From :The Federalist Society

THE GREAT DEBATE:
Interpreting Our Written Constitution

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Foreword

Today many of the most important issues facing the nation are determined by decisions of the United States Supreme Court interpreting the Federal Constitution. Surprisingly, however, the method the Court should adopt when confronted with a question of constitutional interpretation has become a point of controversy even as our constitutional bicentennial approaches. Some legal scholars contend that the document must be interpreted in light of the original meaning and common understanding of those who ratified it. Others suggest that the original meaning of the document as drafted by the founders is unknowable or irrelevant and that constitutional decision-making should be based on a judge's understanding of certain fundamental principles of moral philosophy.

In July 1985, Attorney General Meese sparked a dramatic public debate on the question of constitutional interpretation, a debate which culminated in the appointment by President Ronald Reagan of William H. Rehnquist to Chief Justice and Antonin Scalia to Associate Justice. In reviewing recent Supreme Court decisions in the areas of Federalism, Criminal Procedure, and Religious Freedom before the American Bar Association, the Attorney General urged that the Court be guided by a "Jurisprudence of Original Intention."

Supreme Court Justice Brennan entered the fray by declaring that any such endeavor was little more than "arrogance cloaked as humility." After pointing to difficulties in ascertaining the original intention of those who drafted the Constitution, Justice Brennan called instead for a jurisprudence based on the notion of "human dignity." In applying such jurisprudence, he argued, the courts are not to be fettered by the views of an earlier age, but should seek to apply the ever-evolving values of equality and individual rights.

Shortly thereafter, Supreme Court Justice John Paul Stevens spoke on the Incorporation Doctrine, which applies many of the Bill of Rights' restrictions to the States through the Fourteenth Amendment. The Attorney General has stated that there is serious scholarly debate on the justifications for the Incorporation Doctrine, but never urged the Supreme Court to abandon its jurisprudence in the area.

Attorney General Meese amplified his views in an address to the Federalist Society's Lawyers Division. The founding fathers, he stressed, sought to establish the rule of law, and not men, through a written constitution. They looked to the courts to construe the document in light of its intended meaning at the time of adoption, and feared that any other method of interpretation would subvert the value of having a written document. The Attorney General pointed out that the adoption of the Constitution was accompanied by a tremendous public debate which to a large extent has been recorded for posterity. He urged the Court to use such evidence and to refrain from engaging in constructions which conflict with the original meaning of the Constitution.

Shortly thereafter, Judge Robert Bork delivered a lecture outlining the fundamental nature of the debate over original intent. He contended that the legitimacy of judicial power necessarily rests upon the principle that judges should only impose constraints upon the democratic majorities based upon the limitations found in the written Constitution. Judge Bork exhorted the courts to apply neutral principles in determining the scope and level of generality of the constitutional rights. Adherence to the principles of interpretivism preserves the Madisonian balance between the need for majorities to exercise enumerated government powers and the freedoms of minorities. If this

balance is not anchored in the principles of neutral interpretation, it will become subject to the ebb and flow of popular political sentiment.

A little over a year after Attorney General Meese initiated this historic public debate on the meaning of the Constitution, President Ronald Reagan appointed Chief Justice William H. Rehnquist and Justice Antonin Scalia to the United States Supreme Court. In his remarks on this occasion before the members of the Supreme Court, the Cabinet, and the Senate Judiciary Committee, President Reagan reminded us of Thomas Jefferson's warning that the written Constitution must not be turned into a blank slate through interpretation. The President emphasized that the American Republic-created by a written constitution and made secure by the people's love of liberty-is unique among human institutions and the last, best hope for Freedom on Earth.

Because of the importance of the issues surrounding the debate on a Jurisprudence of Original Intent, the Federalist Society is publishing this collection of these six major speeches.* In so doing we hope to encourage further discussion and debate on what is perhaps the most significant constitutional issue facing this country today. We want to express our deep appreciation to Attorney General Meese, Justices Brennan and Stevens, Judge Bork, and President Reagan for graciously granting us permission to reprint their speeches.

**** We have deleted from Attorney General Meese's first speech, Justice Steven's speech, and President Reagan's speech the portions which are not relevant to this debate. Where deletions occur they are indicated by three asterisks.***

Attorney General Edwin Meese III
Before the American Bar Association
July 9, 1985, Washington, DC

Welcome to our Federal City. It is, of course, entirely fitting that we lawyers gather here in this home of our government. We Americans, after all, rightly pride ourselves on having produced the greatest political wonder of the world-a government of laws and not of men. Thomas Paine was right: "America has no monarch: Here the law is king."

Perhaps nothing underscores Paine's assessment quite as much as the eager anticipation with which Americans await the conclusion of the term of the Supreme Court. Lawyers and laymen alike regard the Court not so much with awe as with a healthy respect. The law matters here and the business of our highest court-the subject of my remarks today-is crucially important to our political order.

* * *

In reviewing a term of the Court, it is important to take a moment and reflect upon the proper role of the Supreme Court in our constitutional system. The intended role of the judiciary generally and the Supreme Court in particular was to serve as the "bulwarks of a limited constitution." The judges, the Founders believed, would not fail to regard the Constitution as "fundamental law" and would "regulate their decisions" by it. As the "faithful guardians of the Constitution," the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.

You will recall that Alexander Hamilton, defending the federal courts to be created by the new Constitution, remarked that the want of a judicial power under the Articles of Confederation had been the crowning defect of that first effort at a national constitution. Ever the consummate lawyer, Hamilton pointed out that "laws are a dead letter without courts to expound and define their true meaning."

The Anti-Federalist Brutus took him to task in the New York press for what the critics of the Constitution considered his naiveté. That prompted Hamilton to write his classic defense of judicial power in The Federalist, No. 78. An independent judiciary under the Constitution, he said, would prove to be the "citadel of public justice and the public security." Courts were "peculiarly essential in a limited constitution." Without them, there would be no security against "the encroachments and oppressions of the representative body," no protection against "unjust and partial" laws.

Hamilton, like his colleague Madison, knew that all political power is "of an encroaching nature." In order to keep the powers created by the Constitution within the boundaries marked out by the Constitution, an independent-but constitutionally bound-judiciary was essential. The purpose of the Constitution, after all, was the creation of limited but also energetic government, institutions with the power to govern, but also with structures to keep the power in check. As Madison put it, the Constitution enabled the government to control the governed, but also obliged it to control itself.

But even beyond the institutional role, the Court serves the American republic in yet another, more subtle way. The problem of any popular government, of course, is seeing to it that the people obey the

laws. There are but two ways: either by physical force or by moral force. In many ways the Court remains the primary moral force in American politics. Tocqueville put it best:

> The great object of justice is to substitute the idea of right for that of violence, to put intermediaries between the government and the use of its physical force...
>
> It is something astonishing what authority is accorded to the intervention of a court of justice by the general opinion of mankind. . .
>
> The moral force in which tribunals are clothed makes the use of physical force infinitely rarer, for in most cases it takes its place; and when finally physical force is required, its power is doubled by his moral authority.

By fulfilling its proper function, the Supreme Court contributes both to institutional checks and balances and to the moral undergirding of the entire constitutional edifice. For the Supreme Court is the only national institution that daily grapples with the most fundamental political questions-and defends them with written expositions. Nothing less would serve to perpetuate the sanctity of the rule of law so effectively.

But that is not to suggest that the justices are a body of Platonic guardians. Far from it. The Court is what it was understood to be when the Constitution was framed-a political body. The judicial process is, at its most fundamental level, a political process. While not a partisan political process, it is political in the truest sense of that word. It is a process wherein public deliberations occur over what constitutes the common good under the terms of a written constitution.

