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# "THE DEFECTS OF BETTER MOTIVES": REFLECTIONS ON MR. MEESE'S JURISPRUDENCE OF ORIGINAL INTENTION

HARRY F. TEPKER, JR.\*

## *Introduction*

Recently, the Attorney General of the United States, Edwin Meese, proposed that the Supreme Court should change its approach to constitutional decision making. In a recent address before the American Bar Association, Mr. Meese called for a "jurisprudence of original intention."<sup>1</sup> The Supreme Court should limit itself to a scholastic and legalistic interpretation of the Constitution's original meaning.

The Attorney General's remarks attracted little initial attention. However, Mr. Meese's proposal for a jurisprudence of original intention provoked two Justices, William Brennan and John Paul Stevens, to take the unusual step of replying to the Attorney General in public addresses of their own.<sup>2</sup> Thus, in a unique way, an old academic debate about the American Constitution spilled out onto the political stage.<sup>3</sup>

Should the Supreme Court confine itself to the Constitution's original meaning so that the people's elected representatives might have a healthy discretion to govern in accord with the nation's democratic ideals? Or is the Supreme Court's function different: "[T]o be a voice of reason," as H. M. Hart wrote, "charged with the creative function of discerning a-fresh and of articulating and developing impersonable and durable principles" of constitutional law?<sup>4</sup>

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1. E. Meese, Address at the Meeting of the American Bar Association House of Delegates 15-17 (July 9, 1985) (available from the United States Department of Justice) [hereinafter cited as Meese, Washington Address]. Mr. Meese also developed similar themes in an address at the Meeting of the American Bar Association, London, England (July 17, 1985) (available from the United States Department of Justice).

2. Justice Brennan, "The Constitution of the United States: Contemporary Ratification," Presentation at the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985); Address by Justice Stevens at the Meeting of the Federal Bar Association (Oct. 23, 1985). Justice Stevens expressly responded to Mr. Meese while Justice Brennan implicitly did so.

3. For a sampling of some of the more prominent points of view, the following recent works are excellent starting places: R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); J. ELY, *DEMOCRACY AND DISTRUST* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983).

4. Hart, *The Supreme Court, 1958 Term—Foreword: "The Time Chart of the Justices,"* 73 HARV. L. REV. 84, 99 (1959).

As every lawyer remembers from law school, debate over the Court's proper role began almost from the time when John Marshall declared that the Court's "province and duty" was to enforce constitutional limits against Congress and the states.<sup>5</sup> Yet, the issue is very different now after decades of Supreme Court activism. For better or worse, this nation cherishes traditions of liberty and equality based on Supreme Court judgments that go well beyond vague, uncertain constitutional language.

Mr. Meese's argument possessed the virtue of a Jeffersonian commitment to democratic government.<sup>6</sup> Judicial self-restraint has always been defended as a strategy to ensure that electorally accountable politicians make policy rather than nine unelected lawyers wearing black robes.<sup>7</sup> The Court has often promised to respect the limits on its own power even as it enforces limits against presidents, Congress, and the states.<sup>8</sup> Still, a jurisprudence of original intention is only one of many visions of judicial self-restraint.<sup>9</sup>

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

6. Limitations on judicial review serve democratic objectives that can fairly be characterized as Jeffersonian in spirit. After an early endorsement of judicial review as a useful instrument to protect a bill of rights, discussed *infra* in text accompanying notes 56-61, Thomas Jefferson grew critical of the Supreme Court's exercise of power under the leadership of John Marshall. For example, in 1819, Jefferson provided an extensive summary of his views in a famous letter to Judge Spencer Roane, another partisan critic of the Marshall Court. The former President believed that Roane conceded too much in his admission that the Court was the "last resort" respecting constitutional questions. "The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. . . Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law." Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), reprinted in THOMAS JEFFERSON: WRITINGS 1425, 1426 (M. Petersen ed. 1984) [hereinafter cited as JEFFERSON WRITINGS]. Jefferson's position seems to be the essence of Mr. Meese's argument for a limited judicial review.

7. The idea that the Court should adhere to the original understanding of the Constitution's Framers remains appealing because it is a formula that keeps an unelected Court confined to narrow principles authorized by the people's exercise of their "original and supreme will," *Marbury v. Madison*, 5 U.S. (1 Cranch) at 176, and usually, at least, enhances the democratic policy-making discretion of Congress and the states. See, e.g., ELY, *supra* note 3, at 4-7.

8. The Court's pledges of judicial self-restraint have been frequent. "We refuse to sit as a 'super legislature to weigh the wisdom of legislation'," *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). In part, judicial self-restraint means that the Court will not weigh the reasonableness of legislation designed to achieve legitimate objectives. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (the wisdom of state legislation is an issue for state legislatures); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (same principle applied to congressional legislation based on commerce clause); *Dandridge v. Williams*, 397 U.S. 471 (1970) (federal courts are without power to impose their views of wise policy on the states); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (limited judicial power respecting national security issues in comparison to Congress and the President).

9. An argument against a jurisprudence of original intention is not an argument against all forms of judicial self-restraint. If the Court seeks a durable, principled set of legal restraints on power, it must seek and preserve stable "qualitative formula[e]" which check abuses of power. Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), reprinted in Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 769 app. (1975).

