I, as a Supreme Court Justice, interact with this text, it is 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. When the text is not prescribing 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. On reflecting 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. 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.

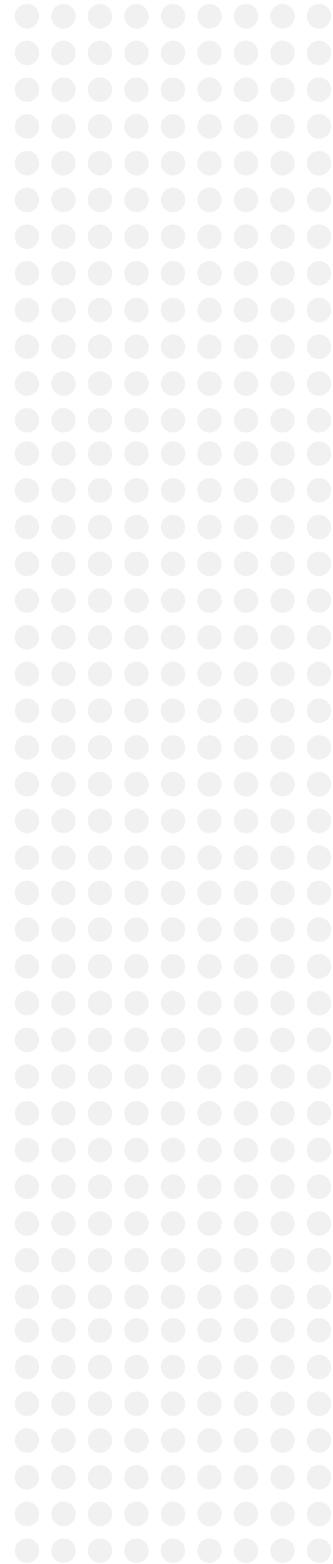
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⁶ *Id.* at 373.

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 acts 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 wellsprings 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 poses. 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 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 my public service, this challenge has largely taken shape within the confines of the interpretive question of 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 safeguard 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. . . .

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 1922 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 constitutional vision of human dignity has, in this past quarter-century, infused far more than our decisions about

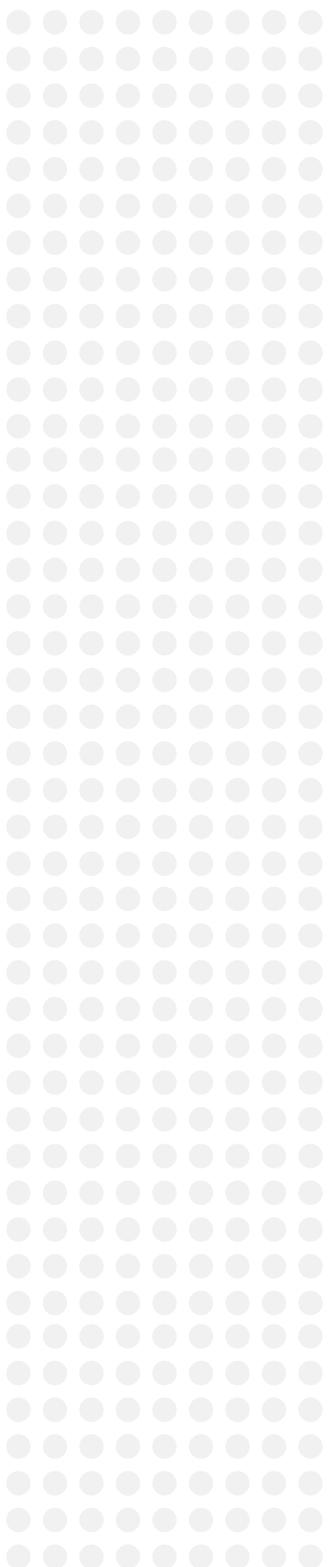
the criminal process. Recognition of the principle of “one person, one vote” as a constitutional principle redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process. Recognition of so-called “new property” 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 exchange 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. These rights 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 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 rights of each individual to form and to express 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. . . .

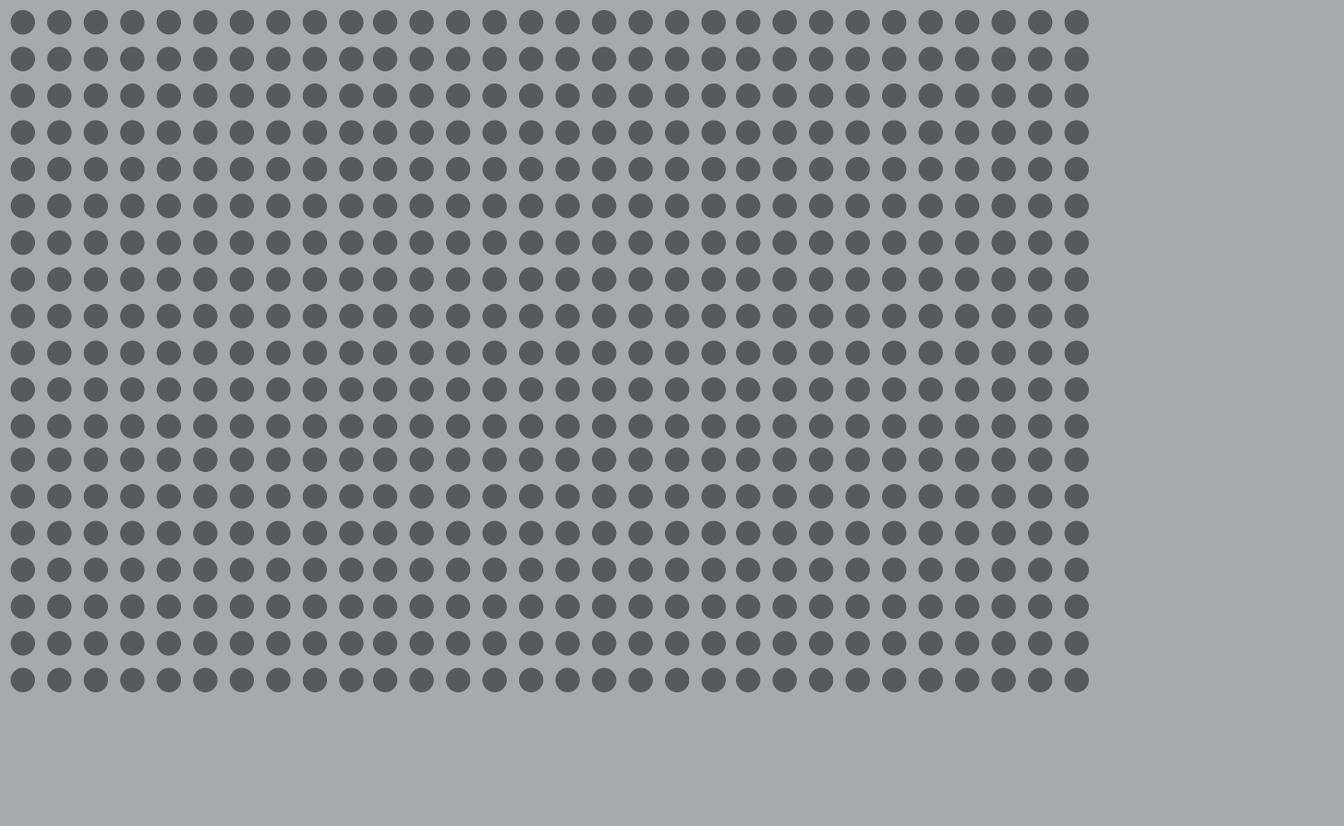
I do not mean to suggest that we have in the last quarter-century achieved a comprehensive definition of the constitutional ideal of human dignity. We are still striving toward that goal, and doubtless it will be an eternal quest. For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve. . . .

The vision of human dignity embodied within the Constitution is deeply moving. Our Constitution is timeless; it has inspired Americans for two centuries, and it will continue to inspire as it continues to evolve. The evolutionary process is inevitable; indeed, it is the true interpretive genius of the text.

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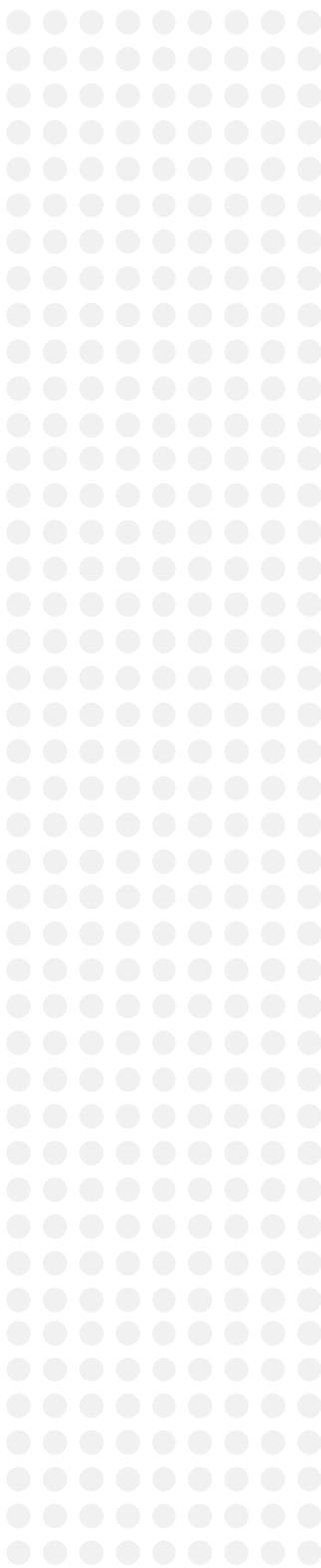
If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. For the political and legal ideals that form the foundation of much that is best in American institutions—ideals jealously preserved and guarded throughout our history—still 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.



Precedent

“The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices.”

— David A. Strauss, in *Common Law Constitutional Interpretation*



from
**COMMON LAW CONSTITUTIONAL
INTERPRETATION**

David A. Strauss¹

The Constitution of the United States is a document drafted in 1787, together with the amendments that have been adopted from time to time since then. But in practice the Constitution of the United States is much more than that, and often much different from that. There are settled principles of constitutional law that are difficult to square with the language of the document, and many other settled principles that are plainly inconsistent with the original understandings. More important, when people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years. In fact, in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires.

Despite this, the terms of debate in American constitutional law continue to be set by the view that principles of constitutional law must ultimately be traced to the text of the Constitution, and by the allied view that when the text is unclear the original understandings must control. An air of illegitimacy surrounds any alleged departure from the text or the original understandings. In the great constitutional controversies of this century, for example, the contestants have repeatedly charged their opponents with usurpation on the ground that they were insufficiently attentive to the text or the original understandings. That was the claim made by the Justices of the so-called *Lochner* era; it was the claim made by Justice Black, first against the *Lochner* judges and then against other opponents; it was the claim made, during the last twenty years, by opponents of the Warren Court innovations. And today, textualism and originalism continue to be extraordinarily prominent on both sides of the principal debates in constitutional law.

But textualism and originalism remain inadequate models for understanding American constitutional law. They owe their preeminence not to their plausibility but to the lack of a coherently formulated competitor.

¹ David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

The fear is that the alternative to some form of textualism or originalism is “anything goes”—that constitutional law, if cut loose from text and original understandings, will become nothing more than a reflection of judges’ political views.

In fact, however, the alternative view is at hand, and has been for many centuries, in the common law. The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices. The emphasis on text, or on the original understanding, reflects an implicit adherence to the postulate that law must ultimately be connected to some authoritative source: either the Framers, or “we the people” of some crucial era. Historically the common law has been the great opponent of this authoritative approach. The common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time. And it is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by “we the people,” that best explains, and best justifies, American constitutional law today.

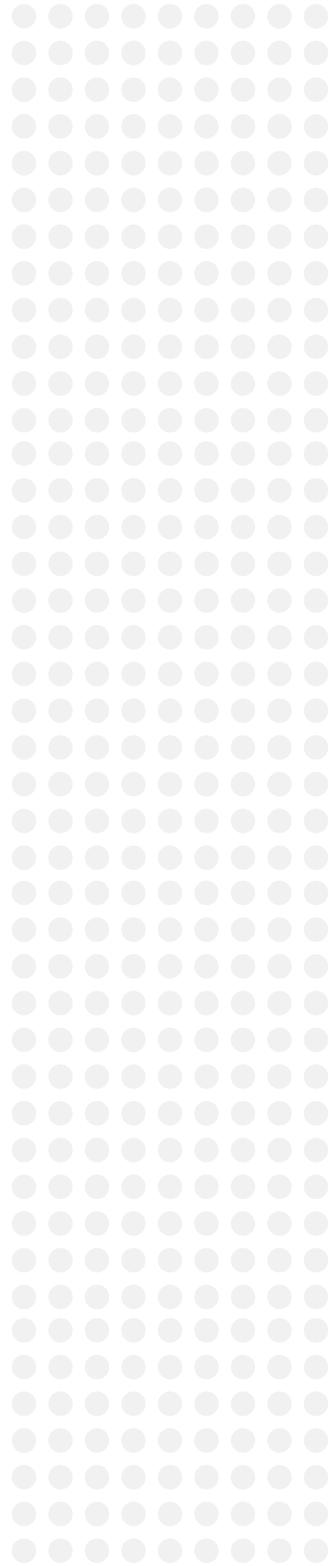
...

I. Common Law Constitutionalism

... The common law method has not gained currency as a theoretical approach to constitutional interpretation because it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind. But our written constitution has, by now, become part of an evolutionary common law system, and the common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law.

The currently prevailing theories of constitutional interpretation are rooted in a different tradition: implicitly or explicitly, they rest on the view that the Constitution is binding because someone with authority adopted it. This view derives from a tradition—that of Austin and Bentham, and ultimately Hobbes—that historically has been the great opponent of the common law tradition. This authoritative tradition sees the law as the command of a sovereign. Most current theories of constitutional interpretation are of course vastly more refined than the reference to a “command” would suggest. But they all in some way reflect the hold of the authoritative tradition rather than the tradition of the common law.

This point is perhaps most obvious in the case of straightforward forms of originalism. In its simplest form, originalism treats the Framers of the Constitution (or its ratifiers) as the authoritative entity, comparable to Austin’s sovereign. Originalism can, of course, be defended on other grounds;



but much of the intuitive plausibility of originalism stems from the notion that the Framers are a super-legislature. Just as our representatives in Congress have the power to tell us how to act, so do, in a more indirect way, the Framers.

The more sophisticated variants of originalism also belong to the Austinian tradition. Some of these variants emphasize the need to reinterpret or “translate” the Framers’ commands in ways that take account of, for example, changes in factual knowledge and social understandings that have occurred since the Constitution was adopted.² But the Framers’ command is still the starting point, and still authoritative in significant ways. . . . My argument is that no version of a command theory, however refined, can account for our constitutional practices. Constitutional law in the United States today represents a flowering of the common law tradition and an implicit rejection of any command theory.

In a sense this should not be surprising. The common law is the most distinctive feature of our legal system and of the English system from which it is descended. We should expect that the common law would be the most natural model for understanding something as central to our legal and political culture as the Constitution. Other theories of constitutional interpretation struggle with the question why judges—and not historians, philosophers, political scientists, or literary critics—are the central actors in interpreting the American Constitution; the common law, more than any other institution, has been the province of judges. American constitutional law is preoccupied, perhaps to excess, with the question of how to restrain judges, while still allowing a degree of innovation; the common law has literally centuries of experience in the use of precedent to accomplish precisely these ends.

...

[One somewhat counterintuitive consequence that follows from the common law approach to constitutional interpretation] is that the interpretation of the Constitution has less in common with the interpretation of statutes than we ordinarily suppose. Conventionally we think of legal reasoning as divided into common law reasoning by precedent on the one hand, and the interpretation of authoritative texts on the other. Constitutional and statutory interpretation, while of course different in many respects, are viewed as forms of the latter and fundamentally different from the former.

² See Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1169–82, 1263–68 (1993).

