The Partisan Battle over the Constitution: Meese's Jurisprudence of Original Intention and Brennan's Theory of Contemporary Ratification

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THE PARTISAN BATTLE OVER THE CONSTITUTION: MEESE'S JURISPRUDENCE OF ORIGINAL INTENTION AND BRENNAN'S THEORY OF CONTEMPORARY RATIFICATION

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I. INTRODUCTION

There is a cartoon from the New Yorker where the family is sitting in the lawyer's office listening to the reading of a will. Imagine the surprised look on their faces when the lawyer says: "My goodness! Your dear old uncle seems to have left everything to me." We can also imagine that even though the lawyer himself has expressed surprise at this result, he must have known all along that this was the natural consequence of the way in which the estate plan was drafted.

In a similar fashion, lawyers involved in litigation sometimes resort to what has come to be known as "law office history." The end sought in litigation, of course, is a favorable result and sometimes the result can be achieved by the claiming of a "legacy" from the appropriate authorities, particularly when those authorities are the Framers of the Constitution, the Bill of Rights, or the fourteenth amendment. The lawyer's search for historical authority can become quite selective, with contravening practices and principles being ignored or distorted. Thus, "law office history" has more to do with advocacy than with scholarship, although its effective-

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1. The cartoon, by Peter Arno, is reprinted in J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS 260 (2d ed. 1978).
ness for advocacy purposes is enhanced by the ability of the lawyer to make it look like scholarship.

The recent exchange between Attorney General Edwin Meese and Supreme Court Justice William Brennan on the role of original intent in constitutional interpretation shows this tendency to favor one's own political position with an ostensibly objective appeal to historical authorities. Attorney General Meese advocated in a series of speeches a "jurisprudence of original intention," which he argued would restore the Supreme Court to its proper role in American government. Meese suggested very strongly that the failure of the current Supreme Court to give proper respect to the text of the Constitution and the intentions of its Framers had caused the Court to enter the realm of policy-making, a realm traditionally reserved for the legislative and executive branches.

In a speech at Georgetown University, Justice Brennan responded to Meese by denying that the historical record could supply direct answers to the myriad of issues arising in modern constitutional cases. He argued that the Court in the twentieth century had to adapt the "great principles [of the Constitution] to cope with current problems and current needs." He also suggested that the ambiguity of the text and the consequent flexibility was as the Framers had intended.

The debate between Meese and Brennan over constitutional interpretation has the tone and substance of a partisan political debate. It is more concerned with politics than with law. Meese argues for "original intent" when it is in his political interest to do so and ignores considerations of original intent or historical precedents when they conflict with his immediate political goals. Brennan likewise relies on "original intent" with respect to civil liberties, but generally eschews its importance in other areas where the results would be incompatible with his position. Meese's and Brennan's readings of the Constitution and the historical record are therefore essentially utilitarian. The Constitution and the historical record


3. *Id.* at 6-7.
have meaning only insofar as they can be marshalled to support a predetermined political end.

Both Attorney General Meese and Justice Brennan have claimed a legacy from the Framers in support of their own respective positions. However, this legacy is not such that it can be shared by both. In fact, neither Meese nor Brennan is entitled to claim the legacy of the Framers. The "estate" must be reserved for a more discerning beneficiary.

II. ATTORNEY GENERAL MEEKSE'S JURISPRUDENCE OF ORIGINAL INTENTION

Attorney General Meese's argument for a jurisprudence of original intention may be found principally in three public speeches given in the summer and fall of 1985. The first speech was delivered at the annual meeting of the American Bar Association in Washington, D.C. This speech critically reviewed some of the latest decisions from the Supreme Court and suggested that the problems with those decisions derived from the Court's departure from the language of the text and the original intentions of the Framers. It was in this speech that Meese proposed the restoration of a jurisprudence of original intention. In the same speech, he created an uproar with his suggestion that the doctrine of incorporation, as contained in the Bill of Rights and applied to the states, was possibly illegitimate because it rested upon an "intellectually shaky foundation."

The Washington Speech was followed by another address to the American Bar Association, but this time the forum was in London, England. Here, Meese briefly described the broad principles underlying the Constitution and attempted to relate these principles to his view of constitutional interpretation. He cited Alexander Hamilton's argument in the Federalist Papers that the judiciary would have only limited powers under

5. Id. at 464.
6. Id. at 463.
the new Constitution. He then leveled criticism at those who advocated "non-interpretive review," which he claimed turned the judges into policymakers. Meese disputed the argument that the original understanding no longer had any direct relevance to the resolution of constitutional issues today and asserted that these principles were no less applicable in our times, no matter how unique we believe our times to be.

The third speech was given several months later, after Justice Brennan had spoken at Georgetown University, and it is clearly the best of the three speeches. Meese responded to Brennan's remarks and clarified his own position in several important respects. He stated the case for reliance on the text with greater care and attempted to indicate how the text should be read in light of general principles underlying the written Constitution. He reiterated his criticism of judicial activism because of its apparent departure from the text and its underlying principles favoring a more modern "vision" or personal "concept of human dignity."

Because the three speeches all cover much of the same ground, this article will not analyze them one after another. Instead, it will attempt to synthesize Meese's views on the adoption of the Constitution, the principles established through its adoption, and describe how his views would shape the adjudication of contemporary constitutional issues.

A. The Framing of the Constitution.

The Constitution of the United States, according to Meese, was fashioned on the basis of "centuries of experience" and this was one of the reasons for its enduring nature. In the London Speech, he acknowledged the influence of England on American constitutionalism, and especially the influence of Thomas Hobbes and John Locke. "From English philosophers came the theory of natural rights; from English jurists came the theory of legal rights." The rights articulated in the Declaration of Independence are simply a "variation of the

philosophic themes of English liberalism." The purpose of the Constitution was to secure these natural rights in civil society. The American contribution to this process was a written constitution. "A written constitution was to serve as an external and tangible check on any arbitrary exercise of governmental power."11

The fact of a written constitution was important in itself. It represented the deliberative effort of the Framers at the Philadelphia Convention to set forth fundamental governmental arrangements in a legal document, to "get it in writing" in Walter Berns' words.12 In the earlier speeches, Meese also argued that the language of the written document reflected more than anything else the original understanding of the Framers: "Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something."13 While this statement is correct as to the lengthy debates of the Convention, it is misleading. The delegates did argue at great length on some very minute points, but not thoroughly on all points.