Attorney General Meese's special brand of restraint has the flavor of an academic's speculative inquiry. The Attorney General's ideas echo the tenor of Jonathan Swift's famous "modest proposal" to alleviate poverty in Ireland: Meese's approach, if adopted, would require the Court to consume virtually all of its living children—almost every enduring landmark decision of the twentieth century.<sup>10</sup>

The Court would discard all but a very few of the important decisions applying first amendment protections to the states, if Mr. Meese's jurisprudence of original intention were followed.<sup>11</sup> The many cases interpreting the equal protection clause frequently depart from the visions of the Thirty-ninth Congress, which framed the fourteenth amendment. Even *Brown v. Board of Education*<sup>12</sup> would be jettisoned if the Court merely applied the original meaning of equal protection,<sup>13</sup> unless, of course, the Framers' presumed "broader" conceptions of equality are emphasized to the exclusion of their more specific understandings.<sup>14</sup> Of course, one of Mr. Meese's favorite examples of an allegedly faithless judicial review is *Roe v. Wade*.<sup>15</sup>

10. Most of the examples cited by the Attorney General as departures from the original intentions of the Framers involve the Bill of Rights. Oddly and inexplicably, Mr. Meese cited *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), to show that basic principles of the Bill of Rights did not apply to the states—"until 1925, that is"—without discussing the fourteenth amendment. Meese, Washington Address, *supra* note 1, at 13-14. Justice Stevens criticized the Attorney General for this serious omission. Stevens, *supra* note 2, at 9.

However, even when the fourteenth amendment is considered, it is almost impossible to justify all but a few modern decisions as simple applications of the Framers' intent. See PERRY, *supra* note 3; and BERGER, *supra* note 3. Citing extensively to Professor Berger's work, Professor Perry argues that virtually all of the Supreme Court's modern decisions are exercises of power based on value judgments not "constitutionalized" by the Framers. Perry, *supra* note 3, at 2, 64. See *infra* notes 11-15 and accompanying text.

11. The current jurisprudence of press freedom is dramatically different from the Framers' original understanding. Compare, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1965) with L. LEVY, *EMERGENCE OF A FREE PRESS* (1985). Additionally, the applicability of first amendment principles respecting religious and expressive liberty to the states is, at least, controversial. BERGER, *supra* note 3, at 270-73.

12. 347 U.S. 483 (1954).

13. Compare *Brown* with the discussion of Congress' original understanding of the fourteenth amendment in PERRY, *supra* note 3, at 1-2, 62-64, 66-72, and BERGER, *supra* note 3, at 117-33.

14. *Brown* illustrates the difficulties of a strict, tenacious faith in original intent as an appropriate method for deciding contemporary constitutional cases. For example, Judge Robert Bork has argued that "the Court's power is legitimate only if it has . . . a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom." Bork, *supra* note 3, at 3. However, when analyzing *Brown*, Judge Bork finds that evidence of the Framers' intent "inconclusive," as did the Warren Court. 347 U.S. at 489.

Judge Bork admits that the language of the fourteenth amendment is "general." However, he also asserts that even such generality in the constitutional language would not justify the Supreme Court's decisions that ignore the Framers' intentions, "[i]f the legislative history revealed a consensus about segregation in schooling and all the other relations in life." Bork, *supra* note

These examples merely illustrate, and do not even begin to exhaust, the enormous impact of a jurisprudence of original intention. Still, lawyers are familiar with the old credo, "Let right be done, though the heavens should fall."<sup>16</sup> Seemingly extreme consequences do not refute a valid legal thesis. Objections to Mr. Meese's proposal do not rest solely on dire predictions.

A jurisprudence of original intention is unwise for at least three basic constitutional reasons. First, it is simply impossible: Neither the text nor the cryptic evidence of the Framers' original intentions provide a meaningful, conclusive guide for decision of a present-day constitutional case. Second, such a jurisprudence of "intention" may not have been intended by the Framers. Finally, a jurisprudence of original intention would undermine the Court's function as a check against excessive legislative, executive, and state power. The Court cannot perform its function if it cannot adapt to new challenges of "a succession of artful and ambitious rulers."<sup>17</sup>

### *The Feasibility of a Jurisprudence of Original Intention*

If the Court accepted the Attorney General's call for judicial fidelity to original meaning, the Court would confront an impossible task.<sup>18</sup> The Constitution is not a code, a statute, or an ordinance. Although the Constitution is one example of a social compact, it lacks the specificity of a contract. The most important words of the Constitution do not have a self-evident meaning: equal protection,<sup>19</sup> due process of law,<sup>20</sup> cruel and unusual punishment,<sup>21</sup> unreasonable searches and seizures.<sup>22</sup> The Framers, trained in the common law tradition, formulated principles that were expansive. Moreover, they often provided no useful definition of these broad, bold phrases. The Framers spent most of their time refining a system of checks and balances and modifying the separation of powers doctrine for their proposed constitutional order. The

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3, at 13. Judge Bork then endorses the result in *Brown* on the basis of the "core meaning" of the fourteenth amendment because "[t]he Court cannot conceivably know how these long-dead men would have resolved issues had they considered, debated and voted on each of them." *Id.* at 14.