In fact, constitutional interpretation, as practiced today in this country, belongs on the other side of the line. The command view, although too simple, may make sense for many statutes: a recent statute enacted by the people's representatives is plausibly an authoritative command of the sovereign that should be followed for that reason. Of course this point must not be overstated. For many statutes, a common law approach to interpretation may again be both the best description of our practices and the best account of how we should proceed. But the usual reflex is to associate the interpretation of statutes with the interpretation of the Constitution, and to contrast both with the common law. To whatever extent the contrast with the common law is true of statutes, it is not true of an eighteenth- and nineteenth-century constitution. Some of the puzzling aspects of our current practices of constitutional interpretation appear problematic only because of the unreflective association of constitutional and statutory interpretation. Once we understand constitutional interpretation as an outgrowth of the common law, those practices are much less puzzling.

...

Common law constitutional interpretation has two components. Each of these components provides a partial explanation for why we should pay attention to the Constitution. Together they provide both the best available answer to that question and, I believe, the best account of our current practices of constitutional interpretation.

The first component is traditionalist. The central idea is that the Constitution should be followed because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances. The second component is conventionalist. It emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying ready-made solutions to problems that otherwise would be too costly to resolve. The traditionalism underlying the practice of constitutional interpretation is a rational traditionalism that acknowledges the claims of the past but also specifies the circumstances in which traditions must be rejected because they are unjust or obsolete. The conventionalist component helps explain why the text of the Constitution is important and how much flexibility judges should have in interpreting it.

II. Traditionalism in Common Law Constitutional Interpretation

A. Rational Traditionalism

Traditionalism in some realms of life is a matter of adhering to the practices of the past just because of their age. The traditionalist component of common law constitutional interpretation is different because it has a more

rational basis. Its central notion is not reverence for the past either for its own sake or because the past is somehow constitutive of one's own or one's nation's "identity." Instead, the traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience.

The central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time. Judgments of this kind embody not just serious thought by one group of people, or even one generation, but the accumulated wisdom of many generations. They also reflect a kind of rough empiricism: they do not rest just on theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough.

Because, in this view of traditionalism, the age of a practice alone does not warrant its value, relatively new practices that have slowly evolved over time from earlier practices deserve acceptance more than practices that are older but that have not been subject to testing over time. That is why this form of traditionalism is associated with the common law and a system of precedent. New precedents, at least to the extent that they reflect a reaffirmation and evolution of the old, count for more than old precedents that have not been reconsidered.

The traditionalist argument for obeying the Constitution is that the Constitution reflects judgments that should be taken seriously for these reasons. . . . The Framers do not have any right to rule us today, but their judgments were the judgments of people (the Framers and ratifiers) acting on the basis of serious deliberation. Moreover, the parts of the Constitution that have not been amended (the traditionalist argument says) have obtained at least the acquiescence, and sometimes the enthusiastic reaffirmation, of many subsequent generations. Consequently, these judgments should not be swept aside lightly. They should be changed only if there is very good reason to think them mistaken, or if they fail persistently.

Understood in this way, traditionalism is counsel of humility: no single individual or group of individuals should think that they are so much more able than previous generations. This form of traditionalism also subsumes the common-sense notion that one reason for following precedent is that it is simply too time consuming and difficult to reexamine everything from the ground up. The premise of that common-sense notion is that any radical reexamination of existing ways of doing things is likely to discard good practices, perhaps because it misunderstands them, and is unlikely to find very many better ones.

. . .

B. Innovation and Morally Unacceptable Traditions

Any traditionalist view must address the question of when a tradition should be rejected on the ground that it is morally wrong. Some of the most celebrated accomplishments of American constitutional law in this century have overturned established doctrine—notably the New Deal abandonment of freedom of contract and expansion of federal legislative power; the Warren Court’s many innovations, especially *Brown*, the most famous case involving a morally unacceptable tradition; and more recent innovations in the law of gender equality. It might be thought that common law constitutionalism, with its emphasis on tradition and precedent, would be too receptive to pernicious traditions and would have a difficult time justifying dramatic innovations like these.

But when common law traditionalism is placed on a rational basis, it is not the iron rule that traditionalism is sometimes thought to be. Traditionalism need not mean that all traditions are sacrosanct or that abstract argument is never to be accepted. If one has a great deal of confidence in an abstraction, it can override the presumption normally given to things that have worked well enough for a long time. But that is the structure of the controversy: are we sufficiently confident in the abstract or theoretical argument to justify casting aside the work of generations? Even if we are, we should prefer evolutionary to revolutionary change. But revolutionary change remains possible, and tradition is not to be venerated beyond the point where the reasons for venerating it apply.

Traditionalism, once it is understood in this rational way, answers the concern about morally unacceptable traditions. . . . [A] rationalistic account of traditionalism just establishes a requirement that one give the benefit of the doubt to past practices. If one is quite confident that a practice is wrong—or if one believes, even with less certainty, that it is terribly wrong—this conception of traditionalism permits the practice to be eroded or even discarded.

In fact it is a great strength of the common law approach, compared to other views, that it gives relatively clear guidance about how we are to weigh the claims of tradition against our current assessment of the justice or appropriateness of a legal rule. Everyone recognizes that law, including constitutional law, is in substantial part about following precedent and otherwise maintaining continuity with the past. Nearly everyone also recognizes that sometimes we must depart from the teachings of the past because we think they are not just or do not serve human needs. Everyone also knows that it is not possible to specify an algorithm for deciding when such a departure is warranted. The challenge is to give as illuminating an account as we can of how that decision is to be made: to specify what we

should take into account and how we should think about the problem of reconciling the claims of the past with those of morality or fairness.

...

III. Conventionalism and the Common Law Method

A. *Conventionalism and the Text*

1. *The conventionalist justification for adhering to the text.*

Traditionalism does fall short in at least one important respect: it cannot account for the deference that is given to the text. A strictly traditionalist approach would occasionally “overrule” textual provisions. But it is not acceptable, in our practice, to declare that a provision of the Constitution (for example, the provision requiring that the President be a natural-born citizen) has outlived its usefulness and therefore is no longer the law. Explicitly declaring that a provision was no longer part of the Constitution would be an act of civil disobedience or, if the provision were very important, revolution. In some way or another, however creative the interpretation, the text must be respected. Moreover, where the text is relatively clear, it is often followed exactly. Simply as a descriptive matter, no one seriously suggests that the age limits specified in the Constitution for Presidents and members of Congress should be interpreted to refer to other than chronological (earth) years because life expectancies now are longer, that a President’s term should be more than four years because a more complicated world requires greater continuity in office, or that states should have different numbers of Senators because they are no longer the distinctive sovereign entities they once were. The text is not always treated in this way: “Congress” in the First Amendment is taken, without controversy, to mean the entire federal government, even though elsewhere “Congress” certainly does not include the courts or the President. But sometimes the text is treated this way, and the traditionalist, Burkean account cannot explain why specific provisions are taken as seriously as they are, as often as they are.

Conventionalism, the second component of common law constitutional interpretation, takes care of this deficiency. Conventionalism is a generalization of the notion that it is more important that some things be settled than that they be settled right. The text of the Constitution is accepted (to adapt a term used in a related way by its originator) by an “overlapping consensus”: whatever their disagreements, people can agree that the text of the Constitution is to be respected.³

³ On the notion of an overlapping consensus, see John Rawls, *Political Liberalism* 133–72 (Columbia 1993).

Left to their own devices, people disagree sharply about various questions, large and small, related to how the government should be organized and operated. In some cases, the text of the Constitution provides answers; in many other cases, the text limits the set of acceptable answers. People who disagree will often find that although few or none of them think the answer provided by the text of the Constitution—either the specific answer or the limit on the set of acceptable answers—is optimal, all of them can live with that answer. Moreover, not accepting that answer has costs—in time and energy spent on further disputation, in social division, and in the risk of a decision that (from the point of view of any given actor) will be even worse than the constitutional decision. In these circumstances, everyone might agree that the best course overall is to follow the admittedly less-than-perfect constitutional judgment.

In addition, conventionalism can be justified on the ground that it is a way for people to express respect for their fellow citizens. Even among people who disagree about an issue, it is a sign of respect to seek to justify one's position by referring to premises that are shared by the others. Moral argument in general has this structure (at least according to most modern conceptions). But appealing simply to shared abstract moral conceptions (such as a common abstract belief in human dignity) does less to establish bonds of mutual respect than appealing to more concrete notions that do more to narrow the range of disagreement—such as the appropriateness of adhering to the text of the Constitution.

...

[2.] *Why the text?*

...

It might be objected . . . that conventionalism does not fully explain the status of the text, which was the deficiency in the traditionalist account that conventionalism was supposed to remedy. In a particular instance, we might think that the range of solutions consistent with the text is not good enough—that is, that the gains from deviating from the text would outweigh the losses. On a conventionalist account, it might be said, we should unapologetically reject the text in such a case. But it is not part of our practice to reject the text in such an explicit way. Why does our overlapping consensus seem to have settled so heavily on the text? The answer to this important question is multifaceted, but two things seem especially important. One is the specific way in which the Constitution was drafted; the other is the special status that the Constitution has in the American political culture.

One reason we do not explicitly disavow the text may be that the text seldom forces truly unacceptable actions on us. This is where the “genius” of the Constitution—that it consists of provisions that are sufficiently broad

and flexible, yet not vacuous—becomes manifest. Many of the provisions are worded in terms broad enough to permit a course that we think is morally acceptable. We therefore seldom have strong reasons to reject the text overtly; instead we can reinterpret it, within the boundaries of ordinary linguistic understandings, to reach a morally acceptable conclusion. At the same time, the costs of disavowing the text, in terms of the ability of the text to serve as a focal point, are likely to be great. It is valuable to society that people who disagree sharply on important issues can have, as common ground, an acceptance of the text. . . .

. . .

At the same time, the acceptance of the Constitution is not the product strictly of calculation, or of an entirely rational process. At first glance conventionalism might seem to be an overly rationalistic explanation that drains notions of national identity and heritage from constitutional interpretation and denies that the Constitution should be revered or accorded a scriptural status. In fact, on a conventionalist account, it is not that the Constitution is important just because of a rational calculation; rather, the calculations come out as they do because of the cultural importance of the Constitution. For a variety of complex reasons—rooted in patriotic impulses and narratives, in American exceptionalism, in Protestantism, and in other sources of national culture—the Constitution has been a central unifying symbol for Americans. That is why the Constitution, and not some other document or source of law, can serve so well as the focal point of agreement. This is one way to understand Madison’s famous answer, in Federalist 49, to Jefferson’s suggestions that constitutions should be easy to change:

As every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. . . . When the examples which fortify opinion are ancient as well as numerous, they are known to have a double effect. . . . The most rational government will not

find it a superfluous advantage to have the prejudices of the community on its side.⁴

Societies hold together not just by virtue of rational calculation but also because of shared symbols, and there is little doubt that the Constitution is such a symbol for the United States. It is because of this special status of the Constitution that its text has become the focal point of agreement.

...

IV. Judicial Restraint and Democracy

... [A]ny approach to constitutional interpretation must explain how it restrains the officials responsible for implementing the Constitution and prevents them from imposing their own will. A theory of constitutional interpretation for our society also ought to be able to explain how the institution of judicial review—judicial enforcement of the Constitution against the acts of popularly elected bodies—can be reconciled with democracy.

...

A. Judicial Restraint

Textualism and originalism are sometimes defended as the best way of restraining judges and preventing them from abusing their authority. On the surface this may seem to be at least a plausible claim. But on closer examination I believe that it owes all of its plausibility to the unspoken assumption that some version of the common law approach to constitutional interpretation is operating in the background.

A judge who conscientiously tries to follow precedent is significantly limited in what she can do. But a judge who acknowledges only the text of the Constitution as a limit can, so to speak, go to town. The text of the Equal Protection Clause, taken alone, would allow a judge to rule that the Constitution requires massive redistributions of wealth (reasoning that “equal protection of the laws” includes “equal protection” against the vicissitudes of the market); the text of the Contract and Just Compensation Clauses, taken alone, would allow a judge to invalidate a wide range of welfare and regulatory legislation. The text of the Due Process and Cruel and Unusual Punishment Clauses, taken alone without reference to the precedents interpreting them, could justify a thorough overhaul of the criminal justice system. And so on.

The notion that the text of the Constitution is an effective limit on judges is plausible only if one assumes a background of highly developed precedent. Within the limits set by precedent, paying more attention to

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⁴ The Federalist 49, at 314–15 (James Madison) (Clinton Rossiter, ed., Mentor 1961).

*[T]he common
law method
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judges.*

text might indeed limit judges' discretion. The appeal of textualism as a limit on judges—as the argument was made, most famously for example, by Justice Black—stems entirely from the assumption that the text will be used to resolve disputes within the gaps left by precedent. If we assume that the various clauses of the Constitution are to be interpreted in something like the current fashion, then judges may indeed be more “restrained” if they insist on some relatively explicit textual source for any constitutional right. But that is primarily a demonstration of the restraining effect of precedent, not of text; the bulk of the restraint by far is provided by precedent.

For similar reasons, it is implausible to say that adherence to the Framers' intentions, by itself (or together with adherence to text), limits judges more than precedent. The familiar problems—uncertainty about who counts as “the Framers,” unclarity in the historical record (or no relevant record at all), difficulty in defining the level of generality on which to identify the intention, changing circumstances—all make the historical record a poor restraint on judges. In fact the strongest advocates of adherence to the Framers' intentions are often, at the same time, embroiled in controversies over what the Framers of particular provisions actually did intend. The existence of controversy in applying a method does not invalidate the method, of course, but it does mean that that method is a less sure way of preventing a judge from “finding” her own moral or political views in the Constitution.

By contrast, the common law method has a centuries-long record of restraining judges. Needless to say, precedents can be treated disingenuously, and judges can abuse the freedom that the common law approach gives them to make moral judgments about the way the law should develop. But no system is immune from abuse. A conscientious judge will find substantial guidance in a well developed body of precedent, like that interpreting the Constitution. Judges who might be tempted to overreach, but who are susceptible to criticism (by others or by themselves), can be evaluated by fairly well developed standards under the common law method. None of the competing views seems superior on this score, and most—including the various forms of originalism—seem decidedly worse.

Finally, common law constitutionalism has the advantage of confronting the question of judicial restraint—that is, the question of how concerned we should be about the danger that judges will implement their own moral and political views under the guise of following the law—more directly and candidly than other theories do. Under common law constitutionalism, the tension is between, on the one hand, the demands of tradition and the need to maintain the text as common ground, and, on the other hand, the perceived requirements of fairness, justice, and good policy. By facing that tension, the judge is forced to decide how restrained

she should be. Approaches that emphasize the text or the Framers' intentions, by contrast, ordinarily insist on the supposed absolute priority of the text or the Framers' intentions over the judge's moral views. Those approaches have a tendency to suggest that it is a usurpation for a judge ever to consider the fairness or justice of the action she is being asked to take. In this way those approaches do not confront the issue of just how restrained a judge should be. Disputes that in fact concern matters of morality or policy masquerade as hermeneutic disputes about the "meaning" of the text, or historians' disputes about what the Framers did. By contrast, in common law constitutional interpretation, the difficult questions are on the surface and must be confronted forthrightly.

B. Democracy

A crucial part of the argument for textualist or originalist approaches is not just that they restrain judges but that they are more consistent with democracy. The objective of constitutional interpretation, on these accounts, is to uncover and enforce the will of "we the people" as expressed in the Constitution. By contrast, the argument goes, common law approaches that rely on precedent exalt the views of "Judge & Co.," an elite segment of the population.

So far as the argument from democracy is concerned, . . . [i]t is difficult to understand why democracy requires us to enforce decisions made by people with whom the current population has so little in common. It is true that the Framers were Americans, and we are Americans. But it does not follow that adherence to their decisions is democratic self-rule in any remotely recognizable sense. The originalist notion that the decisions of the eighteenth-century Framers somehow reflect the views of a continuous "we the people" extending since that time is as mystical and implausible as the most remote reaches of the common law ideology.

