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The Constitution of 1787: A Meditation

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THE CONSTITUTION OF 1787: A MEDITATION

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It is fair to say that most constitutional law scholars regard the decisions of the United States Supreme Court, not the text of the Constitution itself, as the primary source of authority for resolution of contemporary constitutional issues. According to the predominant view, the text is inherently and intentionally ambiguous and, in some instances, out of date.[1] It is only through interpretation and application by the judiciary that its meaning for contemporary constitutional issues can be ascertained. Perhaps this view is best expressed in Justice William Brennan's speech in 1985 at Georgetown University:

> 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.[2]

If the text of the Constitution is the lodestar, it must be a very distant one, providing only majestic generalities and ennobling pronouncements. Of

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1. *See, e.g.*, S. LEVINSON, CONSTITUTIONAL FAITH 184-85 (1988):

> It is obvious that the 1787 Constitution is not the Constitution that we live with, and not only because that Constitution has been subsequently amended, beginning in 1791 with the Bill of Rights. After all, Paul Brest has spoken of contemporary constitutional law as primarily "the elaboration of the Court's own precedents," and he has referred to the documentary Constitution of 1787 as akin to "a remote ancestor who came over on the Mayflower."

See also L. TRIBE, GOD SAVE THIS HONORABLE COURT 42 (1985) [hereinafter GOD SAVE THIS HONORABLE COURT]:

> The central flaw of strict constructionism is that words are inherently indeterminate—they can often be given more than one plausible meaning. If simply *reading* the Constitution the "right" way were all the Justices of the Supreme Court had to do, the only qualification for the job would be literacy, and the only tool a dictionary. But the meanings of the Constitution's words are especially difficult to pin down. Many of its most precise commands are relatively trivial—such as the requirement that the President be thirty-five years old—while nearly all of its most important phrases are deliberate models of ambiguity.

See also M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 75 (1982):

> I prefer to let the framers sleep. Just as the framers, in their day, judged by their lights, so must we, in our day, judge by ours. This is not to deny that the framers have anything to say to us, only to insist that in the end the answers the Court gives are (most often) its own, and not the framers'. And that is as it should be: the framers, after all, were not gods, but, like us, merely human beings.

See generally Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

2. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433 (1986).

greater importance, it appears, is the interpretive work of the Supreme Court. Although one might conclude from this that the Supreme Court has come to assume this role through necessity, attempts to treat the text as more than a lodestar or to understand the text in light of the intentions of its Framers have not been welcomed.[3] Justice Brennan, for one, was not reluctant to attack those who sought to ascertain the meaning of the text from the intentions of the Framers:

> 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. . . . 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.[4]

In this view, the Supreme Court must undertake the inevitable task of interpretation, described by Justice Brennan as the "interaction of reader and text." Thus, the study of constitutional law becomes principally a study of cases.

In this light, George Anastaplo's extended commentary on the text of the Constitution is, to say the least, highly unorthodox. This is a position to which Professor Anastaplo is by now well accustomed.[5] His book, *The Constitution of 1787*, is an attempt to read the text with great care and attention to the language, structure, and nuances of the document and with little attention to the glosses added by nearly two hundred years of adjudication. He suggests reading the text as one would any serious work.[6] The result is indeed illuminating. Instead of the superficial generalities and clichés produced by the

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3. *See, e.g.*, GOD SAVE THIS HONORABLE COURT at 41-49 (cited in note 1); L. TRIBE, CONSTITUTIONAL CHOICES 3-8 (1985); Brest, 60 B.U.L. REV. 204 (1980) (cited in note 1).

4. Brennan, 27 S. TEX. L.J. at 435 (cited in note 2).

5. In 1950, Professor Anastaplo graduated first in his class from the University of Chicago Law School. He passed the Illinois Bar Examination and appeared before the Committee on Character and Fitness. In response to routine questions, he expressed opinions regarding the "right of revolution" set out in the Declaration of Independence that troubled the Committee. When asked if he was a member of the Communist Party, he refused to answer. The Committee eventually refused his application for admission to the Bar. Several years later, he reapplied for admission and was turned down again because of his beliefs about the teachings of the Declaration and his refusal to answer any questions about his political affiliations. The United States Supreme Court heard his case, but upheld the Bar authorities in a 5-4 decision. In re Anastaplo, 366 U.S. 36 (1961). Justice Hugo Black wrote an eloquent dissenting opinion in the case and later requested that excerpts from the opinion be read at his funeral service. See G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 331-418 (1971); G. ANASTAPLO, HUMAN BEING AND CITIZEN 284 (1975). C. Herman Pritchett, a former president of the American Political Science Association began his review of Professor Anastaplo's THE CONSTITUTIONALIST with this observation:

> On April 24, 1961, the Supreme Court of the United States, by a vote of five to four, affirmed the action of the Illinois Supreme Court which, by a vote of four to three, had upheld the decision of the Committee on Character and Fitness of the Illinois bar which, by a vote of eleven to six, had decided that George Anastaplo was unfit for admission to the Illinois bar. This was not Anastaplo's only such experience with power structures. In 1960 he was expelled from Soviet Russia for protesting harassment of another American and in 1970 from the Greece of the Colonels. As W.C. Fields might have said, any man who is kicked out of Russia, Greece and the Illinois bar can't be all bad.

Pritchett, *Book Review*, 60 CALIF. L. REV. 1476 (1972).

6. G. ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 61 (1989) [hereinafter THE CONSTITUTION OF 1787].

usual treatment of the text, one finds many valuable insights in this commentary. It is one of the strengths of this book that what otherwise would have been glossed over or ignored completely is treated as if the Framers intended the words to be taken seriously. The pace of the discussion is therefore quite slow; it has the quality of a meditation. Like the text of the Constitution itself, this book should be read at a slower pace in order to take in all that is there.

Professor Anastaplo begins the commentary by identifying the context for the document. He observes that the American people have had many constitutions, "if by *constitution* we mean that recognized body of principles which defines a community and guides its conduct."[7] In this sense, the English language is one such constitution. Its influence should not be underestimated. "This language has been decisively shaped, for moral and political purposes, by William Shakespeare and the King James version of the Bible."[8] Other constitutions include the British Constitution, the common law, state constitutions, the Declaration of Independence, and the Northwest Ordinance. These helped to shape the moral and political understanding of Americans and should be reckoned with in interpreting various parts of the Constitution.[9] The Constitution of 1787 itself should also be read in light of certain subsequent developments, chiefly the Civil War Amendments, which confirm what had been aimed at from the outset.[10]

The commentary on the text begins with an extended analysis of the Preamble. "The Preamble confirms several key teachings of the Declaration of Independence, especially with respect to both the consent of the governed and the purposes of government."[11] The purposes of government—a people in a union of states, justice, domestic tranquility, common defence, general welfare, and the blessings of liberty—are examined individually and collectively.[12] The stated ends of government are interconnected both stylistically and politically and are intended to state the overarching goals of the Constitution. The importance of the Preamble has been obscured over time by resort to the Necessary and Proper Clause of Article I, Section 8.[13]

The phrase "blessings of liberty," for example, is discussed at some length. Anastaplo notes that liberty is the only end that is not considered an unambiguous good.[14] Only the *blessings* of liberty are to be secured, suggesting that liberty may have curses as well. Liberty, for the Framers, did not mean libertinism. Liberty involves the making of choices within the context of an enduring body of principles and standards rooted in nature.[15] We, as a people, don't always know what we are doing; we are not always fully aware

7. *Id.* at 1.
8. *Id.*
9. *Id.* at 11.
10. *Id.*
11. *Id.* at 14.
12. *Id.* at 15-18.
13. *Id.* at 23.
14. *Id.* at 18.
15. *See, e.g.*, The Virginia Declaration of Rights, adopted in 1776:
That no free Government, or the blessing of liberty, can be preserved to any people but by a

of the moral landscape.[16] Our greatest leaders (Shakespeare among them) help us to understand and to refine what we seek.[17]

The greatest abuse of liberty in the American context was the institution of slavery. Can liberty be an unmitigated good if it allows some men to hold others in slavery? For the sake of union, the principles of the Declaration were compromised in deference to this circumstance.[18] This underscores the inherent tension between the principles of liberty and equality. Liberty implies respect for the different opinions of citizens, including the opinion that all men are not created equal. It is not a simple matter for the government to intervene on the side of equality. If government denies that the opinions of the citizens, however wrong, are not entitled to respect, then it undercuts the moral authority upon which its just powers are based—the consent of the governed.[19] The compromise on slavery, though extremely important, did not irrevocably place the Constitution on the side of inequality. Professor Anastaplo believes that the Constitution remained at its core an anti-slavery document.[20] Congress was given the power to regulate commerce (including the power to prohibit the slave trade after 1808) and to legislate for the territories of the United States. The guarantee of the republican form of government was implicitly antithetical to slavery.[21] The description in the text of those held in slavery as "persons" clearly rejected the slaveowners' position that slaves were property. The language also implied that return of fugitive slaves was according to principles of comity, not justice.[22] In any event, what would have happened to the institution of slavery had the compromise not occurred? Would the slave trade have ever ceased to exist in an independent confederation in the South? As Anastaplo notes, time was on the side of freedom.[23]