As Perry points out, however, Bork's convenient argument ducks historical realities that are particularly uncomfortable for an interpretivist like Bork. The Framers did not intend to outlaw segregation in public schools. They surely did intend a far more narrow meaning for the phrase "equal protection of the laws." As Perry concludes, the Framers' specific intentions and *Brown* are "fundamentally at odds." PERRY, *supra* note 3, at 68.

15. 410 U.S. 113 (1973), cited in Meese, Washington Address, *supra* note 1, at 11. For an analysis of *Roe's* antecedent, *Griswold v. Connecticut*, 381 U.S. 479 (1965), see, e.g., Bork, *supra* note 3, at 7-12.

16. "Fiat justitia, ruat coelum." BLACK'S LAW DICTIONARY 561 (5th ed. 1979).

17. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 5 THE WRITINGS OF JAMES MADISON 269, 273 (G. Hunt ed. 1904) [hereinafter cited as MADISON'S WRITINGS].

18. ELY, *supra* note 3, at 11-41.

19. U.S. CONST. amend. XIV, § 1.

20. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

21. U.S. CONST. amend. VIII.

22. U.S. CONST. amend. IV.

delegates to the Federal Convention did not develop a common understanding of their own words.<sup>23</sup>

Even when the vague phrases are amplified and illuminated by historians' insights, constitutional decision makers will be uncertain about what the Framers might have thought about today's cases. For example, research of original intent cannot reveal how the author of the Bill of Rights, James Madison, would have decided the question of whether wiretapping or other electronic eavesdropping is a search and seizure within the scope of the fourth amendment.<sup>24</sup> Likewise, the issue of prayer in public schools cannot turn on the intentions of men who did not experience or anticipate public education.<sup>25</sup>

Left to the uncertain devices of the historians' art, the Court would lack the basic tools to decide today's cases. The Framers' approach to constitutional drafting suggests that the vague phrases of the Constitution were supposed to be general guides, not authoritative answers to subsequent constitutional controversies. The search for original understanding is no substitute for judgment in a case presented centuries after ambiguous words were set on parchment.

### *Evolutionary Constitutionalism: An Intended Legacy of the Framers?*

An evolutionary constitutionalism was necessary as an adequate foundation for a developing, expansive republic and as an adequate guard against tyranny. National power has grown as the nation has grown. Civil liberties are more broadly and expansively defined, as a check on growing national and state powers.

23. A provocative, illuminating, and realistic commentary on the difficulties of interpretive hindsight is offered by Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 815 (1961) (emphasis omitted):

Probably our greatest difficulty is that we know more about what the Framers should have meant than they themselves did. We are intimately acquainted with the problems that their Constitution should have been designed to master; in short, we have read the mystery novel backwards. . . .

Thus we can ask what the Framers meant when they gave Congress the power to regulate interstate commerce, and we emerge, reluctantly perhaps, with the reply that . . . they may not have known what they meant, that there may not have been any semantic consensus [*sic*]. . . . Commerce was commerce—and if different interpretations of the word arose, later generations could worry about the problem of definition. The delegates were in a hurry to get a new government established; when definitional arguments arose, they characteristically took refuge in ambiguity. . . .

There was a good deal of definitional pluralism with respect to the problems the delegates did discuss, but when we move to the question of extrapolated intentions, we enter the realm of spiritualism. When men in our time . . . launch into elaborate talmudic exegesis to demonstrate that federal aid to parochial schools is (or is not) in accord with the [Framers'] intentions, . . . they are engaging in a historical Extra-Sensory Perception.

24. *E.g.*, *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967); *Olmstead v. United States*, 277 U.S. 438 (1928).

25. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2502-03 (1985) (O'Connor, J., dissenting).

It would be extravagant to claim that the prescient men who founded the nation's political order to remedy government's deficiencies under the Articles of Confederation actually foresaw today's constitutional law. Instead, it seems a reasonable inference that they anticipated some evolution, growth, and change in the Constitution, and not simply through the amendment process.

A jurisprudence of original intention presumes that the Constitution was meant to be "fixed." The presumption is a realistic conclusion based on the fact that Americans, unlike the British, adopted a written constitution. And yet, the very idea of a written constitution was a creative innovation. Historians often discuss American ingenuity as characteristic of this nation's pragmatism and capacity for growth. As evidence, they often speak of cotton gins or vaccines, of firearms or steamboats, of computer chips or space ships. However, the nation's most distinctive invention may not have been technological or scientific. Although America borrowed the common law, the new nation invented the concept of a written constitution. Moreover, the invention was born of necessity. American colonials were pressed by crisis and by self-interest to rethink the fundamentals of government and justice.<sup>26</sup>

Following the French and Indian War in 1763, the British Empire tried to assert legislative and economic control over colonies that had grown accustomed to autonomy. Before this time, as Professor Edmund S. Morgan wrote, Americans believed that "the great thing about [the British Empire], apart from the sheer pride of belonging to it, was that it let [them] alone."<sup>27</sup> Britain attempted to change this state of affairs with legislation, including the famous Stamp Act.

