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THE JUDICIARY

9-1 From *A Matter of Interpretation: Federal Courts and the Law*

Antonin Scalia

Supreme Court judges and indeed—as we learn in the essay by Carp, Manning, and Stidham, later in this section—judges at every level of the federal judiciary decide cases in close accord with the political views of those who appointed them. Years of Democratic control of the White House and Congress created the activist federal judiciary of the 1960s and 1970s that advanced federal protections of civil rights and civil liberties. With the resurgence of the Republican Party in national politics, the federal judiciary has gradually, with turnover in members, become more conservative. Some observers note these trends and conclude that judges are little more than partisan politicians disguised in robes. Unsurprisingly, judges do not view themselves this way. Instead, they account for their sometimes sharply differing opinions on criteria that do not fit neatly on the familiar partisan or ideological dimensions that are used to classify elected officeholders. In the next two essays, two Supreme Court justices—one conservative and appointed by a Republican president, the other a moderate, appointed by a Democrat—explain how they approach decisions, decisions on which they frequently disagree. As you read and weigh these alternative views, note that both judges begin with the same assumption—that as the unelected branch the judiciary should, when possible, defer to the decisions of democratically elected officeholders.

In the following essay, excerpted from his highly regarded series of lectures to Princeton law students, Justice Antonin Scalia explains how he approaches decisions. Some call this style “literalist” or “originalist,” in that Scalia weighs decisions against a close reading of the texts of laws and the Constitution. He reminds us that in a constitutional democracy judges are not charged with deciding what fair and just policy should be. This responsibility belongs with elected officials, who better reflect their citizenry’s views on such matters. Nor should judges try to read the minds of those who make the law. A judge’s role begins and ends with applying the law (including the Constitution) to the particular circumstances of a legal disagreement. Scalia’s critics have complained that the application of law is frequently not so simple. Laws conflict or fail to consider the many contingencies that reach the Supreme Court.

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The following essay attempts to explain the current neglected state of the science of construing legal texts, and offers a few suggestions for improvement. It is addressed not just to lawyers but to all thoughtful Americans who share our national obsession with the law.

THE COMMON LAW

The first year of law school makes an enormous impact upon the mind. Many students remark upon the phenomenon. They experience a sort of intellectual rebirth, the acquisition of a whole new mode of perceiving and thinking. Thereafter, even if they do not yet know much law, they do—as the expression goes—“think like a lawyer.”

The overwhelming majority of the courses taught in that first year, and surely the ones that have the most profound effect, teach the substance, and the methodology, of the common law—torts, for example; contracts; property; criminal law. American lawyers cut their teeth upon the common law. To understand what an effect that must have, you must appreciate that the common law is not really common law, except insofar as judges can be regarded as common. That is to say, it is not “customary law,” or a reflection of the people’s practices, but is rather law developed by the judges. Perhaps in the very infancy of Anglo-Saxon law it could have been thought that the courts were mere expositors of generally accepted social practices; and certainly, even in the full maturity of the common law, a well-established commercial or social practice could form the basis for a court’s decision. But from an early time—as early as the Year Books, which record English judicial decisions from the end of the thirteenth century to the beginning of the sixteenth—any equivalence between custom and common law had ceased to exist, except in the sense that the doctrine of *stare decisis* rendered prior judicial decisions “custom.” The issues coming before the courts involved, more and more, refined questions to which customary practice provided no answer.

Oliver Wendell Holmes’s influential book *The Common Law*¹—which is still suggested reading

for entering law students—talks a little bit about Germanic and early English custom. . . . This is the image of the law—the common law—to which an aspiring American lawyer is first exposed, even if he has not read Holmes over the previous summer as he was supposed to. He learns the law, not by reading statutes that promulgate it or treatises that summarize it, but rather by studying the judicial opinions that invented it. This is the famous case-law method, pioneered by Harvard Law School in the last century, and brought to movies and TV by the redoubtable Professor Kingsfield of *Love Story* and *The Paper Chase*. The student is directed to read a series of cases, set forth in a text called a “casebook,” designed to show how the law developed. . . . Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one. Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. But the second function, and the more important one, was to *make* the law.

If you were sitting in on Professor Kingsfield’s class when *Hadley v. Baxendale* was the assigned reading, you would find that the class discussion would not end with the mere description and dissection of the opinion. [This case, a familiar example of 19th-Century English common law, involves liability in failing to perform a contracted obligation.-Ed.] Various “hypotheticals” would be proposed by the crusty (yet, under it all, good-hearted) old professor, testing the validity and the sufficiency of the “foreseeability” rule. What if, for example, you are a blacksmith, and a young knight rides up on a horse that has thrown a shoe. He tells you he is returning to his ancestral estate, Blackacre, which he must reach that very evening to claim his inheritance, or else it will go to his wicked, no-good cousin, the sheriff of Nottingham. You contract to put on a new shoe, for the going rate of three farthings. The shoe is defective, or is badly shod, the horse goes lame, and the knight reaches Blackacre too late. Are you really liable for the full amount of his inheritance? Is it reasonable to impose that degree of liability for three farthings? Would not the parties have set a different price if liability of that amount had been

contemplated? Ought there not to be, in other words, some limiting principle to damages beyond mere foreseeability? Indeed, might not that principle—call it presumed assumption of risk—explain why *Hadley v. Baxendale* reached the right result after all, though not for the precise reason it assigned?

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one’s own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges!

Besides the ability to think about, and devise, the “best” legal rule, there is another skill imparted in the first year of law school that is essential to the making of a good common-law judge. It is the technique of what is called “distinguishing” cases. That is a necessary skill, because an absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis*—that is, the principle that a decision made in one case will be followed in the next. Quite obviously, without such a principle common-law courts would not be making any “law”; they would just be resolving the particular dispute before them. It is the requirement that future courts adhere to the principle underlying a judicial decision which causes that decision to be a legal rule. (There is no such requirement in the civil-law system, where it is the text of the law rather than any prior judicial interpretation of that text which is authoritative. Prior judicial opinions are consulted for their persuasive effect, much as academic commentary would be; but they are not *binding*.)

Within such a precedent-bound common-law system, it is critical for the lawyer, or the judge, to establish whether the case at hand falls within a principle that has already been decided. Hence the technique—or the art, or the game—of “distinguishing” earlier cases. It is an art or a game, rather than a science, because what constitutes the “holding” of an earlier case is not well defined and can be adjusted to suit the occasion. . . .

It should be apparent that by reason of the doctrine of *stare decisis*, as limited by the principle I have just described, the common law grew in a peculiar

fashion—rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it. The first case lays on the board: “No liability for breach of contractual duty without privity”; the next player adds “unless injured party is member of household.” And the game continues.

As I have described, this system of making law by judicial opinion, and making law by distinguishing earlier cases, is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law. That image of the great judge remains with the former law student when he himself becomes a judge, and thus the common-law tradition is passed on.

DEMOCRATIC LEGISLATION

All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy. In most countries, judges are no longer agents of the king, for there are no kings. . . . [O]nce we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers) becomes apparent. Indeed, that was evident to many even before legal realism carried the day. It was one of the principal motivations behind the law-codification movement of the nineteenth century. . . .