The ends of government stated in the Preamble are aimed at primarily in Article I. The enumeration of congressional powers in Article I, Section 8 ties closely with the Preamble. In fact, Anastaplo argues that the powers are to be read broadly, in a manner consistent with the ends stated in the Preamble.[24] The purpose of the Necessary and Proper Clause is not to supply incidental or implied powers. Such powers are already implied from the Preamble. Indeed,

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firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 236 (1971).

16. We should notice as well that the people are truly in control only when they know what they are doing. There are indications here and there in the Constitution that it is recognized, ultimately by the people themselves, that care must be taken to help the people to bring out the best in themselves and to permit them to seek and to secure what they need and hence truly want.

THE CONSTITUTION OF 1787 at 31.

17. *Id.* at 13.

18. *Id.* at 18.

19. *See* H. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE LINCOLN-DOUGLAS DEBATES 374-79 (1959).

20. THE CONSTITUTION OF 1787 at 175-77.

21. *Id.* at 176.

22. *Id.* at 177.

23. *Id.* at 176.

24. *Id.* at 51.

the language of the Necessary and Proper Clause, if anything, reflects limitations rather than additions to congressional power. "Necessary" requires the exercise of some judgment regarding the relation between the end sought and the legislative means used. "Proper" refers to other limitations found elsewhere in the Constitution.[25] This should not denigrate, however, the broad grant of powers to the Congress. The legislative branch is ultimately the controlling branch of government. The executive and judicial branches are dependent upon the laws Congress chooses to make and Congress is ultimately dependent upon the authority of the people.[26]

"The principle of equality is consistent with (perhaps even requires) the understanding that the American people are the ultimate authority under the Constitution."[27] Anastaplo finds the principle of equality running throughout Article I. For example, members of the House are to have equal voting power, no matter where they come from. The allocation of seats in the House is to be adjusted according to a periodic census, thus entitling no original state or region a superior position in the regime.[28] Article I, Section 9 reflects a strong concern for evenhandedness in revenue raising.[29]

Even though Article I established a strong legislatively-centered government, it is not without safeguards. There are important powers lodged in coordinate branches. The states will continue to play an important role. Most importantly, the people will retain the power to review the performance of those who hold public office.[30] In addition, Article I, Section 9 contains several restrictions on congressional power. Together with Article I, Section 10, these restrictions can be viewed as a bill of rights. There is a similarity between the rule of law implicit in these provisions and the rule of law underlying the Bill of Rights provisions.[31] It may be argued, in fact, that the Bill of Rights is implicit in the Constitution. This certainly was the view expressed by Hamilton in the 84th Federalist.[32] The Bill of Rights therefore makes express what is essentially already there. "[I]t is hardly likely that the very men who wrote the Constitution would, upon taking control of the Congress two years later, have set out to dismantle what had been so painstakingly built up during the summer of 1787."[33]

Following the reading of Article I is a discussion of the influence of Shakespeare on Anglo-American Constitutionalism.[34] The reader may question here whether this is truly an attempt to understand the text of the Consti-

25. *Id.* at 60.
26. *Id.* at 31.
27. *Id.*
28. *Id.* at 30. In fact, the only mention of the existing states, other than the composition of the First Congress, is in connection with the continuation of the slave trade and is done for the purpose of limiting the slave trade. *Id.* at 62, 71-72. The Constitution otherwise offers new states a full partnership in the Union. *Id.* at 172.
29. *Id.* at 63.
30. *Id.* at 66.
31. *Id.* at 66-67.
32. THE FEDERALIST No. 84, at 510-11 (A. Hamilton) (C. Rossiter ed. 1961).
33. THE CONSTITUTION OF 1787 at 67.
34. *Id.* at 74-88.

tution as the Framers understood it. Without denying the influence of Shakespeare on American thought generally and on the Framers specifically, it is a diversion from the text. This can happen during meditation. The discussion is quite interesting, but one can hardly avoid the sense that the commentary at this point becomes a little idiosyncratic.