America protested vigorously and ultimately resisted with force of arms. However, Americans were at a loss to justify their protests and resistance. After all, the greatest previous improvement in free government had been the Parliament's triumph over the King. Americans, like all English subjects, were proud of the Glorious Revolution in 1688. The colonists realized, however, that parliamentary supremacy meant little if they had no representation. If Parliament could regulate and tax unrepresented colonies, then the colonies' liberties were without ordinary political protections.<sup>28</sup>

The colonies' resistance to Parliament's legislation prompted Americans to rethink the question of freedom. Americans confronted the vexing problem of putting into words the dimensions of parliamentary authority that had never before been measured or limited. As one colonial newspaper argued: "No Parliament can alter the Nature of Things, or make that good which is really evil. . . . There is certainly some Bounds to their power, and 'tis Pity they were not more certainly known."<sup>29</sup> As a result, the colonials opposing Parliament were forced "to survey the bounds and map out, in however crude and tentative a fashion, the area of human freedom."<sup>30</sup>

26. E. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89*, at 17-23 (1956).

27. *Id.* at 8.

28. *Id.* at 16-17.

29. *Id.* at 23.

30. *Id.*



Americans needed a new constitutional theory, so they invented one. American spokesmen rejected traditional concepts that the Parliament was supreme. They constructed an idea that the constitution was the empire's collection of "fundamental laws." They distinguished "fundamentals" from the ordinary institutions of government, like Parliament, so that the fundamentals might control and limit governmental power.<sup>31</sup> One colonial propagandist wrote that the existing Parliament "derives its authority and power from the constitution, and not the constitution from the Parliament." The constitution, he continued, "is permanent and ever the same." Parliament "can no more make laws which are against the constitution or the unalterable privileges of British subjects than it can alter the constitution itself. . . . The power of Parliament . . . has its bounds assigned by the constitution."<sup>32</sup>

American constitutionalism, as invented by colonials, was influenced by theories of natural law and natural rights. It is easy to overstate the influence of these theories, but American rhetoric focused on the basic rights of Englishmen, which were supposed to be inalienable and indefeasible. John Dickinson of Pennsylvania articulated the point well when he argued, in a pamphlet, that kings and parliaments cannot give "the rights essential to happiness."<sup>33</sup>

We claim them from a higher source—from the King of kings, and Lord of all the earth. They are not annexed to us by parchments and seals. They are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short, they are founded on the immutable maxims of reason and justice.<sup>34</sup>

In historical perspective, these ideas were new, although they were also borrowed from a number of philosophers and political theorists. Thus, in a sense, the American Revolution was a rejection of English constitutional traditions. Defenders of parliamentary authority reacted with exasperation to America's creative jurisprudence. In a reply to the revolutionary propaganda of Thomas Paine's *Common Sense*,<sup>35</sup> one Loyalist asked:

What is the constitution[?] . . . [What is] that word so often used—so little understood—so much perverted? It is, as I conceive—that assemblage of laws, customs, and institutions which form the general system according to which the several powers of the state are distributed and their respective rights are secured to the different members of the community.<sup>36</sup>

31. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 180-81* (1967).

32. *Id.* at 181-82 (quoting J. ZUBLY, *AN HUMBLE ENQUIRY* 5 (Charleston 1769) (John Harvard Library Pamphlet 28)).

33. *Id.* at 187 (emphasis omitted).

34. *Id.*

35. T. PAINE, *COMMON SENSE* (Philadelphia 1776) (John Harvard Library Pamphlet 63).

36. BAILYN, *supra* note 31, at 175 (quoting C. INGLIS, *THE TRUE INTEREST OF AMERICA* 18 (Philadelphia 1776)) (emphasis omitted).

For those schooled in traditional concepts, "a constitution" was but "a frame, a scheme, a system, a combination of powers," as John Adams had said in 1766.<sup>37</sup> In this sense, the English characterized the constitution as the existing institutional arrangements. Parliament and parliamentary legislation was part of the British constitution, along with the common law and all other customs, practices, and traditions by which the English people governed their political and governmental life. In short, the ordinary actions of Parliament could not "violate" the constitution because such actions became part of the constitution. Obviously, American colonials and English jurists differed sharply over the meaning of the word "constitution."

Americans, however, were not hindered by the weight of precedent or by "fixed" notions of English jurisprudence. Americans wanted the constitution to serve a purpose, and so they argued that it did. The constitution, or at least the nature of things, should limit the power of Parliament, and so the Americans argued that it did. In these arguments, Americans developed their concepts of constitutionalism. Their arguments were theoretical and philosophical. The colonial propagandists emphasized natural law, natural rights, and morality. Although they articulated a vision of fixed, enduring principles based on fundamental, immutable principles of justice, they also established a tradition of constitutionalism capable of growth and evolution.

### *Preserving the "Defects of Better Motives"*

Judicial review is another distinctive American invention. As the idea of a written constitution evolved from English traditions and American needs, the concept of judicial review developed from an evolutionary constitutionalism. The judicial power to declare acts of government void was not explicitly conferred by the Constitution.<sup>38</sup> Yet, the American political system eventually accepted judicial review because it fit the Framers' basic political theories as one "check and balance" in the constitutional order.

As Madison wrote in *The Federalist*, one of the central purposes of the Constitution was to prevent "accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few or many[.]"<sup>39</sup> Such

37. *Id.* at 68, 175 (quoting J. ADAMS, 3 THE WORKS OF JOHN ADAMS 478-79 (C. Adams ed. 1851)).