As a result, as Benjamin Cardozo pointed out, "the greatest tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." Granting that, Tocqueville knew what was required. As he wrote:

> The federal judges therefore must not only be good citizens and men of education and integrity, . . . (they) must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the union and obedience to its laws.

On that confident note, let's consider the Court's work this past year. As has been generally true in recent years, the 1984 term did not yield a coherent set of decisions. Rather, it seemed to produce what one commentator has called a "jurisprudence of idiosyncracy." Taken as a whole, the work of the term defies analysis by any strict standard. It is neither simply liberal nor simply conservative; neither simply activist nor simply restrained; neither simply principled nor simply partisan. The Court this term continued to roam at large in a veritable constitutional forest.

I believe, however, that there are at least three general areas that merit close scrutiny: Federalism, Criminal Law, and Freedom of Religion.

Federalism

In *Garcia v. San Antonio Metropolitan Transit Authority*, [105 S.Ct. 1005 (1985),] the Court displayed what was in the view of this Administration an inaccurate reading of the text of the Constitution and a disregard for the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan. Specifically, five Justices denied that the Tenth Amendment protects States from federal laws regulating the wages and hours of state or local employees. Thus the Court overruled- but barely-a contrary holding in National League of Cities v. Usery [426 U.S. 833 (1976)]. We hope for a day when the Court returns to the basic principles of the Constitution as expressed in Usery; such instability in decisions concerning the fundamental principle of federalism does our Constitution no service.

Meanwhile, the constitutional status of the States further suffered as the Court curbed state power to regulate the economy, notably the professions. *In Metropolitan Life Insurance Co. v. Ward*, [105 S.Ct. 1676 (1985),] the Court used the Equal Protection Clause to spear an Alabama insurance tax on gross premiums preferring in-state companies over out-of-state rivals. In *Supreme Court of New Hampshire v. Piper,* [105 S.Ct. 1272 (1985),] the Court held that the Privileges and Immunities Clause of Article IV barred New Hampshire from completely excluding a nonresident from admission to its bar. With the apparent policy objective of creating unfettered national markets for occupations before its eyes, the Court unleashed Article IV against any State preference for residents involving the professions or service industries. *Hicklin v. Orbeck*, [437 U.S. 518 (1978),] and *Baldwin v. Montana Fish and Game Commission*, [435 U.S. 371 (1978),] are illustrative.

On the other hand, we gratefully acknowledge the respect shown by the Court for state and local sovereignty in a number of cases, including *Atascadero State Hospital v. Scanlon*, [105 S.Ct. 3142 (1985)].

In Atascadero, a case involving violations of §504 of the Rehabilitation Act of 1973, the Court honored the Eleventh Amendment in limiting private damage suits against States. Congress, it said, must express its intent to expose States to liability affirmatively and clearly.

In *Haille v. Eau Claire*, [105 S.Ct. 1713 (1985),] the Court found that active state supervision of municipal activity was not required to cloak municipalities with immunity under the Sherman Act. And, States were judged able to confer Sherman Act immunity upon private parties in *Southern Motor Carrier Rate Conference, Inc. v. United States*, [105 S.Ct. 1721 (1985)]. They must, said the Court, clearly articulate and affirmatively express a policy to displace competition with compelling anticompetitive action so long as the private action is actively supervised by the State.

And, in *Oklahoma City v. Tuttle*, [105 S.Ct. 2427 (1985),] the Court held that a single incident of unconstitutional and egregious police misconduct is insufficient to support a Section 1983 [42 U.S.C. §1983] action against municipalities for allegedly inadequate police training or supervision.

Our view is that federalism is one of the most basic principles of our Constitution. By allowing the States sovereignty sufficient to govern, we better secure our ultimate goal of political liberty through decentralized government. We do not advocate States' rights; we advocate States' responsibilities. We need to remember that state and local governments are not inevitably abusive of rights. It was, after all, at the turn of the century the States that were the laboratories of social and economic progress-and the federal courts that blocked their way. We believe that there is a proper constitutional sphere for state governance under our scheme of limited, popular government.

Criminal Law

Recognizing, perhaps, that the nation is in the throes of a drug epidemic which has severely increased the burden borne by law enforcement officers, the Court took a more progressive stance on the Fourth Amendment, undoing some of the damage previously done by its piecemeal incorporation through the Fourteenth Amendment. Advancing from its landmark *United States v. Leon*, [468 U.S. 897 (1984),] . . . which created a good-faith exception to the Exclusionary Rule when a flawed warrant is obtained by police, the Court permitted warrantless searches under certain limited circumstances.

The most prominent among these Fourth Amendment cases were:

New Jersey v. T.L.O., [105 S.Ct. 733 (1985),] which upheld warrantless searches of public school students based on reasonable suspicion that a law or school rule has been violated; this also restored a clear local authority over another problem in our society, school discipline;

California v. Carney, [105 S.Ct. 2066 (1985),] which upheld the warrantless search of a mobile home;

United States v. Sharpe, [105 S.Ct. 1568 (1985),] which approved on-the-spot detention of a suspect for preliminary questioning and investigation;

United States v. Johns, [105 S.Ct. 881 (1985),] upholding the warrantless search of sealed packages in a car several days after their removal by police who possessed probable cause to believe the vehicle contained contraband;

United States v. Hensley, [105 S.Ct. 675 (1985),] which permitted a warrantless investigatory stop based on an unsworn flyer from a neighboring police department which possessed reasonable suspicion that the detainee was a felon;

Hayes v. Florida, [105 S.Ct.1643 (1985),] which tacitly endorsed warrantless seizures in the field for the purpose of fingerprinting based on reasonable suspicion of criminal activity;

* * *

Similarly, the Court took steps this term to place the Miranda v. Arizona [384 U.S. 436 (1966),] ruling in proper perspective, stressing its origin in the Court rather than in the Constitution. In *Oregon v. Elstad*, [105 S.Ct. 1285 (1985),] the Court held that failure to administer Miranda warnings and the consequent receipt of a confession ordinarily will not taint a second confession after Miranda warnings are received.

The enforcement of criminal law remains one of our most important efforts. It is crucial that the state and local authorities-from the police to the prosecutors-be able to combat the growing tide of crime effectively. Toward that end we advocate a due regard for the rights of the accused-but also a due regard for the keeping of the public peace and the safety and happiness of the people. We will continue to press for a proper scope for the rules of exclusion, lest truth in the fact finding process be allowed to suffer.

I have mentioned the areas of Federalism and Criminal Law, now I will turn to the Religion cases.

Religion

Most probably, this term will be best remembered for the decisions concerning the Establishment Clause of the First Amendment. The Court continued to apply its standard three-pronged test. Four cases merit mention.

In the first, *City of Grand Rapids v. Ball*, [105 S.Ct. 3248 (1985),] the Court nullified Shared Time and Community Education programs offered within parochial schools. Although the programs instruction in non-sectarian subjects, and were taught by full-time or part-time public school teachers, the Court nonetheless found that they promoted religion in three ways: the state-paid instructors might wittingly or unwittingly indoctrinate students; the symbolic union of church and state interest in state-provided instruction signaled support for religion; and, the programs in effect subsidized the religious functions of parochial schools by relieving them of responsibility for teaching some secular subjects. The symbolism test proposed in Ball precludes virtually any state assistance offered to parochial schools.