There are some important provisions in the Constitution whose meaning cannot be ascertained from the debates alone because they were not discussed with any specificity. The commerce clause, a source of much litigation in the late nineteenth and early twentieth centuries, made its first appearance at the Convention in the report of the Committee on Detail and was passed by the whole body without objection.14 The privileges and immunities clause likewise emerged from the report of the Committee on Detail. There is no authoritative account from the Convention records of the meaning of this clause.15

There was considerable debate in the Convention over the nature of the executive branch of the new national govern-

10. Id. at 2.
11. Id. at 3 (emphasis in original).
ment. The debates and the textual language agreed upon in Philadelphia, however, tell us little about the American presidency, even as it developed in the nineteenth century and certainly as it has expanded in the twentieth century. For example, can the presidential role in foreign policy today be traced in any meaningful sense to the intentions of the Framers? The shaping of legislative policy through the budget-making process and the growth of administrative agencies under the control and supervision of the President and his cabinet do not have their origins in the debates in Philadelphia. The growth of practices and precedents in the development of the presidency and related executive branch agencies must be considered outside of Meese's definition of "original intent."

Nor does the problem of ascertaining the original intent become easier when one considers civil liberties issues. The Bill of Rights provisions, with the exception of the religion clauses, were not extensively debated in the First Congress. It would be very difficult to articulate the original intention concerning several of the Bill of Rights provisions on the basis of the few comments made in the debates. One must glean the original intention, in part, from then existing practices and contemporaneous documents because many of the Bill of Rights provisions were evidently part of a shared understanding among the members of the First Congress as well as those who ratified the Bill of Rights. While Meese is correct to point out that "the Constitution is not buried in the mists of time," it is fair to say there are some important gaps and uncertainties in the historical record.

Meese's earlier speeches also suggest that there was common agreement among the Framers on the matters considered in the Constitution. By his repeated references to "the" intention of the Framers, he apparently assumes that it is intelligible to talk about "the" intention of a group. This is always a risky assumption, but it is particularly tenuous with the Constitutional Convention. Anyone who reads Madison's Notes

16. See, e.g., V THE FOUNDERS' CONSTITUTION, 128-29 (P. Kurland & R. Lerner ed. 1987) (speech and press) [hereinafter V THE FOUNDERS' CONSTITUTION]; Id. at 237 (search and seizure); Id. at 262-63 (criminal process); Id. at 377 (cruel and unusual punishment).

17. Federalist Society Speech, supra note 8, at 23.
on the Convention of 1787\textsuperscript{18} will find deep divisions among the delegates, divisions which are not completely repaired by the successful conclusion of the Convention.

Meese softened his position somewhat regarding common agreement among the Framers in his later speech to the Federalist Society:

This is not to suggest that there was unanimity among the Framers and ratifiers on all points. The Constitution and the Bill of Rights, and some of the subsequent amendments, emerged after protracted debate. Nobody got everything they wanted. What's more, the Framers were not clairvoyants — they could not foresee every issue that would be submitted for judicial review. Nor could they predict how all foreseeable disputes would be resolved under the Constitution. But the point is, the meaning of the Constitution can be known.\textsuperscript{19}

Note that even here Meese is insisting on the existence of "the" meaning of the Constitution. As Dr. Peter Schotten points out, Meese himself unwittingly demonstrates the difficulty of understanding the Framers' meaning when he asserts that the purpose of the Constitution was to secure limited government.\textsuperscript{20} If this were so, the delegates in Philadelphia would not have proposed to replace the weak central government of the Articles of Confederation with a much stronger national government. One could argue, as did Hamilton in \textit{The Federalist No. 70},\textsuperscript{21} that a strong government is necessary for the protection of individual rights and therefore necessary if there is to be limited government. But this makes the meaning of the Constitution considerably more complex than simply the size or scope of the national government. Because of the correspondence of Meese's characterization of the Constitution's meaning with the Reagan Administration's own political agenda of limiting the operations of the national government, one suspects that this characterization has an underlying partisan purpose.

\begin{thebibliography}{9}
\bibitem{18} Madison, \textit{supra} note 14.
\bibitem{19} Federalist Society Speech, \textit{supra} note 8, at 24.
\bibitem{20} P. Schotten, The United States Constitution Interpreted and Debated: Changing Times, Unchanging Principles 7, Meeting of the Canadian Association for American Studies, Montreal, Canada (1986) (unpublished manuscript).
\bibitem{21} The Federalist No. 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961).
\end{thebibliography}
Meese also engaged in a fanciful account of the political concerns over adoption of the new Constitution and thereby greatly oversimplified, among other things, the Framers' attitudes toward the federal judiciary. After describing Hamilton's classic defense of judicial review under the Constitution, Meese says there were skeptics at that time who claimed the federal judiciary would abuse its power and interpret the Constitution according to the reasoning spirit of it, without regard to the words or letter. This, of course, is exactly the charge that Meese levels against the current Court. And what was the response of the Framers to this argument?

In response to these concerns, the friends of the Constitution made a promise. There would be no danger of government by an unfettered judiciary. To avoid arbitrary discretion in the courts, the Constitution provided that they would be 'bound down by strict rules'; the judicial tradition promised they would be hedged in by the common law regard for precedent.\textsuperscript{22}

The Constitution itself, of course, made no such promise or provision. Hamilton made the statement in \textit{The Federalist No. 78}, in the course of trying to persuade the voters of New York to ratify the new Constitution.\textsuperscript{23} Whether it was a promise or an expectation, it is hard to say. If it was a promise, by what authority did Hamilton make such a promise? Even more difficult to determine is how many shared Hamilton's view. There was little discussion of the powers and limitations of the federal judiciary in the debates at Philadelphia.\textsuperscript{24}

One of the stronger points concerning the importance of the written Constitution is its underpinning for the defense of judicial review.\textsuperscript{25} Chief Justice Marshall's opinion in \textit{Marbury v. Madison}\textsuperscript{26} relied heavily on the notion of a written constitu-

\textsuperscript{22} London Speech, \textit{supra} note 7, at 7.

\textsuperscript{23} \textit{THE FEDERALIST} No. 78, at 471 (A. Hamilton) (C. Rossiter ed. 1961).


\textsuperscript{25} Even Justice Brennan, to anticipate a little bit, has to acknowledge the importance of the written Constitution when he says: "It is the very purpose of a Constitution — and particularly of the Bill of Rights — to declare certain values transcendent, beyond the reach of temporary political majorities." Brennan, \textit{supra} note 2, at 6. In order to meet the objection posed by the counter-majoritarian difficulty, Brennan must assert that the Constitution does have its status ultimately in the will of the people and its meaning from the words of the document.

