

## Widener University Commonwealth Law School

---

From the Selected Works of Robert C Power

---

1990

### The Textualist (reviewing George Anastaplo, The Constitution of 1787: A Commentary (1989))

Robert C Power, *Widener University - Harrisburg Campus*



Available at: [https://works.bepress.com/robert\\_power/12/](https://works.bepress.com/robert_power/12/)

# BOOK REVIEW

## THE TEXTUALIST

### A REVIEW OF

THE CONSTITUTION OF 1787: A COMMENTARY. By George Anastaplo.\* Baltimore, Maryland: The Johns Hopkins University Press, 1989. Pp. xviii, 339. \$35.00 (cloth); \$10.95 (paper).

*Reviewed by Robert C. Power\*\**

### I. INTRODUCTION

Professor George Anastaplo is a prolific, elegant, and idiosyncratic commentator on the United States Constitution. Anastaplo took up legal scholarship after the state of Illinois denied him the opportunity to practice law because of his refusal to answer questions about his political associations—a denial upheld by the United States Supreme Court.<sup>1</sup> The wrong-headed deprivation of his civil rights spurred Anastaplo to un-

---

\* Professor of Law, Loyola University of Chicago School of Law; Professor Emeritus of Political Science and of Philosophy, Rosary College, River Forest, Illinois. J.D., University of Chicago.

\*\* Professor of Law, University of Bridgeport School of Law. J.D., Northwestern University.

<sup>1</sup> *In re Anastaplo*, 366 U.S. 82 (1961). The controversy began in 1954 when he listed "the right of revolution" as one of the Constitution's basic principles on his application for membership in the Illinois bar. This caught the attention of the bar's character committee, which conducted hearings into Anastaplo's fitness to practice law. Not surprisingly, given the era, a committee member asked Anastaplo if he was a member of the Communist Party. Anastaplo refused to answer, arguing that the answer was not relevant to the committee's function. He was denied admission, *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), even though there was no evidence that Anastaplo was anything other than a conscientious, if somewhat headstrong, student of constitutional principles. Pritchett, Book Review, 60 CALIF. L. REV. 1476 (1972) (reviewing G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971)). The Supreme Court considered the case after a second hearing before the character committee. Anastaplo appeared *pro se*. The majority concluded that the bar's questions were permissible and that Illinois could deny Anastaplo's application because of his unwillingness to cooperate. 366 U.S. at 89-90, 95-96. Four Justices dissented. *Id.* at 97-116. *In re Anastaplo* survives as a note case in constitutional law teaching materials. See, e.g., G. GUNTHER, CONSTITUTIONAL LAW 1369 n.6 (11th ed. 1986); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1313 (1986) [hereinafter G. STONE, CONSTITUTIONAL LAW]. Professor Anastaplo's version of the controversy is included as an appendix to THE CONSTITUTIONALIST, *supra*, at 331-418. See also Anastaplo, *Mr. Justice Black, His Generous Common Sense and the Bar Admission Cases*, 9 SW. U.L. REV. 977 (1977) (summarizing the law and facts of the case).

leash a stream of provocative writings on the Constitution<sup>2</sup>—one that continues with the publication of *The Constitution of 1787: A Commentary*.<sup>3</sup> His scholarship, ironically, has proved that Anastaplo is a loyal citizen—one who cares deeply about our government, is willing to express unconventional views, and is confident enough to defend theories that have gone out of fashion.

Anastaplo's celebration of the Constitution's bicentennial stands out in a crowded and distinguished field. *The Constitution of 1787's* subtitle, *A Commentary*, provides the first clue that this book differs from most works on the subject. Anastaplo examines the text of the Constitution and proceeds for the most part in a straightforward, section-by-section manner, beginning with the preamble and ending with article VII. Two omissions stand out. True to its title, *The Constitution of 1787* ignores, as a practical matter, amendments to the Constitution—even the Bill of Rights, which was adopted as part of the ratification process. Nor does Anastaplo analyze judicial decisions interpreting the Constitution. The few cases he mentions are simply posited and always criticized.

This atypical approach to constitutional exegesis, coupled with Anastaplo's prior work, provides reason enough to read *The Constitution of 1787*.<sup>4</sup> The constitutional theories it expounds provide an even

---

<sup>2</sup> Anastaplo's publications include: *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* (1971); *HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD* (1975); *Freedom of Speech and the Silence of the Law*, 64 *TEX. L. REV.* 443 (1985); *Human Nature and the First Amendment*, 40 *U. PITT. L. REV.* 661 (1979); *Legal Realism, the New Journalism, and The Brethren*, 1983 *DUKE L.J.* 1045; *Mr. Crosskey, the American Constitution, and the Natures of the Things*, 15 *LOY. U. CHI. L.J.* 181 (1984); *Passion, Magnanimity and the Rule of Law*, 50 *S. CAL. L. REV.* 351 (1977); *What is Still Wrong with George Anastaplo? A Sequel to 366 U.S. 82 (1961)*, 35 *DE PAUL L. REV.* 123 (1986). Much of *The Constitution of 1787* was previously published as *The United States Constitution of 1787*, 18 *U. LOY. CHI. L.J.* 15 (1986).

<sup>3</sup> G. ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* (1989).

<sup>4</sup> In contrast to Anastaplo's approach, most academic treatments of the Constitution in recent years have emphasized other analytical theories. Scholars have propounded a variety of approaches to understanding the Constitution, ranging from originalism, largely associated with the Republican right, to any number of noninterpretivist theories that emphasize the open-ended clauses of the Constitution.

Although originalist thought has been a part of constitutional analysis from the beginning, it became a recognized movement when Attorney General Edwin Meese gave a 1985 speech before the American Bar Association in which he argued that the courts should follow a "jurisprudence of original intention." Nonoriginalist approaches have no similarly definable genesis. There are many scholarly works on all sides of the many variations of these viewpoints. Among the noteworthy materials are R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); J. ELY, *DEMOCRACY AND DISTRUST* (1980); L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); M. TUSHNET, *RED, WHITE, AND BLUE* (1988); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984); Bennett, *Objectivity in Constitutional Law*, 132 *U. PA. L. REV.* 445 (1984); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. REV.* 204 (1980); Chang, *Conflict, Coherence and Constitutional Intent*, 72 *IOWA L. REV.* 753 (1987); Dworkin, *The Forum of Principle*, 56 *N.Y.U. L.*

stronger reason. For the most part, Anastaplo presents to a new generation the views of William Winslow Crosskey, whose *Politics and the Constitution*<sup>5</sup> shocked and excited the academic world in the early 1950s. Crosskey's theory was deceptively simple: correct interpretation of the Constitution lies in the precise meaning of its words to an educated and intelligent person of 1787.<sup>6</sup> Crosskey's application of that theory was soon disputed, however, and his work is rarely cited today. It is, nonetheless, worthy to consider despite its flaws, especially in Professor Anastaplo's streamlined package.

This review examines the Crosskey-Anastaplo Constitution. It begins by summarizing *Politics and the Constitution* and the short but intense controversy the book generated. Next, it reviews Anastaplo's presentation in *The Constitution of 1787*, focusing on the merits of its logical, if unusual, structure. The review concludes with several critical reflections on the weaknesses of the Crosskey-Anastaplo approach and the impossibility of deriving a single coherent vision of the Constitution that resolves all important questions.

## II. THE CROSSKEY SPECTACULAR

By all accounts, William Winslow Crosskey was larger than life—a superhuman mix of talent, opinion, and eccentricity. A legendary student at Yale Law School and exceptionally successful in private law

---

REV. 469 (1981); Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751 (1987); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections*, 82 NW. U.L. REV. 226 (1988); Kurland, *The Constitution: The Framers' Intent, the Present, and the Future*, 32 ST. LOUIS U.L.J. 17 (1987); Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811 (1983); Meese, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & POL'Y 5 (1988); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

For a good summary of the different viewpoints in this area, see Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989). In addition, two attempts to collect and synthesize competing interpretive theories are especially noteworthy. Professor Philip Bobbitt addresses most contemporary modes of constitutional analysis in an exceptionally lucid fashion in the first seven chapters of P. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). Professor Richard Fallon places competing theories into a hierarchy based on the importance of each theory to constitutional decisionmaking. See Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

<sup>5</sup> W. CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953) (2 vols.). A third volume was completed and published long after Crosskey's death. 3 W. CROSSKEY & W. JEFFREY, *POLITICS AND THE CONSTITUTION* (1980).