In *Aguilor v. Felton*, [105 S.Ct. 3232 (1985),] the Court invalidated a program of secular instruction for low-income students in sectarian schools, provided by public school teachers who were supervised to safeguard students against efforts of indoctrination. With a bewildering Catch-22 logic, the Court declared that the supervisory safeguards at issue in the statute constituted unconstitutional government entanglement: "The religious school, which has as a primary purpose the advancement and preservation of a particular religion, must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought."

In *Wallace v. Jaffree,* [105 S.Ct. 2479 (1985),] the Court said in essence that states may set aside time in public schools for meditation or reflection so long as the legislation does not stipulate that it be used for voluntary prayer. Of course, what the Court gave with one hand, it took back with the other; the Alabama moment of silence statute failed to pass muster.

In *Thornton v. Caldor*, [105 S.Ct. 2914 (1985),] a 7-2 majority overturned a state law prohibiting private employers from discharging an employee for refusing to work on his Sabbath. We hope that this does not mean that the Court is abandoning last term's first but tentative steps toward state accommodation of religion in the Creche case.

In trying to make sense of the religion cases-from whichever side-it is important to remember how this body of tangled caselaw came about. Most Americans forget that it was not until 1925, in *Gitlow v. New York*, [268 U.S. 652 (1925),] that any provision of the Bill of Rights was applied to the states. Nor was it until 1947 that the Establishment Clause was made applicable to the states through the 14th Amendment. This is striking because the Bill of Rights, as debated, created and ratified was designed to apply only to the national government.

The Bill of Rights came about largely as the result of the demands of the critics of the new Constitution, the unfortunately misnamed Anti-Federalists. They feared, as George Mason of Virginia put it, that in time the national authority would "devour" the states. Since each state had a bill of rights, it was only appropriate that so powerful a national government as that created by the Constitution have one as well. Though Hamilton insisted a Bill of Rights was not necessary and even destructive, and Madison (at least

at first) thought a Bill of Rights to be but a "parchment barrier" to political power, the Federalists agreed to add a Bill of Rights.

Though the first ten amendments that were ultimately ratified fell far short of what the Anti-Federalists desired, both Federalists and Anti-Federalists agreed that the amendments were a curb on national power. When this view was questioned before the *Supreme Court in Barron v. Baltimore*, [32 U.S. 243 (1833),] Chief Justice Marshall wholeheartedly agreed. The Constitution said what it meant and meant what it said. Neither political expediency nor judicial desire was sufficient to change the clear import of the language of the Constitution. The Bill of Rights did not apply to the states-and, he said, that was that.

Until 1925, that is.

Since then a good portion of constitutional adjudication has been aimed at extending the scope of the doctrine of incorporation. But the most that can be done is to expand the scope; nothing can be done to shore up the intellectually shaky foundation upon which the doctrine rests. And nowhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation.

In thinking particularly of the use to which the First Amendment has been put in the area of religion, one finds much merit in Justice Rehnquist's recent dissent in Jaffree. "It is impossible," Justice Rehnquist argued, "to build sound constitutional doctrine upon a mistaken understanding of constitutional history." His conclusion was bluntly to the point: "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, it is difficult to apply and yields unprincipled results."

The point, of course, is that the Establishment Clause of the First Amendment was designed to prohibit Congress from establishing a national church. The belief was that the Constitution should not allow Congress to designate a particular faith or sect as politically above the rest. But to have argued, as is popular today, that the Amendment demands a strict neutrality between religion and irreligion would have struck the founding generation as bizarre. The purpose was to prohibit religious tyranny, not to undermine religion generally.

In considering these areas of adjudication-Federalism, Criminal Law, and Religion-it seems fair to conclude that far too many of the Court's opinions were, on the whole, more policy choices than articulations of constitutional principle. The voting blocs, the arguments, all reveal a greater allegiance to what the Court thinks constitutes sound public policy than a deference to what the Constitution-its text and intention-may demand. It is also safe to say that until there emerges a coherent jurisprudential stance, the work of the Court will continue in this ad hoc fashion. But that is not to argue for any jurisprudence. In my opinion a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government.

What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence and the charge of being either too conservative or too liberal.

A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection. This belief in a Jurisprudence of Original Intention also reflects a deeply rooted commitment to the idea of democracy. The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is why it is the fundamental law. To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.

Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shockingly new theory; nor is it arcane or archaic.

Joseph Story, who was in a way a lawyer's Everyman-lawyer, justice, and teacher of law-had a theory of judging that merits reconsideration. Though speaking specifically of the Constitution, his logic reaches to statutory construction as well.

In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear and determinate, they require no interpretation....Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.

A Jurisprudence of Original Intention would take seriously the admonition of Justice Story's friend and colleague, John Marshall, in Marbury that the Constitution is a limitation on judicial power as well as executive and legislative. That is what Chief Justice Marshall meant in McCulloch when he cautioned judges never to forget it is a constitution they are expounding.

It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.

* * *

We will pursue our agenda within the context of our written Constitution of limited yet energetic powers. Our guide in every case will be the sanctity of the rule of law and the proper limits of governmental power.

It is our belief that only "the sense in which the Constitution was accepted and ratified by the nation," and only the sense in which laws were drafted and passed provide a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law.

Justice William J. Brennan, Jr.
To the Text and Teaching Symposium, Georgetown University
October 12, 1985, Washington, DC

I am deeply grateful for the invitation to participate in the "Text and Teaching" symposium. This rare opportunity to explore classic texts with participants of such wisdom, acumen and insight as those who have preceded and will follow me to this podium is indeed exhilarating. But it is also humbling. Even to approximate the standards of excellence of these vigorous and graceful intellects is a daunting task. I am honored that you have afforded me this opportunity to try.

It will perhaps not surprise you that the text I have chosen for exploration is the amended Constitution of the United States, which, of course, entrenches the Bill of Rights and the Civil War amendments, and draws sustenance from the bedrock principles of another great text, the Magna Carta. So fashioned, the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text. The encounter with the constitutional text has been, in many senses, my life's work.

My approach to this text may differ from the approach of other participants in this symposium to their texts. Yet such differences may themselves stimulate reflection about what it is we do when we "interpret" a text. Thus I will attempt to elucidate my approach to the text as well as my substantive interpretation.

Perhaps the foremost difference is the fact that my encounters with the constitutional text are not purely or even primarily introspective; the Constitution cannot be for me simply a contemplative haven for private moral reflection. My relation to this great text is inescapably public. That is not to say that my reading of the text is not a personal reading, only that the personal reading perforce occurs in a public context, and is open to critical scrutiny from all quarters.

The Constitution is fundamentally a public text-the monumental charter of a government and a people-and a Justice of the Supreme Court must apply it to resolve public controversies. For, from our beginnings, a most important consequence of the constitutionally created separation of powers has been the American habit, extraordinary to other democracies, of casting social, economic, philosophical and political questions in the form of law suits, in an attempt to secure ultimate resolution by the Supreme Court. In this way, important aspects of the most fundamental issues confronting our democracy may finally arrive in the Supreme Court for judicial determination. Not infrequently, these are the issues upon which contemporary society is most deeply divided. They arouse our deepest emotions. The main burden of my twenty-nine terms on the Supreme Court has thus been to wrestle with the Constitution in this heightened public context, to draw meaning from the text in order to resolve public controversies.

Two other aspects of my relation to this text warrant mention. First, constitutional interpretation for a federal judge is, for the most part, obligatory. When litigants approach the bar of court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions. Unlike literary critics, judges cannot merely savor the tensions or revel in the ambiguities inhering in the text-judges must resolve them.