\textsuperscript{26} 5 U.S. (1 Cranch) 368 (1803).
tion as the basis for judicial power to strike down laws contrary to the fundamental will of the people. Whatever the Framers intended with respect to judicial review, it is safe to say that they did not intend for the judiciary to disregard the written words of the Constitution.

Whether the Framers considered the written Constitution to be the sole basis for review of legislative acts cannot be conclusively determined from the debates in the Convention. There are indications that some delegates believed that legislation contrary to principles of natural justice would be struck down by the judiciary. For example, at one point in the Convention, they discussed a prohibition of ex post facto laws. Governor Morris thought such a provision was unnecessary. Oliver Elseworth contended that no one, lawyer or nonlawyer, thought that ex post facto laws were valid. James Wilson objected on the ground that such laws were clearly invalid and inclusion of a written prohibition against them would only cause embarrassment. Wilson argued that others would believe the Framers were ignorant of “first principles of legislation” if they put something in writing which was already obvious to any educated lawyer or legislator. The delegates agreed, nevertheless, to include the provision against ex post facto laws, probably on account of the practical observation of Hugh Williamson that a written provision would aid the judges by giving them something to grasp. This example shows the difficulty of reading the debates for a definitive answer as to the Framers’ intentions on a specific issue. The evidence here can be read both ways. The inclusion of what was regarded as an obvious provision strengthens the case for the text as the exclusive or, at least, primary basis of constitutional interpretation. On the other hand, those delegates who believed there were unwritten principles of law and legislation may have acceded to the inclusion of the ex post facto provision because they felt it ultimately would do no harm.

27. MADISON, supra note 14, at 510.
28. Id.
29. Id.
30. Id. at 511.
31. Id. at 510-11.
32. Id. at 511.
Meese's emphasis on the importance of the written Constitution is intended to compel the judges to restrict the scope of their constitutional inquiry. This emphasis, however, has the unintended effect of making the Framers into legal positivists, a characterization which cannot be sustained by a fair reading of the records of the Convention. Meese himself correctly noted the influence of the natural law tradition, particularly in Thomas Jefferson's formulation in the Declaration of Independence. However, he asserted that the written constitution is the sequel to this natural law tradition. This does a disservice to both the Constitution and the natural law tradition upon which it is based.

There were several occasions during the Constitutional Convention where the delegates argued on the basis of natural law or principles of natural justice. After the convention, much criticism was directed at the document produced because of a failure to include a Bill of Rights. In response, Hamilton argued that the protection of rights was implicit in the structure of the document. The people had retained their rights because the new government was a government of limited powers.

Here . . . the people surrender nothing; and as they retain everything they have no need of particular reservations, 'We, the People of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights and which would sound much better in a treatise of ethics than in a constitution of government.

Hamilton is clearly arguing that the written Constitution is not the exclusive basis of the people's rights. This is consistent with the contemporaneous understanding. Consider, for

33. London Speech, supra note 7, at 3.
35. MADISON, supra note 14, at 220-21, 411, 510-11.
37. Id.
example, the ninth amendment. It clearly indicates the Framers' desire not to exclude rights by the fact of their omission from the Bill of Rights. The ninth amendment rejects the common law maxim of "what is not included is therefore excluded." If we are to give great weight to the Framers' written expressions, the ninth amendment provides strong evidence that the Framers themselves did not intend the written document to be an exhaustive statement of individual rights. Meese's ostensible reliance upon the Framers' intent, without taking into account the plain words of the ninth amendment, thus appears to be selective.

There is some dispute whether the Framers themselves intended that judges be governed by the original intention. Meese cites the following statement from James Madison:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.

Madison's position on the use of evidence of original intention, however, is more complex. He also stated in private correspondence: "As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character." In Madison's view, constitutional interpretation should rely on the text and the intentions of the state ratifiers, not those who sat in Philadelphia. This, of course, makes the task of ascertaining the intention of the Framers even more difficult.

38. U.S. CONST. amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."


40. London Speech, supra note 7, at 12; Federalist Society Speech, supra note 8, at 26.

41. Powell, supra note 39, at 936 (quoting letter from James Madison to Thomas Richie (Sept. 15, 1821), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228 (1865)). See also Rakove, Mr. Meese, Meet Mr. Madison, The ATLANTIC MONTHLY 79 (Dec. 1986).

42. Powell, supra note 39, at 935-41.
Thus far, a number of problems with Meese’s account of the framing of the Constitution have arisen. There are more gaps, ambiguities, and uncertainties in the historical record than Meese is willing to admit. This makes the task of ascertaining the intent of the Framers more difficult. Also, it is not clear who the “Framers” are — whose intent should be consulted. It is clear that the intent of the Framers, with respect to the New Constitution, was more diversified than a single concern for limited government. Moreover, to the extent that Meese’s emphasis on the written Constitution promotes the text as the exclusive basis of rights, his position comes into conflict with his statement that the purpose of the Constitution was to form a limited government. Meese’s account of the framing of the Constitution remains unsatisfactory until these conflicts can be reconciled.

B. Specific Rules, Express Principles, and General Principles.

Meese’s account of the framing of the Constitution is intended to establish the process by which the Constitution is to be interpreted. The next step, therefore, is to look at Meese’s description of this process.

If the Constitution is to be read in light of the Framers’ intentions, what does it contain? It contains some rules that are as exactly specific: the age qualifications for certain offices, the organization of the House and the Senate, and the procedure for impeachment of federal officials.

But the Constitution is not simply a municipal code. It contains certain express principles, according to Meese: “One is the right to be free of an unreasonable search or seizure. Another concerns religious liberty. Another is the right to equal protection of the laws. Those who framed these principles meant something by them. And the meanings can be found, understood, and applied.” Meese is silent here on what the Framers intended with respect to these express principles, but he provides examples elsewhere; these will be discussed in the next section.

43. Federalist Society Speech, supra note 8, at 24.
44. Id. at 25.
In addition to the principles expressly set forth in the text, there are general principles which underlie the Constitution. Meese’s earlier attempts at stating the purpose of the Constitution were awkward and too limited, but his Federalist Society Speech contained the following formulation:

The Constitution itself is also an expression of certain general principles. These principles reflect the deepest purpose of the Constitution — that of establishing a political system through which Americans can best govern themselves consistent with the goal of securing liberty.

The text and structure of the Constitution are instructive. It contains very little in the way of specific political solutions. It speaks volumes on how problems should be approached, and by whom. This formulation suggests that additional principles may be found underlying the text and implicit in the structure of the Constitution. According to Meese, the text and structure “speak volumes” on how to approach constitutional issues, and who should be making the decisions.