38. The idea of judicial review was developing at the time of the Federal Convention, although it was certainly not yet a normal function of American courts. Levy, *Judicial Review, History and Democracy*, in JUDICIAL REVIEW AND THE SUPREME COURT 8-11 (L. Levy ed. 1967). The Framers did not dwell on the problem of judicial enforcement of constitutional principles. At least eight delegates of divergent political philosophies asserted that courts could strike down or ignore unconstitutional legislative acts of Congress and the states. No delegate asserted otherwise. F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 254 (1986). See also *infra* note 47.

39. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961). It is hazardous to characterize the Framers' understanding based solely on the views of James Madison, even in the light of Jefferson's influence. Rather, this brief summary of the evolution in Madison's constitutionalism is offered to make two more modest and unoriginal points. First, whatever the

accumulation, Madison argued, "may justly be pronounced the very definition of tyranny."<sup>40</sup> In Essay No. 51, Madison outlined a political and psychological strategy to allow adequate means for sound government, and yet to "oblige [government] to controul itself."<sup>41</sup>

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.<sup>42</sup>

After Madison's famous reminder that "government itself is but the greatest of all reflections on human nature," he elaborated: "If men were angels no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. . . . A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions."<sup>43</sup>

What are these auxiliary precautions? Madison cited many examples: a bicameral legislative branch, different constituencies for the House and Senate, the presidential veto, and divided authority between the federal and state governments.<sup>44</sup> Madison proposed to supply to every political official "opposite and rival interests, the defect of better motives"<sup>45</sup> so that they would check and balance each other. In this way, Madison hoped to ensure that "the private interest of every individual, may be a centinel over the public rights."<sup>46</sup>

The original concept of the Constitution of 1787 was that tyranny was to be prevented, not by courageous courts, but by internal political limitations against the accumulation of power. The Constitution allocated power to many different institutions and departments. Officers would compete with each other; each would resist encroachment. This resistance and the resulting friction would produce a kind of stability through impasse and moderating compromise.

Madison's analysis illustrates an irony of constitutional history. Judicial review was not the sole bulwark of liberty. The Framers did not place faith

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Framers' intentions, judicial review fits the Madisonian scheme. Moreover, an evolutionary constitutionalism can be understood and justified as consistent with the dynamic political balance created by Madison's "auxiliary precautions."

40. *Id.*

41. THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

42. *Id.*

43. *Id.*

44. *Id.* at 349-53.

45. *Id.* at 349.

46. *Id.*

in the federal courts' enforcement of "parchment barriers."<sup>47</sup> Yet, judicial review has become, for better or for worse, a principal cornerstone of American constitutionalism. Eventually, the nation tolerated judicial review as an invention that served Madison's vision of a disorderly balance of power. The special role of the federal courts, however, emerged despite Madison's emphasis on political safeguards to restrain government.

Madison's distrust of legalism as a bulwark of liberty was also evident in his doubts about a bill of rights.<sup>48</sup> During the Federal Convention of 1787 and during ratification debates, Madison and the supporters of the Constitution expressed doubts that a bill of rights would be useful.<sup>49</sup> In a letter to Jefferson in 1788, Madison said that he favored a bill of rights if one could be drafted properly. But he added, "experience proves the inefficacy of a bill of rights on those occasions when . . . controul [of the government] is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State."<sup>50</sup> Madison pointed to the experience of his native state, Virginia, where, he claimed, "the bill of rights [has been] violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of Conscience it is well known that a religious establishment would have taken place in that State, is the legislative majority had found as they expected, a majority of the people in favor of the measure."<sup>51</sup>

Madison distinguished the utility of a declaration of rights in a monarchy from the uncertain benefits of a declaration in a republic. Government will not invade rights "contrary to the sense of its constituents." The real danger is when "[g]overnment is the mere instrument of the major number of its constituents." In the American states, Madison believed, the majority of the community was the most likely oppressor.<sup>52</sup>

47. Madison was ambivalent on the issues of whether the Constitution created a power of constitutional interpretation in the federal courts. On the one hand, at the Federal Convention, Madison asserted: "A law-violating a constitution established by the people . . . would be considered by the Judges as null & void." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 93 (M. Farrand ed. 1966) (proceedings of July 23, 1787) [hereinafter cited as FARRAND, RECORDS]. On the other hand, Madison had also supported efforts to allow the Supreme Court to participate in the veto of congressional legislation as an appropriate "auxiliary precaution in favor of the maxim" of separation of powers. J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 227 (1971). When the Convention repeatedly rejected proposals for judicial participation in a council of legislative revision, Madison may have drawn the inference that the proposed "auxiliary precaution" had been rejected. Madison's interpretation may account for the Virginian's failure to cite judicial review in his own essays of *The Federalist*. Still, Madison apparently endorsed judicial review by the time he introduced legislation proposing a Bill of Rights. See *infra* note 62 and accompanying text.

48. Letter from James Madison to Thomas Jefferson, MADISON'S WRITINGS, *supra* note 17.

49. Alexander Hamilton, Madison's partner in the preparation of *The Federalist*, asked a rhetorical question of great pertinence in a famous essay arguing against a bill of rights: "What is liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?" THE FEDERALIST No. 84, at 580 (A. Hamilton) (J. Cooke ed. 1961).