Second, consequences flow from a justice's interpretation in a direct and immediate way. A judicial decision respecting the incompatibility of Jim Crow with a constitutional guarantee of equality is not simply a contemplative exercise in defining the shape of a just society. It is an order-supported by the full coercive power of the State-that the present society change in a fundamental aspect. Under such circumstances the process of deciding can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge. We Justices are certainly aware that we are not final because we are infallible; we know that we are infallible only because we final. One does not forget how much may depend on the decision. More than the litigants may be affected. The course of vital social, economic and political currents may be directed.

These three defining characteristics of my relation to the constitutional text-its public nature, obligatory character, and consequentialist aspect-cannot help but influence the way I read that text. When Justices interpret the Constitution they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought. Justices are not platonic guardians appointed to wield authority according to their personal moral 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." 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 Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant-that of the drafters, the congressional disputants, or the ratifiers in the states?-or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states. And apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting

all we perceive. One cannot help but speculate that the chorus of lamentations calling for interpretation faithful to "original intention"-and proposing nullification of interpretations that fail this quick litmus test-must inevitably come from persons who have no familiarity with the historical record.

Perhaps most importantly, while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should not escape notice. A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation-if there is such a thing as the "nature" of interpretation- commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the minority rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.

Another, perhaps more sophisticated, response to the potential power of judicial interpretation stresses democratic theory: because ours is a government of the people's elected representatives, substantive value choices should by and large be left to them. This view emphasizes not the 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 majority will would permit the imposition of a social caste system or wholesale confiscation of property so long as a majority of the authorized legislative body, fairly elected, approved. Our Constitution could not abide such a situation. It is the very purpose of a Constitution-and particularly of the Bill of Rights-to declare certain values transcendent, beyond the reach of temporary political majorities. The majoritarian process cannot be expected to rectify claims of minority right that arise as a response to the outcomes of that very majoritarian process. As James Madison put it:

> *The prescriptions in favor of liberty ought to be 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 minority. (I Annals 437).*

Faith in democracy is one thing, blind faith quite another. Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature. Obvious are the separation of powers; the privilege of the Writ of Habeas Corpus; prohibition of Bills of Attainder and ex post facto

laws; prohibition of cruel and unusual punishments; the requirement of just compensation for official taking of property; the prohibition of laws tending to establish religion or enjoining the free exercise of religion; and, since the Civil War, the banishment of slavery and official race discrimination. With respect to at least such principles, we simply have not constituted ourselves as strict utilitarians. While the Constitution may be amended, such amendments require an immense effort by the People as a whole.

To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned 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." *Board of Education v. Barnette*, [319 U.S. 624, 639 (1943),].

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. This realization is not, I assure you, a novel one of my own creation. Permit me to quote from one of the opinions of our Court, *Weems v. United States*, [217 U.S. 349,] written nearly a century ago:

> "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice John Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision or events of good and bad tendencies of which no prophesy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be."

Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War Amendments to the charter-abolishing slavery, guaranteeing blacks equality under law, and

guaranteeing blacks the right to vote-we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of slave caste.

Having discussed at some length how I, as a Supreme Court Justice, interact with this text, I think it time to turn to the fruits of this discourse. For the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law. Some reflection is perhaps required before this can be seen.

The Constitution on its face is, in large measure, a structuring text, a blueprint for government. And when the text is not 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. When one reflects upon the text's preoccupation with the scope of government as well as its shape, however, one comes to understand that what this text is about is the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy. When one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitution.

As augmented by the Bill of Rights and the Civil War Amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual. And this vision manifests itself most dramatically in the specific prohibitions of the Bill of Rights, a term which I henceforth will apply to describe not only the original first eight amendments, but the Civil War amendments as well. It is a vision that has guided us as a people throughout our history, although the precise rules by which we have protected fundamental human dignity have been transformed over time in response to both transformations of social condition and evolution of our concepts of human dignity.

Until the end of the nineteenth century, freedom and dignity in our country found meaningful protection in the institution of real property. In a society still largely agricultural, a piece of land provided men not just with sustenance but with the means of economic independence, a necessary precondition of political independence and expression. Not surprisingly, property relationships formed the heart of litigation and of legal practice, and lawyers and judges tended to think stable property relationships the highest aim of the law.

But the days when common law property relationships dominated litigation and legal practice are past. To a growing extent economic existence now depends on less certain relationships with government-licenses, employment, contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated before this century, when a man's answer to economic oppression or difficulty was to move two hundred miles west. Now hundreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state.

In general, problems of the relationship of the citizen with government have multiplied and thus have engendered some of the most important constitutional issues of the day. As government acts ever more deeply upon those areas of our lives once marked "private," there is an even greater need to see that

individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the "public good." And as government continues in its role of provider for so many of our disadvantaged citizens, there is an even greater need to ensure that government act with integrity and consistency in its dealings with these citizens. To put this another way, the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands, and this growth, in turn, heightens the need for constant vigilance at the collision points. If our free society is to endure, those who govern must recognize human dignity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage. Such recognition will not come from a technical understanding of the organs of government, or the new forms of wealth they administer. It requires something different, something deeper-a personal confrontation with the well-springs of our society. Solutions of constitutional questions from that perspective have become the great challenge of the modern era. All the talk in the last half-decade about shrinking the government does not alter this reality or the challenge it imposes. The modern activist state is a concomitant of the complexity of modern society; it is inevitably with us. We must meet the challenge rather than wish it were not before us.

The challenge is essentially, of course, one to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure. During the time of my public service this challenge has largely taken shape within the confines of the interpretive question whether the specific guarantees of the Bill of Rights operate as restraints on the power of State government. We recognize the Bill of Rights as the primary source of express information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundation of America's freedoms. Each is a protection with centuries of history behind it, often dearly bought with the blood and lives of people determined to prevent oppression by their rulers. The first eight Amendments, however, were added to the Constitution to operate solely against federal power. It was not until the Thirteenth and Fourteenth Amendments were added, in 1865 and 1868, in response to a demand for national protection against abuses of state power, that the Constitution could be interpreted to require application of the first eight amendments to the states.

It was in particular the Fourteenth Amendment's guarantee that no person be deprived of life, liberty or property without process of law that led us to apply many of the specific guarantees of the Bill of Rights to the States. In my judgment, Justice Cardozo best captured the reasoning that brought us to such decisions when he described what the Court has done as a process by which the guarantees "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption . . . [that] has had its source in the belief that neither liberty nor justice would exist if [those guarantees] . . . were sacrificed." *Palko v. Connecticut*, [302 U.S. 319, 326 (1937),]. But this process of absorption was neither swift nor steady. As late as 1922 only the Fifth Amendment guarantee of just compensation for official taking of property had been given force against the states. Between then and 1956 only the First Amendment guarantees of speech and conscience and the Fourth Amendment ban of unreasonable searches and seizures had been incorporated-the latter, however, without the exclusionary rule to give it force. As late as 1961, I could stand before a distinguished assemblage of the bar at New York University's James Madison Lecture and list the following as guarantees that had not been thought to be sufficiently fundamental to the protection of human dignity so as to be enforced against the states: the prohibition of cruel and unusual punishments, the right against self-incrimination, the right to assistance of counsel in a criminal trial, the right to

confront witnesses, the right to compulsory process, the right not to be placed in jeopardy of life or limb more than once upon accusation of a crime, the right not to have illegally obtained evidence introduced at a criminal trial, and the right to a jury of one's peers.