The nineteenth-century codification movement . . . was generally opposed by the bar, and hence did not achieve substantial success, except in one field: civil procedure, the law governing the trial of civil cases.² (I have always found it curious, by the way, that the

only field in which lawyers and judges were willing to abandon judicial lawmaking was a field important to nobody except litigants, lawyers, and judges. Civil procedure used to be the *only* statutory course taught in first-year law school.) Today, generally speaking, the old private-law fields—contracts, torts, property, trusts and estates, family law—remain firmly within the control of state common-law courts.³ Indeed, it is probably true that in these fields judicial lawmaking can be more freewheeling than ever, since the doctrine of *stare decisis* has appreciably eroded. Prior decisions that even the cleverest mind cannot distinguish can nowadays simply be overruled.

My point in all of this is not that the common law should be scraped away as a barnacle on the hull of democracy. I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields—and perhaps the very best method. An argument can be made that development of the bulk of private law by judges (a natural aristocracy, as Madison accurately portrayed them)⁴ is a desirable limitation upon popular democracy. . . .

But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the mind-set that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?”—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law. . . . Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution. Let me put the Constitution to one side for the time being, since many believe that that document is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like. I think that is wrong—indeed, as I shall discuss below, I think it frustrates the whole purpose of a written constitution. But we need not pause to debate that point now, since a very small proportion of judges’ work is constitutional interpretation in any event. (Even in the Supreme Court, I would estimate that well less than a fifth of the issues we confront

are constitutional issues—and probably less than a twentieth if you exclude criminal-law cases.) By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers. It will not do to treat the enterprise as simply an inconvenient modern add-on to the judge’s primary role of common-law lawmaker. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.

THE SCIENCE OF STATUTORY INTERPRETATION

The state of the science of statutory interpretation in American law is accurately described by a prominent treatise on the legal process as follows:

Do not expect anybody’s theory of statutory interpretation, whether it is your own or somebody else’s, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.⁵

Surely this is a sad commentary: We American judges have no intelligible theory of what we do most.

Even sadder, however, is the fact that the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory. Whereas legal scholarship has been at pains to rationalize the common law—to devise the *best* rules governing contracts, torts, and so forth—it has been seemingly agnostic as to whether there is even any such thing as good or bad rules of statutory interpretation. There are few law-school courses on the subject, and certainly no required ones; the science of interpretation (if it is a science) is left to be picked up piecemeal, through the reading of cases (good and bad) in substantive fields of law

that happen to involve statutes, such as securities law, natural resources law, and employment law. . . .

“INTENT OF THE LEGISLATURE”

Statutory interpretation is such a broad subject that the substance of it cannot be discussed comprehensively here. It is worth examining a few aspects, however, if only to demonstrate the great degree of confusion that prevails. We can begin at the most fundamental possible level. So utterly unformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is. Consider the basic question: What are we looking for when we construe a statute?

You will find it frequently said in judicial opinions of my court and others that the judge’s objective in interpreting a statute is to give effect to “the intent of the legislature.” This principle, in one form or another, goes back at least as far as Blackstone.⁶ Unfortunately, it does not square with some of the (few) generally accepted concrete rules of statutory construction. One is the rule that when the text of a statute is clear, that is the end of the matter. Why should that be so, if what the legislature *intended*, rather than what it *said*, is the object of our inquiry? In selecting the words of the statute, the legislature might have misspoken. Why not permit that to be demonstrated from the floor debates? Or indeed, why not accept, as proper material for the court to consider, later explanations by the legislators—a sworn affidavit signed by the majority of each house, for example, as to what they *really* meant?

Another accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws. We simply assume, for purposes of our search for “intent,” that the enacting legislature was aware of all those other laws. Well of course that is a fiction, and if we were really looking for the subjective intent of the enacting legislature we would more likely find it by paying attention to the text (and legislative history) of the new statute in isolation.

The evidence suggests that, despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of “objectified” intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. As Bishop’s old treatise nicely put it, elaborating upon the usual formulation: “[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended.”⁷ And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

In reality, however, if one accepts the principle that the object of judicial interpretation is to determine the intent of the legislature, being bound by genuine but unexpressed legislative intent rather than the law is only the *theoretical* threat. The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field. When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law. As Dean Landis of Harvard Law School

(a believer in the search for legislative intent) put it in a 1930 article:

[T]he gravest sins are perpetrated in the name of the intent of the legislature. Judges are rarely willing to admit their role as actual lawgivers, and such admissions as are wrung from their unwilling lips lie in the field of common and not statute law. To condone in these instances the practice of talking in terms of the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man.⁸ . . .

The text is the law, and it is the text that must be observed. I agree with Justice Holmes's remark, quoted approvingly by Justice Frankfurter in his article on the construction of statutes: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean."⁹ And I agree with Holmes's other remark, quoted approvingly by Justice Jackson: "We do not inquire what the legislature meant; we ask only what the statute means."¹⁰

TEXTUALISM

The philosophy of interpretation I have described above is known as textualism. In some sophisticated circles, it is considered simpleminded—"wooden," "unimaginative," "pedestrian." It is none of that. To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.

Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am

not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. The difference between textualism and strict constructionism can be seen in a case my Court decided four terms ago.¹¹ The statute at issue provided for an increased jail term if, "during and in relation to . . . [a] drug trafficking crime," the defendant "uses . . . a firearm." The defendant in this case had sought to purchase a quantity of cocaine; and what he had offered to give in exchange for the cocaine was an unloaded firearm, which he showed to the drug-seller. The Court held, I regret to say, that the defendant was subject to the increased penalty, because he had "used a firearm during and in relation to a drug trafficking crime." The vote was not even close (6–3). I dissented. Now I cannot say whether my colleagues in the majority voted the way they did because they are strict-construction textualists, or because they are not textualists at all. But a proper textualist, which is to say my kind of textualist, would surely have voted to acquit. The phrase "uses a gun" fairly connoted use of a gun for what guns are normally used for, that is, as a weapon. As I put the point in my dissent, when you ask someone, "Do you use a cane?" you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway.

But while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible. My favorite example of a departure from text—and certainly the departure that has enabled judges to do more freewheeling law-making than any other—pertains to the Due Process Clause found in the Fifth and Fourteenth Amendments of the United States Constitution, which says that no person shall "be deprived of life, liberty, or property without due process of law." It has been interpreted to prevent the government from taking away certain liberties *beyond* those, such as freedom of speech and of religion, that are specifically named in the Constitution. (The first Supreme Court case to use the Due Process Clause in this fashion was, by the way, *Dred Scott*¹²—not a

desirable parentage.) Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.

Of all the criticisms leveled against textualism, the most mindless is that it is “formalistic.” The answer to that is, *of course it’s formalistic!* The rule of law is *about* form. If, for example, a citizen performs an act—let us say the sale of certain technology to a foreign country—which is prohibited by a widely publicized bill proposed by the administration and passed by both houses of Congress, *but not yet signed by the President*, that sale is lawful. It is of no consequence that everyone knows both houses of Congress and the President wish to prevent that sale. Before the wish becomes a binding law, it must be embodied in a bill that passes both houses and is signed by the President. Is that not formalism? A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbor with a video camera has filmed the crime; and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism. It is what makes a government a government of laws and not of men. . . .