<sup>6</sup> See 1 W. CROSSKEY, *supra* note 5, at 13-14; see also Krash, *William Winslow Crosskey*, 35 U. CHI. L. REV. 232, 234 (1968):

Crosskey believed the Constitution could properly be understood only in the context of the actual events which preceded it and in light of the politics and economics, the law and the language of the age when it was written. He maintained that the Constitution should be interpreted as it was understood by an intelligent, well informed person in 1787.

practice with John W. Davis, Crosskey began teaching at the University of Chicago Law School in 1935.<sup>7</sup> He impressed his colleagues as "one of law's angry men,"<sup>8</sup> "an iconoclast, boldly original, and an exponent of ideas regarded as heresy by many orthodox constitutional historians,"<sup>9</sup> and as a person with "great intensity of purpose, with terrific integrity . . . a fighter who would defend his convictions against all comers."<sup>10</sup>

Crosskey's unconventional views centered on the Constitution and his manifesto was the nearly 1200 page, two volume *Politics and the Constitution*, published in 1953. Crosskey theorized that deliberate, politically motivated distortions lay behind contemporary interpretations of the Constitution. He believed that the Supreme Court and legal scholars had perverted the Constitution from the beginning of Thomas Jefferson's administration. To Crosskey, James Madison was an evil revisionist who published falsified accounts of the Constitutional Convention's deliberations only long after they could be disputed and for the purpose of redefining the national government to fit the more limited scope favored by the Jeffersonian Republicans.<sup>11</sup> *The Federalist Papers*, he argued, were intended to disarm critics of the proposed Constitution by falsely denying the extent to which it centralized authority in the national government.<sup>12</sup>

Crosskey hoped to correct these errors by developing "a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas"<sup>13</sup> that would enable modern scholars to understand the true meaning of the Constitution. His own historical analysis of the Constitution's language led Crosskey to conclude that the national government was not limited by careful delegations but was instead a powerful body with nearly plenary authority over the nation's affairs.

The premises of Crosskey's argument challenged much of the accepted dogma concerning federalism and the separation of powers. He

---

<sup>7</sup> Philip Bobbitt describes Crosskey's background and recounts several of the legends. See P. BOBBITT, *supra* note 4, at 14-15.

<sup>8</sup> Kalven, *Our Man from Wall Street*, 35 U. CHI. L. REV. 229, 230 (1968).

<sup>9</sup> Krash, *supra* note 6, at 233.

<sup>10</sup> Gregory, *William Winslow Crosskey—As I Remember Him*, 35 U. CHI. L. REV. 243, 247 (1968).

<sup>11</sup> 1 W. CROSSKEY, *supra* note 5, at 7-13. A less paranoid view of Madison's notes is that they are too incomplete to be of much use to any particular political persuasion. See generally Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986) (general analysis of controversies surrounding the accuracy of accounts of the Constitutional Convention).

<sup>12</sup> 1 W. CROSSKEY, *supra* note 5, at 8-11. Subsequent scholars have endorsed, to varying degrees, this view. See, e.g., G. STONE, *CONSTITUTIONAL LAW*, *supra* note 1, at 7 ("[I]t is important to keep in mind that the essays [collected as *The Federalist Papers*] were in many respects propaganda pieces, designed to persuade the ambivalent."); J. ELY, *supra* note 4, at 5 (also describing *The Federalist Papers* as "propaganda"); cf. J. GOEBEL, 1 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 292-323 (1971) (chapter entitled "The Framers as Propagandists").

<sup>13</sup> 1 W. CROSSKEY, *supra* note 5, at 5.

asserted, for example, that the commerce clause gives Congress authority to regulate virtually all gainful activity.<sup>14</sup> In addition, he declared that article III makes the Supreme Court “head of a unified American system of administering justice,”<sup>15</sup> which has the power to develop a national common law.<sup>16</sup> Crosskey was not, however, a proponent of unbridled judicial power; he also concluded that federal courts lack the power to declare federal statutes unconstitutional.<sup>17</sup>

The states, on the other hand, did not have a large role under Crosskey’s Constitution. Drawing on the framers’ own language, Crosskey described the tenth amendment as “a Tub for the Whale,”<sup>18</sup> a decoy to divert the states’ attention from the fact that the body of the Constitution strips them of their sovereignty. The states, he argued, retain the power to enact statutes and to develop common law only so long as Congress and the federal courts allow them to do so.<sup>19</sup>

*Politics and the Constitution* rocked legal academia. The *Index to Legal Periodicals* lists thirty-seven reviews of the book in the period from mid-1953 through the end of 1954. Most early reviewers expressed praise and excitement.<sup>20</sup> Crosskey’s views were, in many ways, attractive to proponents of the liberal social ideals of the New Deal and post-World War II era, as they embraced a strong national government, common law unification, and weak state power. The book presented, in Professor Philip Bobbitt’s words, “the Constitution Franklin Roosevelt would have written in 1935.”<sup>21</sup> Indeed, through his appointments to the Supreme Court, Roosevelt engineered an expansion of the commerce clause to authorize an almost complete delegation of power over business activity to the federal government and ensured that judicial review of congressional and administrative action was at its most deferential.<sup>22</sup> Crosskey pro-

<sup>14</sup> *Id.* at 15-186.

<sup>15</sup> 2 W. CROSSKEY, *supra* note 5, at 711.

<sup>16</sup> 1 W. CROSSKEY, *supra* note 5, at 610-74.

<sup>17</sup> “[T]he situation seems very clear: judicial review was not meant to be provided generally in the Constitution, as to acts of Congress . . .” 2 W. CROSSKEY, *supra* note 5, at 1007; *see also id.* at 976-1046. Crosskey did recognize, however, that the courts have power to enforce those article III provisions specifically delineating their powers. *Id.* at 1002-04.

<sup>18</sup> 1 W. CROSSKEY, *supra* note 5, at 688 (quoting letter from Senator Robert Morris to Richard Peters).

<sup>19</sup> *See id.* at 675-708.

<sup>20</sup> *See, e.g.,* Clark, *Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins* (Book Review), 21 U. CHI. L. REV. 24 (1953); Corbin, Book Review, 62 YALE L.J. 1137 (1953); Durham, *Crosskey on the Constitution: An Essay Review* (Book Review), 41 CALIF. L. REV. 209 (1953); Hermann, Book Review, 39 IOWA L. REV. 149 (1953); Peters, *Our Ancient and Sensible Constitution: Professor Crosskey’s View* (Book Review), 28 NOTRE DAME LAW. 307 (1953).

<sup>21</sup> P. BOBBITT, *supra* note 4, at 15.

<sup>22</sup> *See, e.g.,* SEC v. Chenery Corp., 332 U.S. 194 (1946) (choice of adjudication or rulemaking normally lies within the discretion of the administrative agency); National Labor Relations Bd. v. Hearst Publications, 332 U.S. 111, 130-31 (1944) (accepting agency definition of a statutory provision because the agency had a reasonable basis for its interpretation); United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 (1938) (court need find only some rational basis to sustain congress-

vided an historical justification and doctrinal basis for the expansion of federal power that Roosevelt initiated.

Nevertheless, the collective mood of Crosskey's reviewers changed quickly and became rather ugly. One leading scholar after another attacked Crosskey's scholarship and theories, criticizing Crosskey for manipulating historical data and jumping to conclusions without factual support.<sup>23</sup> Professor Irving Brant, for example, described Crosskey's analysis as "one of the strangest combinations of fact and fancy ever put before the public."<sup>24</sup> The typical review focused on a single aspect of the book, explained its failings in depth, suggested that the rest of its analysis must be similarly shoddy, and expressed contempt for the author. Professor Julius Goebel flatly declared: "Mr. Crosskey's performance, measured by even the least exacting of scholarly standards, is in the reviewer's opinion without merit."<sup>25</sup> It remained, however, for Professor Henry Hart to supply the hardest punches. Crosskey's analysis of judicial review, Hart declared, was "simply without relation to reality or to the recorded imaginings of anyone except Professor Crosskey."<sup>26</sup> Hart saw in Crosskey's writing a "note of madness,"<sup>27</sup> and implied that his attacks on Madison were akin to McCarthyism.<sup>28</sup> Hart dismissed *Politics and the Constitution* as fiction, thereby signalling the end of serious treatment of Crosskey's work.

Most scholars today cite *Politics and the Constitution* only in passing, critical references.<sup>29</sup> When someone raises Crosskey's name at a constitutional law symposium, he or she is likely to see awkward and indulgent smiles on the panelists and to hear the moderator hurry on to the next commentator. Crosskey has become a nonperson.

### III. THE ANASTAPLO RESTATEMENT

*The Constitution of 1787* reaches many of the same conclusions as *Politics and the Constitution*. Anastaplo, like Crosskey, seeks to identify

---

sional enactment); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 588-90 (1937) (deferring to congressional judgment concerning the utility of conditions on state receipt of federal social security funds).

<sup>23</sup> See, e.g., Brown, Book Review, 67 HARV. L. REV. 1439, 1441-44 (1954).

<sup>24</sup> Brant, *Mr. Crosskey and Mr. Madison* (Book Review), 54 COLUM. L. REV. 443, 443 (1954). Professor Brant, unlike most of Crosskey's other critics, did find some of his analysis to be sound. See *id.* at 443-45.

<sup>25</sup> Goebel, *Ex Parte Clio* (Book Review), 54 COLUM. L. REV. 450, 451 (1954).

<sup>26</sup> Hart, *Professor Crosskey and Judicial Review* (Book Review), 67 HARV. L. REV. 1456, 1457 (1954).

<sup>27</sup> *Id.* at 1461.