One underlying premise of the Constitution is that “democratic self-government is subject only to the limits of certain constitutional principles.” Here, Meese emphasizes that the chief policy-making role is given to the Congress, not the courts. He cites McCulloch v. Maryland as support for the broad powers given to Congress to deal with the “various crises of human affairs.” He further suggests that some have wrongly attributed to McCulloch the freedom of the Court to elaborate and expand constitutional principles. The principle of democratic self-government is intended by Meese to create a presumption in favor of legislation, unless there is a clear and express provision of the Constitution to the contrary.

One difficulty with implied general principles lies in the fact that they are, to a certain extent, in conflict with the notion of a written constitution. Where there is an apparent ten-

45. Washington Speech, supra note 4, at 457; London Speech, supra note 7, at 3.
46. Federalist Society Speech, supra note 8, at 25 (emphasis in original).
47. Id. at 25.
48. 17 U.S. 415 (1819).
49. Federalist Society Speech, supra note 8, at 25.
50. The power to declare acts of Congress and laws of the states null and void is truly awesome. This power must be used when the Constitution clearly speaks. It should not be used when the Constitution does not. Id. at 29.
sion between the principle and the text, further inquiry is required to avoid interpreting the Constitution according to its "spirit" rather than its express words. Meese makes this point in his Federalist Society Speech:

Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.51

It is necessary to examine how Meese finds these implied principles and how they are reconciled, in difficult cases, with the text of the Constitution.

C. The Role of the Court in Contemporary Constitutional Adjudication.

Meese's discussion of the express and implied principles of the Constitution is intended to provide the basis for limiting the discretion of the Court in reviewing legislative acts. He acknowledges that constitutional adjudication is not to be a mechanical process. "It requires an appeal to reason and discretion. The text and intention of the Constitution must be understood to constitute the banks within which constitutional interpretation must flow."52 Meese's description of these constitutional principles should be compared to his discussion of several recent decisions of the Supreme Court.

In his Washington Speech, Meese discussed several recent decisions of the Court on the meaning of the fourth amendment protection against unreasonable search and seizure. It is necessary to start as Meese would, with the text of the fourth amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

51. Id. at 26.
52. Id.
and particularly describing the place to be searched, and the persons or things to be seized.\textsuperscript{53}

The text suggests, and the historical record appears to confirm, that a warrant is required before there may be a search of persons or a seizure of evidence.\textsuperscript{54} As long as one does not deny that the warrant requirement is a fundamental protection "implicit in the concept of ordered liberty,"\textsuperscript{55} then its application to states as well as the national government is clear. Meese in fact does not dispute the application of the fourth amendment to the states.

Now consider Meese's review of the recent cases in this area:

Recognizing, perhaps, that the nation is in the throes of a drug epidemic which has severely increased the burden borne by law enforcement officers, the Court took a more progressive stance on the fourth amendment . . . .

The most prominent among these fourth amendment cases were: \textit{New Jersey v. T.L.O.} which upheld warrantless searches of public school students based on reasonable suspicion that a law or school rule has been violated; this case also restored a clear local authority over another problem in our society, school discipline; \textit{California v. Carney}, which upheld the warrantless search of a mobile home; \textit{United States v. Sharpe}, which approved on-the-spot [i.e., warrantless] detention of a suspect for preliminary questioning and investigation; \textit{United States v. Johns}, upholding the warrantless search of sealed packages in a car several days after their removal by police who possessed probable cause to believe the vehicle contained contraband; \textit{United States v. Hensley}, which permitted a warrantless investigatory stop based on an unsworn flyer from a neighboring police department; the flyer stated that reasonable suspicion existed that the detainee was a felon; \textit{Hayes v. Florida}, which tacitly endorsed warrantless seizures in the field for the purpose of fingerprinting where reasonable suspicion of criminal activity existed; and \textit{United States v. Montoya de Hernandez} which upheld border detentions and warrantless searches by cus-

\begin{footnotes}
\footnotetext[53]{U.S. Const. amend. IV.}
\footnotetext[54]{V The Founder's Constitution, supra note 16, at 235-38.}
\footnotetext[55]{Palko v. Connecticut, 302 U.S. 319, 325 (1937).}
\end{footnotes}
toms officials based on reasonable suspicion of criminal activity.56

Nowhere in this passage is there any indication of a conflict or tension between the text of the fourth amendment and the abandonment of the warrant requirement because of exigent circumstances. Meese is at least required to explain how his position is faithful to the text and to the original intention of the Framers. It would appear that Meese's praise of the Court's "progressive stance" in dealing with the drug epidemic is precisely the kind of result-oriented jurisprudence and judicial activism that he deplores. His instincts as a law enforcer appear to have prevailed in this instance over his instincts as a strict constructionist. One should be careful not to remold the principles to fit the circumstances, as Meese says.

Meese's criticism of the Court in the area of religious liberty is on sounder ground.57 But there is a mild irony here as well. The Supreme Court's decisions in this area have been based ostensibly on a reading of the text and an investigation of the intentions of the Framers.58 The problem, to put it bluntly, is that the Court's historical account is wrong.59 As Justice Rehnquist has noted, it is difficult to build sound constitutional doctrine when the underlying constitutional history is misunderstood.60 It is probably accurate to say that the Court has been misled in this area by "law office history" presented by the lawyers. The Court's decisions, which have become increasingly inconsistent (and incoherent),61 give

56. Washington Speech, supra note 4, at 460-61.
57. Id. at 461-64.
some caution to any optimism about the ability of the Court to in fact carry out Meese's jurisprudence of original intention.

When one considers the articulation and applicability of the implied general principles, the difficulties become even more apparent. Consider federalism, which Meese regards as "one of the most basic principles of our Constitution." Meese was quite critical of the recent decision in Garcia v. San Antonio Metro. Transit Auth. which overruled National League of Cities v. Urey and applied the Fair Labor Standards Act to municipal employees. The constitutional issue was the power of Congress to regulate minimum wages and maximum hours of state employees.