LEGISLATIVE HISTORY

Let me turn now . . . to an interpretive device whose widespread use is relatively new: legislative history, by which I mean the statements made in the floor debates, committee reports, and even committee testimony, leading up to the enactment of the legislation. My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the

conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning. This was the traditional English, and the traditional American, practice. Chief Justice Taney wrote:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.¹³

That uncompromising view generally prevailed in this country until the present century. The movement to change it gained momentum in the late 1920s and 1930s, driven, believe it or not, by frustration with common-law judges’ use of “legislative intent” and phonied-up canons to impose their own views—in those days views opposed to progressive social legislation. I quoted earlier an article by Dean Landis inveighing against such judicial usurpation. The solution he proposed was not the banishment of legislative intent as an interpretive criterion, but rather the use of legislative history to place that intent beyond manipulation.¹⁴

Extensive use of legislative history in this country dates only from about the 1940s. . . . In the past few decades, however, we have developed a legal culture in which lawyers routinely—and I do mean routinely—make no distinction between words in the text of a statute and words in its legislative history. My Court is frequently told, in briefs and in oral argument, that “Congress said thus-and-so”—when in fact what is being quoted is not the law promulgated by Congress, nor even any text endorsed by a single house of Congress, but rather the statement of a single committee of a single house, set forth in

a committee report. Resort to legislative history has become so common that lawyerly wags have popularized a humorous quip inverting the oft-recited (and oft-ignored) rule as to when its use is appropriate: “One should consult the text of the statute,” the joke goes, “only when the legislative history is ambiguous.” Alas, that is no longer funny. Reality has overtaken parody. A few terms ago, I read a brief that *began* the legal argument with a discussion of legislative history and then continued (I am quoting it verbatim): “Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language.”¹⁵

As I have said, I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law. What is most exasperating about the use of legislative history, however, is that it does not even make sense for those who *accept* legislative intent as the criterion. It is much more likely to produce a false or contrived legislative intent than a genuine one. . . .

Ironically, but quite understandably, the more courts have relied upon legislative history, the less worthy of reliance it has become. In earlier days, it was at least genuine and not contrived—a real part of the legislation’s *history*, in the sense that it was part of the *development* of the bill, part of the attempt to inform and persuade those who voted. Nowadays, however, when it is universally known and expected that judges will resort to floor debates and (especially) committee reports as authoritative expressions of “legislative intent,” affecting the courts rather than informing the Congress has become the primary purpose of the exercise. It is less that the courts refer to legislative history because it exists than that legislative history exists because the courts refer to it. One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten “floor debate”—or, even better, insert into a committee report. . . .

I think that Dean Landis, and those who joined him in the prescription of legislative history as a cure for what he called “willful judges,” would be aghast at the results a half century later. On balance, it has facilitated rather than deterred decisions that are

based upon the courts’ policy preferences, rather than neutral principles of law. Since there are no rules as to how much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility. If the willful judge does not like the committee report, he will not follow it; he will call the statute not ambiguous enough, the committee report too ambiguous, or the legislative history (this is a favorite phrase) “as a whole, inconclusive.” . . .

INTERPRETING CONSTITUTIONAL TEXTS

Without pretending to have exhausted the vast topic of textual interpretation, I wish to address a final subject: the distinctive problem of constitutional interpretation. The problem is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text. Chief Justice Marshall put the point as well as it can be put in *McCulloch v. Maryland*:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.¹⁶

In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.

Take, for example, the provision of the First Amendment that forbids abridgment of “the freedom

of speech, or of the press.” That phrase does not list the full range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole. That is not strict construction, but it is reasonable construction.

It is curious that most of those who insist that the drafter’s intent gives meaning to a statute reject the drafter’s intent as the criterion for interpretation of the Constitution. I reject it for both. . . . [T]he Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather that between *original* meaning (whether derived from Framers’ intent or not) and *current* meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and “find” that changing law. Seems familiar, doesn’t it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures. . . .

If you go into a constitutional law class, or study a constitutional law casebook, or read a brief filed in a constitutional law case, you will rarely find the discussion addressed to the text of the constitutional provision that is at issue, or to the question of what was the originally understood or even the originally intended meaning of that text. The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that

the Constitution might mean what it *ought* to mean. Should there be—to take one of the less controversial examples—a constitutional right to die? If so, there is.¹⁷ Should there be a constitutional right to reclaim a biological child put out for adoption by the other parent? Again, if so, there is.¹⁸ If it is good, it is so. Never mind the text that we are supposedly construing; we will smuggle these new rights in, if all else fails, under the Due Process Clause (which, as I have described, is textually incapable of containing them). Moreover, what the Constitution meant yesterday it does not necessarily mean today. As our opinions say in the context of our Eighth Amendment jurisprudence (the Cruel and Unusual Punishments Clause), its meaning changes to reflect “the evolving standards of decency that mark the progress of a maturing society.”¹⁹

This is preeminently a common-law way of making law, and not the way of construing a democratically adopted text. . . . Proposals for “dynamic statutory construction,” such as those of Judge Calabresi . . . are concededly avant-garde. The Constitution, however, even though a democratically adopted text, we formally treat like the common law. What, it is fair to ask, is the justification for doing so?

One would suppose that the rule that a text does not change would apply *a fortiori* to a constitution. If courts felt too much bound by the democratic process to tinker with statutes, when their tinkering could be adjusted by the legislature, how much more should they feel bound not to tinker with a constitution, when their tinkering is virtually irreparable. It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that “evolving standards of decency” always “mark progress,” and that societies always “mature,” as opposed to rot. Neither the text of such a document nor the intent of its framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.

FLEXIBILITY AND LIBERALITY OF THE LIVING CONSTITUTION

The argument most frequently made in favor of the Living Constitution is a pragmatic one: Such an evolutionary approach is necessary in order to provide the “flexibility” that a changing society requires; the Constitution would have snapped if it had not been permitted to bend and grow. This might be a persuasive argument if most of the “growing” that the proponents of this approach have brought upon us in the past, and are determined to bring upon us in the future, were the *elimination* of restrictions upon democratic government. But just the opposite is true. Historically, and particularly in the past thirty-five years, the “evolving” Constitution has imposed a vast array of new constraints—new inflexibilities—upon administrative, judicial, and legislative action. To mention only a few things that formerly could be done or not done, as the society desired, but now cannot be done:

- admitting in a state criminal trial evidence of guilt that was obtained by an unlawful search;²⁰
- permitting invocation of God at public-school graduations;²¹
- electing one of the two houses of a state legislature the way the United States Senate is elected, i.e., on a basis that does not give all voters numerically equal representation;²²
- terminating welfare payments as soon as evidence of fraud is received, subject to restoration after hearing if the evidence is satisfactorily refuted;²³
- imposing property requirements as a condition of voting;²⁴
- prohibiting anonymous campaign literature;²⁵
- prohibiting pornography.²⁶

And the future agenda of constitutional evolutionists is mostly more of the same—the creation of

new restrictions upon democratic government, rather than the elimination of old ones. *Less* flexibility in government, not *more*. As things now stand, the state and federal governments may either apply capital punishment or abolish it, permit suicide or forbid it—all as the changing times and the changing sentiments of society may demand. But when capital punishment is held to violate the Eighth Amendment, and suicide is held to be protected by the Fourteenth Amendment, all flexibility with regard to those matters will be gone. No, the reality of the matter is that, generally speaking, devotees of The Living Constitution do not seek to facilitate social change but to prevent it.