<sup>28</sup> *Id.* at 1475.

<sup>29</sup> See, e.g., L. LEVY, *supra* note 4, at 103 ("Wishful thinking and confusion . . . characterize the eccentric studies made by . . . William Winslow Crosskey . . ."); see also P. BOBBITT, *supra* note 4, at 21 (Crosskey's approach is a failure); Sherry, *supra* note 4, at 1135 n.36 (delicately describing Crosskey's judicial review analysis to be "open to question").

the objective meaning of the text<sup>30</sup> and finds in the Constitution a strong national government premised on plenary congressional power and federal common law.<sup>31</sup> The major difference between the books is structure. Crosskey addressed several isolated constitutional provisions at enormous length. Anastaplo, however, presents the Constitution from "We the People" through article VII—the Constitution as it was presented for ratification in 1787, and packs his analysis into approximately 300 pages.

This structure is the book's most valuable aspect. Anastaplo's article-by-article, section-by-section (and nearly clause-by-clause) approach forces readers to think about the Constitution as a single, integrated document. This approach is a natural byproduct of his and Crosskey's view that the Supreme Court has deviated from its mission to develop a national common law to serve instead as a constitutional exegetist (and third house of Congress) through judicial review.<sup>32</sup>

Anastaplo's antipathy toward Supreme Court decisions enhances the impact of his methodical approach. Commentary on the Constitution has all too often been commentary on judicial opinions, which float uncertainly as neither wholly primary nor wholly secondary sources of constitutional law. By refusing to enter the case law thicket, Anastaplo emphasizes his message that the Constitution is best understood through its own words, without the ambiguous and manipulable doctrines created by courts over the past two hundred years. The clear "Preamble-to-Ratification" approach allows readers to think about the document as a whole,<sup>33</sup> which should help them re-evaluate their own constitutional interpretations. In so doing, readers may also be compelled to re-evaluate the necessity and function of the Constitution's amendments.

Anastaplo's analysis of the preamble sets the tone for the entire book. Studies of the Constitution often omit discussion of the preamble, presuming it to have no legal effect.<sup>34</sup> To Anastaplo, however, the preamble is a significant restatement of the fundamental principles set forth

<sup>30</sup> Anastaplo's interpretive methodology is captured by Justice Holmes' comment, "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." This statement is an epigraph for both G. ANASTAPLO, *supra* note 3, at ix, and 1 W. CROSSKEY, *supra* note 5, at ii. Anastaplo also begins his Preface with a quotation from Justice Benjamin Curtis' dissent in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 620-21 (1857), that supports textual interpretation of the Constitution. G. ANASTAPLO, *supra* note 3, at xiii.

<sup>31</sup> See *infra* notes 41-45, 64-66 and accompanying text.

<sup>32</sup> See G. ANASTAPLO, *supra* note 3, at 127-45; *supra* notes 15-17 and accompanying text (Crosskey's views).

<sup>33</sup> The preface to *The Constitution of 1787* reveals that Anastaplo does not assign cases in his own classes until his students have spent several weeks studying the text of the Constitution and other pertinent documents. See G. ANASTAPLO, *supra* note 3, at xvii.

<sup>34</sup> The established principle is that Congress may exercise only those powers specifically enumerated in the Constitution. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-2, at 298 (2d ed. 1988). The preamble enumerates no powers; instead it sets forth the reasons for the enumerated powers that follow it.



in the Declaration of Independence and serves to transfer sovereign power from the people to the national government. "We the People" is not a rhetorical flourish through which a small group of wealthy white men arrogated the power to confer legitimacy; rather, it expresses the founders' belief in a pre-existing citizenry with natural rights. The rest of the preamble is not just a parade of wonderfals, as it is generally treated today. Instead, Anastaplo presents an intricate and thought-provoking argument that the six objectives announced in the preamble are interconnected and together describe the manifest powers conferred on the new government.<sup>35</sup> The first and last objectives—to "form a more perfect union" and to "secure the Blessings of Liberty to ourselves and our Posterity"—are the inspirational ends; the others are more prosaic but equally important. Public safety is the point of "domestic tranquility" and "common defence," while "justice" and "general welfare" look to "the proper ordering of relations among people."<sup>36</sup>

Anastaplo believes that these words were chosen with care and have meaning, in contrast to the boilerplate reportorial phrases in the preamble to the Articles of Confederation.<sup>37</sup> He suggests that congressional and judicial preoccupation with the necessary and proper clause is to blame for conventional disregard of the preamble, which "conceal[s] from view the superb craftsmanship of the drafters of the Constitution."<sup>38</sup> This argument has force, yet Anastaplo relies also on subtlety to make it—posing the critical question as "how much the Preamble itself empowers the General Government,"<sup>39</sup> rather than *whether* it empowers the government. He thus restates one of Crosskey's major points,<sup>40</sup> but does so by raising the issue artfully instead of arrogantly bludgeoning the nonbeliever.

Consistent with his notion of legislative supremacy, Anastaplo devotes four chapters to article I, which largely governs the structure and powers of Congress.<sup>41</sup> The third chapter in this sequence is the most significant. It analyzes the powers enumerated in section 8 and accord-

---

<sup>35</sup> See G. ANASTAPLO, *supra* note 3, at 15-16.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> See *id.* at 20. Appendix B to *The Constitution of 1787* sets out the Articles of Confederation in their entirety. See *id.* at 245-55.

<sup>38</sup> *Id.* at 23.

<sup>39</sup> *Id.*

<sup>40</sup> See 1 W. CROSSKEY, *supra* note 5, at 370-79.

<sup>41</sup> The first chapter on article I addresses sections 1-6, generally arguing that the structure of Congress reinforces equality and public control of the government. The next chapter, which addresses article I, section 7, discusses lawmaking, emphasizing legislative superiority and the role of the President. The final chapter on article I addresses sections 9 and 10. Section 9 places limitations on Congress, which Anastaplo characterizes as mandating equality among the states and guaranteeing the rule of law. G. ANASTAPLO, *supra* note 3, at 63, 66-69. Section 10 is complementary, prohibiting states from interfering with national prerogatives and protecting individual rights. *Id.* at 70-73. The analysis in these three chapters is neither novel nor controversial; their strength is in the passion of the telling.

ingly contains the book's central discussion of the legislative function. Anastaplo reads section 8 as granting to Congress nearly plenary powers. For example, he interprets the first grant of authority, the power to "provide for the . . . general welfare,"<sup>42</sup> through taxation as establishing "a comprehensive mandate for Congress with respect to the general welfare."<sup>43</sup> It bothers Anastaplo not in the least that the courts have never adopted such a broad reading.<sup>44</sup> Nor is Anastaplo at a loss to explain why section 8 goes on to list additional congressional powers. His answer, which is certainly rational, is that the enumerations confirm that these powers reside, first, in the national government rather than in the states, and second, in Congress rather than in one of the other branches.<sup>45</sup>

The most thought-provoking aspect of Anastaplo's article I analysis is his suggested rationale for the order in which section 8 lists congressional powers. The ordering appears to be rather random—highlighted by the taxing and spending, commerce, and necessary and proper clauses—and the section's structure is generally ignored as having no particular meaning. Anastaplo first notes that the powers fall into seven categories, which he identifies, in order, as financial, commercial, monetary, intellectual, judicial, defensive, and managerial.<sup>46</sup> He is wary of finding great significance in this order,<sup>47</sup> but his point reminds readers that unless the order resulted from pure chance, the emphasis on economic powers may be significant.

Anastaplo suggests an additional reason for this structure as well. He notes that the powers are "grouped according to the character of those powers before the Constitution was drafted, that is, according to the way those powers were regarded in earlier constitutional documents or in the constitutional thought of the period."<sup>48</sup> Anastaplo identifies five overlapping groups. The first and last consist of traditional legislative powers and include all of the enumerated powers except the necessary and proper power.<sup>49</sup> The categories of domestic executive powers<sup>50</sup>

<sup>42</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>43</sup> G. ANASTAPLO, *supra* note 3, at 51.

<sup>44</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 289-92 (1936) ("[T]he . . . notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, has never been accepted but always definitely rejected by this court.").

<sup>45</sup> See G. ANASTAPLO, *supra* note 3, at 54. This is generally consistent with Crosskey's view. See 1 W. CROSSKEY, *supra* note 5, at 409-508.

<sup>46</sup> See G. ANASTAPLO, *supra* note 3, at 54-57, 280.

<sup>47</sup> Anastaplo writes:

Much of what one says about the arrangement of these seventeen sets of powers in Section 8 is bound to be speculative. . . . There must be something that accounts for the arrangement discerned here, for it is obvious that these powers are not collected in the order in which they were agreed upon by the Federal Convention over the summer of 1787.

*Id.* at 55.

<sup>48</sup> *Id.* at 56.

<sup>49</sup> See *id.* at 56, 280.

and foreign and military executive powers<sup>51</sup> that the Constitution delegates to Congress are more discriminating. His final group consists of traditional judicial powers given to Congress;<sup>52</sup> it overlaps with portions of each of the preceding categories.