Neo-Hamiltonian views are less vulnerable to this objection. According to those views, judges are to enforce the decisions made by "we the people" at subsequent moments rather than those reflected in the original constitutional provisions. These approaches mitigate the objection that the dead hand of the past is governing the present. And at first glance it might seem that such views, whatever else one might say about them, are more suitable for a democratic, self-governing society than a common law approach. In particular, the common law approach seems elitist by comparison—a reflection of the guild interest of lawyers.

This argument can be answered on several levels. To begin with, it is not obvious what should count as an appropriately "democratic" approach to constitutional interpretation. The most straightforward definition of democracy—rule by a current majority—is obviously not a good basis for

constitutional interpretation. Constitutions are supposed to provide some protection against the current majority.

In addition, common law constitutionalism is democratic in an important sense: the principles developed through the common law method are not likely to stay out of line for long with views that are widely and durably held in the society. Indeed, by this standard the common law approach can plausibly claim to be as democratic as any of its competitors. Consider the most important principles that have emerged from constitutional common law in this century: expansive federal power; expansive presidential power, particularly in foreign affairs; the current contours of freedom of expression; the federalization of criminal procedure; a conception of racial equality that disapproves *de jure* distinctions and intentional discrimination; the rule of one person, one vote; a (somewhat formal) principle of gender equality; and reproductive freedom protected against criminalization. None of these important principles can be said to be rooted in original intent, and none has particularly strong textual roots. For most of them, it is hard to identify any “moment” at which a strong popular consensus crystallized behind them.

Instead, all of these principles were developed essentially by common law methods—the evolution of doctrine in response to the perceived demands of justice and the needs of society. All of these principles were once highly controversial. But it is plausible to say that all of them now rest on a broad democratic consensus. They are evidence that the common law approach is at least broadly consistent with the demands of democracy.

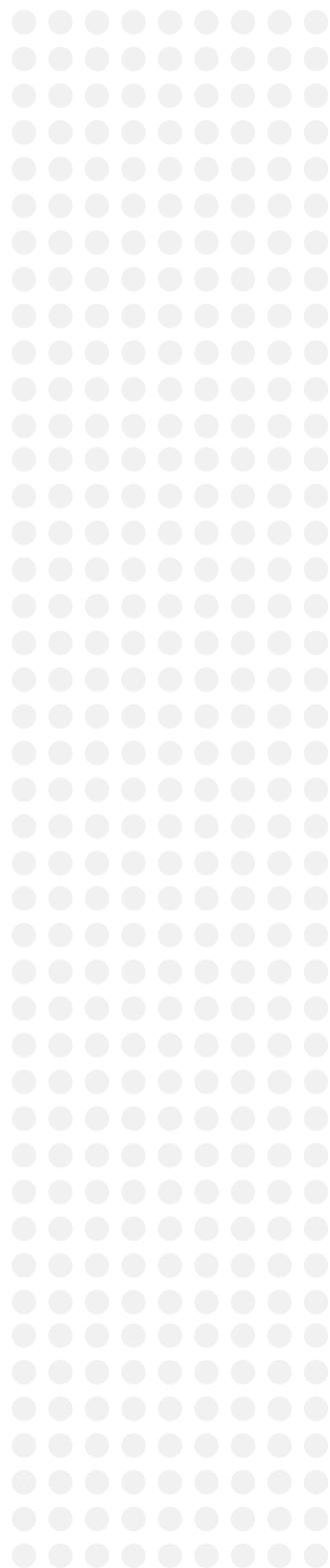
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Conclusion

Our legal system is distinctive, perhaps unique, for the prominence it gives to judges. The distinctiveness is manifested in two practices in particular: judicial interpretation of the Constitution, and the common law. I have suggested that these two practices have much in common, and that American constitutionalism, over the years, has increasingly, and justifiably, taken on the character of a common law system. We sometimes say that the written Constitution is another distinctive aspect of our legal order. The written text does play a crucial role as a focal point for the conventionalism that is important to any political order. There are powerful reasons not to interpret the text in a way that would seem too contrived. But the Constitution is much more, and much richer, than the written document. When we apotheosize the Framers we understate the importance of the many subsequent generations of lawyers and judges, and nonlawyers and nonjudges, who have helped develop the principles of American constitutional law.

Today it is those principles, not just the document, that make up our Constitution. Originalist and textualist approaches often find themselves in the position of making exceptions for, or apologizing for, or simply being unable to account for, some of the most prominent features of our constitutional order. The common law approach greatly reduces the need to do any of that. It forthrightly accepts, without apology, that we depart from past understandings, and that we are often creative in interpreting the text. These practices, which are common and well settled, need not be carried on covertly or with a sense that they are somehow inappropriate. They are important parts of our system, and they can be justified on the basis of one of the oldest legal institutions, the common law.

Perhaps the most serious charge against the common law approach is that it is resistant to change. To some degree that is true. But properly understood the common law method does not immunize the past from sharp, critical challenges. Gradual innovation, in the hope of improvement, has always been a part of the common law tradition, as it has been a part of American constitutionalism. Even sudden changes are possible. They require a stronger justification, but the common law approach, unlike some other methods, allows judges to make them. Perhaps most important, the common law method identifies what is truly at stake: whether the arguments for change, in order to make the law fairer or more just, overcome the presumption that should operate in favor of the work of generations. Since we cannot avoid that question, we are perhaps better off with an approach that forces us to answer it.



from
LAWRENCE V. TEXAS,
539 U.S. 558 (2003)

Opinion of Justice Anthony Kennedy for the Court

...
The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

...
[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers v. Hardwick*.

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. *Id.*, at 485.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, *id.*, at 454; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, *id.* It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

“It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion

into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.*, at 453.

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade*, 410 U.S. 113 (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman’s rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

In *Carey v. Population Services Int’l*, 431 U.S. 678 (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.

The facts in *Bowers* had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. . . . The Court, in an opinion by Justice White, sustained the Georgia law. . . . [Justice Kennedy then discusses the Court’s analysis in *Bowers*, as well as weaknesses in the historical premises underlying that decision.]

. . .

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851. . . .

The second post-*Bowers* case of principal relevance is *Romer v. Evans*, 517 U.S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado’s constitution which named

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.

as a solitary class persons who were homosexuals, lesbians, or bisexual either by “orientation, conduct, practices or relationships,” *id.*, at 624, (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was “born of animosity toward the class of persons affected” and further that it had no rational relation to a legitimate governmental purpose. *Id.*, at 634.

...

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

478 US, at 216 (footnotes and citations omitted).

Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.

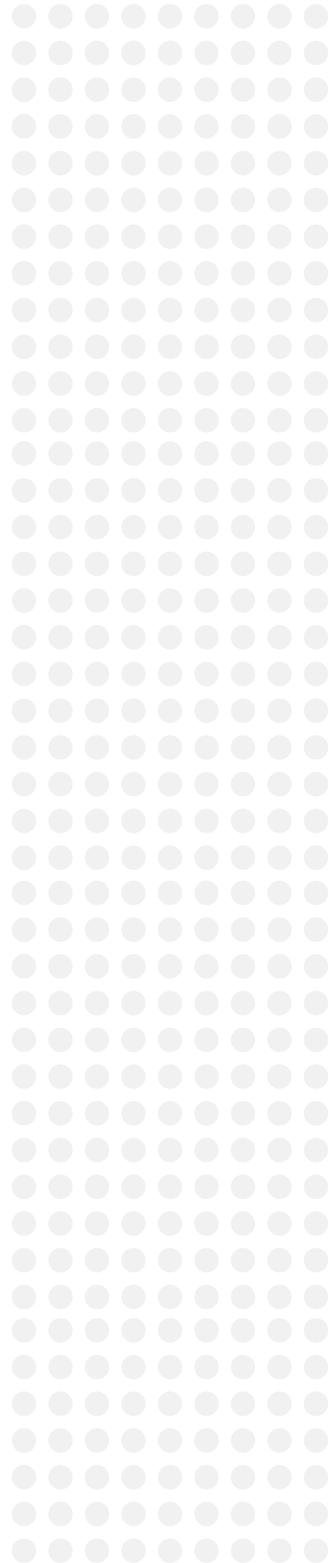
Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

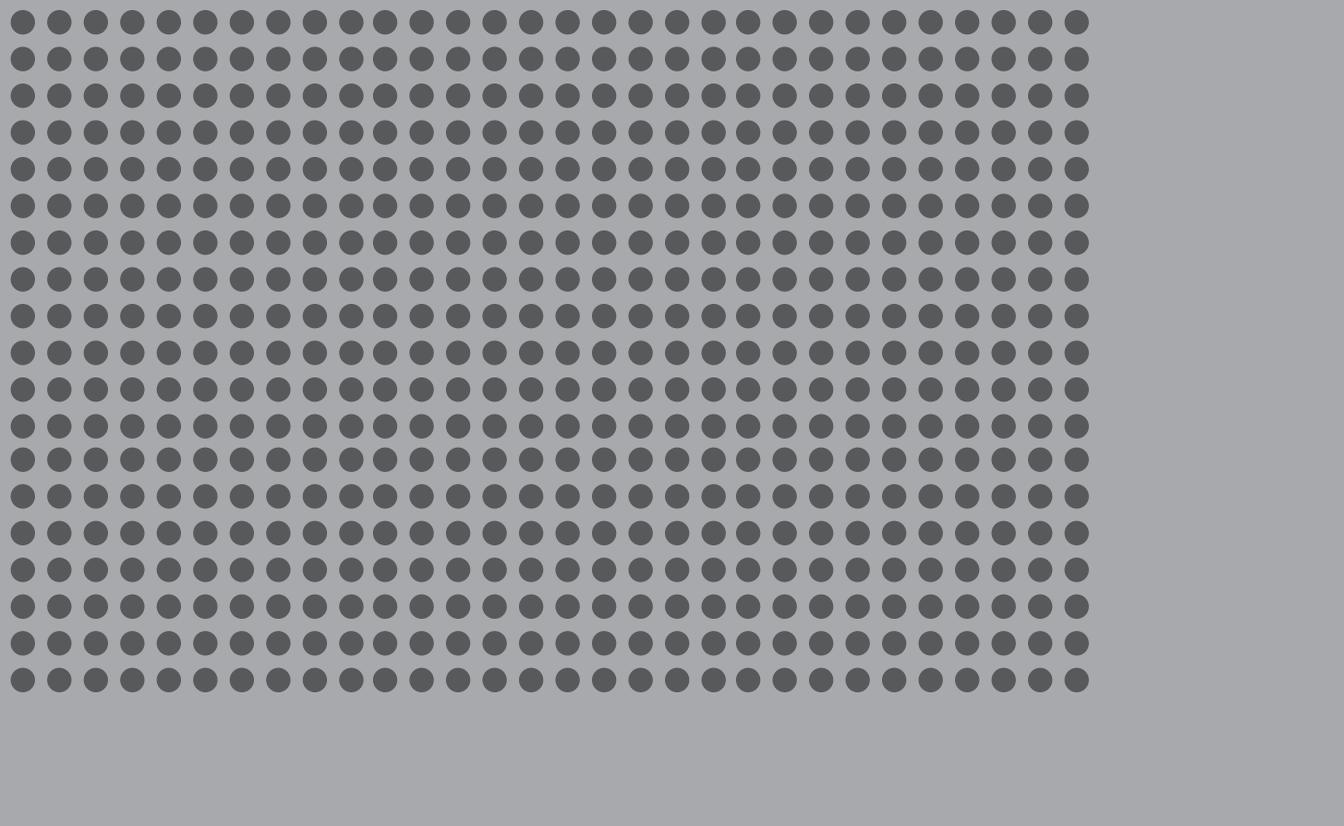
The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where

consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” *Casey, supra*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.





Consequences

“The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time.”

— Justice Stephen Breyer, in his dissenting opinion in *Parents Involved in Community Schools v. Seattle School District No. 1, et al.*, 551 U.S. 701 (2007)

from

**PARENTS INVOLVED IN COMMUNITY
SCHOOLS V. SEATTLE SCHOOL
DISTRICT NO. 1, ET AL.,**

551 U.S. 701 (2007)

Dissenting Opinion of Justice Stephen Breyer

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education*, 347 U.S. 483 (1954), long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are “compelling.” We have approved of “narrowly tailored” plans that are no less race-conscious than the plans before us. And we have understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.

The plurality pays inadequate attention to this law, to past opinions’ rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown’s* promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.

...

V. Consequences

The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality’s approach, as measured against the Constitution’s objectives. To do so provides further reason to believe that the plurality’s approach is legally unsound.

For one thing, consider the effect of the plurality’s views on the parties before us and on similar school districts throughout the Nation. Will

Louisville and all similar school districts have to return to systems like Louisville's initial 1956 plan, which did not consider race at all? That initial 1956 plan proved ineffective. Sixteen years into the plan, 14 of 19 middle and high schools remained almost totally white or almost totally black.

The districts' past and current plans are not unique. They resemble other plans, promulgated by hundreds of local school boards, which have attempted a variety of desegregation methods that have evolved over time in light of experience. A 1987 Civil Rights Commission Study of 125 school districts in the Nation demonstrated the breadth and variety of desegregation plans. . . .

A majority of [the desegregation techniques studied] explicitly considered a student's race. Transfer plans, for example, allowed students to shift from a school in which they were in the racial majority to a school in which they would be in a racial minority. Some districts, such as Richmond, California, and Buffalo, New York, permitted only "one-way" transfers, in which only black students attending predominantly black schools were permitted to transfer to designated receiver schools. Fifty-three of the 125 studied districts used transfers as a component of their plans.

At the state level, 46 States and Puerto Rico have adopted policies that encourage or require local school districts to enact interdistrict or intradistrict open choice plans. Eight of those States condition approval of transfers to another school or district on whether the transfer will produce increased racial integration. Eleven other States require local boards to deny transfers that are not in compliance with the local school board's desegregation plans.

Arkansas, for example, provides by statute that "no student may transfer to a nonresident district where the percentage of enrollment for the student's race exceeds that percentage in the student's resident district." An Ohio statute provides, in respect to student choice, that each school district must establish "procedures to ensure that an appropriate racial balance is maintained in the district schools." Ohio adds that a "district may object to the enrollment of a native student in an adjacent or other district in order to maintain an appropriate racial balance."

A Connecticut statute states that its student choice program will seek to "preserve racial and ethnic balance." Connecticut law requires each school district to submit racial group population figures to the State Board of Education. Another Connecticut regulation provides that "any school in which the Proportion for the School falls outside of a range from 25 percentage points less to 25 percentage points more than the Comparable Proportion for the School District, shall be determined to be racially imbalanced." A "racial imbalance" determination requires the district to submit a plan to correct the racial imbalance, which plan may include "mandatory pupil reassignment."

Interpreting that State's Constitution, the Connecticut Supreme Court has held legally inadequate the reliance by a local school district solely upon some of the techniques Justice Kennedy today recommends (*e.g.*, reallocating resources, etc.). The State Supreme Court wrote: "Despite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the defendants did not intend to create or maintain these disparities, the disparities that continue to burden the education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity."

At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm.

The wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including *de facto* segregation, is difficult to solve. The fact that many such plans have used explicitly racial criteria suggests that such criteria have an important, sometimes necessary, role to play. The fact that the controlling opinion would make a school district's use of such criteria often unlawful (and the plurality's "colorblind" view would make such use always unlawful) suggests that today's opinion will require setting aside the laws of several States and many local communities.

As I have pointed out, *de facto* resegregation is on the rise. It is reasonable to conclude that such resegregation can create serious educational, social, and civic problems. Given the conditions in which school boards work to set policy, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts now consider vital—the limited use of broad race-conscious student population ranges.