There are, I must admit, a few exceptions to that—a few instances in which, historically, greater flexibility has been the result of the process. But those exceptions serve only to refute another argument of the proponents of an evolving Constitution, that evolution will always be in the direction of greater personal liberty. (They consider that a great advantage, for reasons that I do not entirely understand. All government represents a balance between individual freedom and social order, and it is not true that every alteration of that balance in the direction of greater individual freedom is necessarily good.) But in any case, the record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights. The most obvious refutation is the modern Court’s limitation of the constitutional protections afforded to property. The provision prohibiting impairment of the obligation of contracts, for example, has been gutted.²⁷ I am sure that We the People agree with that development; we value property rights less than the Founders did. So also, we value the right to bear arms less than did the Founders (who thought the right of self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgment of property rights and *like* the

elimination of the right to bear arms; but let us not pretend that these are not *reductions of rights*.

Or if property rights are too cold to arouse enthusiasm, and the right to bear arms too dangerous, let me give another example: Several terms ago a case came before the Supreme Court involving a prosecution for sexual abuse of a young child. The trial court found that the child would be too frightened to testify in the presence of the (presumed) abuser, and so, pursuant to state law, she was permitted to testify with only the prosecutor and defense counsel present, with the defendant, the judge, and the jury watching over closed-circuit television. A reasonable enough procedure, and it was held to be constitutional by my Court.²⁸ I dissented, because the Sixth Amendment provides that “[i]n *all* criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him” (emphasis added). There is no doubt what confrontation meant—or indeed means today. It means face-to-face, not watching from another room. And there is no doubt what one of the major purposes of that provision was: to induce *precisely* that pressure upon the witness which the little girl found it difficult to endure. It is difficult to accuse someone to his face, particularly when you are lying. Now no extrinsic factors have changed since that provision was adopted in 1791. Sexual abuse existed then, as it does now; little children were more easily upset than adults, then as now; a means of placing the defendant out of sight of the witness existed then as now (a screen could easily have been erected that would enable the defendant to see the witness, but not the witness the defendant). But the Sixth Amendment nonetheless gave *all* criminal defendants the right to *confront* the witnesses against them, because that was thought to be an important protection. The only significant things that *have* changed, I think, are the society’s sensitivity to so-called psychic trauma (which is what we are told the child witness in such a

situation suffers) and the society’s assessment of where the proper balance ought to be struck between the two extremes of a procedure that assures convicting 100 percent of all child abusers, and a procedure that assures acquitting 100 percent of those falsely accused of child abuse. I have no doubt that the society is, as a whole, happy and pleased with what my Court decided. But we should not pretend that the decision did not *eliminate* a liberty that previously existed. . . .

It seems to me that that is where we are heading, or perhaps even where we have arrived. Seventy-five years ago, we believed firmly enough in a rock-solid, unchanging Constitution that we felt it necessary to adopt the Nineteenth Amendment to give women the vote. The battle was not fought in the courts, and few thought that it could be, despite the constitutional guarantee of Equal Protection of the Laws; that provision did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis not only of age but of property and of sex. Who can doubt that if the issue had been deferred until today, the Constitution would be (formally) unamended, and the courts would be the chosen instrumentality of change? The American people have been converted to belief in The Living Constitution, a “morphing” document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.

NOTES

I am grateful for technical and research assistance by Matthew P. Previn, and for substantive suggestions by Eugene Scalia.

1. Oliver Wendell Holmes, Jr., *The Common Law* (1881).
2. The country's first major code of civil procedure, known as the Field Code (after David Dudley Field, who played a major role in its enactment), was passed in New York in 1848. By the end of the nineteenth century, similar codes had been adopted in many states. See Lawrence M. Friedman, *A History of American Law* 340–47 (1973).
3. The principal exception to this statement consists of so-called Uniform Laws, statutes enacted in virtually identical form by all or a large majority of state legislatures, in an effort to achieve nationwide uniformity with respect to certain aspects of some common-law fields. See, e.g., Uniform Commercial Code, 1 U.L.A. 5 (1989); Uniform Marriage and Divorce Act 9A U.L.A. 156 (1987); Uniform Consumer Credit Code, 7A U.L.A. 17 (1985).
4. "The [members of the judiciary department], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions." *The Federalist* No. 49, at 341 (Jacob E. Cooke ed., 1961).
5. Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).
6. See 1 William Blackstone, *Commentaries on the Laws of England* 59–62, 91 (photo reprint 1979) (1765).
7. Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* 57–58 (Boston: Little, Brown, & Co. 1882) (emphasis added) (citation omitted).
8. James M. Landis, *A Note on "Statutory Interpretation,"* 43 Harv. L. Rev. 886, 891 (1930).
9. Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 538 (1947).
10. Oliver Wendell Holmes, *Collected Legal Papers* 207 (1920), *quoted in* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 397 (1951) (Jackson, J., concurring).
11. *Smith v. United States*, 508 U.S. 223 (1993).
12. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).
13. *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) (emphasis added).
14. See Landis, *supra* note 17, at 891–92.
15. Brief for Petitioner at 21, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989), *quoted in* *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 530 (1989) (Scalia, J., concurring).
16. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).
17. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).
18. See *In re Kirchner*, 649 N.E.2d 324, 333 (Ill.), *cert. denied*, 115 S. Ct. 2599 (1995).
19. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), *quoting from* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).
20. See *Mapp v. Ohio*, 367 U.S. 643 (1961).
21. See *Lee v. Weisman*, 505 U.S. 577 (1992).
22. See *Reynolds v. Sims*, 377 U.S. 533 (1964).
23. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).
24. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).
25. See *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995).
26. Under current doctrine, pornography may be banned only if it is "obscene," see *Miller v. California*, 413 U.S. 15 (1973), a judicially crafted term of art that does not embrace material that excites "normal, healthy sexual desires," *Brockert v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).
27. See *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).
28. See *Maryland v. Craig*, 497 U.S. 836 (1990).

9-2 From Active Liberty

Stephen Breyer

Justice Stephen Breyer's book Active Liberty, from which this essay is excerpted, has been widely viewed as an activist judge's response to Justice Scalia's paean to judicial restraint. Yet Breyer does not envision a broadly activist role for judges in shaping social policy. For one thing, he agrees fundamentally with Scalia that unelected, life-tenured judges should subordinate their personal views on policy to those who are elected to make these decisions. Reflecting this, Breyer's decisions show his reluctance to overrule acts of Congress and executive decisions. For Breyer, the primacy of democracy requires that judges play a special role as guardians of citizens' rights and opportunities to influence government. On a variety of issues, this hierarchy of values leads Breyer to decide cases in ways that Scalia believes overstep judges' mandate. Breyer accepts broad regulation of campaign finance as advancing the performance of democracy, whereas Scalia argues that such laws affront First Amendment protections of free speech.