The extensive overlapping between categories makes it difficult to draw any firm conclusions, but Anastaplo's attempt at categorization is provocative and provides some textual support for his argument that section 8's list of congressional powers was intended to clarify the location of each power within the national government rather than to constitute an exhaustive enumeration of national powers. Anastaplo regards section 8 as having "an instructive symmetry."<sup>53</sup> His analysis is less instructive than one would like, but section 8's structure deserves more scholarly attention than it has received, and Anastaplo deserves credit for presenting the issue in a clear and thoughtful manner.

The middle portion of *The Constitution of 1787* analyzes articles II and III.<sup>54</sup> The first chapter on article II focuses on the identity of the President and addresses the selection process, emphasizing the electoral college and proposals to replace it with some more democratic mechanism.<sup>55</sup>

The second chapter on article II concerns presidential authority. Anastaplo concludes that the President has very limited authority under the Constitution<sup>56</sup> and divides that power into two categories. The first

<sup>50</sup> U.S. CONST. art. I, § 8, cls. 1-9.

<sup>51</sup> U.S. CONST. art. I, § 8, cls. 10-16.

<sup>52</sup> U.S. CONST. art. I, § 8, cls. 8-10.

<sup>53</sup> G. ANASTAPLO, *supra* note 3, at 57.

<sup>54</sup> These chapters are prefaced by an essay entitled *Anglo-American Constitutionalism*, which examines visions of government that Anastaplo finds in Shakespeare's history plays. *Id.* at 74-88. It begins by noting that Shakespeare was the one author "who probably provided early Americans with a comprehensive moral and political account of things." *Id.* at 75. Anastaplo argues that Shakespeare's history plays set forth several basic precepts of constitutionalism. Justice and the rule of law dominate the histories, and Anastaplo sees them as fundamental to all successful governments. Property must be protected, and oppressive governmental action, especially that directed at the right of property, will cause a government to fail. *Id.* at 78-79.

These points are lightly made; Anastaplo has no intention of making grand pronouncements—at least with regard to Shakespeare's role in the development of the United States. Nevertheless, the discussion of Shakespeare makes two points exceptionally well. First, the framers' images of good government, wherever they came from, influenced their views of governmental structure. Second, those factors that influenced past governmental systems would have a similar effect in the United States. It was necessary to design a government that would draw on the positive factors and limit the effects of the negative factors. These points make Anastaplo's discussion of Shakespeare—a separable essay more than an integral part of this book—a worthy addition to the "Law and Literature" field.

<sup>55</sup> See *id.* at 93-106. Anastaplo defends the existing system, at least with the conventions that have grown up around it, and makes well-reasoned criticisms of "reforms." He seems largely uninterested in the matter, however. Part of his ambivalence may be attributable to his belief that fortuity ultimately rules in presidential selection and performance. See *id.* at 89-91, 94, 102, 108.

<sup>56</sup> His opinion is underscored at the beginning of the discussion: "It is important . . . to insist that the President is very much confined by the Constitution . . . . If the people do not respond or if,

contains the so-called "independent powers," such as military command. Anastaplo's thesis is that the President is subservient to Congress even in exercising these powers, asserting that congressional authority to raise military forces and to appropriate funds for governmental operations make the President nothing more than an agent of Congress.<sup>57</sup>

Anastaplo repeats this theme in his discussion of the second category of presidential powers—those explicitly shared with Congress. Chief among these are the President's treaty and appointment powers, which are subject to Senate review.<sup>58</sup> The Constitution's text, he contends, plainly envisions a circumscribed role for the President, even if the reality of modern government does not.<sup>59</sup>

The bulk of his support for the weak view of presidential authority, however, is found in his discussion of emergency powers.<sup>60</sup> The Constitution gives Congress several emergency powers;<sup>61</sup> the President, on the other hand, is limited to appearing before Congress to give State of the Union addresses.<sup>62</sup> He or she therefore has only an opportunity to persuade rather than the authority to act. Other presidential powers are essentially ceremonial, and there has been altogether too much ceremony in the modern era to suit Anastaplo's republican preferences.<sup>63</sup>

If modern government makes too much of the presidency, it makes both too much and too little of the federal judiciary. The first chapter on article III addresses sections 1 and 2, which Anastaplo, like Crosskey, interprets as conferring general common-law authority on the federal courts in all cases that come before them.<sup>64</sup> This view is based, in part, on the expansive language of the delegation, "The judicial Power." It is also based on the general understanding in 1787 of the nature of the judi-

---

in turn, the Congress does not respond to the popular opinion of the moment, the President is left with little more than the appearance of power." *Id.* at 109.

<sup>57</sup> See *id.* at 110-11.

<sup>58</sup> See *id.* at 111-12.

<sup>59</sup> For a variety of other views concerning the Senate's role in the appointment process, see Nagel, *The Role of the Senate in Supreme Court Appointments*, 84 NW. U.L. REV. — (1990) (forthcoming).

<sup>60</sup> See G. ANASTAPLO, *supra* note 3, at 113-18.

<sup>61</sup> The Constitution gives Congress the powers to declare war, U.S. CONST. art. I, § 8, cl. 11; to call out the military to enforce the laws and defend the nation, U.S. CONST. art. I, § 8, cl. 15; and to suspend habeas corpus in an emergency, U.S. CONST. art. I, § 9, cl. 2.

<sup>62</sup> U.S. CONST. art. II, § 3. This general distinction between broad congressional authority and narrow executive power accords with constitutional case law. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President lacks authority to seize private business in absence of congressional authorization). At the same time, however, it fails to take account of the realities of presidential power to command standing, professional military forces and to exercise discretion with regard to the enforcement of federal statutes. See generally L. TRIBE, *supra* note 34, § 4-7, at 230-62.

<sup>63</sup> See G. ANASTAPLO, *supra* note 3, at 121-23.

<sup>64</sup> See *id.* at 127-29; see also *supra* notes 15-16 and accompanying text (Crosskey's views).

cial function.<sup>65</sup>

Anastaplo's principal argument is that the absence of federal common-law authority renders federal courts inferior to state courts in their most important function and prevents development of a unified system of law. To Anastaplo, it is inconceivable that the framers intended such a result, given their views of both the scope of national government and the nature of the common law.<sup>66</sup> Anastaplo's conception of the federal judiciary thus dovetails with his conception of the federal legislature—the Constitution creates a national government much like that of England, with both a national legislature with general welfare authority and a national common-law court system.

While Anastaplo criticizes the unwillingness of the courts to exercise their full authority in developing national common-law principles, he seconds Crosskey's argument that the courts have wrongfully asserted the authority to review the constitutionality of congressional actions.<sup>67</sup> This necessarily requires a critical analysis of *Marbury v. Madison*.<sup>68</sup> Anastaplo maintains his textual emphasis, pointing to the absence of any constitutional language supporting the notion of judicial review.<sup>69</sup> More interestingly, he posits that *Marbury* is inherently self-contradictory—that it renders judicial review meaningless by recognizing Congress' power to contract the Supreme Court's appellate jurisdiction, thereby escaping the very review asserted in the decision.<sup>70</sup>

Perhaps Anastaplo's most intriguing argument against judicial review is one that seems antithetical to his strict theory of interpretation. It is simply that the Supreme Court has done a poor job, and therefore is

---

<sup>65</sup> Anastaplo points out that history and logic virtually compel the conclusion that the framers expected that federal courts would create a uniform body of federal common law. *Id.* at 127-35.

The relationship between English courts and Parliament in the 1700s provides more subtle support for federal common law authority. In England, courts decided common law cases but Parliament was authorized to change the resulting rules through legislation and could thus have the final word on any particular subject. *See id.* at 130.

<sup>66</sup> *See id.* at 129, 131-39.

<sup>67</sup> *See supra* note 17 and accompanying text (Crosskey's views). Anastaplo also follows Crosskey in recognizing judicial authority to enforce article III against encroachment by the other branches. *See G. ANASTAPLO, supra* note 3, at 144-47.

<sup>68</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>69</sup> *See G. ANASTAPLO, supra* note 3, at 143.

<sup>70</sup> *See id.* at 141. The relationship between judicial review and Congress' power to contract the jurisdiction of the federal courts raises fundamental separation of powers issues; accordingly it is a major topic in constitutional law casebooks. *See, e.g.,* G. GUNTHER, *supra* note 1, at 40-53; G. STONE, *CONSTITUTIONAL LAW, supra* note 1, at 69-75; J. BARRON, C. DIENES, W. MCCORMACK & M. REDISH, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 1270-76 (3d ed. 1987). These issues are of less practical significance, however, because Congress has only rarely attempted to avoid judicial review of its statutes by curtailing the judiciary's jurisdiction. Congressional reserve in this regard may be explained either by uncertainty as to the legitimacy of such restrictions on jurisdiction or by the fact that Congress (and the Executive) often explicitly rely on the courts to strike legislation that may be unconstitutional rather than making their own explicit determinations in that regard.

not up to the task.<sup>71</sup> Anastaplo asserts that the analysis in *Marbury* was both illogical and unnecessary; the next case to invalidate a congressional statute was *Dred Scott v. Sandford*,<sup>72</sup> which was wrongly decided under any modern view of the Constitution. Anastaplo also notes that the Court's next aggressive resort to the power—during the early days of the New Deal—was promptly repudiated by the Court itself.<sup>73</sup> In short, says Anastaplo, where Congress and the Court have disagreed, “the Congress has been correct.”<sup>74</sup>

Most of the remainder of *The Constitution of 1787* addresses articles IV, V, VI, and VII.<sup>75</sup> Anastaplo's most provocative insights relate to

<sup>71</sup> See G. ANASTAPLO, *supra* note 3, at 142-43. Anastaplo's other arguments focus on limitations in the Constitution that seem to recognize a concern with judicial rather than legislative tyranny, such as the provisions concerning treason and trial by jury. See *id.* at 145-46.