50. Madison to Jefferson, MADISON'S WRITINGS, *supra* note 17, at 272.

51. *Id.*

52. *Id.* at 272-73.

Still, Madison admitted to Jefferson that even in a republic, a bill of rights would do little harm and might do some good. First, "the political truths . . . might acquire . . . the character of fundamental maxims of free Government." Such principles might be "incorporated within the national sentiment, counteract[ing] the impulses of interest and passion."<sup>53</sup>

Madison also believed that a declaration of rights might prevent the "subversion of liberty" by "a succession of artful and ambitious rulers." Madison feared "gradual and well-timed advances" in the power of political leaders.<sup>54</sup> As in *The Federalist*, Madison warned that a free people cannot trust their liberty to the good intentions and pure hearts of their political leaders. "It is vain to say, that enlightened statesmen will be able to adjust to [the] clashing interests [of factions], and render them all subservient to the public good. Enlightened statesmen will not always be at the helm."<sup>55</sup>

One of the nation's eternal debts to Thomas Jefferson is that he helped persuade James Madison to fight for a bill of rights in the House of Representatives during the First Congress. Jefferson, who was in France during most of the period in which the nation considered the Constitution, wrote again and again of the need for a declaration of basic civil liberties in the Federal Constitution.<sup>56</sup> Moreover, he identified a missing analytical link between the bill of rights and judicial review that demonstrated that a declaration of fundamental rights would add to the "auxiliary precautions" Madison had always sought to construct.

In the letter responding to Madison's analysis of the efficacy of a bill of rights, Jefferson predicted that Madison's political safeguards were not sufficient to protect liberty.<sup>57</sup> Jefferson argued that a declaration of rights would be a supplementary brace to prevent abuses of power. The rights declared would give various officers principles of law useful for resisting encroachment. A bill of rights would supply not only "opposite and rival interests, the defect of better motives" but also "constitutional means" to aid self-defense. In other words, the declaration would fit Madison's strategy.<sup>58</sup>

Jefferson also saw "the legal check which [a bill of rights] puts into the hands of the judiciary." The judicial branch, Jefferson continued, "if rendered independent and kept strictly to their own department[,] merits great confidence for their learning and integrity."<sup>59</sup> Such a body could resist the "*civium ardor prava jubentium*"—the zeal and energy of the majority commanding wrong.<sup>60</sup> Jefferson's response to Madison is but an illustration that judicial

53. *Id.* at 273.

54. *Id.*

55. THE FEDERALIST No. 10, at 60 (J. Madison) (J. Cooke ed. 1961).

56. D. MALONE, JEFFERSON AND THE RIGHTS OF MAN 168-73 (1951); L. LEVY, *supra* note 11, at 255-57.

57. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* JEFFERSON WRITINGS, *supra* note 6, at 943.

58. Compare generally *id.* at 943-44 with notes 41-46 *supra* and accompanying text.

59. Jefferson to Madison, *id.* at 943.

60. *Id.* (Jefferson used the Latin phrase.)

review emerged as a practical inference from the Madisonian strategy of checks and balances, and from America's adoption of a written constitution with a bill of rights.<sup>61</sup> Jefferson's influence was manifest when Madison argued for a bill of rights on the floor of the House:

If [basic rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.<sup>62</sup>

The views of Madison and Jefferson may illuminate the origins of judicial review. This evidence does not, however, clearly indicate whether the Framers intended courts to maintain and defend fixed legal principles. The judiciary was intended to function as courts of law,<sup>63</sup> not as extensions of the legislative process.<sup>64</sup> Once judicial review was invented, the Court seems to have accepted quickly the idea that its "checking" role would be constrained by judicial proprieties. At a bare minimum, the discretion of the judiciary was to be less than the discretion vested in legislators and executives.<sup>65</sup>

61. Writing of the Madison-Jefferson correspondence, William Van Alstyne states that the two Virginians shared "modest and quite unexceptionable expectations" for a bill of rights and for judicial review. "They did not dwell upon extraordinary notions of judicial review, but . . . treated [judicial review] quite matter-of-factly. The assumption that judges would nonetheless feel bound to apply its provisions as superior law is seen as no anomaly, but rather as a useful device." Van Alstyne, *supra* note 3, at 211-12.

62. Madison Speech to the United States House of Representatives (June 8, 1789), *reprinted in 5 MADISON'S WRITINGS*, *supra* note 17, at 370, 385.

63. Constitutional interpretation would be another species of "the traditional legal activity of construing a written instrument." POWELL, *supra* note 3, at 902. *See also* G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 454-63 (1969).

64. When James Wilson sought to resuscitate the idea of allowing the judiciary to participate with the executive in vetoing legislation, Elbridge Gerry of Massachusetts replied that the scheme made "Statesmen of the judges; and set . . . them up as the guardians of the Rights of the people." 2 FARRAND, *RECORDS*, *supra* note 47, at 73-75, *discussed in* GOEBEL, *supra* note 47, at 227. Gerry's argument reflects a sense that the judiciary was to be limited to a judicial function.