The theme as I here consider it falls within an interpretive tradition. . . . That tradition sees texts as driven by *purposes*. The judge should try to find and “honestly . . . say what was the underlying purpose expressed” in a statute. The judge should read constitutional language “as the revelation of the great purposes which were intended to be achieved by the Constitution” itself, a “framework for” and a “continuing instrument of government.” The judge should recognize that the Constitution will apply to “new subject matter . . . with which the framers were not familiar.” Thus, the judge, whether applying statute or Constitution, should “reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision.” Since law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences*, including “contemporary conditions, social, industrial, and political, of the community to be affected.” And since “the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.”¹

That tradition does not expect highly general instructions themselves to determine the outcome of

difficult concrete cases where language is open-ended and precisely defined purpose is difficult to ascertain. Certain constitutional language, for example, reflects “fundamental aspirations and . . . ‘moods,’ embodied in provisions like the due process and equal protection clauses, which were designed not to be precise and positive directions for rules of action.” A judge, when interpreting such open-ended provisions, must avoid being “willful, in the sense of enforcing individual views.” A judge cannot “enforce whatever he thinks best.” “In the exercise of” the “high power” of judicial review, says Justice Louis Brandeis, “we must be ever on our guard, lest we erect our prejudices into legal principles.” At the same time, a judge must avoid being “wooden, in uncritically resting on formulas, in assuming the familiar to be the necessary, in not realizing that any problem can be solved if only one principle is involved but that unfortunately all controversies of importance involve if not a conflict at least an interplay of principles.”²

How, then, is the judge to act between the bounds of the “willful” and the “wooden”? The tradition answers with an *attitude*, an attitude that hesitates to rely upon any single theory or grand view

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of law, of interpretation, or of the Constitution. It champions the need to search for purposes; it calls for restraint, asking judges to “speak . . . humbly as the voice of the law.” And it finds in the democratic nature of our system more than simply a justification for judicial restraint. Holmes reminds the judge as a general matter to allow “[c]onsiderable latitude . . . for differences of view.” . . .

[O]ne can reasonably view the Constitution as focusing upon active liberty, both as important in itself and as a partial means to help secure individual (modern) freedom. The Framers included elements designed to “control and mitigate” the ill effects of more direct forms of democratic government, but in doing so, the Framers “did not see themselves as repudiating either the Revolution or popular government.” Rather, they were “saving both from their excesses.” The act of ratifying the Constitution, by means of special state elections with broad voter eligibility rules, signaled the democratic character of the document itself.³

As history has made clear, the original Constitution was insufficient. It did not include a majority of the nation within its “democratic community.” It took a civil war and eighty years of racial segregation before the slaves and their descendants could begin to think of the Constitution as theirs. Nor did women receive the right to vote until 1920. The “people” had to amend the Constitution, not only to extend its democratic base but also to expand and more fully to secure basic individual (negative) liberty.

But the original document sowed the democratic seed. Madison described something fundamental about American government, then and now, when he said the Constitution is a “charter . . . of power . . . granted by liberty,” not (as in Europe) a “charter of liberty . . . granted by power.”⁴ . . .

In sum, our constitutional history has been a quest for workable government, workable democratic government, workable democratic government protective of individual personal liberty. Our central commitment has been to “government of the people, by the people, for the people.” And the applications following illustrate how this constitutional understanding helps interpret the Constitution—in a way that helps to resolve problems related to *modern* government. . . .

STATUTORY INTERPRETATION

The [first] example concerns statutory interpretation. It contrasts a literal text-based approach with an approach that places more emphasis on statutory purpose and congressional intent. It illustrates why judges should pay primary attention to a statute’s purpose in difficult cases of interpretation in which language is not clear. It shows how overemphasis on text can lead courts astray, divorcing law from life—indeed, creating law that harms those whom Congress meant to help. And it explains why a purposive approach is more consistent with the framework for a “delegated democracy” that the Constitution creates.⁵

The interpretive problem arises when statutory language does not clearly answer the question of what the statute means or how it applies. Why does a statute contain such language? Perhaps Congress used inappropriate language. Perhaps it failed to use its own drafting expertise or failed to have committee hearings, writing legislation on the floor instead. Perhaps it chose politically symbolic language or ambiguous language over more precise language—possibilities that modern, highly partisan, interest-group-based politics (responding to overly simplified media accounts) make realistic. Perhaps no one in Congress thought about how the statute would apply in certain circumstances. Perhaps it is impossible to use language that foresees how a statute should apply in all relevant circumstances.

The founding generation of Americans understood these or similar possibilities. They realized that judges, though mere “fallible men,” would have to exercise judgment and discretion in applying newly codified law. But they expected that judges, when doing so, would remain faithful to the legislators’ will. The problem of statutory interpretation is how to meet that expectation.

Most judges start in the same way. They look first to the statute’s language, its structure, and its history in an effort to determine the statute’s purpose. They then use that purpose (along with the language, structure, and history) to determine the proper interpretation. Thus far, there is agreement. But when the problem is truly difficult, these factors without more

may simply limit the universe of possible answers without clearly identifying a final choice. What then?

At this point judges tend to divide in their approach. Some look primarily to text, i.e., to language and text-related circumstances, for further enlightenment. They may try to tease further meaning from the language and structure of the statute itself. They may look to language-based canons of interpretation in the search for an “objective” key to the statute’s proper interpretation, say a canon like *noscitur a sociis*, which tells a judge to interpret a word so that it has the same kind of meaning as its neighbors. Textualism, it has been argued, searches for “meaning . . . in structure.” It means “preferring the language and structure of the law whenever possible over its legislative history and imputed values.” It asks judges to avoid invocation of vague or broad statutory purposes and instead to consider such purposes at “lower levels of generality.” It hopes thereby to reduce the risk that judges will interpret statutes subjectively, substituting their own ideas of what is good for those of Congress.⁶

Other judges look primarily to the statute’s purposes for enlightenment. They avoid the use of interpretive canons. They allow context to determine the level of generality at which they will describe a statute’s purpose—in the way that context tells us not to answer the lost driver’s request for directions, “Where am I?” with the words “In a car.” They speak in terms of congressional “intent,” while understanding that legal conventions govern the use of that term to describe, not the intent of any, or every, individual legislator, but the intent of the group—in the way that linguistic conventions allow us to speak of the intentions of an army or a team, even when they differ from those of any, or every, soldier or member. And they examine legislative history, often closely, in the hope that the history will help them better understand the context, the enacting legislators’ objectives, and ultimately the statute’s purposes. At the heart of a purpose-based approach stands the “reasonable member of Congress”—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem. The judge will ask how this person (real or fictional), aware of the statute’s language, structure, and general objectives

(actually or hypothetically), *would have wanted* a court to interpret the statute in light of present circumstances in the particular case.

[A] recent case illustrate[s] the difference between the two approaches. In [it] the majority followed a more textual approach; the dissent, a more purposive approach. . . . The federal habeas corpus statute is ambiguous in respect to the time limits that apply when a state prisoner seeks access to federal habeas corpus. It says that a state prisoner (ordinarily) must file a federal petition within one year after his state court conviction becomes final. But the statute tolls that one-year period during the time that “a properly filed application for State post-conviction or other collateral review” is pending. Do the words “other collateral review” include an earlier application for a federal habeas corpus petition? Should the one-year period be tolled, for example, when a state prisoner mistakenly files a habeas petition in federal court before he exhausts all his state collateral remedies?