The history of the quarter century following that Madison Lecture need not be told in great detail. Suffice it to say that each of the guarantees listed above has been recognized as a fundamental aspect of ordered liberty. Of course, the above catalogue encompasses only the rights of the criminally accused, those caught, rightly or wrongly, in the maw of the criminal justice system. But it has been well said that there is no better test of a society than how it treats those accused of transgressing against it. Indeed, it is because we recognize that incarceration strips a man of his dignity that we demand strict adherence to fair procedure and proof of guilt beyond a reasonable doubt before taking such a drastic step. These requirements are, as Justice Harlan once said, "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, [397 U.S. 358, 372 (1970),] (concurring opinion). There is no worse injustice than wrongly to strip a man of his dignity. And our adherence to the constitutional vision of human dignity is so strict that even after convicting a person according to these stringent standards, we demand that his dignity be infringed only to the extent appropriate to the crime and never by means of wanton infliction of pain or deprivation. I interpret the Constitution plainly to embody these fundamental values.

Of course the constitutional vision of human dignity has, in this past quarter century, infused far more than our decisions about the criminal process. Recognition of the principle of "one person, one vote" as a constitutional one redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process. Recognition of so-called "new property" rights in those receiving government entitlements affirms the essential dignity of the least fortunate among us by demanding that government treat with decency, integrity and consistency those dependent on its benefits for their very survival. After all, a legislative majority initially decides to create governmental entitlements; the Constitution's Due Process Clause merely provides protection for entitlements thought necessary by society as a whole. Such due process rights prohibit government from imposing the devil's bargain of bartering away human dignity in 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 con" science reaffirm the vision of human dignity in many ways. They too redeem the promise of self-governance by facilitating-indeed demanding-robust, uninhibited and wide-open debate on issues of public importance. Such public debate is of course vital to the development and dissemination of political ideas. As importantly, robust public discussion is the crucible in which personal political convictions are forged. In our democracy, such discussion is a political duty, it is the essence of self government. The constitutional vision of human dignity rejects the possibility of political orthodoxy imposed from above; it respects the right of each individual to form and to 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. Justice Brandeis put it so well sixty years ago when he wrote: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." *Whitney v. California* [274 U.S. 357, 375 (1927),] (concurring opinion).

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

Indeed, I cannot in good conscience refrain from mention of one grave and crucial respect in which we continue, in my judgment, to fall short of the constitutional vision of human dignity. It is in our continued tolerance of State-administered execution as a form of punishment. I make it a practice not to comment on the constitutional issues that come before the Court, but my position on this issue, of course, has been for some time fixed and immutable. I think I can venture some thoughts on this particular subject without transgressing my usual guideline too severely.

As I interpret the Constitution, capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. This is a position of which I imagine you are not unaware. Much discussion of the merits of capital punishment has in recent years focused on the potential arbitrariness that attends its administration, and I have no doubt that such arbitrariness is a grave wrong. But for me, the wrong of capital punishment transcends such procedural issues. As I have said in my opinions, I view the Eighth Amendment's prohibition of cruel and unusual punishments as embodying to a unique degree moral principles that substantively restrain the punishments our civilized society may impose on those persons who transgress its laws. Foremost among the moral principles recognized in our cases and inherent in the prohibition is the primary principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. Death for whatever crime and under all circumstances is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the State from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, indeed, "cruel and unusual." It is thus inconsistent with the fundamental premise of the Clause that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity.

This is an interpretation to which a majority of my fellow Justices-not to mention, it would seem, a majority of my fellow countrymen-does not subscribe. Perhaps you find my adherence to it, and my recurrent publication of it, simply contrary, tiresome, or quixotic. Or perhaps you see in it a refusal to abide by the judicial principle of stare decisis, obedience to precedent. In my judgment, however, the unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of stare decisis. Because we are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive, again, to the anachronistic views of long-gone generations. I mentioned earlier the judge's role in seeking out the community's interpretation of the Constitutional text. Yet, again in my judgment, when a Justice perceives an interpretation of the text to have departed so far from its essential meaning, that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path. On this issue, the death penalty, I hope to embody a community striving for human dignity for all, although perhaps not yet arrived.

You have doubtless observed that this description of my personal encounter with the constitutional text has in large portion been a discussion of public developments in constitutional doctrine over the last century. That, as I suggested at the outset, is inevitable because my interpretive career has demanded a public reading of the text. This public encounter with the text, however, has been a profound source of personal inspiration. The vision of human dignity embodied there is deeply moving. It is timeless. It has inspired Americans for two centuries and it will continue to inspire as it continues to evolve. That evolutionary process is inevitable and indeed, it is the true interpretive genius of the text.

If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. For the political and legal ideals that form the foundation of much that is best in American institutions-ideals jealously preserved and guarded throughout our history-still form the vital force in creative political thought and activity within the nation today. As we adapt our institutions to the ever- changing conditions of national and international life, those ideals of human dignity-liberty and justice for all individuals-will continue to inspire and guide u 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.

Justice John Paul Stevens
Before the Federal Bar Association
October 23, 1985, Chicago, Illinois

What do Supreme Court Justice do during the period between the day in July when the last opinion is announced and the first Monday in October? Just as there is no single answer to a similar question about practicing lawyers, United States Senators, or law professors, I am sure that each of the nine Justice would answer the question in a different way. Nevertheless there would be more similarity in the nine answers than many of you may assume.

* * *

I also find time during the summer to read some of the criticism of our work product. Since I have already adverted to the Jaffree case, [105 S.Ct. 2479 (1985),] I shall mention one of the many adverse comments on that six-to-three decision. In his speech to the American Bar Association on July 9th, Attorney General Meese not only endorsed the rationale of Justice Rehnquist's dissenting opinion-that the Establishment Clause was originally designed to guarantee strict neutrality between religion and non-religion-he also expressed an even more basic disagreement with the Court's decision. In advocating what he described as a constitutional "Jurisprudence of Original Intention," Attorney General Meese placed great emphasis on the fact that "the Bill of Rights, as debated, created and ratified was designed to apply only to the national government."

I have emphasized the word "only" because it is underscored on page twelve of the written text of his speech and because the point is so forcefully made in the following quotation from pages thirteen and fourteen:

> *"Though the first ten amendments that were ultimately ratified fell far short of what the Anti-Federalists desired, both Federalist and Anti-Federalists agreed that the amendments were a curb on a national power.*
>
> *"When this view was questioned before the Supreme Court in Barron v. Baltimore (1983), Chief Justice Marshall wholeheartedly agreed. The Constitution said that what it meant and meant what it said. Neither political expediency nor judicial desire was sufficient to change the clear import of the language of the Constitution. The Bill of Rights did not apply to the states-and, he said, that was that.*
>
> *"Until 1925, that is.*
>
> *"Since then a good portion of constitutional adjudication has been aimed at extending the scope of the doctrine of incorporation. But the most that can be done is to expand the scope; nothing can be done to shore up the intellectually shaky foundation upon which the doctrine rests. And nowhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation."*

Of course, the Attorney General has correctly stated the holding in *Barron v. Baltimore* in 1833, and he was quite correct in identifying the year 1925 as the time when the Supreme Court first held that the

State of New York as well as the Congress of the United States, must obey the dictates of the First Amendment. The development of his argument is somewhat incomplete, however, because its concentration on the original intention of the Framers of the Bill of Rights overlooks the importance of subsequent events in the development of our law. In particular, it overlooks the profound importance of the Civil War and the post-war amendments on the structure of our government, and particularly upon the relationship between the Federal Government and the separate States. Moreover, the Attorney General fails to mention the fact that no Justice who has sat on the Supreme Court during the past sixty years has questioned the proposition that the prohibitions against state action that are incorporated against federal action that are found in the First Amendment.