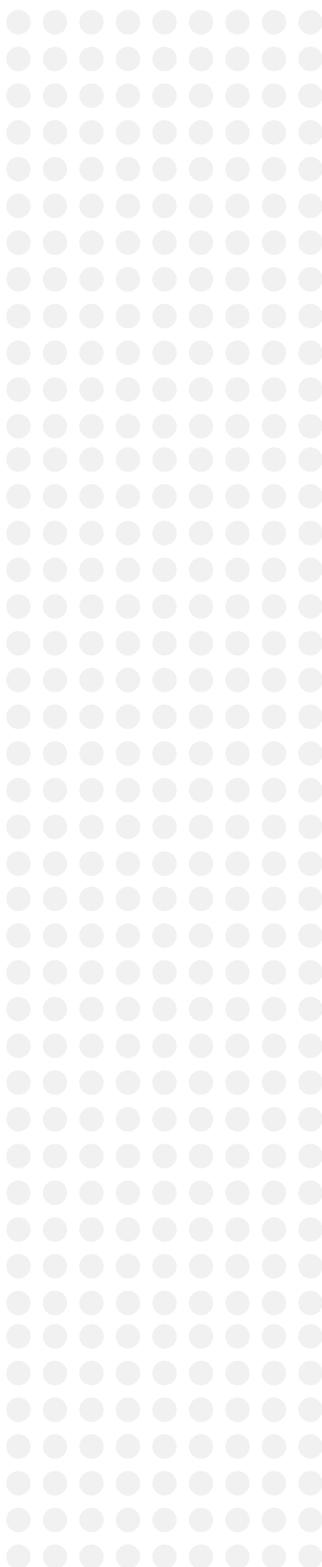
I use the words "may need" here deliberately. The plurality, or at least those who follow Justice Thomas' "'color-blind'" approach may feel confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria including those with inclusive objectives. By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation, troubled inner city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find

answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." That is why the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of "race-conscious" criteria from among their available options. Today, however, the Court restricts (and some Members would eliminate) that leeway. I fear the consequences of doing so for the law, for the schools, for the democratic—process, and for America's efforts to create, out of its diversity, one Nation.

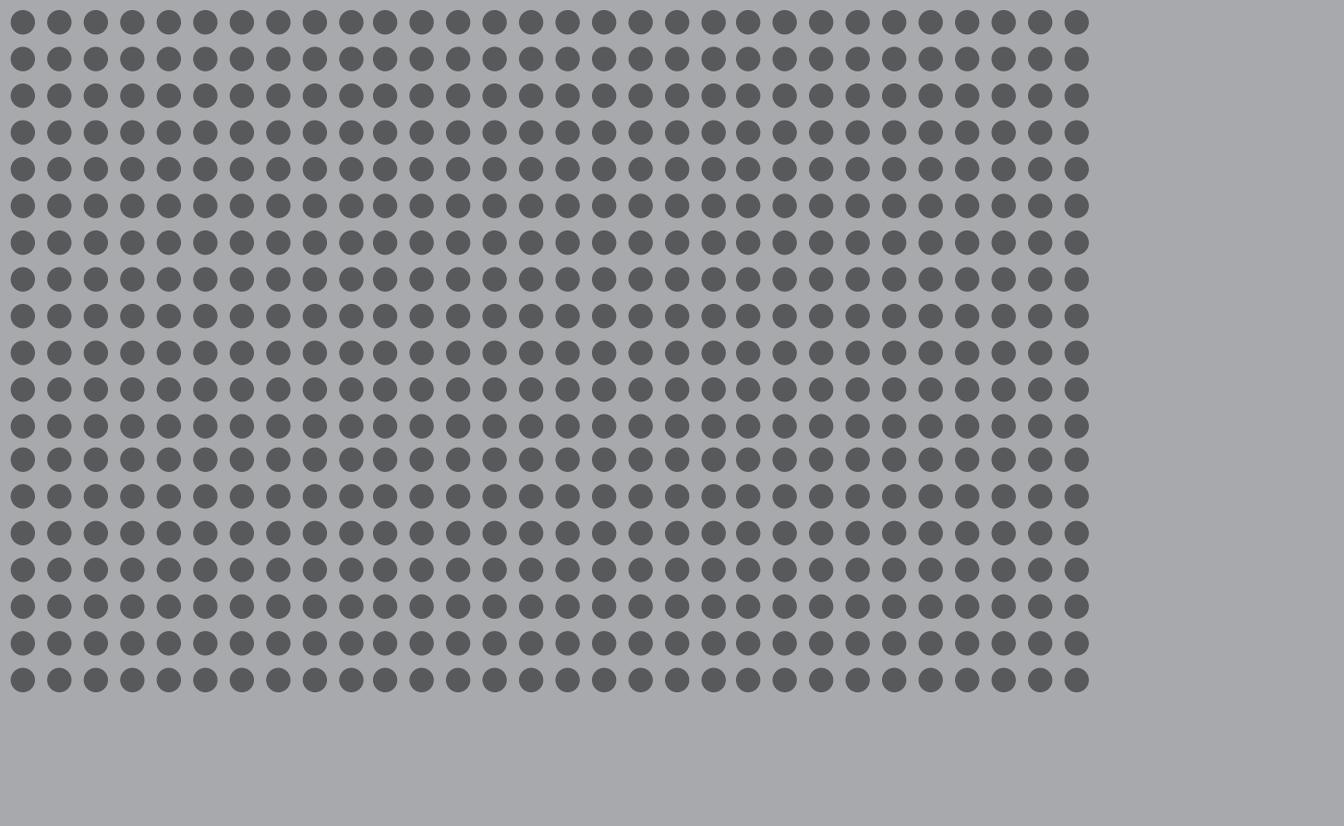
. . . For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.



The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

I must dissent.



Judging

*“This independence of the judges is equally
requisite to guard the Constitution and the
rights of individuals...”*

— Alexander Hamilton, in *Federalist No. 78*

*from***FEDERALIST NO. 78****Alexander Hamilton**

...

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power.

...

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. . . .

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be

The complete independence of the courts of justice is peculiarly essential in a limited Constitution.

preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

...

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

...

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an

The complete independence of the courts of justice is peculiarly essential in a limited Constitution.

act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

...

from

JUDICIAL REVIEW: *A Practicing Judge's Perspective*

Stephen Breyer¹

...

[One important criticism of “independent judicial review”—the “grant of legal authority to judges to set aside statutes upon the ground that they violate provisions of a written constitution”—is that it] substitutes the views of judges for the views of legislators. The judges are unelected, they interpret highly abstract constitutional language, *e.g.*, the word “liberty,” and they work in an ivory tower. The results are undemocratic, subjective, and impractical.

I cannot entirely refute this criticism, for it is valid—but only, as the editor says in Evelyn Waugh’s *Scoop*, “up to a point, Lord Copper, *up to a point*.” My object this afternoon is to provide you with comments and examples, expressed from the viewpoint of a practicing judge, that, I hope, will help you determine just where that point lies and evaluate its significance. I shall describe the “democratic anomaly” Then, focusing upon decisions that remain significantly “undemocratic,” I shall illustrate through discussion and example how a judge might find constraints that make “subjectivity” and “administrative impracticality” somewhat less problematic than is often thought.

...

. . . The question at the heart of the [democratic] anomaly is why a democracy—a political system based on representation and accountability—should entrust the final, or near final, making of . . . highly significant decisions to judges who are unelected, independent, and insulated from the direct impact of public opinion.

I can narrow the anomaly by pointing out that all government, to achieve flexibility, must involve the exercise of delegated authority. Given delegation, enacted law will not necessarily reflect the views of a particular electorate; nor will law that takes the form of treaties, regulations, and administrative rulings necessarily reflect the views of a particular legislature. Democracies also delegate authority to judges, and properly so. Who would want to convict a person accused of murder on the basis of a popular vote? Nor could one reasonably advocate a system of civil law that instantly

¹ Stephen Breyer, *Judicial Review: A Practicing Judge's Perspective*, 78 Tex. L. Rev. 761 (2000).

changed to reflect the views of a popular majority, for such law would lack the stability that any form of government under law requires. For that matter, any actual democracy contains many nonmajoritarian institutions (*e.g.*, a senate) and procedures (*e.g.*, seniority). I can narrow the anomaly further by pointing out that many nonconstitutional judicial decisions are already, in a sense, immune from later legislative revision. As a practical matter, lack of legislative time or interest or the popularity of a judicial decision means that the legislature usually will not overturn a judge's statutory decision despite its legal power to do so.

. . .

Still, there remains much to reconcile with "majoritarian" democracy, for example, certain constitutional protections such as the Eighth Amendment's prohibition of cruel and unusual punishments, or the Fourteenth Amendment's protection of certain aspects of family life that fall within the scope of the word "liberty." Nor can one easily justify, as necessary to the preservation of that democracy, the independent determination by judges of related claims, based either upon constitutional words such as "liberty" (*e.g.*, the claim of a constitutionally protected "right to die") or upon the words in a court opinion interpreting those words (such as a claim about the constitutionally required implementation of a court decree forbidding certain kinds of racial discrimination). . . .

. . . Our judiciary, aware of the anomaly, tries to minimize its impact through the use of rules, standards, or canons that recognize the problem. For example, the standard of constitutionality applicable to statutes focuses not on the statute's wisdom but on its constitutionality, which often concerns the statute's "rationality"; the rule for determining when to overrule a previous case, *stare decisis*, is less strict in constitutional than in statutory matters; a canon of interpretation requires courts to try to save a statute by interpreting it in a way that will avoid a serious constitutional problem. There are others. I also believe it important to note that judges, aware of the anomaly, often seek through their interpretive attitude to reflect the constitutionally vested primacy of legislative decisionmaking, even in cases that do not fall squarely within an interpretive canon.

But however much I may narrow, ultimately there remains an important set of cases—for example, cases involving privacy or religious freedom—that can require us, when interpreting or applying the Constitution, directly to frustrate the legislature's express objective. I turn to that set of cases, those in which there is an inevitable tension between the will of the elected legislature and the work of the unelected judge. Does judicial decisionmaking there mean subjective, impractical decisionmaking? Or, to return to Lord Copper, up to what point?

You are aware that language, history, and precedent will answer many constitutional questions. Moreover, some fine constitutional judges have believed that, even in more difficult cases, a single factor, such as the Constitution's language or its history, can itself significantly constrain subjective decisionmaking. For myself, however, I cannot find a touchstone in any such single factor. Instead, I believe that a realistic appraisal of subjectivity must take account of certain constraints, related to each other, which I shall describe in five parts and follow with an example.

First, judges of a constitutional court, like all judges, find constraints in the rules, canons, principles, and institutional understandings of the judicial enterprise itself. Judge Learned Hand answered the charge of "subjectivity" by pointing to "those books." I assume he meant metaphorically to include (in common law matters) the common law tradition, and (in statutory matters) language, structure, history, precedent, purpose, and consequences—all of which permit a judge to find a "better" and a "worse" answer even to the most difficult of statutory questions, even where language (for example, antitrust law's "contract, combination or conspiracy in restraint of trade") is open-ended.

Second, as is true of any craft, experience both teaches and constrains its practitioners. And constitutional court judges do develop a kind of special experience. Our work differs in kind from most trial court work, for unlike trial courts we do not determine facts or apply previously elaborated law to those facts. It also differs in kind from some of the work of the courts of appeals, in that we do not review for error the trial court's application of previously elaborated law to the facts of a particular case. As Chief Justice Taft pointed out in 1921, litigants have already had "two chances." Rather, we most frequently hear and decide cases that involve conflicts of interpretation among the lower courts, thereby producing uniform national law. That "law interpreting" work resembles that of the courts of appeals when it involves statutes. Our work does not resemble theirs when we interpret the Constitution. Because all federal and state courts have the power to interpret the Constitution, the difference is one of degree, not kind. But it is one of considerable degree, for open questions of constitutional law in our Court become a steady diet. And the difference in degree is important in that the experience, the steadiness and diversity of a constitutional diet, naturally lead a judge to try to see, and to understand, the Constitution as a coherent whole.

Third, that effort, in my view, leads one to see the Constitution as a "framework," a concept that I believe plays as central a role in our constitutional decisionmaking as does the notion of "legislative purpose" in statutory interpretation, or "comparative institutional expertise" in administrative law. The concept acts as a functional limitation, for it reminds

Democracies also delegate authority to judges, and properly so. Who would want to convict a person accused of murder on the basis of a popular vote?

us that we almost always must determine not whether a statute or other legal rule is wise (*e.g.*, whether handguns should be regulated or whether doctors should be free to assist a patient's suicide), but rather who has the legal power to make such a decision: individual or government? state or federal government? executive, legislative, or judicial branch? And it reminds us (as does our small size and limited docket capacity) that a constitutional power-allocating answer must last, irrespective of today's politics, for many years to come.

The concept acts as a substantive limitation in that the Constitution's provisions (read together) create a framework for a certain kind of workable government. That government is characterized by the rule of law, democratic responsibility for decisionmaking, the protection of basic human liberties, fair procedures, equal treatment of citizens, and widespread dispersal of governmental powers (among different levels and branches of government) to assure that no small group of individuals becomes too powerful. The framework viewed substantively helps to explain individual provisions, as does the historical origin of each provision, for that origin typically tells a story that helps a judge identify the provision's central objective or value, thereby providing an interpretive key that promises a degree of interpretive consistency over time despite the fact that the content of highly general phrases, such as "interstate commerce" or "fundamental fairness" now may differ dramatically from that of two hundred years ago. I recognize that talk of a framework for, say, workable, liberal (in the liberty-protecting sense) democratic government, as well as descriptions of the "central values" embodied in particular provisions, sounds abstract. Still, those characteristics, especially when seen as part of a coherent framework, can help guide a judge's response to particular questions by ruling out some answers and by highlighting the merits of others.

Fourth, I find constraint in the need to fit decisions within what one might call the legal "fabric," a fabric that is itself tied, through purpose and through consequence, to actual human behavior. To say this is, in a sense, to repeat my first point, for every legal decision interacts (one might say "horizontally") with other decisions, principles, standards, practices, and institutional understandings, always modifying the "web" of the law; and every decision affects (one might say "vertically") the way in which that web, in turn, affects the world. Judges must often take account of vertical effects both because individual laws have particular individual purposes that guide legal interpretation and because legal institutions themselves are designed to help us solve the human problems that call them into being. I suggest, however, that, in respect to constitutional matters, estimates of vertical effects—that is, the real world consequences of horizontal interactions—have a particularly important role to play. In order to write an

opinion one might, for example, ask not only the obvious horizontal questions, about, say, language, history, and precedent, but also such vertical questions as:

- (a) How will lower courts, lawyers, government officials, and other institutions (such as businesses and trade unions), who must rely upon the Court's cases for authoritative guidance, implement the opinion's holding? For example, should a constitutional rule that excludes illegally seized evidence from criminal trials be applied to court officials who negligently fail to check a computer-generated suspect list, in light of the need for a uniform, easily administered basic rule, or should it except them from the rule on the ground that their inclusion is administratively unnecessary?
- (b) What theme or "music" does the opinion's rhetorical language generate? Consider the powerful practical effects, above and beyond an opinion's holding, that use of a word like "sovereignty," or a metaphor such as "public forum," can have in cases involving, say, Indian tribes or free speech. Think, too, of the disastrous practical impact of the phrase "separate but equal" on American life and the Court's consequent difficulties in extricating the law from the phrase's implications in the segregated society that it helped to bring about.
- (c) What effect will the opinion have upon the working relations between courts and other major governmental institutions? How will it affect the way in which the court itself works as an institution?
- (d) Should the opinion focus only on the facts characterized narrowly—say, to avoid commitment to a "theme," where consequences are not known, or where such commitment might mislead the public—or will so narrow a focus prevent the opinion from generating any clear and important principle?

Ultimately, what is the opinion's real-world impact (its effect, not its popularity), considered in light of basic constitutional objectives?

The answers to these practical questions constrain. Where a serious discrepancy develops between the world as described in terms of the Constitution's ultimate objectives and the world a particular decision helped to create, the constitutional rule will change. The Supreme Court realized by 1954, for example, that the Constitution's Equal Protection Clause could not tolerate the racially segregated society that the Court's earlier "separate but equal" cases had helped to establish. It properly overruled those cases, thereby indicating that constitutional interpretation itself is an ongoing, iterative, and self-correcting process.