It is unlikely that anyone in Congress thought about this question, for it is highly technical. Yet it is important. More than half of all federal habeas corpus petitions fall into the relevant category—i.e., state prisoners file them prematurely before the prisoner has tried to take advantage of available state remedies. In those cases, the federal court often dismisses the petition and the state prisoner must return to state court to exhaust available state remedies before he can once again file his federal habeas petition in federal court. If the one-year statute of limitations is not tolled while the first federal habeas petition was pending, that state prisoner will likely find that the one year has run—and his federal petition is time-barred—before he can return to federal court.⁷

A literal reading of the statute suggests that this is just what Congress had in mind. It suggests that the one-year time limit is tolled only during the time that *state* collateral review (or similar) proceedings are in process. And that reading is supported by various linguistic canons of construction.⁸

Nonetheless, the language does not foreclose an alternative interpretation—an interpretation under which such petitions would fall within the scope of the phrase “other collateral review.” The word “State” could be read to modify the phrase

“post-conviction . . . review,” permitting “*other* collateral review” to refer to federal proceedings. The phrase “properly filed” could be interpreted to refer to purely formal filing requirements rather than calling into play more important remedial questions such as the presence or absence of “exhaustion.” A purposive approach favors this latter linguistic interpretation.⁹

Why? [Consider] our hypothetical legislator, the reasonable member of Congress. Which interpretation would that member favor (if he had thought of the problem, which he likely had not)? Consider the consequences of the more literal interpretation. That interpretation would close the doors of federal habeas courts to many or most state prisoners who mistakenly filed a federal habeas petition too soon, but not to all such prisoners. Whether the one-year window was still open would depend in large part on how long the federal court considering the premature federal petition took to dismiss it. In cases in which the court ruled quickly, the short time the federal petition was (wrongly) present in the federal court might not matter. But if a premature federal petition languishes on the federal court’s docket while the one year runs, the petitioner would likely lose his one meaningful chance to seek federal habeas relief. By way of contrast, state court delay in considering a prisoner petition in state court would not matter. Whenever *state* proceedings are at issue, the statute tolls the one-year limitations period.

Now ask *why* our reasonable legislator would want to bring about these consequences. He might believe that state prisoners have too often abused the federal writ by filing too many petitions. But the distinction that a literal interpretation would make between those allowed to file and those not allowed to file—a distinction that in essence rests upon federal court processing delay—is a *random* distinction, bearing no logical relation to any abuse-related purpose. Would our reasonable legislator, even if concerned about abuse of the writ, choose to deny access to the Great Writ on a *random* basis? Given our traditions, including those the Constitution grants through its habeas corpus guarantees, the answer to this question is likely no. Would those using a more literal text-based approach answer this question differently? I do not think so. But my real objection to

the text-based approach is that it would prevent them from posing the question at all.¹⁰

[This] example suggest[s] the danger that lurks where judges rely too heavily upon just text and textual aids when interpreting a statute. . . . [W]hen difficult statutory questions are at issue, courts do better to focus foremost upon statutory purpose, ruling out neither legislative history nor any other form of help in order to locate the role that Congress intended the statutory words in question to play.

For one thing, near-exclusive reliance upon canons and other linguistic interpretive aids in close cases can undermine the Constitution’s democratic objective. Legislation in a delegated democracy is meant to embody the people’s will, either directly (insofar as legislators see themselves as translating how their constituents feel about each proposed law) or indirectly (insofar as legislators see themselves as exercising delegated authority to vote in accordance with what they see as the public interest). Either way, an interpretation of a statute that tends to implement the legislator’s will helps to implement the public’s will and is therefore consistent with the Constitution’s democratic purpose. For similar reasons an interpretation that undercuts the statute’s objectives tends to undercut that constitutional objective. . . .

Use of a “reasonable legislator” fiction also facilitates legislative accountability. Ordinary citizens think in terms of general purposes. They readily understand their elected legislators’ thinking similarly. It is not impossible to ask an ordinary citizen to determine whether a particular law is consistent with a general purpose the ordinary citizen might support. It is not impossible to ask an ordinary citizen to determine what general purpose a legislator sought to achieve in enacting a particular statute. And it is not impossible for the ordinary citizen to judge the legislator accordingly. But it *is* impossible to ask an ordinary citizen (or an ordinary legislator) to understand the operation of linguistic canons of interpretation. And it *is* impossible to ask an ordinary citizen to draw any relevant electoral conclusion from consequences that might flow when courts reach a purpose-thwarting interpretation of the statute based upon their near-exclusive use of interpretive canons. Were a segment of the public unhappy about application of the

Arbitration Act to ordinary employment contracts, whom should it blame?

For another thing, that approach means that laws will work better for the people they are presently meant to affect. Law is tied to life, and a failure to understand how a statute is so tied can undermine the very human activity that the law seeks to benefit. The more literal text-based, canon-based interpretation of the Foreign Sovereign Immunities jurisdictional statute, for example, means that foreign nations, those using tiered corporate ownership, will find their access to federal courts cut off, undermining the statute's basic jurisdictional objectives. The textual approach to the habeas corpus statute randomly closes courthouse doors in a way that runs contrary to our commitment to basic individual liberty. And it does so because it tends to stop judges from asking a relevant purpose-based question: Why would Congress have wanted a statute that produces those consequences?¹¹

In sum, a “reasonable legislator” approach is a workable method of implementing the Constitution's democratic objective. It permits ready translation of the general desire of the public for certain ends, through the legislator's efforts to embody those ends in legislation, into a set of statutory words that will carry out those general objectives. I have argued that the Framers created the Constitution's complex governmental mechanism in order better to translate public will, determined through collective deliberation, into sound public policy. The courts constitute part of that mechanism, and judicial use of the “will of the reasonable legislator”—even if at times it is a fiction—helps statutes match their means to their overall public policy objectives, a match that helps translate the popular will into sound policy. An overly literal reading of a text can too often stand in the way.

CONSTITUTIONAL INTERPRETATION: SPEECH

The [next] example focuses on the First Amendment and how it . . . show[s] the importance of reading the First Amendment not in isolation but as seeking to maintain a system of free expression designed

to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions.

The example begins where courts normally begin in First Amendment cases. They try to classify the speech at issue, distinguishing among different speech-related activities for the purpose of applying a strict, moderately strict, or totally relaxed presumption of unconstitutionality. Is the speech “political speech,” calling for a strong pro-speech presumption, “commercial speech,” calling for a mid-range presumption, or simply a form of economic regulation presumed constitutional?

Should courts begin in this way? Some argue that making these kinds of categorical distinctions is a misplaced enterprise. The Constitution's language makes no such distinction. It simply protects “the freedom of speech” from government restriction. “Speech is speech and that is the end of the matter.” But to limit distinctions to the point at which First Amendment law embodies the slogan “speech is speech” cannot work. And the fact that the First Amendment seeks to protect active liberty as well as modern liberty helps to explain why.¹²

The democratic government that the Constitution creates now regulates a host of activities that inevitably take place through the medium of speech. Today's workers manipulate information, not wood or metal. And the modern information-based workplace, no less than its more materially based predecessors, requires the application of community standards seeking to assure, for example, the absence of anti-competitive restraints; the accuracy of information; the absence of discrimination; the protection of health, safety, the environment, the consumer; and so forth.