The most detailed discussion in Garcia of the constitutional text and its implicit structure, however, comes from Justice Blackmun's majority opinion. The constitutional text expressly gives Congress the power to regulate commerce among the several states. This, as Blackmun points out, is a textual limitation on the sovereignty of the states. Moreover, the events leading to the Philadelphia Convention and the debates in the Convention lend support to the recognition of limitations upon state sovereignty. The delegates were concerned about the failure of the Articles of Confederation government to curb the unrestrained and self-serving behavior of the state legislatures. Finally, an examination of the structure of government contemplated by the Framers con-

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64. 426 U.S. 833 (1976).
65. 469 U.S. at 554-56.
66. Id. at 548-54.
68. The principal criticism of the arrangement under the Articles of Confederation was that the national government was too weak and the state governments were too strong. Madison, supra note 14, at 140-48 (the speech of James Madison on June 19). The ensuing discussion reflected the conviction of the nationalists in the Convention that the power of the state governments had to be curbed in order to bring the country out of its then existing crisis. Id. at 151-54. James Madison went so far as to seek a congressional veto over state legislation. Id. at 79-80, 304-05, 461-62. Although he was not successful in winning approval of this measure, the Convention did impose certain prohibitions upon the power of the state legislatures. Id. at 541-42; U.S. Const. art. I, § 10.
vinced Blackmun that the restraints on Congress were to be primarily legislative, not judicial:

In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.69

There is a counter argument, based upon implied constitutional principles, in Rehnquist's majority opinion in National League of Cities,70 but little of this argument is based upon an examination of the original understanding or the historical record.

Garcia amply illustrates that arguments based upon implied principles can cut both ways. In light of these difficulties, one might expect Meese to have been pleased with the deference given by the Court to the "democratic process." Instead, he argued that the Court had made "an inaccurate reading of the text of the Constitution and [had displayed] a disregard for the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan."71 The conflict between the principle of federalism and the respect to be accorded the democratic process in the absence of a clear constitutional limitation is resolved by Meese in favor of the former and against the latter without an explanation of how the conflict is to be resolved on a principled basis.

The principle of federalism is clearly more complex than Meese understands. The Framers did not intend to leave the states' sovereignty undisturbed, as it existed under the Articles of Confederation. The states would continue to play an important role in the new regime, but under greater constraints than had previously existed. The national government was given affirmative powers which limited the sovereignty of the states. The power to regulate commerce, the power to coin money, and the power to organize and call forth the militia

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69. Madison, supra note 14, at 552.
70. 426 U.S. 833 (1976).
71. Washington Speech, supra note 4, at 458.
are examples of such affirmative powers. Moreover, the Constitution placed express prohibitions on certain activities by the states: they could not coin money, emit bills of credit, lay duties on imports or exports (without the consent of Congress), nor abridge the privileges and immunities of the citizens from other states. The concept of federalism, therefore, is not a talisman, nor should it be used as a pious invocation whenever it suits the purposes of the advocate.

A case in point is New Hampshire v. Piper. In Piper, a woman who passed both the bar exam and the moral character standards of the bar had been denied admission to the bar solely on the grounds that she was not a resident of New Hampshire. The privileges and immunities clause of the Constitution prohibits discrimination against persons solely on account of residency. The Court had long held that the pursuit of a lawful profession was protected by this clause and hence it ruled in favor of Ms. Piper in this case. This involved a simple application of the text: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Meese, nevertheless, criticized the decision on the grounds that it violated the principle of federalism. He stated: "With the apparent policy objective of creating unfettered national markets for occupations before its eyes, the Court unleashed article IV against any state preference for residents involving the professions or service industries." In light of his professed desire that unwritten principles at least not conflict with the text, Meese surely was required to show how the federalism principle overrode the seemingly clear meaning of the text in this case. Otherwise, there is the danger of using implied principles to contravene the express words of the text. He does not attempt to resolve these problems, leaving the

74. U.S. Const. art. IV, § 2.
76. Id. at 276.
77. U.S. Const. art. IV, § 2.
78. Piper, 470 U.S. at 288.
79. U.S. Const. art. IV, § 2.
80. Washington Speech, supra note 4, at 459.
impression that his jurisprudence of original intention is as result-oriented as the "noninterpretive review" of those judges and scholars whom he criticizes.

Meese denies that his call for a jurisprudence of original intention is result-oriented or has an underlying political motivation:

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

It is not clear why this presumption of constitutionality in the absence of clear textual guidance should be so strong. Meese himself is willing to abandon the presumption, as his criticism of the Garcia case illustrates. Moreover, this statement creates yet another unresolved conflict with Meese's own assertion that the Constitution's purpose was to establish limited government with structures to keep the power of government in check. If limited government is one of the chief purposes, then why should legislation (or regulations) be entitled to a presumption of constitutionality? The answer probably lies in the concept of separation of powers but the problem needs to be worked through with greater care.

A jurisprudence of original intention is, on its face, probably the most plausible account of how the judiciary should act within the constitutional framework. Fidelity to the text and

81. London Speech, supra note 7, at 3.
82. Washington Speech, supra note 4, at 457.
to the underlying intentions of the Framers provide the strongest grounds for permitting an unelected and largely unaccountable judiciary to overrule the will of legislative majorities. However, the fidelity to text and intention must be carried out with considerable care. The necessity of this effort, however, is demonstrated when one considers the alternative posed by Justice William Brennan.

III. JUSTICE BRENNAN'S THEORY OF CONTEMPORARY RATIFICATION

Justice Brennan's speech at Georgetown University was in itself a remarkable event. Traditionally, the Justices remain above the political debates which necessarily accompany the great issues decided by the Court. There was no doubt, however, that Brennan chose this opportunity to respond to Meese's speeches before the American Bar Association and to certain political themes advocated by the Reagan Administration. As a result, the speech had much more directness and candor than is usual with off-the-bench remarks made by sitting Justices.

A. The Constitutional Text and the Intentions of the Framers.

Because the occasion for the Georgetown speech was a symposium on "Text and Teaching," it was appropriate for Brennan to discuss the text of the Constitution and his approach to reading and interpreting this document. He began with a characterization of the text which was markedly different from Meese's:

Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text.83

Whereas Meese's text is filled with meaningful words and phrases, carefully chosen by the Framers, Brennan's text contains "majestic generalities and ennobling pronouncements."

83. Georgetown Speech, supra note 2, at 2.
According to Brennan, this was intended by the Framers. It is part of the "genius of the Constitution" because the document was not intended to have "any static meaning." 84

Brennan had to be careful he did not give the impression the text is so vague as to permit the Justices to read their own values and purposes into the "majestic generalities." He therefore quickly added that his "encounters" with the text "are not purely or even primarily introspective . . . ." 85 Justices of the Supreme Court, he asserted, give the text a "public reading." 86 The act of interpreting "the text must be undertaken with the sense that it is "the community's interpretation . . . ." 87 By contrast, the more traditional view was that the Justices spoke for the Constitution, not the community.