Fifth, constraints arise out of the judge's own need for personal consistency over time. Justice O'Connor has described a judge's initial decisions as creating footprints that later decisions will follow. Moreover,

Where a serious discrepancy develops between the world as described in terms of the Constitution's ultimate objectives and the world a particular decision helped to create, the constitutional rule will change. The Supreme Court realized by 1954, for example, that the Constitution's Equal Protection Clause could not tolerate the racially segregated society that the Court's earlier "separate but equal" cases had helped to establish.

the appointment process likely assures that judges have awareness, through prior experience of the nation's history and cultural heritage. Those facts, combined with diversity of membership and longevity of service, help to dampen radical swings in the Court's approach to constitutional problems.

Let me provide an example designed to isolate an area where traditional history, language, and precedent do not easily resolve the question—an area of potential subjectivity—and thereby illustrate how some of these constraining factors might work. Consider the 1995 case, *U.S. Term Limits v. Thornton*.² It focused on the Constitution's requirements for membership in the House of Representatives, namely: "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." The State of Arkansas enacted a statute that forbade an otherwise eligible candidate from placing his name on the ballot if he had previously served three two-year terms. Is this "term limit" requirement, adopted by Arkansas voters at a state election, consistent with the federal Constitution? Does the Constitution mean the three requirements it lists—age, citizenship, and residence—to be exclusive, or does it permit a state to add others?

The ordinary "nonsubjective" factors that guide interpretation are in almost perfect balance. The constitutional language, read literally, helps Arkansas a little, for it is negatively phrased ("no one shall be a Representative who does not . . ."), but one can still read the passage as setting forth an exclusive list. Precedent hurts Arkansas a little, for the Court in an earlier case . . . held that the Constitution's three qualifications were exclusive; but that case concerned only the constitutional power of the federal Congress, not constitutional limitations on the authority of a state, to add other qualifications. Perhaps a draw. History left the question open. Among the Founding Fathers, Alexander Hamilton wrote that the Constitution's "qualifications . . . are defined and fixed . . . and are unalterable by the legislature." And James Madison implied agreement by adding that "no qualification of wealth, of birth, of religious faith" could "fetter the judgment of the people." But Thomas Jefferson said that the Constitution does "not declare . . . that the member shall not be a lunatic, a pauper, a convict . . . or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications . . ." Jefferson argues for a nonexclusive reading by asking why the Constitution would forbid the states to disqualify lunatics and convicts, while Madison argues for an exclusive reading by asking why a democratic constitution would permit states to disqualify on the basis of property or class. Another draw.

² 514 U.S. 779 (1995).

The historical practice shows that in 1789 many states set property qualifications for legislators, but only one (Virginia) applied them to federal legislators. It also shows that several states insisted on local district (not just state) residence, but Congress later (with many dissenting voices) found that this kind of state requirement was contrary to the Constitution. Draw again.

Nor do other constitutional provisions answer the question. The Tenth Amendment favors the Arkansas position, for it says that powers “not delegated to the United States” are “reserved to the States” (or to the people). But the fact that the office in question is a federal office hurts it, for one might expect the federal Constitution to specify the necessary qualifications for a federal office holder. Still close to a draw.

If I am right in stating that the arguments from language, precedent, history, purpose, and structure (set forth in 150 pages of opinions) were close to equipoise, what now could determine the result? Have we reached a zone where a judge simply decides as he wishes—a zone of “subjective preference”? Consider: The question, like most constitutional questions, concerns the allocation of power. Does an individual state have the power to determine qualifications, or does that power rest only in Congress and the States together, acting through constitutional amendment? The Court’s decision would likely have significant consequences in the world: to decide against Arkansas would impose a significant obstacle to any term limits change; to decide for Arkansas would seem likely to lead to significant change in the makeup and workings of the federal legislature, by increasing turnover dramatically. And it is difficult to predict whether that change would mean more democracy (*e.g.*, by producing legislators who are more closely “in touch” with their “grass roots”) or less democracy (*e.g.*, by making it more difficult for voters to hold individual legislators, or their parties, responsible for what occurs over time).

These consequences, viewed through the lens of the Constitution’s framework, help to generate an answer, albeit one that may vary among different judges. The more one sees the Constitution as providing for stable democratic government over time, the more one sees a state term limits requirement as making a major change (with unforeseeable but certainly important institutional consequences) in the workings of that government, the more one would likely believe that the Constitution intends a structural change of that magnitude to flow only from the widespread durable consensus that must underlie a constitutional amendment. The more one sees in the Constitution’s division of powers an insistence upon the continued influence, power, and authority of the individual states, the more one would likely believe that the Constitution, without amendment, permits a state to impose the additional requirements.

I can understand how a judge's experience as well as expressions of view in prior opinions, *i.e.*, "footprints," may be relevant as to which of the two constitutional "elements" or policies just mentioned weighs more heavily in the mind of that particular judge. And I understand that the matter presents a very close question—one on which our Court split five to four (ruling against Arkansas). But I find it difficult to characterize the resulting conclusion as unusually "political" or particularly "ideological" or even highly "subjective," as those terms are normally used. Rather, differences in outcome reflect somewhat different views of the same constitutional framework, differences in emphasis perhaps reflecting differences in background or experience that are inevitable, perhaps highly desirable, among judges.

...

I have tried to put the classical criticisms of judicial review . . . in perspective. Because the interpretive system I describe is not mechanical but depends upon human judgment, because the constraints I mention only bind to a degree, and because the Court at certain times in its history has gone seriously awry, I cannot deny that the criticisms retain validity—up to a point. Why, then, one might ask, as democratic forms of government have become increasingly prevalent in, for example, Latin America and the former Eastern Bloc, have democratic societies increasingly tried to create independent judiciaries with final, or near final, authority to interpret basic legal documents that guarantee basic rights?

The obvious answer is that these nations increasingly have measured the criticisms against what they see as a need, a need for the protection of democratically structured government and of basic liberties that an independent judiciary can help to provide. That independent judiciary may protect them by helping gradually to develop among citizens and legislators liberty-protecting habits based in part upon their expectation that liberty-infringing laws will turn out not to be laws. And such protection might seem particularly necessary in a new democracy or one with a highly diverse citizenry or sizeable minority groups. That independent judiciary may also protect through the kind of force—ultimately based on habit and expectations—that a court can bring to bear when, faced with a law that clearly violates a constitutional provision, that court says "no."

...

from

LOOKING BEYOND OUR BORDERS:

The Value of a Comparative Perspective in Constitutional Adjudication

Ruth Bader Ginsburg¹

...

While you are the *American* Constitution Society, your perspective on constitutional law should encompass the world. The United States was once virtually alone in exposing laws and official acts to judicial review for constitutionality. But particularly in the years following World War II, many nations installed constitutional review by courts as one safeguard against oppressive government and stirred up majorities. National, multinational, and international human rights charters and tribunals today play a key part in a world with increasingly porous borders. My message tonight is simply this: We are the losers if we do not both share our experience with, and learn from others.

That message is hardly original. A prominent jurist put it this way 14 years ago:

For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.²

The speaker was Chief Justice William H. Rehnquist. More recently, Justice O'Connor said: "While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from . . . distinguished

¹ Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 *Yale L. & Pol'y Rev.* 329 (2004).

² William H. Rehnquist, *Constitutional Courts - Comparative Remarks* (1989), in *Germany and Its Basic Law: Past, Present and Future - A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

[T]he just pride
we take in
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our judicially
enforceable Bill
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from others.

jurists [in other places] who have given thought to the same difficult issues that we face here.”³

In the value I place on comparative dialogue—on sharing with and learning from others—I count myself an originalist in this sense. The 1776 Declaration of Independence, you will recall, expressed concern about the opinions of other peoples; it placed before the world the reasons why the United States of America (the new nation was called that in the Declaration) was impelled to separate from Great Britain. The Declaration did so out of “a decent Respect to the Opinions of Mankind.”⁴ It submitted the “Facts”—the “long Train of [the British Crown’s] Abuses and Usurpations”—to the scrutiny of “a candid World.”⁵

In writing the Constitution, the Framers looked to other systems and to thinkers from other lands for enlightenment, and they understood that the new nation would be bound by “the Law of Nations,”⁶ today called international law. Among powers granted Congress, the Framers enumerated the power “to define and punish . . . Offences against the Law of Nations.”⁷

John Jay, one of the authors of *The Federalist Papers* and our first Chief Justice, wrote in 1793 that the United States, “by taking a place among the nations of the earth, [had] become amenable to the laws of nations.”⁸ Eleven years later, Chief Justice John Marshall cautioned that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”⁹ And in 1900, the Court famously reaffirmed in *The Paquete Habana*:

International law is part of our law, and must be ascertained and administered by the courts of justice For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.¹⁰

. . .

True, there is a discordant view on recourse to the “Opinions of Mankind.” A mid-19th century Chief Justice expressed that view concisely:

³ Sandra Day O’Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 *Am. Soc’y Int’l L. Proc.* 348, 350 (2002).

⁴ The Declaration of Independence para. 1 (U.S. 1776).

⁵ *Id.* at para. 2.

⁶ U.S. Const. art. I, 8, cl. 10.

⁷ U.S. Const. art. I, 8, cl. 10.

⁸ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

⁹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹⁰ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

No one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe or in this country, should induce the court to give the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted.¹¹

Those words were penned in 1857. They appear in Chief Justice Roger Taney's opinion for a divided Court in *Dred Scott v. Sandford*, an opinion that invoked the majestic Due Process Clause to uphold one individual's right to hold another in bondage.

Jurists identified as today's originalists adhere to the view that a comparative perspective, though useful in the framing of our Constitution, is inappropriate to its interpretation. Partisans of that view sometimes carry the day in our courts. I anticipate, however, that they will speak increasingly in dissent. Two cases in point. In 1989, in *Stanford v. Kentucky*,¹² the Court held it was not "cruel and unusual punishment" under the Eighth Amendment to sentence an individual to death for a crime committed at age 16 or 17. Rejecting the relevance of "the sentencing practices of other countries," the Court "emphasized that it is American conceptions of decency that are dispositive."¹³ Thirteen years later, in *Atkins v. Virginia*,¹⁴ the Court held that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment.¹⁵ The six-member majority noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."¹⁶

In a 1996 address at American University, Chief Justice Rehnquist said: "The framers of the United States Constitution came up with two quite original ideas."¹⁷ The first was "a chief executive who [is] not responsible to the legislature, as a Chief Executive is under the parliamentary system."¹⁸ The separation of legislative and executive authority established under Articles I and II of the U.S. Constitution, the Chief Justice noted, has not been embraced by many other nations. But the second idea—"an independent judiciary with the authority to declare laws passed by Congress unconstitutional"—"has caught on [abroad], particularly since the

¹¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857).

¹² 492 U.S. 361 (1989).

¹³ *Id.* at 369 n.1.

¹⁴ 536 U.S. 304 (2002).

¹⁵ *Id.* at 307, 321.

¹⁶ *Id.* at 316 n.21.

¹⁷ William H. Rehnquist, Keynote Address at the Symposium on The Future of the Federal Courts (Apr. 9, 1996), *in* 46 Am. U. L. Rev. 263, 273 (1996).

¹⁸ *Id.* at 273-74.

end of the Second World War.”¹⁹ Of that idea, the Chief Justice said: Constitutional review by independent tribunals of justice “is one of the crown jewels of our system of government today.”²⁰

I agree, but the just pride we take in our system of constitutional review, also in our judicially enforceable Bill of Rights, hardly means we should rest content with our current jurisprudence and have little to learn from others. May I suggest two areas in which, as I see it, we could do better. One concerns the dynamism with which we interpret our Constitution, and similarly, our common law. The other involves the extraterritorial application of fundamental rights.

Chief Justice Taney, in the passage I earlier quoted, described a constitutional text frozen in time. Contrast the view stated in *Trop v. Dulles*,²¹ a pathmarking 1958 plurality opinion. That case concerned the proper reading of the Eighth Amendment’s ban on “cruel and unusual punishments.” Those words, the opinion said, “must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society.”²² As the 2002 decision banning execution of the mentally retarded (*Atkins v. Virginia*) expressly reaffirmed, a majority of the U.S. Supreme Court Justices generally adhere to that understanding. But the “frozen-in-time” position occasionally holds sway.

A recent example, involving no grand constitutional question, simply equity between parties with no ideological score to settle: A Mexican company defaulted on payments due a U.S. creditor and was sued in a Federal District Court, which had personal jurisdiction over the debtor. Sliding into insolvency, the Mexican company was busily distributing what remained of its assets to its Mexican creditors. It did so in clear violation of a contractual promise to treat the U.S. creditor on a par with all other unsecured, unsubordinated creditors. If that activity continued, nothing would be left in the till for the U.S. creditor.

Since 1975, English courts had been providing a remedy in similar circumstances. To assure that there would be assets against which a final judgment for the creditor could be executed, they would order a temporary injunction restraining the foreign debtor from transferring assets pending adjudication of the creditor’s claim. The U.S. District Court, ruling over two decades later, looked to the English practice, which other common law nations had by then adopted, and found it altogether fitting for the U.S. creditor’s case against the Mexican debtor. At the hearing on

¹⁹ [*Id.* at 274.]

²⁰ *Id.*

²¹ 356 U.S. 86 (1958) (plurality opinion).

²² *Id.* at 101.

the preliminary injunction, the District Judge asked: “We have got a case where . . . no [plausible] defense [is] presented, why shouldn’t I be able to provide [the creditor] with [injunctive] relief?”²³ Why should the debtor be allowed “to use the process of the court to delay entry of a judgment as to which there is no defense? Why is that equitable?”²⁴

Overturing a Second Circuit decision that affirmed the preliminary asset-freeze order, a 5–4 majority of the Supreme Court, in 1999, answered the District Judge’s questions this way: Injunctions of the kind at issue (called *Mareva* injunctions, the short name of the 1975 English case that first approved the practice) were not “traditionally accorded by courts of equity” at the time the Constitution was adopted. “Any substantial expansion of [1789] practice,”²⁵ the Court said, was the prerogative of Congress. A power that English courts of equity “did not actually exercise . . . until 1975,” the Court concluded, was not one U.S. courts could assume.²⁶

Joined by Justices Stevens, Souter, and Breyer, I dissented from the Court’s static conception of equitable remedial authority. Earlier decisions described that authority as supple, adaptable to changing conditions. I noted, among other things, that federal courts, in their sometimes heroic efforts to implement the public school desegregation mandated by *Brown v. Board of Education*, did not embrace a frozen-in-time view of their equitable authority. Issuing decrees “beyond the contemplation of the 18th-century Chancellor,” they applied the enduring principles of equity to the changing needs of a society still in the process of achieving “a more perfect Union.”²⁷

Turning from frozen-in-time interpretation to another shortfall, the Bill of Rights, few would disagree, is our nation’s hallmark and pride. One might assume, therefore, that it guides and controls U.S. officialdom wherever in the world they carry our flag or their credentials. But that is not our current jurisprudence. For example, absent an express ban by treaty, a U.S. officer may abduct a foreigner and forcibly transport him to the United States to stand trial here. The Court so held, 6–3, in 1992.²⁸ Just a year earlier, South Africa’s highest court had ruled the other way, determining that “abduction [violates] the applicable rules of international law.”²⁹

*In the value
I place on
comparative
dialogue—on
sharing with
and learning
from others—I
count myself an
originalist in this
sense. The 1776
Declaration of
Independence,
you will recall,
expressed concern
about the
opinions of other
peoples....*

²³ App. to Pet. for Cert. at 34a, quoted in [*Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 341–42 (1999) (Ginsburg, J., concurring in part and dissenting in part)].

²⁴ App. to Pet. for Cert. at 36a, quoted in *Grupo Mexicano*, 527 U.S. at 342 (Ginsburg, J., concurring in part and dissenting in part).

²⁵ [*Grupo Mexicano*, 527 U.S. at 329.]

²⁶ *Id.*

²⁷ U.S. Const. pmbl.

²⁸ *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992).

²⁹ *State v. Ebrahim*, 1991 (2) SALR 553, 568 (A), quoted in *Alvarez-Machain*, 504 U.S. at 687 n.36 (Stevens, J., dissenting).