Laws that embody these standards obviously affect speech. Warrant laws require private firms to include on labels statements of a specified content. Securities laws and consumer protection laws insist upon the disclosure of information that businesses might prefer to keep private. Health laws forbid tobacco advertising, say, to children. Anti-discrimination laws insist that employers prevent employees from making certain kinds of statements. Communications laws require cable broadcasters to provide network access. Campaign finance laws restrict citizen contributions to candidates.

To treat all these instances alike, to scrutinize them all as if they all represented a similar kind of legislative effort to restrain a citizen's "modern liberty" to speak, would lump together too many different kinds of activities under the aegis of a single standard, thereby creating a dilemma. On the one hand, if strong First Amendment standards were to apply across the board, they would prevent a democratically elected government from creating necessary regulation. The strong free speech guarantees needed to protect the structural democratic governing process, if applied without distinction to all governmental efforts to control speech, would unreasonably limit the public's substantive economic (or social) regulatory choices. The limits on substantive choice would likely exceed what any liberty-protecting framework for democratic government could require, depriving the people of the democratically necessary room to make decisions, including the leeway to make regulatory mistakes. . . . Most scholars, including "speech is speech" advocates, consequently see a need for distinctions. The question is, Which ones? Applied where?

At this point, reference to the Constitution's more general objectives helps. First, active liberty is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials. That special risk justifies especially strong pro-speech judicial presumptions. It also justifies careful review whenever the speech in question seeks to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live.

Second, whenever ordinary commercial or economic regulation is at issue, this special risk normally is absent. Moreover, strong pro-speech presumptions risk imposing what is, from the perspective of active liberty, too severe a restriction upon the legislature—a restriction that would dramatically limit the size of the legislative arena that the Constitution opens for public deliberation and action. The presence of this second risk warns against use of special, strong pro-speech judicial presumptions or special regulation-skeptical judicial review.

The upshot is that reference to constitutional purposes in general and active liberty in particular helps to justify the category of review that the Court applies to a given type of law. But those same considerations argue, among other things, against category boundaries that are too rigid or fixed and against too mechanical an application of those categories. Rather, reference to active liberty will help courts define and apply the categories case by case.

Consider campaign finance reform. The campaign finance problem arises out of the explosion of campaign costs, particularly those related to television advertising, together with the vast disparity in ability to make a campaign contribution. In the year 2000, for example, election expenditures amounted to \$1.4 billion, and the two presidential candidates spent about \$310 million. In 2002, an off-year without a presidential contest, campaign expenditures still amounted to more than \$1 billion. A typical House election cost \$900,000, with an open seat costing \$1.2 million; a typical Senate seat cost about \$4.8 million, with an open contested seat costing about \$7.1 million.¹³ . . .

A small number of individuals and groups underwrite a very large share of these costs. In 2000, about half the money the parties spent, roughly \$500 million, was soft money, i.e., money not subject to regulation under the then current campaign finance laws. Two-thirds of that money—almost \$300 million—came from just 800 donors, each contributing a minimum of \$120,000. Of these donors, 435 were corporations or unions (whose *direct* contributions the law forbids). The rest, 365, were individual citizens. At the same time, 99 percent of the 200 million or so citizens eligible to vote gave less than \$200. Ninety-six percent gave nothing at all.¹⁴

The upshot is a concern, reflected in campaign finance laws, that the few who give in large amounts may have special access to, and therefore influence over, their elected representatives or, at least, create the appearance of undue influence. (One study found, for example, that 55 percent of Americans believe that large contributions have a "great deal" of impact on how decisions are made in Washington; fewer than 1 percent believed they had no impact.) These contributions (particularly if applied to television)

may eliminate the need for, and in that sense crowd out, smaller individual contributions. In either case, the public may lose confidence in the political system and become less willing to participate in the political process. That, in important part, is why legislatures have tried to regulate the size of campaign contributions.¹⁵

Our Court in 1976 considered the constitutionality of the congressional legislation that initially regulated campaign contributions, and in 2003 we considered more recent legislation that tried to close what Congress considered a loophole—the ability to make contributions in the form of unregulated soft money. The basic constitutional question does not concern the desirability or wisdom of the legislation but whether, how, and the extent to which the First Amendment permits the legislature to impose limits on the amounts that individuals or organizations or parties can contribute to a campaign. Here it is possible to sketch an approach to decision-making that draws upon the Constitution’s democratic objective.¹⁶

It is difficult to find an easy answer to this basic constitutional question in language, in history, or in tradition. The First Amendment’s language says that Congress shall not abridge “the freedom of speech.” But it does not define “the freedom of speech” in any detail. The nation’s Founders did not speak directly about campaign contributions. . . .

Neither can we find the answer through the use of purely conceptual arguments. Some claim, for example, that “money is speech.” Others say, “money is not speech.” But neither contention helps. Money is not speech, it is money. But the expenditure of money enables speech, and that expenditure is often necessary to communicate a message, particularly in a political context. A law that forbade the expenditure of money to communicate could effectively suppress the message.

Nor does it resolve the problem simply to point out that campaign contribution limits inhibit the political “speech opportunities” of those who wish to contribute more. Indeed, that is so. But the question is whether, in context, such a limitation is prohibited as an abridgment of “the freedom of speech.” To announce that the harm imposed by a contribution limit is under no circumstances justified is simply to

state an ultimate constitutional conclusion; it is not to explain the underlying reasons.¹⁷

Once we remove our blinders, however, paying increased attention to the Constitution’s general democratic objective, it becomes easier to reach a solution. To understand the First Amendment as seeking in significant part to protect active liberty, “participatory self-government,” is to understand it as protecting more than the individual’s modern freedom. It is to understand the amendment as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process. It is to suggest a constitutional purpose that goes beyond protecting the individual from government restriction of information about matters that the Constitution commits to individual, not collective, decision-making. It is to understand the First Amendment as seeking primarily to encourage the exchange of information and ideas necessary for citizens themselves to shape that “public opinion which is the final source of government in a democratic state.” In these ways the Amendment helps to maintain a form of government open to participation (in Constant’s words) by “all the citizens, without exception.”¹⁸

To focus upon the First Amendment’s relation to the Constitution’s democratic objective is helpful because the campaign laws seek to further a similar objective. They seek to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate’s meaningful financial support, and encouraging greater public participation. Ultimately, they seek thereby to maintain the integrity of the political process—a process that itself translates political speech into governmental action. Insofar as they achieve these objectives, those laws, despite the limits they impose, will help to further the kind of open public political discussion that the First Amendment seeks to sustain, both as an end and as a means of achieving a workable democracy.