<sup>72</sup> 60 U.S. (19 How.) 393 (1857).

<sup>73</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). *Jones & Laughlin* and *Wickard* effectively overturned narrow interpretations of Congress' powers under the commerce clause in cases such as *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Court's reversal is also evident in its treatment of substantive due process cases in this era. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937) (overturning *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)); *Phelps Dodge v. National Labor Relations Bd.*, 313 U.S. 177, 187 (1941) (overturning *Adair v. United States*, 208 U.S. 161 (1908)). Professor Tribe's treatise contains a good summary of the Court's change of direction on such issues. See L. TRIBE, *supra* note 34, §§ 8-5 to -6, at 574-86.

<sup>74</sup> G. ANASTAPLO, *supra* note 3, at 142. Of course, invalidation of federal statutes is only one very limited aspect of judicial enforcement of the Constitution. Anastaplo says nothing about judicial review of administrative action, which is ultimately review of the President or (other) agents of Congress. Not surprisingly, though, he strongly supports federal judicial review of state action. See *id.* at 141.

<sup>75</sup> This portion of the book is prefaced by a chapter analyzing state constitutions in effect during the drafting of the federal Constitution. *Id.* at 148-66. Anastaplo's analysis stresses the development of American views concerning constitutionalism in the revolutionary period and shows how the national Constitution flowed naturally from the experiences of the states and earlier national governments in structuring governmental authority.

*The Constitution of 1787* accurately describes article IV as establishing several principles of federalism and interstate relations. States are admonished to treat outsiders fairly; the national government must treat states uniformly and protect their geographic and political integrity. See *id.* at 167-74.

The book also addresses various issues presented by article V, which concerns the amendment process. Several of Anastaplo's points reaffirm his earlier observations concerning legislative supremacy by stressing Congress' wide latitude in shaping the amendment process. For example, Congress can probably prevent a national convention, *id.* at 182-84, and it dictates the terms and sufficiency of state ratifications, *id.* at 189-90. By contrast, the President and the courts have little to say about constitutional amendments. See *id.* at 180-81, 190. A brief discussion addresses failed proposals to amend the Constitution, principally the so-called balanced-budget amendment. See *id.* at 184-87.

Anastaplo also addresses article VII, which provides for the Constitution's ratification. Most commentators ignore the provision because ratification in 1788 accomplished its purpose. Anastaplo addresses the ratification process in order to stress that the framers took a cautious and deliberate approach in implementing their revolutionary document. Ratification by only nine states was necessary (in contravention of the provisions of the Articles of Confederation, which required unanimous

article VI. He notes, for example, that the debts and engagements clause reaffirms the commitments of the pre-existing government, thereby underscoring the continuing nature of the nation and its government.<sup>76</sup>

Anastaplo's discussion of the supremacy clause is more extensive. He agrees with the general understanding that the clause clarifies the subservience of the states, including their laws and judges, to the Constitution.<sup>77</sup> He differs with conventional scholars, however, with respect to the "in pursuance" language of the clause.<sup>78</sup> Chief Justice Marshall seized on this language in *Marbury* to establish that the Constitution trumps inconsistent federal statutes.<sup>79</sup> Anastaplo disagrees, restating Crosskey's argument<sup>80</sup> that "[t]his language is more likely to mean 'following upon' or 'made after this Constitution is adopted' than it is to mean 'in conformity to the Constitution' in the sense used today to denote 'constitutionality.'"<sup>81</sup> The impact of Anastaplo's reading of the supremacy clause is that the Constitution and federal statutes are equal components of "the supreme law of the land"—regardless of whether or not they are consistent.<sup>82</sup>

The final chapter of *The Constitution of 1787* tracks the period immediately following the Constitution's ratification and comments on several recurring issues concerning federalism. Anastaplo begins by restating his textual commitment: "In the final analysis, . . . a sound interpretation of the Constitution depends primarily upon a careful reading of the document itself."<sup>83</sup> Anastaplo then turns his attention to several actions of the First Congress, including the drafting of the Bill of Rights. Although he acknowledges that the Bill of Rights is "virtually a part of

---

consent for changes in the national government), yet the political realities of 1787 required the framers make the accommodations necessary to obtain ratification by all states. *See id.* at 216-18, 220-21. Anastaplo also notes that the delegates signed as representatives of their states and purported only to witness the conclusion of the drafting process; this encouraged dissenters to sign and created an illusion of unanimity. *Id.* at 218-20.

<sup>76</sup> *Id.* at 197-98.

<sup>77</sup> *See id.* at 199-200.

<sup>78</sup> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2.

<sup>79</sup> Marshall concluded that this "particular phraseology" established that statutes not in compliance with the Constitution have no legal status and may not be enforced by the courts. 5 U.S. (1 Cranch) 137, 180 (1803).

<sup>80</sup> *See* 2 W. CROSSKEY, *supra* note 5, at 990-1002.

<sup>81</sup> G. ANASTAPLO, *supra* note 3, at 201. This conclusion heralds a brief reprise of Anastaplo's criticisms of judicial review. *Id.* at 201-02. The remainder of the chapter on article VI addresses clause 3, which requires federal and state officers to take an oath to support the Constitution, *see id.* at 202-06, and prohibits religious tests for national offices. *See id.* at 207-14.

<sup>82</sup> This point is consistent with Anastaplo's arguments against judicial review. As in England, he reasons, no court may rely on the Constitution to invalidate a congressional statute. *Id.* at 201. Instead, courts are limited to using the Constitution for guidance in statutory interpretation and developing federal common law. *Id.* at 202.

<sup>83</sup> *Id.* at 225-26.

the original Constitution,"<sup>84</sup> he discusses only the tenth amendment in any depth. Despite his recommitment to textualism several pages earlier, the clear message of his analysis is that the tenth amendment is of no real significance and that the states are subservient to the national government in all important respects.<sup>85</sup> Anastaplo's conclusion is, however, consistent with his statements to the Illinois Bar committee back in 1954; the only way for the states to assert their sovereignty, he argues, is through "the natural right of revolution."<sup>86</sup>

#### IV. THE SPECIAL PROBLEMS OF SLAVERY AND EQUALITY

Anastaplo's emphasis on the words and structure of the Constitution reveals aspects of the document that have largely been overlooked to the detriment of constitutional analysis. Two of the topics addressed in *The Constitution of 1787*, however, expose weaknesses in his approach. First, his treatment of slavery shows that the clause-by-clause approach obscures connections among various clauses that address the same issue. Second, Anastaplo's analysis of equality as a constitutional norm proves that his approach draws on too many sources to be manageable and is ultimately as manipulable as any other theory of constitutional interpretation.

##### A. Slavery

*The Constitution of 1787* first confronts slavery in chapter 3, where Anastaplo addresses article I's provision that a slave is "three fifths" of a person for purposes of both representation in the House of Representatives and federal taxation.<sup>87</sup> He observes that this unhappy compromise arose during the Confederation period, but fails to analyze it in any depth.<sup>88</sup>

Anastaplo is more forthcoming three chapters later in discussing article I, section 9's twenty-year protection of the international slave trade.<sup>89</sup> He argues that this demonstrates the enormous extent of congressional power: no protection would have been necessary unless Congress was empowered to prohibit the slave trade entirely. He concludes

<sup>84</sup> *Id.* at 227.

<sup>85</sup> *See id.* at 228-33. This interpretation of the tenth amendment is textual only if the amendment was without meaning when it was ratified in 1789. Anastaplo takes this view, concluding that the amendment means "the Constitution provides what it provides." *Id.* at 229. Crosskey, on the other hand, saw the amendment as an affirmative diversionary tactic. *See supra* notes 18-19 and accompanying text.

<sup>86</sup> G. ANASTAPLO, *supra* note 3, at 233. The right of revolution is one of Anastaplo's favorite themes. *See id.* at 82, 163, 188-89, 195, 323 n.113. It is also one reason that he found himself unable to practice law in Illinois. *See supra* note 1.

<sup>87</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>88</sup> *See* G. ANASTAPLO, *supra* note 3, at 29-30.