65. This idea seems to be the essence of Alexander Hamilton's famous characterization of the judiciary:

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 capacity to annoy or injure them. . . . The judiciary . . . 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.

THE FEDERALIST No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

Still, the proper role of the federal judiciary must be understood in the context of Madison's vision. Both the "parchment barriers" and the national courts were to be supplementary protections for liberty. The Madisonian analysis presupposes a dynamic equilibrium of checks and balances, of encroachment and resistance. Consistent with this plan for a new political order, Madison disdained legalism and realistically emphasized a more practical political strategy for the preservation of liberty. In this sense, the idea that constitutional doctrine must be capable of growth derives from Madison's modest hopes for the Bill of Rights and judicial review.

The Madisonian theory promotes the idea that any "checking" branch, including the Supreme Court, will need to resist the dangerous challenges from talented, aggressive political leaders.<sup>66</sup> Consistent with this idea, one practical defense against overreaching ambition is the ambition of competitors.<sup>67</sup> Madison never applied this analysis explicitly to the courts, but an evolutionary constitutionalism seems better suited to allow judicial ambition to "counteract" various forms of political ambition.

Doctrine must evolve in light of unforeseeable and unforeseen developments.<sup>68</sup> To allow the Court's "provisions for defense [to] be commensurate with the danger of attack,"<sup>69</sup> the Court must be allowed the benefit of experience. When and if political leaders take liberties by innovative means for "gratification of their ruling passions,"<sup>70</sup> a court depending on the Framers' original understandings may discover no effective means of resistance. It is difficult to imagine how Madison could have concluded that an inflexible legalism or a fixation of past understandings would be equal to the challenges of tyranny emanating either from legislatures or presidents. Although the

66. Madison to Jefferson, MADISON'S WRITINGS, *supra* note 17, at 273.

67. THE FEDERALIST No. 51, *supra* note 41, at 349-53. See *supra* notes 41-46 and accompanying text.

68. See, e.g., *Teamsters v. Vogt*, 354 U.S. 284, 287 (1957) (Frankfurter, J.) ("Inevitably . . . the doctrine of a particular case 'is not allowed to end with its enunciation and . . . an expression in an opinion yields to the impact of facts unforeseen'. . . . It is also not too surprising that examination of . . . adjudications [under the due process clause of the fourteenth amendment] should disclose an evolving, not a static, course of decision.") (quoting *Jaybird Min. Co. v. Weir*, 271 U.S. 609, 619 (1926) (Brandeis, J., dissenting)).

69. THE FEDERALIST No. 51, *supra* note 41, at 349. See note 41 and accompanying text.

70. This phrase is from Lincoln's prophetic address before the Young Men's Lyceum of Springfield, Ill. (Jan. 27, 1838). 1 COLLECTED WORKS OF ABRAHAM LINCOLN 108, 113 (R. Basler Ed. 1953) [hereinafter cited as LINCOLN WORKS]. For an interesting comparison of Lincoln's prophecies of a Caesarian threat to American liberty with Madison's *The Federalist* No. 51, see H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 203-06 (1959). Compare generally Lincoln's Lyceum address, *supra*, with a later restatement of his similar fear during his 1858 campaign for the United States Senate. 3 LINCOLN WORKS, *supra*, at 95. In these addresses, Lincoln places great emphasis on "reverence for laws," 1 LINCOLN WORKS, *supra*, at 112, and "the spirit which prizes liberty as the heritage of all free men" as the only sure bulwark against "the first cunning tyrant who rises" among the people, 3 LINCOLN WORKS, *supra*, at 95. In these passages, Lincoln echoes Madison's modest hopes that the people might learn to cherish the Bill of Rights in a way that might "counteract" the passions of temporary majorities threatening liberty. See Madison to Jefferson, MADISON'S WRITINGS, *supra* note 17, and *supra* notes 50 and 53 and accompanying text.

judiciary was to be limited by adjudicatory process, it was not to be stripped of a right to adapt to encroachments of other branches.

As students of history who knew that past republics fell victim to anarchy followed by tyranny, Madison and Jefferson shared the same fear that laws might not be adequate to preserve republican liberty. Both shared the same hope for the new Constitution and, later, the Bill of Rights: that principles of civil and religious liberty might become immutable maxims of free government. The care and protection of the law is an ongoing process. The discovery of different legal remedies for specific problems occurs over time. As an attorney trained in common law traditions, Madison understood that the public meaning of a document, such as the Constitution, could change with authoritative precedents.<sup>71</sup> He also understood that principles of law must be stable, consistent, and durable so that they would not leave, in Hamilton's words, "utmost latitude for evasion."<sup>72</sup> If the Court was to be a check, it also would have to be a teacher expounding principles of free government as cases, controversies, and changing times required.<sup>73</sup>

In this context, it is not surprising that the dominant characteristic of liberty in this country has been growth and evolution. For example, the champions of expressive liberty learned by trial and error. When the right to a jury trial and truth-as-a-defense failed to serve as a bulwark for a free press, Madison and others turned to more theoretical and philosophical arguments for freedom.<sup>74</sup> Later, when the clear-and-present-danger test allowed too much government power for punishing free speech, libertarians searched again for "qualitative formula[e], hard, difficult to evade"<sup>75</sup> to protect the values of the first amendment.