Recognizing that forecasts are risky, I nonetheless believe we will continue to accord “a decent Respect to the Opinions of Humankind” as a matter of comity and in a spirit of humility.

Another example, this one involving civil litigation: Interpreting Supreme Court precedent, the D.C. Circuit held in 1989, during my time on that court and over my dissent, that foreign plaintiffs, acting abroad—plaintiffs were Indian family planning organizations—had no First Amendment rights and therefore no standing to assert a violation of such rights by U.S. officials.³⁰ In dissent, I resisted the notion that in an encounter between the United States and non-resident aliens, “the amendment we prize as ‘first’ has no force in court.”³¹ I expressed the expectation that the position taken in the Restatement (Third) of Foreign Relations would one day accurately describe our law. “Wherever the United States acts,” the Restatement projects, “it can only act in accordance with the limitations imposed by the Constitution.”³²

...

In celebration of the Supreme Court of Canada’s 125th anniversary three years ago, I remarked on the impressive human rights decisions that court has made since the 1982 adoption of Canada’s Charter of Rights and Freedoms. Interpreting the Charter, Canada’s Supreme Court, as of 1996, had referred in some 50 cases to international human rights instruments. In contrast, since the United Nations’ 1948 adoption of the Universal Declaration of Human Rights, the U.S. Supreme Court has mentioned that basic international Declaration a spare six times—and only twice in a majority decision.

But our “island” or “lone ranger” mentality is beginning to change. Our Justices, as I noted at the start of these remarks, are becoming more open to comparative and international law perspectives. The term just ended may prove a milestone in that regard. New York Times reporter Linda Greenhouse observed in her annual roundup of the Court’s decisions: The Court has “displayed a [steadily growing] attentiveness to legal developments in the rest of the world and to the Court’s role in keeping the United States in step with them.”³³

In the Michigan affirmative action cases,³⁴ in separate opinions, joined in one case by Justice Breyer, in the other in full by Justice Souter and in part by Justice Breyer, I looked to two United Nations Conventions: the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified; and the 1979

³⁰ *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 284–85 (D.C. Cir. 1989).

³¹ *Id.* at 308 (R.B. Ginsburg, J., concurring in part and dissenting in part).

³² *Id.* (quoting Restatement (Third) of Foreign Relations Law of the United States 721 n.1 (1987) (quoting from *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion of Black, J.))).

³³ Linda Greenhouse, *The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. Times, July 1, 2003, at A1.

³⁴ *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

Convention on the Elimination of All Forms of Discrimination Against Women, which, sadly, the United States has not yet ratified. Both Conventions distinguish between impermissible policies of oppression or exclusion, and permissible policies of inclusion, “temporary special measures aimed at accelerating de facto equality.”³⁵ The Court’s decision in the Law School case, I observed, “accords with the international understanding of the office of affirmative action.”³⁶

A better indicator, because it attracted a majority, is Justice Kennedy’s opinion for the Court in *Lawrence v. Texas*,³⁷ announced June 26, 2003. Overruling the Court’s 1986 decision in *Bowers v. Hardwick*, *Lawrence* declared unconstitutional a Texas statute prohibiting two adult persons of the same sex from engaging, voluntarily, in certain intimate sexual conduct. On the question of dynamic versus static, frozen-in-time constitutional interpretation, the Court’s opinion instructs:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.³⁸

And on respect for “the Opinions of Humankind,” the Court emphasized: “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”³⁹ In support, the Court cited the leading 1981 European Court of Human Rights decision, *Dudgeon v. United Kingdom*, and follow-on European Human Rights Court decisions affirming the protected right of homosexual adults to engage in intimate, consensual conduct.

Recognizing that forecasts are risky, I nonetheless believe we will continue to accord “a decent Respect to the Opinions of Humankind” as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over. And

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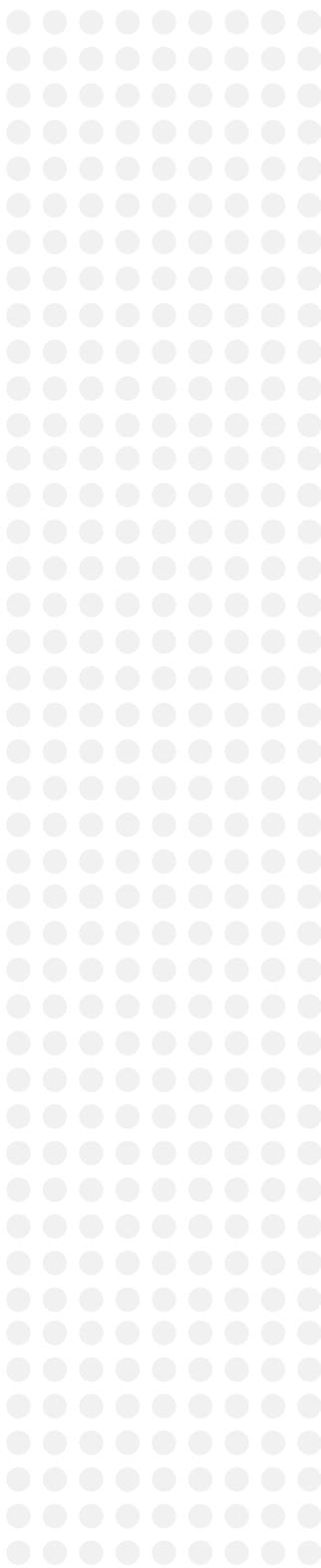
³⁵ [Annex to G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at art. 4(1), U.N. Doc. A/34/46 (1979).]

³⁶ *Grutter*, 123 S. Ct. at 2347 (Ginsburg, J., concurring).

³⁷ 123 S. Ct. 2472 (2003).

³⁸ *Lawrence*, 123 S. Ct. at 2484.

³⁹ *Id.* at 2483.

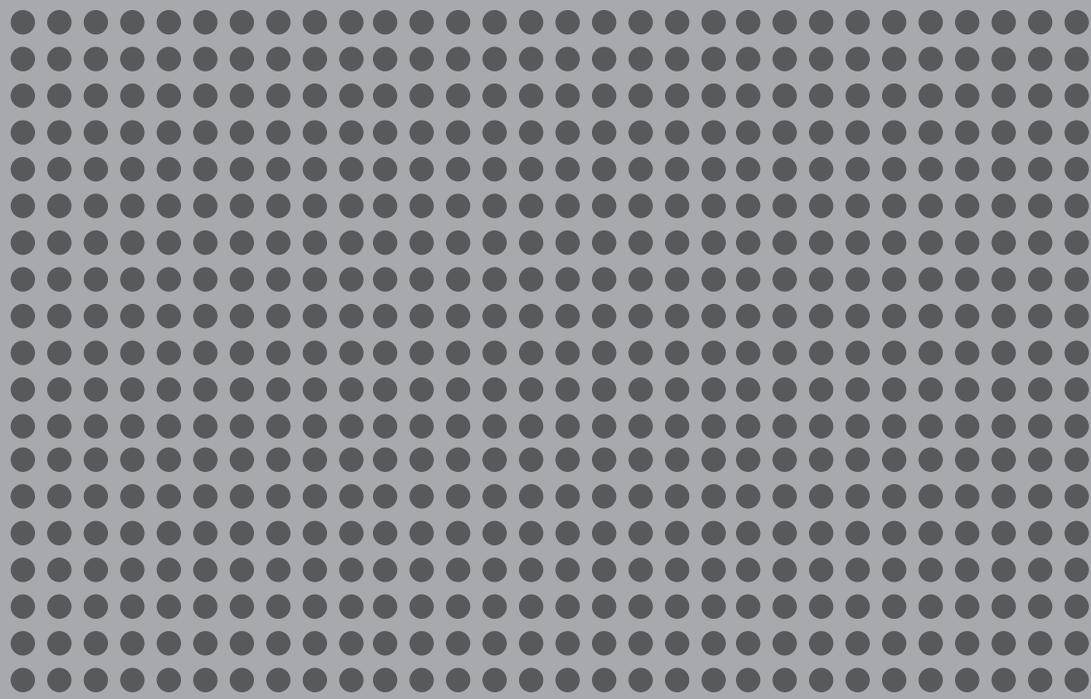


humility because, in Justice O'Connor's words: "Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit."⁴⁰

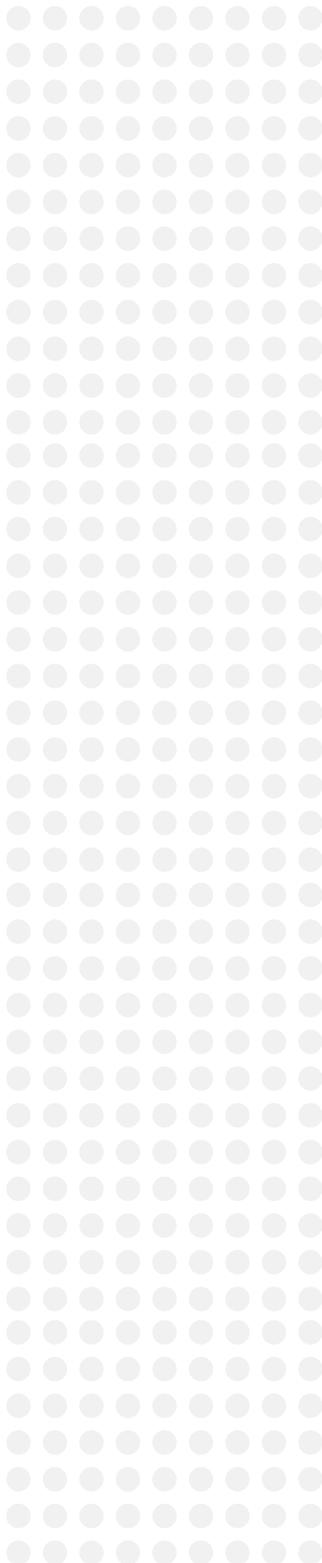
In conclusion, my cheers as you undertake the challenging mission to support and nurture the Constitution, as it has evolved over the span of two centuries and more. The time is right for that mission. As Abigail Adams wrote to her son of the era in which he was coming of age, "These are the times in which a genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties."⁴¹

⁴⁰ Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, Int'l Jud. Observer, June 1997, at 2.

⁴¹ Letter from Abigail Adams to John Quincy Adams, *quoted in* David McCullough, *John Adams* 226 (2001).



Conclusion



from

The Roberts Court, *Stare Decisis*, and the Future of Constitutional Law

Geoffrey R. Stone¹

...
I would like to turn now to a look forward—to the future of constitutional law. I fear that the 2006 Term marks the opening salvo of a paradigm shift in the Supreme Court’s constitutional jurisprudence, so let me begin with some observations about the current Supreme Court.

In the media, we constantly read about how “closely divided” the Court is and about how many cases are decided by a vote of five-to-four. There are, according to the media, the “conservative” Justices—Scalia, Thomas, Roberts, and Alito; the “liberal” Justices—Stevens, Souter, Ginsburg, and Breyer; and Justice Kennedy—the “man in the middle.” The impression created by such accounts is that this is an “evenly balanced” Court. This is a fallacy, and a dangerous one at that. What do we mean by “balance”? Why don’t the many five-to-four decisions prove that this is a “well-balanced” Court?

The Supreme Court has discretionary jurisdiction. It generally agrees to decide only the “hardest” cases. What are the “hardest” cases? Most often, they are the ones about which the Justices are divided. That, indeed, is largely what makes them “hard.” Thus, one can reasonably expect that the Supreme Court is most likely to hear those cases that will most sharply divide the Justices, because those are the cases about which the law is most uncertain. Even a Court consisting of nine Scalias or nine Ginsburgs would eventually wind up dividing five-to-four in the cases it agrees to decide, because it is the division within the Court itself that defines the cases that most demand the Court’s attention.

The important question, then, is not whether the Court often divides five-to-four, but where on the constitutional spectrum the decisive Justice sits. Depending on the makeup of the Court, that Justice might split the difference between Scalia and Thomas, on the one end, or she might split the difference between Brennan and Douglas, on the other.

Within any set of nine Justices, some will be relatively more “conservative” and some will be relatively more “liberal.” That they often divide five-to-four tells us nothing about “balance” and nothing about whether

¹ Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 Tul. L. Rev. 1533 (2008).

the Court as a whole is “liberal,” “conservative,” moderate, or whatever. It tells us only that the Justices often divide five-to-four, which tells us nothing about the Court as a whole.

The current Supreme Court is not “balanced” in any meaningful sense of that term. It is, in fact, an extremely conservative Court—more conservative than any group of nine Justices who have sat together in living memory. Here are some ways of testing this proposition:

- ▶ Seven of the current nine Justices were appointed by Republican presidents.
- ▶ Twelve of the fourteen most recent Supreme Court appointments have been made by Republican presidents.
- ▶ Four of the current Justices are more conservative than any other Justice who has served on the Court in living memory.
- ▶ The so-called “swing vote” on the Court has moved to the right every single time it has shifted over the past forty years, from Stewart to Powell to O’Connor to Kennedy.
- ▶ As Justice Stevens recently observed, every Justice who has been appointed in the past forty years was more conservative than the Justice he or she replaced.
- ▶ If we regard Warren, Douglas, Brennan, and Marshall as the model of a “liberal” Justice, then there is no one within even hailing distance of a “liberal” Justice on the current Supreme Court.

In fact, the current Court consists of five conservative Justices, four of whom are very conservative, and four moderate Justices, one of whom, Ginsburg, is moderately liberal. As Justice Stevens recently observed, it is only the presence of so many very conservative Justices that makes the moderate Justices appear liberal. But this is merely an illusion.

Now, I know I have been tossing around the terms “conservative” and “liberal” as if they have clear, well-defined meanings, when of course they do not. So, let me clarify what I mean by these terms. First, there is the distinction between judicial “activism” and judicial “restraint.” According to traditional conservatives, judicial activists legislate, which is bad, but judicial passivists interpret, which is good. Traditional liberals, of course, say that judicial activists interpret, which is good, but that judicial passivists abdicate, which is bad. What we learn here is that everyone agrees that interpreting is good. We just don’t know it when we see it. One might say that some interpreters use a text, whereas others use a pretext.

There is also the distinction between judicial “conservatives” and judicial “liberals.” A conservative, it has been said, is someone who believes that nothing should be done for the first time. According to liberals, the central tenet of judicial conservatism must be the conservation of all liberal precedents. Liberals complains that conservatives who overturn such

precedents are radicals who are outside the “mainstream.” Liberals, as we know, always advocate “balance” on the Supreme Court—when they are in the minority. Conservatives, of course, like corporations, but they don’t like criminals—unless they are corporations. According to liberals, a corporation is an artificial person created by law to prey upon real things. A criminal is a real person with predatory instincts, but who lacks sufficient capital to form a corporation.

Finally, there is the principle of “original intent,” which we have all found so entertaining since the 1980s. As more than twenty years of experience has amply demonstrated, the core methodology of those judges who purport to seek the original intent of the framers is to ask what they would have intended had they been framers and—presto!—there it is.

Let me turn now to a more serious analysis of these terms. When people think of a “liberal” Justice, they are usually thinking of Justices like Earl Warren, William Brennan, and Thurgood Marshall. What made these Justices “liberal”? To begin with, they shared a common vision of the purpose of judicial review. They believed that a primary responsibility of the judiciary is to protect individual liberties, and most especially the rights of minorities and others whose rights might not be fairly protected in the majoritarian political process. They believed that this responsibility was both contemplated and intended by the Framers of our Constitution as a fundamental check on the power of the elected branches of government, and they believed that courts can fulfill this responsibility only by actively interpreting the Constitution to ensure that democracy operates both properly and fairly.

It was therefore a “liberal” approach to constitutional interpretation that produced such decisions as *Brown v. Board of Education*,² forbidding racial segregation, *Engel v. Vitale*,³ prohibiting school prayer, *Reynolds v. Sims*,⁴ protecting the principle of “one person, one vote,” *Gideon v. Wainwright*,⁵ guaranteeing the right to counsel to those accused of crime, *Plyler v. Doe*,⁶ prohibiting the government from denying an education to the children of illegal immigrants, *Goldberg v. Kelly*,⁷ requiring a hearing before the termination of welfare benefits, and the Pentagon Papers case,⁸ forbidding the government to enjoin the publication of classified information about the Vietnam War. Each of these decisions, and many others be-

² 347 U.S. 483 (1954).