<sup>89</sup> *Id.* at 62-65.



that the southern insistence on protecting the slave trade "can be read as eloquent testimony to the great dormant powers of the General Government under the Constitution."<sup>90</sup> It can, but the fact that the southern states insisted on protection of only the international aspects of the slave trade, which was clearly subject to Congress' commerce power, suggests that the slavery interests assumed that the more important local slave trade was *exempt* from national interference. If correct, this is wholly inconsistent with Anastaplo's theory of national power.<sup>91</sup>

The book's discussion of article IV's fugitive slave clause is less an expression of the author's interpretive theories and more an occasion for philosophical ruminations about the attitudes of the framers. Anastaplo does relatively little to explicate the constitutional text, and most of the discussion relates to the nature of the compromises over slavery.<sup>92</sup> He has a fairly sympathetic view of the founders' willingness to tolerate slavery, noting that many were firmly opposed to the institution but believed that accommodation was better than the alternatives (even for the slaves!) and that the Constitution doomed slavery from the beginning.<sup>93</sup> Anastaplo argues that the Constitution's protections of slavery "tacitly acknowledged that slaves were human"<sup>94</sup> and refers to the document's euphemistic language<sup>95</sup> as signifying unhappiness with slavery.<sup>96</sup> Anastaplo's analysis is thoughtful and indicates that we should have some sympathy for those drafters who opposed slavery but believed themselves to be forced by circumstances to give constitutional protection to the institution.

The final discussion of slavery occurs in the informative treatment of article V's restriction on amending article I's twenty-year ban on congressional regulation of the international slave trade.<sup>97</sup> Here, Anastaplo's primary concern is the theory that article V was intended to

---

<sup>90</sup> *Id.* at 64-65.

<sup>91</sup> Anastaplo addresses this point, arguing that, although the balance of power protected slavery as an institution, the general hostility to international slave trafficking rendered it susceptible to abolition by constitutional amendment. *Id.* at 194. This argument reveals the complexity of the issues facing the framers, but does not explain why the Southern delegates and ratifiers would accept a constitution that made slavery subject to prohibition by a mere majority of Congress.

<sup>92</sup> *See id.* at 175-77.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 177.

<sup>95</sup> The Constitution refers not to slaves, but to "free persons" and "all other Persons." U.S. CONST. art. I, § 2, cl. 3; *see also* U.S. CONST. art. I, § 9, cl. 1 (defining slave trafficking as "[t]he importation of such Persons as any of the States now existing shall think proper to admit").

<sup>96</sup> *See* G. ANASTAPLO, *supra* note 3, at 177. Anastaplo's comments here stress the overall hostility of the constitutional structure to slavery, noting that the Declaration of Independence "inspired and shaped antislavery sentiments," *id.* at 176, that the "dedication to a republican form of government implicitly called slavery into question," *id.*, and that the framers expected Congress to end the slave trade as soon as possible, *id.* at 176-77.

<sup>97</sup> *See id.* at 192-95. The discussion also addresses article V's permanent prohibition of changes in the equal representation of states in the Senate. *See id.* at 194-95.

permit a two-stage constitutional amendment. Under such an approach, the nation would first amend the Constitution by striking article V's restriction; it could then strike the twenty-year ban because there would no longer be any constitutional prohibition of such action. Anastaplo asserts that use of this technical loophole would have been unimaginable, arguing that the Constitution consists of more than its terms, but also "relies on both good sense and good faith."<sup>98</sup> The framers' need to doubly-protect slavery is, to the author, proof of the document's general antipathy to slavery and supports the notion that the Constitution rendered it vulnerable to nationwide prohibition by Congress beginning in 1808.<sup>99</sup>

Anastaplo clearly despises slavery; a recent article repeatedly stresses its horrors.<sup>100</sup> But his fragmented approach to the issue in *The Constitution of 1787* is myopic and demeans the Constitution of 1990. Reading the slavery clauses in this fashion treats them as no more significant than the price terms of a contract for the sale of widgets. It may be effective advocacy to argue that specific textual limitations on congressional powers are evidence of the general breadth of those powers, but it obscures the fact that our nation's fundamental document once tolerated this truly evil institution. To describe the Constitution as an antislavery document is to take appalling liberties with history. Slavery ended only as a result of the Civil War and a constitutional amendment; the Constitution ended slavery seventy-eight years too late to be honored for its original dedication to human rights.

Anastaplo's treatment of slavery suffers by comparison with the discussion of the institution in a recent article by Professor Paul Finkelman.<sup>101</sup> This article examines a variety of issues surrounding the "original intent" controversy<sup>102</sup> and includes a lengthy analysis of the framers' views concerning slavery.<sup>103</sup> Some of Finkelman's conclusions are consistent with Anastaplo's,<sup>104</sup> but his purpose and his emphasis are different. Anastaplo sees no real ambiguity in the slavery provisions; he simply uses them as tools in a lawyer's argument for proving the existence of expansive national power. Finkelman sees these same provisions

<sup>98</sup> *Id.* at 193.

<sup>99</sup> *See id.* at 194.

<sup>100</sup> Anastaplo, *Slavery and the Constitution: Explorations*, 20 TEX. TECH. L. REV. 677 *passim* (1989).

<sup>101</sup> Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989).

<sup>102</sup> *Id.* at 349-57.

<sup>103</sup> *Id.* at 378-86.

<sup>104</sup> These include the significance of the use of euphemisms in the Constitution's text, *id.* at 379, and the importance of the slavery clauses in securing support from Southern delegates. *Id.* at 379-84. Finkelman notes that many Northern delegates acquiesced in the Constitution's protections of slavery in order to gain support for other provisions or ratification. *Id.* at 382-84.

as signifying inconsistent and ambiguous intentions.<sup>105</sup> He also notes that the 1787 Constitution failed to address the status of free blacks,<sup>106</sup> an issue that Anastaplo never mentions. What Finkelman sees, and Anastaplo ignores, is that the controversy over slavery affected the Constitution's design. The complexity of that design is a product of a variety of intentions, obscured by deliberate ambiguity.

The structure of Anastaplo's book, so valuable for describing the outline of the Constitution and for highlighting largely forgotten aspects of the text, fails when a single topic is addressed at several different places in the document. It obscures the importance of the topic and, when it is something as significant as slavery, drains it of vitality.

Ironically, Anastaplo recognizes this problem. In his discussion of the possible two-step constitutional amendment loophole,<sup>107</sup> Anastaplo states, "[w]e see, once again, that we have to think about the parts of the Constitution and fit them together with care if either the meaning of any particular part or the overall sense of the document is to be grasped."<sup>108</sup> In his discussion of slavery, however, Anastaplo ignored his own advice.

### B. Equality

Anastaplo's treatment of slavery is but one example of a recurring theme of *The Constitution of 1787*: that the Constitution is a strong vehicle for ensuring equality. Anastaplo is able to prove his point, however, only by ignoring the very real limits of the framers' dedication to equality and by expanding the 1787 document to include other documents and sources of law. His manipulation of constitutional history reveals that his theories have no special claim of fidelity to constitutional meaning or principle.

Anastaplo's first substantive reference to the 1787 Constitution concerns the Declaration of Independence's assertion that "all Men are created equal."<sup>109</sup> A cynic might argue that the Declaration's "Truths" concerning equality and natural rights to "Life, Liberty and the Pursuit of Happiness" were quickly forgotten when the business of government became serious. Equality among men, let alone among human beings, is largely absent from the 1787 Constitution.<sup>110</sup>

<sup>105</sup> See, e.g., *id.* at 380 & n.151 (the Virginia delegates purported to oppose the slave trade for moral reasons, though contemporary critics noted that economic motives played a part; other southerners voted for the slave trade clause because of political views, economic interests, or regional loyalty); *id.* at 382-83 (describing various attitudes among northern delegates); *id.* at 383 (the debates reveal that "it is impossible to tell how anyone expected the [fugitive slave] clause to operate").

<sup>106</sup> *Id.* at 384-90. This noteworthy omission was disastrously "corrected" in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>107</sup> See *supra* notes 97-99 and accompanying text.

<sup>108</sup> G. ANASTAPLO, *supra* note 3, at 194.

<sup>109</sup> See *id.* at 11.

<sup>110</sup> Similarly, while "life" and "liberty" were protected in the fifth and fourteenth amendments, the drafters of those amendments replaced "happiness" with the more pragmatic "property."