Whatever is meant by the "community's interpretation," it does not include Meese's jurisprudence of original intention. Those who argue for interpretation according to the original intention are wrong, Brennan says:

[In truth [this view] is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant — that of the drafters, the congressional disputants, or the ratifiers in the states? — or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states . . . . One cannot help but speculate that the chorus of lamentations calling for interpretation faithful to 'original intention'— and proposing nullification of interpretations that fail this quick litmus test — must inevitably come from persons who have no familiarity with the historical record. 88
It would be reasonable to conclude from this passage that Brennan completely eschews as arrogant or futile any resort to the intentions of the Framers. This conclusion, however, would be wrong. Over the course of nearly thirty years on the Court, Brennan has on many occasions argued on the basis of the Framers' intent in a "specific, contemporary" case.

There are many examples; the following are illustrative:

(1) In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 89 the Court held that Congress could not create bankruptcy court judges with article III powers without giving them the article III protections of life tenure and no salary diminution during term of office. Brennan's discussion of the legal framework began with a series of sentences, each one with the Framers as the subject or the object of the sentence.

Basic to the constitutional structure established by the Framers was their recognition that "[t]he accumulation of all powers ... in the same hands ... may justly be pronounced the very definition of tyranny." The Federalist No. 47 ... (J. Madison). To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches ... "The Framers regarded the checks and balances ... as a self-executing safeguard ... ."

The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature .... The Court has only recently reaffirmed the significance of this feature of the Framers' design .... 90

Not only is the authority of the Framers useful for the resolution of a contemporary constitutional question, there is no confusion here as to whose intent matters. Brennan cites both Madison and Hamilton without raising the question of whether this was a "coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states." 91

(2) Meese may be fairly criticized for treating the Framers as if they spoke with a single voice, but Brennan does not hesitate to invoke their full authority when he wishes to bestow importance upon certain constitutional principles and prevent

89. 458 U.S. 50 (1982).
90. Id. at 57-58 (citations omitted).
91. See supra text accompanying note 88.
any "incremental erosion." In *Commodity Futures Trading Comm’n v. Schor,*\(^\text{92}\) a case involving assertion of an executive agency’s jurisdiction over common law counterclaims (a long established judicial function), Brennan dissented from the majority decision on separation of powers grounds. He stated:

_The Framers knew “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” In order to prevent such tyranny, the Framers devised a governmental structure composed of three distinct branches — a vigorous legislative branch, “a separate and wholly independent executive branch,” and “a judicial branch equally independent.” The separation of powers and the checks and balances that the Framers built into our tripartite form of government were intended to operate as a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”\(^{93}\)_

Brennan is able to attribute knowledge, design, and deliberate construction to the Framers. He is able to speak of them as joint actors with a single intention which has a particular contemporary application. Apparently, this is one of the atypical cases where they did agree and did not hide their differences in “cloaks of generality.”

(3) Brennan has been able to discern between Framers as to whose intent counts and when. In *Walz v. Tax Comm’n,*\(^{94}\) the Court upheld a property tax exemption for religious organizations against a challenge on establishment grounds. Brennan wrote a concurring opinion in which he relied on the lack of objection to tax exemptions for religious organizations by Thomas Jefferson and James Madison as evidence of their general acceptance. "It is unlikely that two men so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion."\(^{95}\) There was some evidence that Madison, later in life, objected

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to tax exemptions, but Brennan dismissed this as an instance of extreme views which Madison "may have reached only late in life."\(^{96}\) Brennan noted Madison had expressed no such reservations during the debates in the First Congress and distinguished between Madison's private views and the views of the Framers: "[E]ven if he privately held these views at that time, there is no evidence that they were shared by others among the Framers and Ratifiers of the Bill of Rights."\(^{97}\)

(4) The Framers' actions after the adoption of constitutional provisions can prove useful in ascertaining the core meaning of those provisions. In *New York Times Co. v. Sullivan*,\(^ {98}\) the Court reversed a libel judgment and set forth a constitutionally-based standard for lawsuits by public figures. Brennan's opinion looked to the historical record and found Jefferson's and Madison's opposition to the Sedition Act of 1798 to be illustrative of the "central meaning" of the free speech clause.\(^ {99}\) "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground it was unconstitutional."\(^ {100}\)

(5) At other times, the most useful evidence of original intention is to be found in the ratification debates and other contemporaneous documents. In *Atascadero State Hosp. v. Scanlon*,\(^ {101}\) Brennan dissented from the majority's holding in favor of a state's sovereignty immunity claim with an extended analysis of the problem of sovereign immunity from the state ratification debates. Brennan focused on the Virginia ratification convention and satisfied himself that Madison's and Marshall's views on sovereign immunity (not helpful to his position) were "a minority of those given at the convention."\(^ {102}\) He also asserted that "[t]he debate in the press sheds further light on the effect of the Constitution on state sover-

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96. *Id.* at 685 n.5.
97. *Id.*
99. *Id.* at 273.
100. *Id.* at 276.
eign immunity.” From these materials he was able to draw several conclusions regarding the sovereign immunity doctrine prior to *Chisholm v. Georgia* and the subsequent enactment of the eleventh amendment. Finally, Brennan reviewed the debates in Congress concerning the eleventh amendment and then concluded:

The language of the Eleventh Amendment, its legislative history, and the attendant historical circumstances *all strongly suggest* that the Amendment was intended to remedy an interpretation of the Constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the state law of sovereign immunity on state-law causes of actions brought in federal courts.

Brennan's command of these materials is very skillful and quite persuasive. He has the inclination and the ability to conduct searching inquiry into the original intentions of the Framers when it helps buttress his position.

It is fair to conclude from these examples that the historical record for Brennan is not completely hidden in “cloaks of generality.” He is able, on some issues, to “gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.” His inability to discern the intentions of the Framers on other occasions may be influenced by his desire to reach a decision more in accordance with his own views. In any event, it is quite interesting to note the disparity between Brennan's Georgetown Speech, which scorns the whole idea of original intention, and his own opinions from the bench. The inability of an advocate to live with his own teaching may be a telling sign.