The importance of evaluating subsequent developments in the law, as well as the original intent of the Framers, is well illustrated by James Madison's view about the constitutionality of a federally charted national bank. As a Congressman he opposed the first National Bank in part because he did not believe Congress had the constitutional power to authorize it, but as President twenty years later he no not only signed the bill authorizing the second bank, but also accepted the interpretation of the Constitution that had been adopted by the Supreme Court in the interim. In a letter written in 1819 he explained: "It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them." (Powell, "The Original Understanding of the Original Intent," 98 Harvard L. Rev. 885, 939-941 (1985)).

It is possible that I have misconstrued the speech given by Attorney General Meese last July and that he did not actually intend his recommended "Jurisprudence of Original Intention" as a rejection of the proposition that the Fourteenth Amendment has made the First Amendment applicable to the States. But if there is ambiguity in the message that was conveyed by an articulate contemporary lawyer last July, is it not possible that some uncertainty may attend an effort to identify the precise messages that equally articulate lawyers ware attempting to convey almost two hundred years ago? We must, of course, try to read their words in the contexts of the beliefs that were widely held in the late Eighteenth Century. Relying on that background, the Attorney General forcefully asserted "to have argued, as is popular today, that the amendment demands a strict neutrality between religion and irreligion would have struck the founding generation as bizarre."

The term "founding generation" describes a rather broad and diverse class. It included apostles of intolerance as well as tolerance, advocates of differing points of view in religion as well as politics, and great minds in Virginia and Pennsylvania as well as Massachusetts. I am not at all sure that men like James Madison, Thomas Jefferson, Benjamin Franklin or the pamphleteer, Thomas Paine, would have regarded strict neutrality on the part of government between religion and irreligion as "bizarre." Consider for example this passage that was penned by Thomas Paine in 1794:

> *"I believe in one God, and no more; and I hope for happiness beyond this life.*
>
> *"I believe in the quality of man, and I believe that religious duties consist in doing justice, loving mercy, and endeavoring to make our fellow-creatures happy.*

"But, lest it should be supposed that I believe many other things in addition to these, I shall, in the progress of this work, declare the things I do not believe, and my reasons for not believing them.

"I do not believe in the creed professed by the Jewish church, by the Roman church, by the Greek church, the Turkish church, by the Protestant church, nor by any church that I know of. My own mind is my own church.

"All national institutions of churches-whether Jewish, Christian, or Turkish-appear to me no other than human inventions set up to terrify and enslave mankind and monopolize power and profit.

"I do not mean by this declaration to condemn those who believe otherwise. They have the same right to their belief as I have to mine. But it is necessary to the happiness of man, that he be mentally faithful to himself. Infidelity does not consist in believing, or disbelieving; it consists in professing to believe what he does not believe."

T. Paine, The Age of Reason 231-323 (Hist. Ed. 1928).

Attorney General Edwin Meese III
Before the DC Chapter of the Federalist Society Lawyers Division
November 15, 1985, Washington, DC

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

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

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

A great deal has already been said, much of it of merit and on point. But occasionally there has been confusion. There has been some misunderstanding, some perhaps on purpose. Caricatures and straw men, as one customarily finds even in the greatest debates, have made appearances. Still, whatever the differences, most participants are agreed about the same high objective: fidelity to our fundamental law.

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

Before doing so, I would like to make few commonplace observations about the original document itself. It is easy to forget what a young country America really is. The bicentennial of our independence was just a few years ago, that of the Constitution still two years off. The period surrounding the creation of the Constitution is not a dark and mythical realm. The young America o the 1780's and 90's was a vibrant place, alive with pamphlets, newspapers and books chronicling and commenting upon the great issues of the day. We know how the Founding Fathers lived, and much of what they read, thought, and believed. The disputes and compromises of the Constitutional Convention were carefully recorded. The minutes of the Convention are a matter of public record. Several of the most important participants - including James Madison, the "father" of the Constitution - wrote comprehensive accounts of the convention. Others, Federalists and Anti-Federalists alike, committed their arguments for and against ratification, as well as their understandings of the constitution, to paper, so that their ideas and conclusions could be widely circulated, read, and understood.

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

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

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

The language they employed clearly reflects this. For example, they addressed commerce, not simply shipping or barter. Later the Bill of Rights spoke, through the Fourth Amendment, to "unreasonable searches and seizures," not merely the regulation of specific law enforcement practices of 1789. Still later, the Framers of the 14th Amendment were concerned not simply about the rights of black citizens to personal security, but also about the equal protection of the law for all persons within the states. The Constitution is not a legislative code bound to the time in which it was written. Neither, however, is it a mirror that simply reflects the thoughts and ideas of those who stand before it.

Our approach to constitutional interpretation begins with the document itself. The plain fact is, it exists. It is something that has been written down. Walter Berns of the American Enterprise Institute has noted that the central object of American constitutionalism was "the effort" of the Founders "to express fundamental governmental arrangements in a legal document-to 'get it in writing'." Indeed, judicial review has been grounded in the fact that the Constitution is a written, as opposed to an unwritten, document. In Marbury v. Madison, [5 U.S. 137 (1803),] John Marshall rested his rationale for judicial review on the fact that we have a written constitution with meaning that is binding upon judges. "[I]t is apparent," he wrote, "that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it?"

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

We know that those who framed the Constitution chose their words carefully. They debated at great length the most minute points. The language they chose meant something. They proposed, they substituted, they edited, and they carefully revised. Their words were studied with equal care by state ratifying conventions. This is not to suggest that there was unanimity among the framers and ratifiers on all points. The Constitution and the Bill of Rights, and some of the subsequent amendments, emerged after protracted debate. Nobody got everything they wanted. What's more, the Framers were not clairvoyants-they could not foresee every issue that would be submitted for judicial review. Nor could they predict how all foreseeable disputes would be resolved under the Constitution. But the point is, the meaning of the Constitution can be known.

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

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

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

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

Yet the Constitution remains a document of powers and principles. And its undergirding premise remains that democratic self government is subject only to the limits of certain constitutional principles. This respect of the political process was made explicit early on. When John Marshall upheld the Act of Congress chartering a national bank in *McCulloch v. Mayland*, [17 U.S. 316 (1819),] he wrote: "The Constitution [was] intended to endure of rages to come, and, consequently, to be adapted to the various crisis of human affairs." But to use McCulloch, as some have tried, as support for the idea that the Constitution is a protean, changeable thing is to stand history on its head. Marshall was keeping faith with the original intention that Congress be free to elaborate and apply constitutional powers and principles. He was not saying that the Court must invent some new constitutional value in order to keep pace with the times. In Walther Berns' words: "Marshall's meaning is not that the Constitution may be adapted to the 'various crisis of human affairs,' but that the legislative powers granted by the Constitution are adaptable to meet these crisis."

The approach this administration advocates is rooted in the text of the Constitution as illuminate by those who drafted, proposed, and ratified it. In his famous Commentary on the Constitution of the United States, Justice Joseph Story explained that: "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."

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

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

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

> *On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find], what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it passed.*

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

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

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

In the 1850's, the Supreme Court under Chief Justice Roger B. Taney read blacks out of the Constitution in order to invalidate Congress' attempt to limit the spread of slavery. The *Dred Scott* decision, famously described as a judicial "self-inflicted wound," helped bring on the civil war. There is a lesson in this history. There is danger in seeing the Constitution as an empty vessel into which each generation may pour its passion and prejudice.