³ 370 U.S. 421 (1962).

⁴ 377 U.S. 533 (1964).

⁵ 372 U.S. 335 (1963).

⁶ 457 U.S. 202 (1982).

⁷ 397 U.S. 254 (1970).

⁸ *New York Times v. United States*, 403 U.S. 713 (1971).

sides, illustrates what most people mean by a “liberal” approach to judicial review.

Defining a “conservative” Justice is more difficult. I would identify at least three different types of judicial conservatives. First, there is what we might call the “judicial passivist.” This type of “conservative,” typified by Felix Frankfurter and John Marshall Harlan, acts on the view that judicial review is an extraordinary exercise of undemocratic governmental authority, and that it should therefore be employed only when a law is clearly unconstitutional. At their best, such judicial passivists are principled, even-handed, and neutral in their reluctance to invoke the power of judicial review.

The basic assumption of this type of “conservative” jurist is that democratically-enacted laws are presumptively constitutional and should be invalidated only when there is no doubt of their invalidity. To do otherwise, they believe, would be an illegitimate judicial usurpation of the legitimate authority of the majority to make whatever laws they see fit, subject only to clear and unequivocal constitutional limitations. One former colleague of mine, whom I might fondly describe as a “judicial passivist gone wild,” proudly proclaims that, in his view, the Supreme Court has never considered a law that it should have held unconstitutional.

When critics attacked the “liberal” Justices of the Warren Court as “activist” in the 1950s and 1960s, what they usually said they wanted were “passivist” Justices who would exercise “judicial restraint” and give the democratic branches of government the deference they deserve. I should note, by the way, that judicial passivists do not necessarily reach politically “conservative” results. On some issues, such as the constitutionality of affirmative action, campaign finance regulation, regulations of the market, and regulations of commercial advertising, principled passivists will reach results that are politically liberal. Thus, this approach is institutionally, but not necessarily politically, conservative.

A second form of “conservative” Justice is the so-called “originalist.” Originalism is, in a sense, a variant of “passivism,” but it is not institutional passivism. That is, it is not based on the assumption that courts should err in favor of upholding laws. Rather, it is based on the assumption that courts should invalidate laws only when they are confident that the Framers affirmatively intended the particular practice at issue to be unconstitutional. Thus, in theory, originalists can be either activist or passivist, depending on their reading of the Framers’ intent in any specific situation.

...

In theory, originalism can be “liberal” as well as “conservative” in its results, depending upon what the Justice thinks the Framers intended. Justice Scalia, for example, has taken what might be seen as conventionally “liberal” positions in cases involving such issues as flag burning, the

Confrontation Clause, and habeas corpus, because of his understanding of the Framers' intent. Most often, however, originalism, at least as it is applied by its typically conservative adherents, leads to results that are conventionally conservative.

The third form of "conservative" Justice is the "conservative activist." A conservative activist aggressively interprets the Constitution and invokes the power of judicial review to implement conservative political values. Justices McReynolds, Sutherland, and Peckham are good examples, as illustrated by their decisions during the *Lochner* era, when they broadly construed the so-called "freedom of contract" to invalidate all sorts of progressive legislation. . . .

Recent cases that illustrate "conservative activism" include decisions that aggressively interpret the First Amendment to invalidate restrictions on commercial advertising and campaign finance regulations, aggressively interpret the Equal Protection Clause to invalidate affirmative action, aggressively interpret the Takings Clause to invalidate laws regulating property, and aggressively interpret the principle of federalism to invalidate federal laws dealing with such issues as domestic violence, handguns, the environment, and age discrimination.

. . .

Having now identified at least four approaches to constitutional interpretation—judicial passivism, originalism, conservative activism, and liberalism, I would like to say a few words about the relative wisdom of each. Judicial passivism, the approach that says courts should uphold all laws unless they are unconstitutional beyond a reasonable doubt, has the virtue of insulating courts from difficult constitutional issues and giving great deference to the decisions of the democratically-elected branches of government. Unfortunately, these are also its vices. Most fundamentally, this approach misapprehends the essential nature of our constitutional system and abdicates a central responsibility of the judiciary.

To understand why this is so, it is helpful to return to the original debate over the adoption of a Bill of Rights. Those who opposed a Bill of Rights argued, among other things, that a list of enumerated rights in the Constitution would serve little, if any, purpose, for in a self-governing society the majority could simply run roughshod over whatever rights are guaranteed in the Constitution. How would listing our rights restrain the people from violating them? Moreover, as skeptics about human nature, the Framers had little doubt that for reasons of self-interest, prejudice, panic, passion, and intolerance, the majority of the people would pay little attention to the rights of minorities.

James Madison, the most influential of the Framers, understood that the protection of rights in a self-governing society posed a novel question.

Where traditional theory had focused on rights as necessary to protect the people against the King, Madison recognized that in a republic rights are necessary to protect one segment of the community—particularly minorities—against the self-interested demands and interests of the majority.

As Madison wrote at the time, the real source of the problem “lies among the people themselves,” because they see democracy as a means to enforce their own private interests over and against both the public good and the rights of their fellow citizens. This led Madison to pose the following question: “In a republican Government the majority . . . ultimately give the law. Wherever therefore an apparent interest or common passion unites a majority, what is to restrain them from unjust violations of the rights and interests of the minority. . . .?” “What use,” he asked Thomas Jefferson, “can a bill of rights serve in popular Governments?”⁹ Jefferson wrote back to Madison, “Your thoughts on the subject” of a Bill of Rights fail to address one consideration “which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent . . . merits great confidence for their learning & integrity.”¹⁰

On June 8, 1789, Madison proposed a Bill of Rights to the House of Representatives. He acknowledged that some might think that such “paper barriers against the power of the community, are too weak to be worthy of attention,” but then, echoing Jefferson’s argument to him, Madison insisted that if these rights are

incorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.¹¹

The Framers’ “solution” to the seemingly insoluble dilemma of how to enforce individual liberties in a self-governing society against the

⁹ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *The Papers of James Madison* 295, 298 (Robert A. Rutland & Charles F. Hobson eds., 1977), reprinted in Jack N. Rakove, *Declaring Rights: A Brief History with Documents* 160, 162 (1998).

¹⁰ Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 12 *The Papers of James Madison* 13 (Charles F. Hobson & Robert A. Rutland eds., 1979), reprinted in Rakove, *supra* note 8, at 165, 165.

¹¹ James Madison, Speech to the House of Representatives (June 8, 1789), in 1 *The Congressional Register or History of the Proceedings and Debates of the First House of Representatives of the United States of America* 423, 431-34 (Harrison & Purdy 1789), reprinted in Rakove, *supra* note 8, at 170, 177, 179.

“overbearing majorities” that control the legislative and executive branches of government was the third branch of government—the courts, which could serve as “an impenetrable bulwark” against majoritarian encroachments on the liberties of political, social, religious, and other minorities.

James Iredell, a future Justice of the Supreme Court, penned an eloquent statement to this effect in a newspaper essay in North Carolina, in which he explained that judges must refuse to enforce any law that is not “warranted by the constitution,” explaining that “this is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, they being judges for the benefit of the whole people, not mere servants of the Assembly.”¹²

Similarly, Alexander Hamilton argued in Federalist 78 that constitutional limits could “be preserved in practice no other way than through the medium of the courts of justice.” The courts, he maintained, are “designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.” The “independence of the judges,” Hamilton added, is intended to enable them “to guard the constitution and the rights of individuals from the effects of those ill humours which . . . sometimes disseminate among the people themselves.” Judges, he insisted, have the right and the responsibility to resist invasions of constitutional rights even if they are “instigated by the major voice of the community.”¹³

The problem with “judicial passivism,” in other words, is that it abdicates judicial responsibility and subverts a fundamental part of the genius of the American constitutional system. By evading their duty to enforce the Constitution in a meaningful manner, judicial passivists betray a central feature of our constitutional system.

The second conservative approach, “originalism,” purports to respect the intent of the Framers. But it has gained no credibility over the past quarter-century, despite the earnest efforts of its proponents, in part because it does precisely the opposite. The central intellectual premise of conservative originalism is that courts should hold nothing unconstitutional that the Framers themselves did not intend to hold unconstitutional. But this conception of constitutional law misreads the intent of the Framers. It assumes that the Framers intended to limit the effect of the Constitution to only those outcomes that they themselves consciously expected and intended.

But in drafting the Constitution, the Framers were not enacting a series of specific and predetermined rules. “Congress shall make no law”

¹² James Iredell, Address to the Public, in 2 Griffith J. McRee, Life and Correspondence of James Iredell 145, 148 (D. Appleton & Co. 1858).

¹³ The Federalist No. 78, at 524–28 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).

prohibiting the “free exercise” of religion or abridging “the freedom of speech,” no person shall “be deprived of life, liberty, or property, without due process of law,” and the prohibition of “cruel and unusual punishments,” were not designed as crabbed, narrow-minded ordinances like speed limits. Rather, they were intended to serve as open-ended aspirations that would gain meaning and vitality over time.

As men of the Enlightenment, the Framers conceived of rights as inherent in nature and “founded on the immutable maxims of reason and justice.” They understood them much as they understood the laws of science. That is, just as they knew that they did not know all there was to know about biology and physics, so too did they know that they did not know all there was to know about their rights. Just as reason, observation and experience would enable man to gain more insight into philosophy, science, and human nature, so too would they enable him to learn more over time about man’s inalienable rights, which would have to be distilled from “reason and justice.”¹⁴

With this mindset, the notion that any particular moment’s conception of rights should be taken as exhaustive would have seemed patently wrong-headed to the Framers, just as it would have seemed wrong-headed to them for anyone to assume that their knowledge of the human body or of the universe should be taken as final and conclusive. Such a conception was antithetical to the very core of Enlightenment thought and to everything the Framers stood for.

They were not timid men. They were bold. They knew full well that the rights they had identified did not “exhaust the great treasury of human rights.” They knew full well that their understanding of these freedoms “marked out the minimum not the maximum boundaries” of man’s inalienable rights. The “preservation of liberty,” they knew, “would continue to be what it had been in the past, a bitter struggle with adversity,” which would demand constant vigilance both to protect the rights they had recognized and to be alert to the recognition of new rights yet to be discovered.¹⁵

The crabbed, frightened originalism of [contemporary “originalists”] would have seemed absurd to the Framers. As a constitutional methodology, it not only invites manipulative and result-oriented history, but it also and more fundamentally denies the true original understanding of the Framers of our Constitution.

[The Framers] were not timid men. They were bold. They knew full well that the rights they had identified did not “exhaust the great treasury of human rights.” They knew full well that their understanding of these freedoms “marked out the minimum not the maximum boundaries” of man’s inalienable rights.

¹⁴ John Dickinson, An Address to the Committee of Correspondence in Barbados (1766), in *The Political Writings of John Dickinson* 262 (Paul Leicester Ford ed., Da Capo Press 1970) (1895), quoted in Bernard Bailyn, *The Ideological Origins of the American Revolution* 77 (2d ed. 1992).

¹⁵ Bailyn, *supra* note 13, at 78.

Constitutional law is about precedent, and text, and history, and law. But it is also about values and vision.

The third approach—“conservative activism”—sounds like an oxymoron, and it should. But it is in fact the dominant form of jurisprudence on the Supreme Court today. . . . [I]t is conservative activism that explains the Court’s decisions invalidating regulations of commercial advertising, invalidating campaign finance regulations, invalidating affirmative action programs, invalidating the use of race to increase integration, invalidating zoning laws, invalidating laws prohibiting the Boy Scouts from discriminating against gays and lesbians, and invalidating federal laws dealing with the environment, handguns, domestic violence, and age discrimination.

Conservative activism offers the worst of both worlds. It undermines the decisions of democratic majorities, not to protect the rights of minorities, or the powerless, or the oppressed, or the disenfranchised, or the dispossessed, or the poor, or the downtrodden, or the accused, but to protect the interests of whites, corporations, the wealthy, the privileged, and the powerful. Like the *Lochner* era of which it is the constitutional and moral descendent, modern-day conservative judicial activism is a perversion of the values that the Constitution is designed to protect and, more specifically, of the values the Constitution relies on the *Court* to protect.

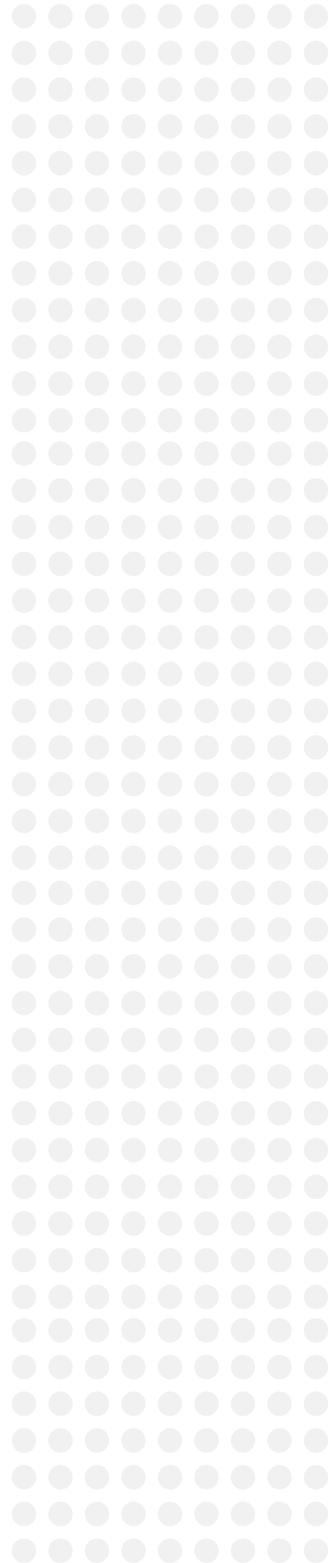
Finally, there is the approach that has variously been called “liberalism,” or “judicial activism,” or “not strict constructionism.” In my view, a better and more descriptive term would be “constitutionalism.” The central mission of this approach to constitutional interpretation is to embrace the responsibility the Framers imposed upon the judiciary to serve as a check against the inherent dangers of democratic majoritarianism and to maintain the vitality of fundamental individual liberties in a constantly changing world.

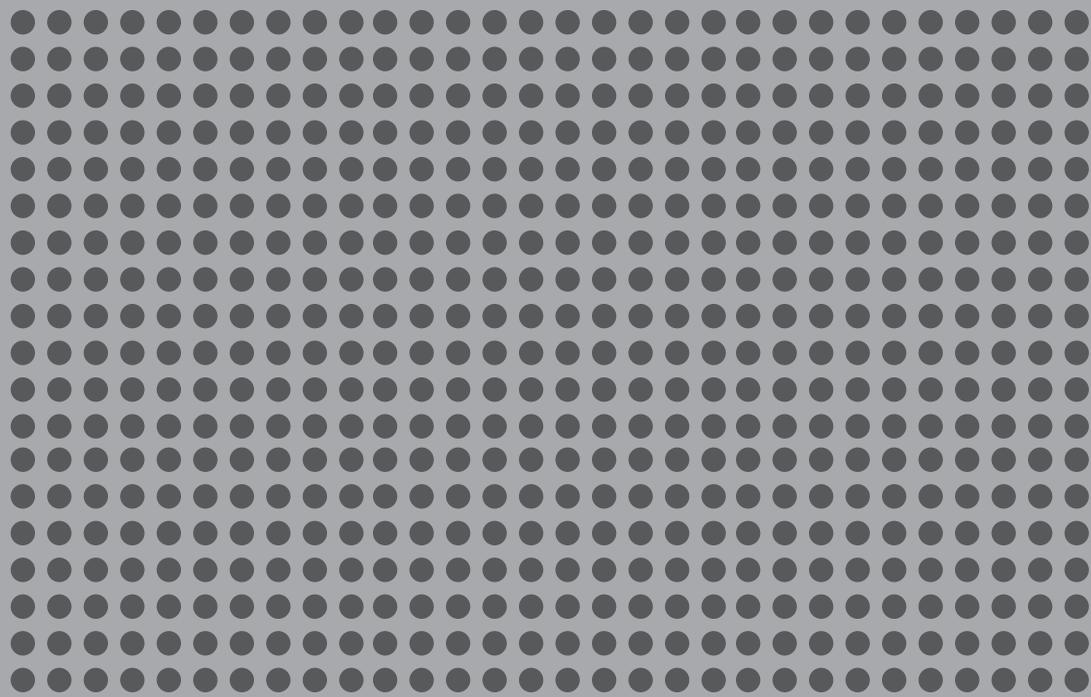
This is not an easy task. But nor is self-governance easy. Constitutionalism is not mechanical, it is not mindless, and it is not value-free. It requires judges to exercise judgment. It calls upon them to consider text, history, precedent, values, and ever-changing social and cultural conditions. It requires restraint, humility, curiosity, wisdom, and intelligence. Perhaps above all, it requires intellectual honesty, courage, a recognition of the judiciary’s unique strengths and weaknesses, and a deep understanding of our nation’s most fundamental constitutional aspirations.