**B. Political Majorities and Constitutional Values.**

For the most part, it is Brennan's own reading of the constitutional text, not the Framers' intentions, which governs Brennan's decisions. He is inclined in this reading towards an active scrutiny of the actions of legislative majorities. He suggests that any presumption against a claim of a constitutional right, unless there is clear support in the Constitution, cannot

103. *Id.* at 271.
104. 1 U.S. (2 Dall.) 16 (1793).
105. 473 U.S. at 281 (Brennan, J., dissenting).
106. *Id.* at 289 (emphasis added).
be politically neutral, as Meese claims. Such a presumption "expresses antipathy to claims of the minority to rights against the majority."\textsuperscript{107} Although Brennan does not mention \textit{Roe v. Wade}\textsuperscript{108} by name, he undoubtedly would so describe this case. It is equally clear that Meese has \textit{Roe v. Wade} in mind when he criticizes the Court's judicial activism.\textsuperscript{109} Brennan responded against Meese's majoritarian process argument by observing: "It is the very purpose of a Constitution — and particularly of the Bill of Rights — to declare certain values transcendent, beyond the reach of temporary political majorities."\textsuperscript{110}

Brennan has dedicated most of his judicial career to articulating those values which transcend the political process. For Brennan, the "majestic generalities" of the constitutional text are not without substance. In fact, he can become quite literal in his approach to the text. Consider his response to some of the fourth amendment decisions praised by Meese.\textsuperscript{111} In \textit{New Jersey v. T.L.Q.},\textsuperscript{112} the Court upheld a search by school officials, without a warrant, of a student's purse. Brennan, in dissent, said: "Today's decision sanctions school officials to conduct full-scale searches on a 'reasonableness' standard whose only definite content is that it is \textit{not} the same test as the 'probable cause' standard found in the text of the Fourth Amendment."\textsuperscript{113} Later, he added: "The Warrant Clause is something more than an exhortation to this Court to maximize social welfare as \textit{we} see fit."\textsuperscript{114} The argument here is that the majority is molding the text to fit the needs of contemporary society or, at least, of contemporary law enforcement, and Brennan doesn't like it.

Brennan does concede that there is a great deal of risk connected with the inherent ambiguity of the text: "Each generation has the choice to overrule or add to the fundamental

\begin{itemize}
\item \textsuperscript{107} Georgetown Speech, \textit{supra} note 2, at 5.
\item \textsuperscript{108} 410 U.S. 113 (1973).
\item \textsuperscript{109} London Speech, \textit{supra} note 7, at 11.
\item \textsuperscript{110} Georgetown Speech, \textit{supra} note 2, at 6.
\item \textsuperscript{111} Brennan voted to overturn the conviction of all but one of the decisions cited by Meese.
\item \textsuperscript{112} 469 U.S. 325 (1985).
\item \textsuperscript{113} 469 U.S. 325, 354 (1985) (Brennan, J., dissenting) (emphasis in original).
\item \textsuperscript{114} \textit{Id.} at 356 (emphasis in original).
\end{itemize}
principles enunciated by the Framers; the Constitution can be amended or it can be ignored. Yet with respect to its fundamental principles, the text has suffered neither fate." This is Brennan's notion of "contemporary ratification." By the "public reading" of the constitutional text, each generation participates in the ratifying of the evolving Constitution. It is not clear how "each generation" actually participates, unless it is through the justices as representatives of each generation. Nor is it clear how the Constitution can have "transcendent values" when the meaning of the Constitution must be ratified by each successive generation.

At Georgetown, Brennan spoke eloquently about the evolving text and the need to read the Constitution as "Twentieth Century Americans." But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.

This is the extent of Brennan's praise for an age that is "dead and gone." But listen to Brennan's words in another of the fourth amendment cases praised by Meese. Here he chastises the majority's decision to approve a warrantless search at the United States border: "[T]he Court repeatedly has emphasized that the Fourth Amendment's Warrant Clause is not mere 'dead language' or a bothersome 'inconvenience to be somehow "weighed" against the claims of police efficiency.'" Brennan certainly doesn't think the warrant requirement is "dead and gone," nor does he believe it is adaptable to "cope with current problems and current needs."

Brennan has shown extreme displeasure concerning other Justices' attempts at contemporary ratification of an evolving constitutional provision in the face of changing societal condi-

\begin{itemize}
\item \textsuperscript{115} Georgetown Speech, \textit{supra} note 2, at 7.
\item \textsuperscript{116} \textit{Id.} at 7.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} United States v. Montoya de Hernandez, 473 U.S. 531, 552 (1985) (Brennan, J., dissenting).
\end{itemize}
tions. In *United States v. Leon*, Brennan dissented in part as follows:

The majority ignores the fundamental constitutional importance of what is at stake here. *While the machinery of law enforcement and indeed the nature of crime itself have changed dramatically since the Fourth Amendment became part of the Nation's fundamental law in 1791, what the Framers understood then remains true today* — that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be *permanently and unambiguously restricted* in order to preserve personal freedoms . . . . If those independent tribunals lose their resolve, however, as the Court has done today, and give way to the seductive call of expediency, the vital guarantees of the Fourth Amendment are reduced to nothing more than a "form of words."120

The adaptability of the Constitution's "great principles to cope with current problems and current needs" apparently has some limits. Brennan's belief that the Framers insisted on permanent restrictions on law enforcement efforts would appear to give the fourth amendment a "static meaning."

Brennan's concern with the Court's direction sometimes makes him sound a lot like Edwin Meese. In *National League of Cities v. Usery*, the Court invalidated the amendment of the Fair Labor Standards Act as an unconstitutional interference with state sovereignty and Brennan spoke sharply in dissent:

I cannot recall another instance in the Court's history when the reasoning of so many decisions covering so long a span of time has been discarded in such a roughshod manner. That this is done without any justification not already often advanced and consistently rejected clearly renders today's decision an *ipse dixit* reflecting nothing but displeasure with a congressional judgment. . . . More alarming is the startling restructuring of our federal system, and the role they

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create therein for the federal judiciary. This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure . . . . It is unacceptable that the judicial process should be thought superior to the political process in this area.\(^1\)\(^2\)

One would think this was Meese talking about *Roe v. Wade*. What does he expect with a “living Constitution?” It sometimes grows in directions that some, or many, do not like. When the process of constitutional adjudication becomes a common law process — where judges articulate and shape the doctrines as they go along — problems like Brennan describes in *National League of Cities* will arise. If the text is inherently ambiguous and the historical record offers little guidance, then constitutional interpretation must inevitably become introspective. Ultimately, a community of shared interpretation (or, in Brennan’s words, “the public reading”) becomes difficult, if not impossible, to sustain.

The contrast between Brennan’s Georgetown Speech and his statements on the bench is striking. He does not hesitate to argue from the literal words of the text and the intentions of the Framers when they lend support to his views on a particular issue. It should be apparent, however, that these arguments are means to an end and that this end is not to be found either in the text or the intentions of the Framers. Brennan’s “lodestar” is not the Constitution itself, but instead what he calls “the constitutional vision of human dignity.”\(^1\)\(^2\)\(^3\) This “lodestar” is clearly of modern origin. It cannot be found in the preamble to the Constitution, where the purposes are outlined, nor in the body of the Constitution (even as amended), nor in any contemporaneous document from this period.