Yet Anastaplo finds much in the original Constitution that secures equality as a constitutional principle. He invokes the concept several times in his discussion of the structure of Congress, noting that the allocation of seats in the House of Representatives suggests equality among free persons.<sup>111</sup> He sees further application of the principle in the assumption—unrealistic in 1990—that within each house of Congress all members have equal authority, in the direct election of members of the House of Representatives, and in the fact that senators and the President are chosen by bodies directly elected by the people.<sup>112</sup> Legislative supremacy enhances the effect of these provisions and prevents executive and judicial tyranny.<sup>113</sup> Article I's prohibition of titles of nobility and article III's prohibition of hereditary punishment likewise militate against a hierarchical society.<sup>114</sup> Anastaplo also notes the equality of the states in the Senate, which is not vulnerable to constitutional amendment.<sup>115</sup> He often praises such provisions, stating, for example, that "[i]t is difficult to overestimate the effects of the equality principle in the American regime, especially since that principle is intimately related to the importance attributed to the liberty of everyone in the Country."<sup>116</sup>

In reality, however, equality under the 1787 Constitution was so circumscribed as to be largely an illusion. Seats in the House of Representatives are distributed by population, but even today the individual states control who chooses its members,<sup>117</sup> just as they do with respect to senators and Presidential electors.<sup>118</sup> Moreover, the second-level equality of elected state legislatures that Anastaplo trumpets is also a very weak form of equality. Only in the 1960s did the Supreme Court interpret the Constitution as mandating any meaningful level of equal apportionment of state legislative or congressional districts.<sup>119</sup> Furthermore, the states were immune from constitutional oversight of voting qualifications until 1870 with respect to race,<sup>120</sup> until 1920 with respect to sex,<sup>121</sup> until 1964 with respect to poll taxes,<sup>122</sup> and until 1971 with respect to age.<sup>123</sup> One of the major themes of the Constitution's amendments has been equality,

---

<sup>111</sup> *See id.* at 30-34.

<sup>112</sup> *See id.* at 31. The 1787 Constitution provided that each state legislature would choose the state's senators. U.S. CONST. art. I, § 3, cl. 1. The use of the electoral college in Presidential elections also dates from the original Constitution.

<sup>113</sup> *See id.* at 32-35.

<sup>114</sup> *See id.* at 63-64, 72, 147.

<sup>115</sup> *See id.* at 194-95.

<sup>116</sup> *Id.* at 30.

<sup>117</sup> U.S. CONST. art. I, § 2, cl. 1.

<sup>118</sup> U.S. CONST. amend. XVII, cl. 1 (senators); U.S. CONST. art. II, § 1, cl. 2 (President).

<sup>119</sup> *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (state legislatures); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (Congress).

<sup>120</sup> U.S. CONST. amend. XV, § 1.

<sup>121</sup> U.S. CONST. amend. XIX, cl. 1.

<sup>122</sup> U.S. CONST. amend. XXIV, § 1.

<sup>123</sup> U.S. CONST. amend. XXVI, § 1.

and the obvious point of the amendments was to remedy a major failing in the 1787 Constitution.<sup>124</sup>

Anastaplo avoids this reality only by taking an expansive view of what makes up the Constitution. While *The Constitution of 1787* expresses his commitment to the words used by the framers, it also stresses that the 1787 Constitution is just one part of "that recognized body of principles which defines a community and guides its conduct."<sup>125</sup> Anastaplo's sources of constitutional principles include the English language, the British Constitution, the Declaration of Independence, the common law, state constitutions, international law, the Articles of Confederation, the 1787 document (with and without amendments), the character of the people, and something he dubs the "best regime."<sup>126</sup>

Of course, each of these sources can shed light on the Constitution's meaning. For obvious reasons, the English language is a necessary resource for understanding the Constitution, and the common law provides guidance in explaining much of the document's terminology, such as "habeas corpus" and "property."<sup>127</sup> The other sources of law are, at least, indirectly helpful in interpreting the Constitution. For example, the Articles of Confederation are important in part because the framers of the tenth amendment intentionally deviated from the Articles by using the word "expressly" to refer to those powers delegated to the national government. This led the Supreme Court to conclude that Congress has implied powers.<sup>128</sup>

Anastaplo's exceptionally broad view may be illuminating, but it is ultimately self-defeating. Treating so many sources as effectively part of our Constitution provides vast stores of ammunition for constitutional argument, but produces utter chaos for those who must apply the Constitution to real cases. If every source of public law and morality has constitutional status, then arguments over constitutional meaning devolve into unrestrained power struggles over competing values. While some would applaud such an approach, it seems unlikely that Anastaplo intended this; rather, he seems to have shifted into rhetorical overdrive to make a philosophical point about the strength and beauty of the Consti-

<sup>124</sup> Equal protection, of course, was not even a part of the constitution's text until ratification of the fourteenth amendment in 1868. Anastaplo's reasoning seems similar to that of opponents of the Equal Rights Amendment who claim that the amendment is unnecessary because the Constitution's basic commitment to equality is sufficient to protect the rights of women.

<sup>125</sup> G. ANASTAPLO, *supra* note 3, at 1.

<sup>126</sup> Anastaplo's "constitutions" are discussed throughout chapter 1. *Id.* at 1-12. In describing the "best regime," Anastaplo draws on both reason and religion. It seems, by and large, to be made up of equal parts morality, natural rights, and rational discourse. *See id.* at 6-8. In some respects, Anastaplo's ideas concerning the multitude of constitutions resemble those of Walter Berns, who argues that the Declaration of Independence is, in effect, a part of the Constitution. *See* W. BERNs, *TAKING THE CONSTITUTION SERIOUSLY* (1987).

<sup>127</sup> *See id.* at 3-4.

<sup>128</sup> *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819).

tution. But it is possible to treat the 1787 Constitution as endorsing equality only by stretching the document beyond recognizable shape and by ignoring history. This results in an admirable Constitution, but not in a textualist's Constitution.

## V. THE FAILURE OF THE GRAND THEORY

Why is the Crosskey-Anastaplo approach to the Constitution virtually taboo? It cannot be simply that it is wrong, for constitutional scholars love nothing more than to administer a good trashing to a weak theory. Moreover, the authors' conclusions are not so farfetched as to be beyond the pale of provocative constitutional analysis. The three major underpinnings of their Constitution are plenary congressional control of commerce, a denial of judicial review of federal statutes, and federal common-law authority. The first is essentially the present state of the law,<sup>129</sup> the second is always an open topic for discussion,<sup>130</sup> and the third was established law until 1938<sup>131</sup> and continues to be a subject of academic debate.<sup>132</sup>

One reason relates to the tone of *Politics and the Constitution*. Crosskey proclaimed his own significance and purported to have written *the* book on the Constitution; his language repudiated and belittled other scholarship. Most scholars can weather criticism of their analysis, but it takes exceptionally thick skin to ward off contempt for intelligence and the implied assertion that one's work has been a waste of time. When Crosskey's targets found that many of his positions were weak, they gleefully returned fire in reviews of his book. Crosskey lost the war, and his

<sup>129</sup> See, e.g., *Perez v. United States*, 402 U.S. 146, 154-57 (1971) (Congress may prohibit extortionate credit practices due to the nationwide impact of organized crime); *Katzenbach v. McClung*, 379 U.S. 294, 299-302 (1964) (Congress may regulate the business practices of restaurants serving food that travels across state lines).

<sup>130</sup> There is no point in identifying particular books or articles on this point; every source cited in this essay addresses the subject, elliptically if not directly. In 1988 Professor Tribe wrote: "Despite pleas to move beyond the legitimacy debate . . . the volume of contemporary comment on the subject shows no sign of abating." L. TRIBE, *supra* note 34, § 1-8, at 14 n.12; see also Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1331 (1988) ("A casual reader of law reviews might well conclude that today [the legitimacy of judicial review] is not just the first but the only issue on the agenda of constitutional scholars.").

<sup>131</sup> *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) (recognizing a federal judicial power to develop general common law that prevails over contrary state precedents), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-80 (1938). Professor Charles Heckman argues that the Court in *Swift* did not intend to authorize federal general common law but instead intended only to adopt the law merchant. Heckman, *Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the Swift Doctrine*, 27 EMORY L. J. 45 (1978).

<sup>132</sup> See, e.g., Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U.L. REV. 761 (1989); Weinberg, *Federal Common Law*, 83 NW. U.L. REV. 805 (1989); see also Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U.L. REV. 853 (1989); Weinberg, *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U.L. REV. 860 (1989) (responding to Professor Redish).

theories were relegated to footnotes or ignored by most constitutional scholars after 1954.

Unlike Crosskey, Anastaplo does not express contempt for those who disagree. He presents his views in a thoughtful, diplomatic fashion; no one is obliged to agree. His book consists of a series of philosophical arguments that one can consider without sensing the author's baleful stare over the shoulder.

Yet, there is a reason apart from his vitriol that Crosskey's views have largely been banished from intellectual discourse concerning the Constitution, and this reason applies in part to Anastaplo's work as well. Both authors state their views with an almost religious conviction that obviates reasoning and analysis. Ultimately, they hold their interpretation to be virtually self-evident—a version to be taken as a matter of faith rather than of doctrine. The doubting Thomases of contemporary constitutional scholarship are seldom persuaded by ipse dixit renditions of constitutional hermeneutics, however.