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

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

When the Supreme Court, in Brown v. Board of Education, [347 U.S. 483 (1954),] sounded the death knell for official segregation in the country, it earned all the plaudits it received. But the Supreme Court in that case was not giving new life to old words, or adapting a "living," "flexible" Constitution to new reality. It was restoring the original principle of the Constitution to constitutional law. The Brown Court was correcting the damage done 50 years earlier, when in *Plessy v. Ferguson*, [163 U.S. 537 (1896),] an earlier Supreme Court had disregarded the clear intent of the Framers of the civil war amendments to eliminate the legal degradation of blacks, and had contrived a theory of the Constitution to support the charade of "separate but equal" discrimination.

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

It is amazing how so much of what passes for social and political progress is really the undoing of old judicial mistakes. Mistakes occur when the principles of specific constitutional provisions-such as those contained in the Bill of Rights-are taken by some as invitations to read into the Constitution values that contradict the clear language of other provisions.

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

Unfortunately, as I've noted, navigation by such lodestars has in the past given us questionable economics, governmental disorder, and racism-all in the guise of constitutional law. Recently one of the distinguished judges of one of our federal appeals courts got it about right when he wrote: "The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else." [Robert H. Bork, Traditions and Morality in Constitutional Law (1984).] Or, as we recently put it before ht Supreme Court in an important brief: "The further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning." [Brief for the United States as amicus curiae at 24, Thornburgh v. American College of Obstetricians and Gynecologists, No. 84-495, June 11, 1986.]

In the *Osborne v. Bank of the United States*, [22 U.S. 738 (1824),] decision 21 years after Marbury, Chief Justice Marshall further elaborated his view of the relationship between the judge and the law, be it statutory or constitutional:

> *Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said*

> *to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the courts prescribed by law; and, when that is discerned, it is the duty of the Court to follow it.*

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

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

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

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

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

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

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

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

I close, unsurprisingly, by returning a last time to the period of the Constitution's birth. As students of the Constitution are aware, the struggle for ratification was protracted and bitter. Essential to the success of the campaign was the outcome of the debate in the two most significant states: Virginia and New York. In New York the battle between Federalist and Anti-Federalist forces was particularly hard. Both sides eagerly awaited the outcome in Virginia, which was sure to have a profound effect on the struggle in the Empire State. When news that Virginia had voted to ratify came, it was a particularly bitter blow to the Anti-Federalist side. Yet on the evening the message reached New York an event took place that speaks volumes about the character of early America. The losing side, instead of grousing, feted the Federalist leaders in the taverns and inns of the city. There followed a night of drinking, good fellowship, and mutual toasting. When the effects of the good cheer wore off, the two sides returned to their inkwells and presses, and the debate resumed.

There is a great temptation among those who view this debate form the outside to see in it a clash of personalities, a bitter exchange. But you and I, and the other participants in this dialogue know better. We and our distinguished opponents carry on the old tradition, of free, uninhibited, and vigorous debate. Out of such arguments come no losers, only truth. It's the American way. And the Founders wouldn't want it any other way.

Judge Robert H. Bork
United States Court of Appeals for the District of Columbia
Before the University of San Diego Law School, November 18, 1985
(Reprinted originally in the University of San Diego Law Review)

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

This has been a topic of fierce debate in the law schools for the past thirty years. The controversy shows no sing of subsiding. To the contrary, the torrent of words is freshening.

It is odd that the one group whose members rarely discuss the intellectual framework within which they decide cases is the federal judiciary. Judges, by and large, are not much attracted to theory. That is unfortunate, and perhaps it is changing. There are several reasons why it should change.

Law is an intellectual system. It progresses, if at all, through continual intellectual exchanges. There is no reason why members of the judiciary should not engage in such discussion and, since theirs is the ultimate responsibility, every reason why they should.

Moreover, the only real control the American people have over their judges is that of criticism that ought to be informed and to focus not upon the congeniality of political results but upon the judges' faithfulness to their assigned role.

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

I want to stress that I did not come here to enter into political controversy. This is a subject I have been teaching and writing about for twenty years, most of that time as a professor. I have been arguing with professors and that is what I will be doing tonight. In these remarks I am not concerned to prove that any particular decision or doctrine is wrong. I am concerned with the method of reasoning by which constitutional argument should proceed.

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

democratic authority and individual liberty. The first would court tyranny by the majority; the second tyranny by the minority.

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

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

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

If this were not so, if judges could govern areas not committed to them by specific clauses of the Constitution, then there would be no law other than the will of the judge. It is common ground that such a situation is not legitimate in a democracy. Justice Brennan recently put the point well: "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." This means that any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges. An observer must be able to say whether or not the judge's result follows fairly from the premises and is not merely a question of taste or opinion.

There are those in the academic world, professors at very prestigious institutions, who deny that the Constitution is law. I will not rehearse their arguments here or rebut them in detail. I note merely that that there is no question they do not address. If the Constitution is now law, law that, with the usual areas of ambiguity at the edges, nevertheless tolerable tell judges what to do and what not to do-if the Constitution is not law in that sense, what authorizes judges to set at naught the majority judgment of the representatives of the American people?

If the Constitution is not law, if, as yet another professor put it, it is of "questionable authority," why is the judge's authority superior to that of the President, the Congress, the armed forces, the departments and agencies, the governors and legislatures of the states, and that of everyone else in the nation? No answer exists.

The answer that is attempted is usually that the judge must e guided by some form of moral philosophy. Not only is moral philosophy wholly inadequate to the task but there is no reason for the rest of us, who have our own moral visions, to be governed by the judge's moral predilections.

Those academics who think the Constitution is not law ought to draw the only conclusion that intellectual honesty leaves to them: that judges must abandon the function of constitutional review. I have yet to hear that suggested. The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments.

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

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

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

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

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

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

There is one objection to intentionalism that is particularly tiresome. Whenever I speak on the subject someone invariable asks, "But why should we be ruled by men long dead?" The question is never asked about the main body of the Constitution where we really are ruled by men long dead in such matters as the powers of Congress, the President, and the judiciary. It is asked about the amendments that guarantee individual freedoms. The answer as to those is that we are not governed by men long dead

unless we wish to cut back those freedoms, which the questioner never does. We are entirely free to create all the additional freedoms we wish by legislation, and the nation has done that frequently. What the questioner is really driving at is why judges, not the public, but judges, should be bound to protect only those freedoms actually specified by the Constitution. The objection underlying the question is not to the rule of dead men but to the rule of living majorities.

Moreover, when we understand that the Bill of Rights gives us major premises and not specific conclusions, the document is not at all anachronistic. The major values specified in the Bill of Rights are timeless in the sense that they must be preserved by any government we would regard as free. For that reason, courts must not hesitate to apply old values to new circumstances. A judge who refuse to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty.

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

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

> *The very adoption of such a principle, however, demands an arbitrary choice among levels of abstraction. Just what is "the general principle of equality that applies to all cases?" Is it the "core idea of black equality" that Bork finds in the original understanding (in which case Alan Bakke did not state a constitutionally cognizable claim), or a broader principle of "racial equality" (so that, depending on the precise content of the principle, Bakke might have a case after all), or is it a still broader principle of equality that encompasses discrimination on the basis of gender (or sexual orientation) as well?...*

The fact is that all adjudication requires making choices among levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decision making can be salvaged if its legitimacy depends on satisfying Bork's requirements that principles be "neutrally derived, defined and applied."

I think that is wrong and that an intentionalist can do what Brest says he cannot. Let me use Brest's example as a hypothetical-I am making no statement about the truth of the matter. Assume for the sake of the argument that a judge's study of the evidence shows that both black and general racial equality were clearly intended, but that equality on matters such as sexual orientation was not under discussion.

The intentionalist may conclude that he can enforce black and racial equality but that he had no guidance at all about any higher level of generality. He has, therefore, no warrant to displace a legislative choice that prohibits certain forms of sexual behavior. That result follows form the principle of acceptance of democratic choice where the Constitution is silent. In short, the problem of levels of

generality is solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support.