Let me use the Warren Court as an example. Is the United States a better or worse nation today because of the decisions in *Brown v. Board of Education*, *Engel v. Vitale*, *Goldberg v. Kelly*, *Reynolds v. Sims*, *Mapp v. Ohio*, *Miranda v. Arizona*, *Gideon v. Wainwright*, and *New York Times v. Sullivan*? That is a fair question. The proof, after all, is in the results. In my judgment, however controversial some or all of these decisions might have been, every one of them properly understood and implemented the values with which the Framers sought to imbue our Constitution. And however

controversial those decisions might have been at the time, every one of them is today regarded as a beacon of what the United States stands for in the world. . . .

Constitutional law is about precedent, and text, and history, and law. But it is also about values and vision. I ask you, what is your vision for the constitutional future of our nation?





Appendix

The Constitution of the United States

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. 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 by 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.

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.

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 increased 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 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 an 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 Offenses 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.

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 its 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 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.

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.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased 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.

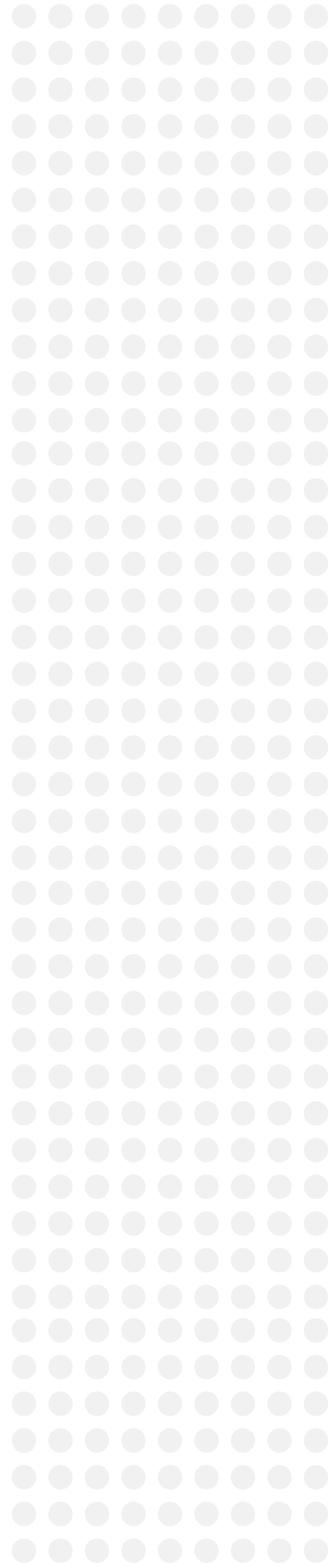
Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United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

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.

Section 3. New States may be admitted by the Congress into this Union; but no new States 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 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

[Signed also by the deputies of twelve States.]

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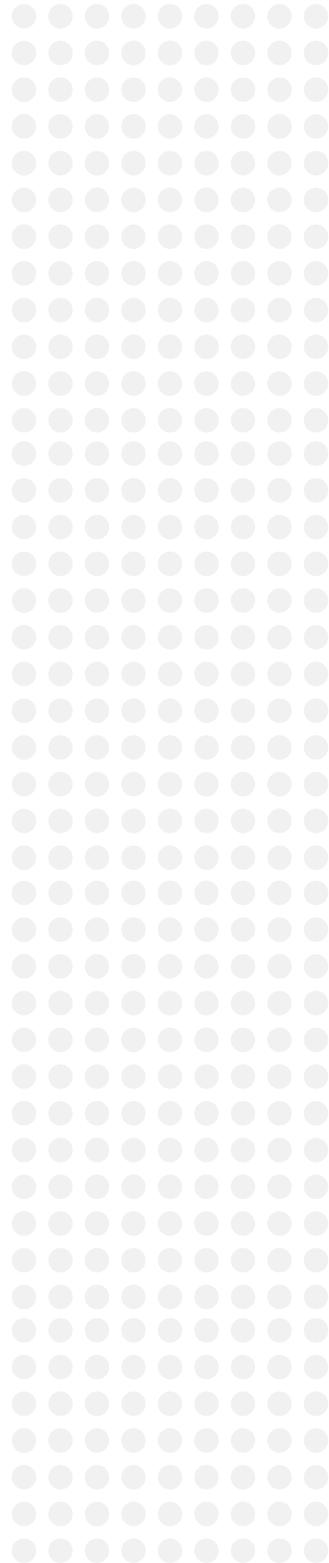
John Dickinson

Richard Bassett

Jaco: Broom

Maryland	James MCHenry Dan of ST ThoS. Jenifer DanL. Carroll
Virginia	John Blair James Madison Jr.
North Carolina	WM Blount RichD. Dobbs Spaight Hu Williamson
South Carolina	J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler
Georgia	William Few Abr Baldwin
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 David Brearley WM. Paterson Jona: Dayton
Pennsylvania	B Franklin Thomas Mifflin RobT Morris Geo Clymer ThoS. FitzSimons Jared Ingersoll James Wilson Gouv Morris

Attest William Jackson Secretary



AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment I

(Ratified December 15, 1791)

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.

Amendment II

(Ratified December 15, 1791)

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.

Amendment III

(Ratified December 15, 1791)

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.

Amendment IV

(Ratified December 15, 1791)

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.

Amendment V

(Ratified December 15, 1791)

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

Amendment VI

(Ratified December 15, 1791)

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.

Amendment VII

(Ratified December 15, 1791)

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 re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

(Ratified December 15, 1791)

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

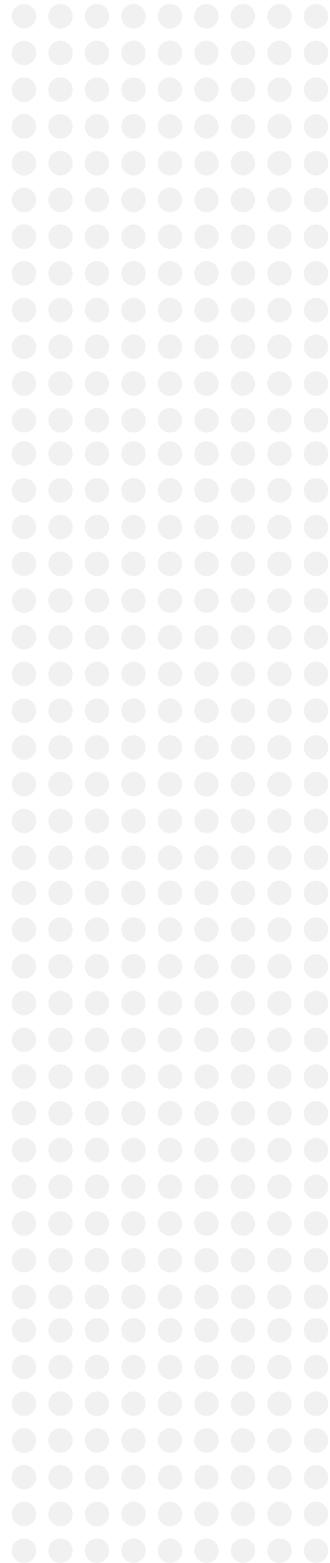
Amendment IX

(Ratified December 15, 1791)

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

Amendment X

(Ratified December 15, 1791)



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.

Amendment XI

(Ratified February 7, 1795)

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.

Amendment XII

(Ratified June 15, 1804)

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.

Amendment XIII

(Ratified December 6, 1865)

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.

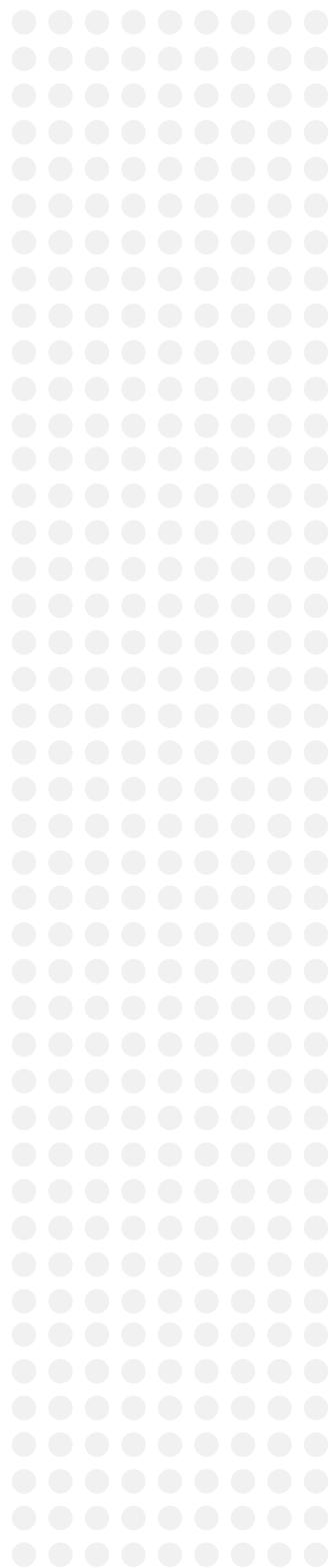
Amendment XIV

(Ratified July 9, 1869)

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.

Amendment XV

(Ratified February 3, 1870)

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.

Amendment XVI

(Ratified February 3, 1913)

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.

Amendment XVII

(Ratified April 8, 1913)

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.

Amendment XVIII

(Ratified January 16, 1919)

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

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

Section 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.

Amendment XIX

(Ratified August 18, 1920)

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.

Amendment XX

(Ratified January 23, 1933)

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.

Section 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.

Section 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.

Section 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.

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

Section 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.

Amendment XXI

(Ratified December 5, 1933)

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

Section 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.

Section 3. The 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.

Amendment XXII

(Ratified February 27, 1951)

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.

Section 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.

Amendment XXIII

(Ratified March 29, 1961)

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.

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

Amendment XXIV

(Ratified January 23, 1964)

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.

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

Amendment XXV

(Ratified February 10, 1967)

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

Section 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.

Section 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.

Section 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.

Amendment XXVI

(Ratified July 1, 1971)

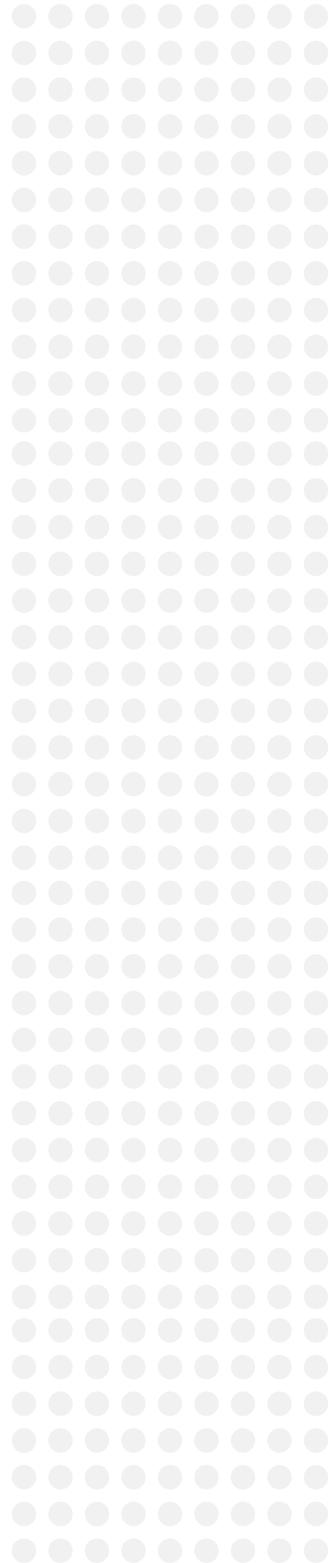
Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

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

Amendment XXVII

(Originally Proposed September 25, 1789. Ratified May 7, 1992)

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.



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Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993). © 1993, the Texas Law Review Association. Permission granted for English version only.

Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747 (1999). © 1999, The Harvard Law Review Association.

Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (The Free Press 1990). © 1990, Robert H. Bork.

Richard A. Posner, *Bork and Beethoven*, 42 *Stan. L. Rev.* 1365 (1990). © 1990, the Board of Trustees of the Leland Stanford Junior University.

Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Comment.* 291 (2007). © 2007, Constitutional Commentary.

Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 *Const. Comment.* 383 (2007). © 2007, Constitutional Commentary.

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *Minn. L. Rev.* 349 (1973). © 1973, the Minnesota Law Review Foundation and Anthony G. Amsterdam.

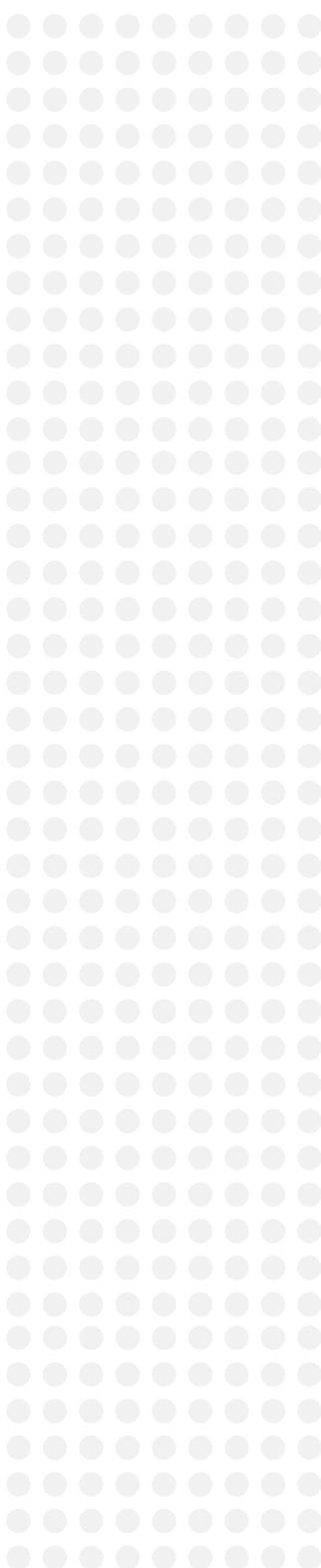
Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127 (1987). © 1987, The University of Chicago.

Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 *Harv. L. Rev.* 1 (1987). © 1987, The Harvard Law Review Association.

William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 *S. Tex. L. Rev.* 433 (1985). © 1985, South Texas Law Review.

David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877 (1996). © 1996, The University of Chicago.

Stephen Breyer, *Judicial Review: A Practicing Judge's Perspective*, 78 *Tex. L. Rev.* 761 (2000). © 2000, Texas Law Review Association. Permission granted for English version only.



Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 Yale L. & Pol’y Rev. 329 (2004). © 2004, Yale Law and Policy Review.

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from the Foreword by Laurence H. Tribe

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