A substantial portion of the Georgetown Speech is devoted to discussing the “fruits” of his discourse in Court decisions, “on the dignity of man.”\(^1\)\(^2\)\(^4\) He attributes this vision to the constitutional text, as augmented by the Bill of Rights and the Civil War Amendments, but it is fair to say that other “readers” on the Court have not been able to see the same “visions” in the text. Nor will future generations necessarily see the

\(^{122}\) 426 U.S. 833, 871-72, 875, 876 (1976) (Brennan, J., dissenting).
\(^{123}\) Georgetown Speech, supra note 2, at 11.
\(^{124}\) Id. at 8.
same visions. "[W]hat those fundamentals mean for us, our
descendants will learn, cannot be their measure to the vision
of their time."^{125}

Brennan admits that on the death penalty issue, his vision
of human dignity is not shared by a majority of the Court or
the American public.^{126} But he is willing to persist in voting
against the death penalty, notwithstanding the principle of
stare decisis.

["I"]n my judgment, when a Justice perceives an interpretation
of the text to have departed so far from its essential meaning,
that Justice is bound, by a larger constitutional duty to the
community, to expose the departure and point toward a dif-
ferent path. On this issue, the death penalty, I hope to em-
body a community striving for human dignity for all,
although perhaps not yet arrived.^{127}

It is clear that on this issue, Brennan does not strive for the
community's interpretation of the text. Rather, he is attempt-
ing to lead the community to accept his vision of the text's
"essential meaning." This is extraordinarily difficult because
the text itself clearly contemplates the possibility of the death
penalty. The fifth and fourteenth amendments address, inter
alia, with procedural protections to be accorded in capital
cases. Thus, he has to extract the "essential meaning" from a
text which is directly contrary to his own reading. In this in-
stance, Brennan has chosen not to speak for the Constitution
(the traditional duty of the judge) or the community (the view
he suggested at the beginning of his speech), but instead for
himself.

Brennan has utilized this technique before in the area of
religious liberty. When a close examination of the history be-
hind the adoption of the first amendment showed governmen-
tal encouragement and support of religious institutions,
Brennan warned against a "too literal quest for the advice of
the Founding Fathers." He urged that the historical inquiry
should be limited to the understanding of "broad purposes,
not specific practices."^{128} When the historical record suggests
a result contrary to the one Brennan wished to reach, he ex-

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125. Id. at 7.
126. Id. at 13.
127. Id. at 13-14.
tracts from that record "broad purposes" which supply the "essential meaning" even though the evidence is to the contrary.

Brennan's vision of the text is either clear or blurred, depending upon the issues in the case; the historical record becomes obscure or immutable, depending upon the issues in the case. Ultimately, his vision of human dignity is not to be limited by the text, countervailing practices of the Framers, or by underlying purposes which conflict with his vision. One may conclude that his vision, therefore, is essentially introspective and that his method of constitutional interpretation is idiosyncratic.

Brennan's reading, though idiosyncratic, is not without political consequences. Brennan's judicial activism increases the role of government in the life of every individual. The multiplication of rights increases the number of conflicts between government and individuals and between competing versions of rights among individuals. The power to resolve these conflicts usually vests in the judicial branch of government. Brennan welcomes, and Meese deplores, this redistribution of power to the judiciary. Brennan's view of constitutional interpretation inures to his own political benefit because it places policy decisions in a favorable forum and insulates the outcomes from the political pressures of representative democracy. "Contemporary ratification" is ultimately not a ratification by the people. It is a concept advanced by a judicial activist which has the purpose of concealing in "cloaks of generality" the exercise of power over others.

IV. CONCLUSION

Neither Attorney General Meese nor Justice Brennan have given us a satisfactory account of constitutional interpretation. Both approaches break down upon closer examination, albeit for different reasons. A summary of these difficulties may point the way to a more principled approach to constitutional interpretation.

Meese's central argument is that the Constitution has an objective content which is ascertainable apart from partisan debate. This content can be determined from the text and the intentions of the Framers manifested in the debates and contemporary historical records. Meese clearly bears the burden
of proof on this argument and it would appear that, thus far, he has failed to carry this burden. The discerning of meaning from the text and intentions of the Framers must be demonstrated with more care than Meese has yet mustered. A jurisprudence of original intention, furthermore, does not aid adjudication where the historical record is in fact inconclusive. Finally, Meese’s comments on original intention and constitutional adjudication unwittingly reveal that he does not understand the difficulties of ascertaining the Framers’ intentions or of resolving conflicts between various constitutional principles.

The less charitable conclusion is that Meese’s account of the Framers’ intentions is done with an eye towards contemporary political issues and is itself motivated by partisan concerns. His emphasis on the text is intended to counter the recent recognition by the Court of implied rights, particularly in the area of privacy. His call for deference to the legislative process is intended to counter judicial activism generally. His criticism of Garcia, however, favors state sovereignty over deference to the legislative process. His praise of the “progressive stance” of the Court in the search and seizure area is consistent with a type of judicial activism he favors. If there is to be a case for jurisprudence of original intention, it will probably have to be made by one who is less intimately involved with partisan politics.

Brennan proves to be no less a partisan than Meese. It is apparent that his “public reading” of the text is influenced by his own political views. Brennan, of course, would deny he is acting as a “Platonic Guardian,” but he offers no real argument against the charge and his actions on the bench prove otherwise. His defense ultimately rests upon cliches which are transparent and contradictory. How can there be a “public reading” of the Constitution consistent with “transcendent values?” How can there be “transcendent values” when the meaning of the text must be determined and ratified by each generation in response to contemporary circumstances? How can there be “permanent and unambiguous” restrictions on law enforcement from a text which consists largely of “majestic generalities?”

As in most debates, some interesting ironies arise. There is the irony of Meese’s praise of the new “progressive” approach
in search and seizure cases and Brennan's corresponding insistence upon a strict and permanent construction of the warrant requirement. Brennan's arguments against original intention and in favor of an evolving interpretation are undermined significantly by his own actions on the bench. Both men describe a constitution which is relatively easy to interpret, but there is little in common between their respective visions of the Constitution. A less ironic but more disturbing aspect of this debate is that there is so little agreement between these two public figures on a matter which is fundamental to constitutional government.

It is also apparent, however, that we are not confronted with these two alternatives only. The problems of partisan interpretation can be minimized if the inquiry into the intentions of the Framers is honest and fair-minded. Where the historical record provides guidance, we should take heed. Where it is ambiguous, we should analyze in light of the principles we do know toward a solution which is consistent with these principles. The "genius of the Constitution" does not lie chiefly in its adaptability, but in its ability to give the fair-minded observer principled guidance in the resolution of contemporary constitutional problems.