Americans seek practical solutions to most political problems. Judicial review reflects only a part of the Constitution's pragmatic strategy to preserve an ordered liberty. As one component in a Madisonian balance, the Court must resist innovative exercises of power by adapting older principles to newer encroachments of ambitious executives and legislators. A jurisprudence of original intention pays no heed to the need for flexibility and inventiveness in the judicial search for principles with sufficient strength to help liberty endure.

71. POWELL, *supra* note 3, at 940-41. For example, despite Madison's initial personal opinion that a federally chartered bank was unconstitutional, as President he concluded that the constitutional controversy had been settled "by repeated recognitions, under varied circumstances, of the validity of such an institution." P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 18 (2d ed. 1983) (quoting B. HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 118 (1957)).

72. *THE FEDERALIST*, *supra* note 49, at 580.

73. See MADISON'S WRITINGS, *supra* note 50, at 273, and accompanying text. Although Madison, like Jefferson, became critical of the Supreme Court's decisions under the leadership of John Marshall, he apparently never doubted the need for "a regular course of practice to liquidate and settle the meaning" of ambiguous constitutional phrases. Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *quoted in* 3 FARRAND, *RECORDS*, *supra* note 47, at 435. Professor Powell provides an excellent summary of Madison's views on constitutional interpretation in his article on the original understanding of original intent. POWELL, *supra* note 3, at 935-41.

74. LEVY, *supra* note 11, at 309-49.

75. Letter from Learned Hand to Zechariah Chafee, Jr., *supra* note 9.



*Conclusion: A Result-Oriented Constitutional Jurisprudence?*

Constitutional decision making is, and has always been, something more than a scholastic and legalistic assessment of "what the law is."<sup>76</sup> A written constitution was an innovation in 1787. It was, as John Marshall said, the greatest of America's improvements on political institutions.<sup>77</sup> Moreover, the Constitution of 1787, the foundation of a new political order, sprang from the nation's most cherished, most debated, most important principles of political philosophy. If, as Lincoln said, the "new nation [was] conceived in liberty and dedicated to the proposition that all men are created equal," then the Constitution was designed to ensure that this nation "so conceived and so dedicated can long endure."<sup>78</sup> Nationalism, practical devices for preserving liberty, limiting government, and declaring basic rights—all these innovations were part of the Framers' legacy.

This nation's search for principles of liberty and freedom began as a political and philosophical process and was only belatedly transformed into a preeminently legal inquiry. Yet, because the judiciary is responsible for the interpretive process, we often assume that judicial review should be legalistic and scholastic—altogether different from the search that gave birth to the nation's supreme law. It is doubtful that strict legalism is possible because the Constitution is boldly and ambiguously written. If the text's uncertainties were to be left to subsequent generations, how can the interpretive process be anything but a continuation of the search for principles inaugurated by the Framers? In this sense, as Justice Frankfurter once wrote, "The constitutional labors of the Supreme Court . . . are accurately described as statecraft."<sup>79</sup>

On occasion, judges must preserve the Republic as it is. Sometimes, however, judges should push the Republic toward a vision of what it ought to become in light of what the nation claims to be.<sup>80</sup> Again, the words of Justice Frankfurter are illuminating:

Even a decision settling an ordinary quarrel between litigants is a push, though unavowed, in the direction of one generalization rather than another. Moreover, though it is the fashion to insist that law is what the courts do and not what they say, what they say has a considerable influence on what they do next. This is profoundly true of constitutional law. . . . The wise judge is conscious of the implications of this process. He knows that generalizations are partly a projection of the present into the future, and except where he consciously attempts to determine its direction, he is curbed by his awareness of the limited scope of his prophetic vision.<sup>81</sup>

76. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177.

77. *Id.* at 178.

78. Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), in 7 LINCOLN WORKS, *supra* note 70, at 18-20.

79. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 22 (1964).

80. *Poe v. Ullman*, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting).

81. FRANKFURTER, *supra* note 79, at 26.

Even Justice Frankfurter, a dedicated advocate of judicial self-restraint, believed that judges interpreting the Constitution have no realistic choice but to pursue a vision, albeit with humility and a respect for judicial limitations.

Every lawyer and every law student grows accustomed to the vices and dangers of result-oriented jurisprudence. Judicial ideals teach that a judge should be objective, dispassionate, fair, and open-minded. "Result-oriented" jurisprudence is when a judge decides how a case should "end up" and then reasons backward to rationalize his own prejudice. When a judge does this, we are tempted to conclude that the judge has been dishonest and has betrayed a trust.<sup>82</sup> One troubling possibility is that constitutional decision making is different. A type of "result-oriented jurisprudence" is essential, or at least inevitable, whether a judge tries to preserve doctrine as it is or tries to transform the law into a more effective and durable embodiment of values fairly implicit in the Constitution.

The federal judiciary is vested with a unique, historically prominent role as guardian of principle, traditions, and law. For better or worse, almost from the beginning, the courts and the Constitution have been focal points for debate of what this nation is, what this nation claims to be, and what principles should govern this nation's basic direction through "the various crises of human affairs."<sup>83</sup> The Supreme Court cannot escape the burden of this statecraft even if it wished.

82. Levy, *supra* note 38, at 38.

83. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 415 (1819).