To emphasize the First Amendment’s protection of active liberty is not to find the campaign finance laws automatically constitutional. Rather, it is to recognize that basic democratic objectives, including some of a kind that the First Amendment

seeks to further, lie on both sides of the constitutional equation. Seen in terms of modern liberty, they include protection of the citizen's speech from government interference; seen in terms of active liberty, they include promotion of a democratic conversation. That, I believe, is why our Court has refused to apply a strong First Amendment presumption that would almost automatically find the laws unconstitutional. Rather the Court has consistently rejected "strict scrutiny" as the proper test, instead examining a campaign finance law "close[ly]" while applying what it calls "heightened scrutiny." In doing so, the Court has emphasized the power of large campaign contributions to "erod[e] public confidence in the electoral process." It has noted that contribution limits are "aimed at protecting the integrity of the process"; pointed out that in doing so they "tangibly benefit public participation in political debate"; and concluded that that is why "there is no place for the strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'" In this statement it recognizes the possibility that, just as a restraint of trade is sometimes lawful because it furthers, rather than restricts, competition, so a restriction on speech, even when political speech is at issue, will sometimes prove reasonable, hence lawful. Consequently the Court has tried to look realistically both at a campaign finance law's *negative* impact upon those primarily wealthier citizens who wish to engage in more electoral communication and its *positive* impact upon the public's confidence in, and ability to communicate through, the electoral process. And it has applied a constitutional test that I would describe as one of proportionality. Does the statute strike a reasonable balance between electoral speech-restricting and speech-enhancing consequences? Or does it instead impose restrictions on speech that are disproportionate when measured against their electoral and speech-related benefits,

taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restriction in order to secure them?¹⁹

In trying to answer these questions, courts need not totally abandon what I have referred to as judicial modesty. Courts can defer to the legislature's own judgment insofar as that judgment concerns matters (particularly empirical matters) about which the legislature is comparatively expert, such as the extent of the campaign finance problem, a matter that directly concerns the realities of political life. But courts should not defer when they evaluate the risk that reform legislation will defeat the participatory self-government objective itself. That risk is present, for example, when laws set contribution limits so low that they elevate the reputation-related or media-related advantages of incumbency to the point of insulating incumbent officeholders from effective challenge.²⁰

A focus upon the Constitution's democratic objective does not offer easy answers to the difficult questions that campaign finance laws pose. But it does clarify the First Amendment's role in promoting active liberty and suggests an approach for addressing those and other vexing questions. In turn, such a focus can help the Court arrive at answers faithful to the Constitution, its language, and its parts, read together as a consistent whole. Modesty suggests when, and how, courts should defer to the legislature in doing so. . . .

My argument is that, in applying First Amendment presumptions, we must distinguish among areas, contexts, and forms of speech. Reference . . . back to at least one general purpose, active liberty, helps both to generate proper distinctions and also properly to apply the distinctions generated. The active liberty reference helps us to preserve speech that is essential to our democratic form of government, while simultaneously permitting the law to deal effectively with such modern regulatory problems as campaign finance. . . .

NOTES

1. Hand, *supra* note I, at 109; *United States v. Classic*, 313 U.S. 299, 316 (1941) (Stone, J.); Hand, *id.*, at 157; Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 28 (2002) (“The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the judge is to understand the purpose of law in society and to help the law achieve its purpose.”); Goldman, *supra* note I, at 115; Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 541 (1947).
2. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, in *Of Law and Life & Other Things That Matter* 94 (Philip B. Kurland ed., 1965); *id.* at 95; Hand, *supra* note I, at 109; *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Frankfurter, *supra* note 3, at 95.
3. *Id.* at 517.
4. Bailyn, *supra* note I, at 55 (quoting James Madison).
5. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 28–29 (2002).
6. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 26–27 (Amy Gutmann ed., 1997); see William N. Eskridge Jr., Philip P. Frickey, & Elizabeth Garrett, *Cases and Materials on Legislation—Statutes and the Creation of Public Policy* 822 (3d ed. 2001); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J. L. & Pub. Pol’y 61, 64 (1994).
7. *Duncan*, 533 U.S. 167 at 185 (Breyer, J. dissenting) (citing U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 17 [1995]).
8. See *id.* at 172–75.
9. *Id.* at 190–93 (Breyer, J., dissenting).
10. *Id.* at 190 (Breyer, J., dissenting).
11. Barak, *supra* note I, at 28–29.
12. See, e.g., Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?* 76 Va. L. Rev. 627, 631 (1990); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 452–48 (1971); cf. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in the judgment); U.S. Const. art. I.
13. Ctr. for Responsive Politics, *Election Overview, 2000 Cycle: Stats at a Glance*, at <http://www.opensecrets.org/overview/index.asp?Cycle=2000> accessed Mar. 8, 2002 (aggregating totals using Federal Election Commission data); Ctr. for Responsive Politics, *Election Overview*, at <http://www.opensecrets.org/overview/stats.asp> accessed Nov. 21, 2003 (based on FEC data).
14. Taken from the record developed in *McConnell v. Federal Election Comm’n*, No. 02-1674 et al., Joint Appendix 1558. In the 2002 midterm election, less than one-tenth of one percent of the population gave 83 percent of all (hard and soft) itemized campaign contributions. Ctr. for Responsive Politics, see *supra* note 2.
15. Taken from the record developed in *McConnell*, No. 02-1674 et al., Joint Appendix 1564.
16. *Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. FEC*, 540 U.S. 93 (2003).
17. U.S. Const. amend. I.
18. *Masses Publishing Co. v. Patten*, 244 F.535, 540 (S.D.N.Y. 1917 Hand, J.) Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns* (1819), in *Political Writings*, at 327 (Biancamaria Fontana trans. & ed., 1988).
19. *McConnell*, 540 U.S. at 136, 231; see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 399–402 (2000) (Breyer, J., concurring); *id.* at 136 (internal quotation marks omitted); *id.* at 137 (internal quotation marks omitted); see *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918); see *McConnell*, 540 U.S. at 134–42.
20. *McConnell*, 540 U.S. at 137.

9-3 **Federalist No. 78**

Alexander Hamilton
May 28, 1788

Of the several branches laid out in the Constitution, the judiciary is the least democratic—that is, the least responsive to the expressed preferences of the citizenry. Indeed, it is hard to imagine an institution designed to be less responsive to the public than the Supreme Court, whose unelected judges enjoy lifetime appointments. During the Constitution’s ratification, this fact exposed the judiciary to all sorts of wild speculation from opponents about the dire consequences the judiciary would have for the new republic. In one of the most famous passages of The Federalist, Alexander Hamilton seeks to calm fears by declaring the judiciary to be “the least dangerous branch.” Unlike the president, the Court does not control a military force, and unlike Congress, it cannot confiscate citizens’ property through taxation. At the same time, Hamilton does not shrink from assigning the judiciary a critical role in safeguarding the Constitution against congressional and presidential encroachments he sees as bound to occur from time to time. By assigning it this role, he assumed that the Supreme Court has the authority of “judicial review” even though there was no provision for it in the Constitution.

We proceed now to an examination of the judiciary department of the proposed government. In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First.

As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed . . . that nothing can be said here which would not be useless repetition.

Second.

As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behavior. . . . The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a

Note: Some text and accompanying endnotes have been omitted. Please consult the original source.

capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power¹; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”² And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like.

Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative

body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior

ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . . Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. . . .

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the

displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. . . .

NOTES

1. The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing." "Spirit of Laws." vol. i., page 186. [See Charles de Secondat, Baron

de Montesquieu, *The Spirit of Laws*, trans. Thomas Nugent, rev. J. V. Pritchard (London: G. Bell & Sons Ltd., 1914).]

2. *Idem*, page 181.

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