It is clear that both authors purport to be textualists. Crosskey and Anastaplo present the text of the Constitution as having a determinate meaning in history and argue that courts should recognize that meaning today. Their emphasis on historical intent, however, distinguishes their approach from most other textual approaches, which apply contemporary meanings to the Constitution's words.<sup>133</sup> Instead, they employ an "originalist text" theory that is related to "original intent" theory but emphasizes language use in 1787 rather than the expectations of individual framers.<sup>134</sup>

To the extent that *The Constitution of 1787* espouses original intent, it is part of a fashionable but unavailing movement. It is one thing to state, with former Judge Robert Bork, that "[t]he only legitimate way [to interpret law] . . . is by attempting to discern what those who made the law intended."<sup>135</sup> It is quite another thing to discern that intent with any

<sup>133</sup> See P. BOBBITT, *supra* note 4, at 26; Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 564-65 (1985).

<sup>134</sup> Professor Bobbitt examines Crosskey's theories in his chapter on historical interpretation. See P. BOBBITT, *supra* note 4, at 14-21. Neither Crosskey nor Anastaplo are so easily pigeonholed, however. Their approach rejects historical intentions at odds with the objective meanings of the Constitution's text, *as they read it*. Thus, evidence of contrary interpretations, even from 1787, are disregarded as misunderstandings or deliberate distortions. To them, the words in the Constitution have the meanings placed on them by an informed literate person in 1787, apparently even if a majority of delegates and ratifiers intended the words to mean something entirely different.

The distinction between meaning and intention permits Anastaplo to reject many of the unpalatable attitudes prevalent in 1787, even among the venerable framers. It is hard to believe, for example, that any of the framers expected women or African-Americans ever to hold high office in the national government. Anastaplo's approach disregards such expectations because no constitutional text mentions race or gender qualifications for office. Pure original intent theory, on the other hand, runs the risk of imposing some of the founders' social attitudes on a nation that bears little resemblance to the United States of 1787.

<sup>135</sup> *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of*

degree of success. Those provisions that had a single cognizable meaning in 1787 are largely the same provisions that produce easy cases—the most noted being that the President must be at least thirty-five years of age<sup>136</sup>—under textual analysis. But then, as now, many provisions lacked clear meanings; the framers, like modern courts and legislators, knew the utility of intentional ambiguity. Professor Leonard Levy states the resulting problem matter-of-factly: “Ambiguity cannot be strictly construed.”<sup>137</sup>

More subtly, some modern scholars believe that the general “original intent” of the framers was that their specific “original intentions” concerning constitutional provisions should be ignored.<sup>138</sup> This view leaves battles over meaning to legal argument rather than historical research. Originalism works only when a fixed objective intention can be identified; the irony of Crosskey and Anastaplo’s work is that their inventiveness in discovering previously undiscovered meanings reveals the futility of using present beliefs concerning historical intention to determine constitutional meaning.<sup>139</sup>

Beyond the problems created by its similarity to originalism, Anastaplo’s theories never come to grips with the reality that this nation has never had a purely textual Constitution. From the early 1800s to the

---

*the United States Before the Comm. on the Judiciary, United States Senate, 100th Cong., 1st Sess. 75 (1987).*

<sup>136</sup> U.S. CONST. art. II, § 1, cl. 5. See generally Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 402, 414 (1985) (listing various noncontroversial interpretations). But even this example may be subject to debate. Professor Mark Tushnet notes that the President’s “age” may mean different things to different constitutional interpreters. See M. TUSHNET, *supra* note 4, at 61-62; see also D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 NW. U.L. REV. 250 (1990).

<sup>137</sup> L. LEVY, *supra* note 4, at 342; cf. Fallon, *supra* note 4, at 1196 (the text does not answer the difficult questions; textual analysis is primarily useful in reducing the range of likely meanings).

<sup>138</sup> See G. STONE, *CONSTITUTIONAL LAW*, *supra* note 1, at 35 (“From the text of the Constitution, it is often plausible to suggest that the framers intended to delegate, to people in the future, the power to make decisions about what the provision means in the particular circumstances.”); see also L. LEVY, *supra* note 4, at 1-2 (the framers believed that their understandings of the text were not the key to constitutional interpretation); Brest, *supra* note 4, at 215-16 (contemporary practices suggest that the framers did not expect courts or other interpreters to examine the framers’ intentions); Powell, *supra* note 4, at 903-04, 913-21 (most early attempts at constitutional interpretation avoided inquiries into the intentions of the delegates or ratifiers).

<sup>139</sup> See Brest, *supra* note 4, at 231 (“[S]trict intentionalism produces a highly unstable constitutional order. The claims of scholars like William Winslow Crosskey and Raoul Berger demonstrate that a settled constitutional understanding is in perpetual jeopardy of being overturned by new light on the adopters’ intent.”); see also R. DWORKIN, *LAW’S EMPIRE* 359-63 (1986) (historicism founders in part due to conflicts and inconsistencies among the framers collectively and individually); M. TUSHNET, *supra* note 4, at 35-41 (historical research is incapable of producing the unambiguous historical facts that are necessary to originalism); Fallon, *supra* note 4, at 1211-14 (attempts to identify the framers’ collective intent are unable to meet the standards required by originalist theory); Powell, *The Modern Misunderstanding of Original Intent* (Book Review), 54 U. CHI. L. REV. 1513, 1530 (1987) (noting that the evidence of original intent concerning state authority “is irreconcilably divided”).



present, courts and the public have recognized that "the Constitution" includes unstated principles.<sup>140</sup> It is no answer that the inclusion has usually occurred through interpretation of open-ended provisions such as the due process clauses. Crosskey and Anastaplo refer to their own open-ended provisions—notably the preamble and the general welfare clause of article I, section 8—proving only that the Constitution's text is readily manipulable. If the framers actually thought their words were clear, they were wrong,<sup>141</sup> and so are Crosskey and Anastaplo.

Moreover, by eliminating judicial review, the Crosskey-Anastaplo theory contains no mechanism for resolving interpretive disagreements. Our legal system relies on the accretion of case law to regulate the government and to apply the Constitution, yet their approach would discard it as illegitimate. Regardless of the understanding in 1787, it is simply too late to jettison judicial review, which has been legitimized and ratified by Congress and the people over time.<sup>142</sup> More importantly, judicial review allows the people to choose among constitutional theories at different times and in the context of different legal and societal issues. The result is an ongoing interpretation of the Constitution through the governmental bodies established in the 1787 Constitution.<sup>143</sup> That is as close to the real Constitution as we are likely to get.

There is, nevertheless, something very valuable in the combined textual-historical emphasis of Crosskey and Anastaplo. Even if pure textualism and pure originalism fail as self-sufficient theories, the words and historical context of the Constitution are important analytical tools.<sup>144</sup>

---

<sup>140</sup> See J. ELY, *supra* note 4, at 11-41 (provisions such as the due process and equal protection clauses invite, if not demand, consideration of values and beliefs not found in the text or the specific intentions of the framers); Grey, *supra* note 4, at 708-09 (Supreme Court decisions from the beginning have enforced widely-shared moral beliefs despite purporting only to be interpreting specific constitutional language); Sherry, *supra* note 4, at 1127, 1145-67 (the framers did not intend for the Constitution to be the sole source of fundamental law).

<sup>141</sup> Professor Tushnet writes:

Few people today believe that phrases like *due process of law* or *the freedom of speech* have the kind of plain meaning that the framers believed they had. This may be the result of greater sophistication about language and law, or the outcome of a long process by which a self-interested elite has hoodwinked the public, or the product of cultural decline.

M. TUSHNET, *supra* note 4, at 24.

<sup>142</sup> Professor Levy suggests that judicial review is now a part of the constitution regardless of original intent. See L. LEVY, *supra* note 4, at 122-23. In essence, nearly 200 years of general acquiescence has amended the Constitution to provide for this judicial authority. Anastaplo recognizes the force of this argument but insists that the evils of judicial review outweigh the benefits. See G. ANASTAPLO, *supra* note 3, at 144-45.

<sup>143</sup> According to Professor Powell, this was the view of James Madison: "Madison's interpretive theory, in the end, rested on an unrelenting insistence that the Constitution is the act of the people, who gave it force by ratifying it in state conventions and continue to interpret it authoritatively through their constitutional organs of expression." Powell, *supra* note 139, at 1542.

<sup>144</sup> See Brest, *supra* note 4, at 207 ("[T]o attempt to read a provision without regard to its linguistic and social contexts will either yield unresolvable indeterminacies of language or just nonsense . . .").

Words are used in different ways at different times for different purposes,<sup>145</sup> and although the attempt to discover historical usages cannot solve all problems, it can at least help interpret constitutional provisions. The most critical failing of *Politics and the Constitution* and *The Constitution of 1787* is that the authors believe that their approach is complete.

Anastaplo's exceptionally readable book returns the text of the Constitution to unaccustomed prominence. Notwithstanding its flaws, its approach to constitutional interpretation deserves recognition. Constitutional analysis is a vibrant field precisely because no single theory provides a magic wand for decisionmaking. Original intent, textualism, and various other theories all battle one another to dominate scholarly discourse; the failure of any one theory to resolve all problems serves to keep that discourse alive. *The Constitution of 1787* will help keep the debate forceful and spirited.

---

<sup>145</sup> See Fallon, *supra* note 4, at 1252-53 & nn.252-53 (changes of meaning are inherent in constitutional interpretation).