The power of extreme generalization was demonstrated by Justice William O. Douglas in *Griswold v. Connecticut*, [381 US 479(1965)]. In that case the Court struck down that state's anti-contraception statute. Justice Douglas created a constitutional right of privacy that invalidated the state's law against the use of contraceptives. He observed that many provisions of the Bill of Rights could be viewed as protections of aspects of personal privacy. He then generalized these particulars into an overall right of privacy that applies even where no provision of the Bill of Rights does. By choosing that level of abstraction, the Bill of Rights was expanded beyond the known intentions of the Framers. Since there is no constitutional text or history to define the right, privacy becomes an unstructured source of judicial power. I am not now arguing that any of the privacy cases were wrongly decided. My point is simply that the level of abstraction chosen makes a generalized right of privacy unpredictable in its application.

A concept of original intent, one that focuses on each specific provision of the Constitution rather than upon generalized values, is essential to prevent courts from invading the proper domain of democratic government.

That proposition is directly relevant to the subject of economic rights and the Constitution. Article I, Section 10, provides that no state shall pass any law impairing the obligations of contracts. The fifth and fourteenth amendments between them prevent either the federal or any state government from taking private property for public use without paying just compensation.

The intention underlying these clauses has been a matter of dispute and perhaps they have not been given their proper force. But hat is not my concern here because few deny that original intention should govern the application of these particular clauses.

My concern is with the contention that a more general spirit of libertarianism pervades the original intention underlying the fourteenth amendment so that courts may review virtually all regulations of human behavior under the due process clause of that amendment. This would include judicial review of economic regulations. The burden of justification would be placed on the government so that all such regulations would start with a presumption of unconstitutionality. Viewed from the standpoint of economic philosophy and of individual freedom the idea has many attractions. But viewed from the standpoint of constitutional structures the idea works a massive shift away from democracy and toward judicial role.

Professor Siegan has explained what is involved.

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

This method of review is familiar to us from case law. It has merit where the court is examining legislation that appears to threaten a right or a value specified by a provision of the Constitution. But

when employed as a formula for the general review of all restrictions on human freedom without guidance from the interpreted Constitution, the court is cut loose from any external moorings and required to perform tasks that are not only beyond its competence but beyond any function that can conceivably be called judicial. That assertion is true, I submit, with respect to each of the three steps of the process described.

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

It must be so detailed and well-articulated, all the major and minor premises in place, that it allows judges to decide infinite numbers of concrete disputes. IT must also rest upon more than individual preferences of judges in order not only that internal inconsistency be avoided but also that the legitimacy of forcing the chosen ends of government upon elected representatives, who have other ends in mind, can be justified. No theory of the proper ends of government that possesses all of these characteristics is even conceivable. Yet, to satisfy the requirements of adjudication and the premise that a judge may not override democratic choice without an authority other than his own will, each of those qualities is essential.

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

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

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

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

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

The conclusion, I think, must be that only by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure the Constitution is law.

President Ronald Reagan
At the investiture of Chief Justice William H. Rehnquist and
Associate Justice Antonin Scalia at the White House
September 26, 1986, Washington, DC

Mr. Chief Justice Burger, Mr. Chief Justice Rehnquist, members of the Court, and ladies and gentlemen: Today we mark one of those moments of passage and renewal that has kept our Republic alive and strong -- as Lincoln called it, the last, best hope of man on Earth -- for all the years since its founding. One Chief Justice of our Supreme Court has stepped down, and together with a new Associate Justice, another has taken his place. As the Constitution requires, they've been nominated by the President, confirmed by the Senate, and they've taken the oath of office that is required by the Constitution itself -- the oath "to support and defend the Constitution of the United States . . . so help me God."

* * *

With these two outstanding men taking their new positions, this is, as I said, a time of renewal in the great constitutional system that our forefathers gave us -- a good time to reflect on the inspired wisdom we call our Constitution, a time to remember that the Founding Fathers gave careful thought to the role of the Supreme Court.

In a small room in Philadelphia in the summer of 1787, they debated whether the Justices should have life terms or not, whether they should be part of one or the other branches or not, and whether they should have the right to declare acts of the other branches of government unconstitutional or not. They settled on a judiciary that would be independent and strong, but one whose power would also, they believed, be confined within the boundaries of a written Constitution and laws. In the convention and during the debates on ratification, some said that there was a danger of the courts making laws rather than interpreting them. The framers of our Constitution believed, however, that the judiciary they envisioned would be "the least dangerous" branch of the Government, because, as Alexander Hamilton wrote in the Federalist Papers, it had "neither force nor will, but merely judgment." The judicial branch interprets the laws, while the power to make and execute those laws is balanced in the two elected branches. And this was one thing that Americans of all persuasions supported.

Hamilton and Thomas Jefferson, for example, disagreed on most of the great issues of their day, just as many have disagreed in ours. They helped begin our long tradition of loyal opposition, of standing on opposite sides of almost every question while still working together for the good of the country. And yet for all their differences, they both agreed -- as should be -- on the importance of judicial restraint. "Our peculiar security," Jefferson warned, "is in the possession of a written Constitution." And he made this appeal: "Let us not make it a blank paper by construction."

Hamilton, Jefferson, and all the Founding Fathers recognized that the Constitution is the supreme and ultimate expression of the will of the American people. They saw that no one in office could remain above it, if freedom were to survive through the ages. They understood that, in the words of James Madison, if "the sense in which the Constitution was accepted and ratified by the nation is not the guide to expounding it, there can be no security for a faithful exercise of its powers." The Founding Fathers were clear on this issue. For them, the question involved in judicial restraint was not -- as it is not -- will we have liberal or conservative courts? They knew that the courts, like the Constitution itself, must not

be liberal or conservative. The question was and is, will we have government by the people? And this is why the principle of judicial restraint has had an honored place in our tradition. Progressive, as well as conservative, judges have insisted on its importance -- Justice Holmes, for example, and Justice Felix Frankfurter, who once said, "The highest exercise of judicial dutyis to subordinate one's personal pulls and one's private views to the law."

Chief Justice Rehnquist and Justice Scalia have demonstrated in their opinions that they stand with Holmes and Frankfurter on this question. I nominated them with this principle very much in mind. And Chief Justice Burger, in his opinions, was also a champion of restraint. All three men understand that the Founding Fathers designed a system of checks and balances, and of limited government, because they knew that the great preserver of our freedoms would never be the courts or either of the other branches alone. It would always be the totality of our constitutional system, with no one part getting the upper hand. And that's why the judiciary must be independent. And that is why it must exercise restraint.

So, our protection is in the constitutional system, and one other place as well. Lincoln asked, "What constitutes the bulwark of our own liberty?" And he answered, "It is in the love of liberty which God has planted in us." Yes, we the people are the ultimate defenders of freedom. We the people created the Government and gave it its powers. And our love of liberty and our spiritual strength, our dedication to the Constitution, are what, in the end, preserves our great nation and this great hope for all mankind. All of us, as Americans, are joined in a great common enterprise to write the story of freedom -- the greatest adventure mankind has ever known and one we must pass on to our children and their children, remembering that freedom is never more than one generation away from extinction.

The warning, more than a century ago, attributed to Daniel Webster, remains as timeless as the document he revered. "Miracles do not cluster," he said, "Hold on to the Constitution of the United States of America and to the Republic for which it stands -- what has happened once in 6,000 years may never happen again. Hold on to your Constitution, for if the American Constitution shall fall there will be anarchy throughout the world."