When the commentary turns to Article II, there is less help from the text. The description of Presidential powers, for example, is not nearly as extensive as the congressional powers enumerated in Article I.[35] If we were to assess how closely today the respective branches resemble their description in the text, it would be fair to say that Congress most closely resembles the constitutional description (albeit with several important additions), with the Presidency further and the Judiciary arguably the furthest removed (if only because there is little direction given in Article III). Anastaplo himself observes that much of the contemporary Presidency is "extraconstitutional" in character.[36] This circumstance can pose a pitfall for any commentary on the text. The decision to look at the text without regard to historical developments and current practices is a good one here, but the results become less satisfactory where the text itself is brief. There is a risk that the reading will reflect more of the reader than the text.[37]

Anastaplo argues that the intense focus on the person serving as President is overdone because of the moderating influences of the system.[38] However much the President is hedged in by the pressures of the system, we should not, in any event, underestimate the power of the President. The development of the Presidency, even if on an "extraconstitutional" basis, is an established part of the political and legal landscape. We can hope that the exercise of Presidential power is for the good, as was the case with one of Professor Anastaplo's heroes, Abraham Lincoln.[39]

It is instructive to note the textual limitations on the power of the Presi-

35. This reinforces Anastaplo's argument that the Executive powers are to be regarded as ultimately dependent upon the exercise of congressional powers. *Id.* at 109-10.

36. *Id.* at 110.

37. Consider, for example, the following argument in favor of the two term limitation for the President:

> After a decade of acting "Presidential" (that is, during one's first election campaign and then while in office), one is not apt to be well informed about what is happening among the people of the Country no matter how instructive and disciplining political campaigns may be. One is likely to have spent a decade in which one's contacts with people have been unnaturally limited and one's information has become considerably restricted, however bolstered by specialized secret intelligence. One is likely, therefore, to become simply "out of touch," adept only for ceremonial occasions. *Perhaps most crippling is the lack of time the typical President has for serious reading, extended conversation, and sustained reflection.* He is even more constrained in these respects than members of Congress, who are also far too busy.

Id. at 92-93 (Emphasis added). This is a wonderful, admirable observation. Would that the President and members of Congress took it to heart. It speaks to all professionals, particularly lawyers, who do not have adequate time for reading or reflection. But would the "typical" President seek out time for reading, reflection, and serious conversation? Even those who come to Washington as "outsiders" show great concern with how the events each day play on the network news. *See, e.g.*, D. STOCKMAN, THE TRIUMPH OF POLITICS 7, 12 (1986).

38. THE CONSTITUTION OF 1787 at 90-91.

39. *Id.* at 91.

dent. The vesting of executive power in the President recognizes that "the President is to execute laws that serve the policies laid down by Congress."[40] Executive power is thus subject to congressional direction. Even the ostensibly independent powers, such as Commander-in-Chief, are not exercised altogether independently from Congress, which controls the purse strings.[41] In this regard, Anastaplo does devote some discussion to a contemporary issue—that of the War Powers Resolution. He is not very impressed with the arguments, based upon circumstance, which favor a more independent President. Nor is he bothered with the institutional sharing of power in the area of foreign affairs. "It is prudent to recall that it is not this act or that, or even this institution or that, which ultimately determines how a country acts, but rather the understanding and the soundness of the people, at least in a liberal democracy."[42]

If Anastaplo is relatively dispassionate over the War Powers Resolution controversy, he reserves some of his most pointed criticism for the power wielded by Presidential aides and the pageantry surrounding the Presidency. He observes that such aides, not subject to confirmation by the Senate, treat Cabinet officers as subordinates and, at times, usurp the duties of these officers.[43] The cutting off of the President from the advice of these officials, as well as the advice of Congress, can lead to serious errors of judgment, such as the Iran-Contra affair.[44] The pomp and ceremony attending the Presidency also serves to isolate the President and elevates the office out of proportion to its constitutional standing. This is not healthy, either for the President or the people. "Is there not something demeaning to a republican people to make what we now do of our Presidents and of their families and other intimates?"[45]

Although the intention of Professor Anastaplo's commentary is to understand the Framers as they understood themselves, there are signs of Anastaplo in this reading as well. Just as Mozart played by Horowitz is not "pure" Mozart, so the reading of the Constitution by Anastaplo has certain idiosyncracies which probably cannot be attributed to the Framers. This is best illustrated by his reading of Article III. Anastaplo believes that the federal judiciary has been both underutilized and overutilized. First, he argues against the demise of federal common law pursuant to *Erie Railroad Co. v. Tompkins*.[46] Second, he argues against judicial review of Acts of Congress.

Anastaplo believes that *Erie Railroad* was wrong because it prevents federal courts from developing common law of the United States and hence is a wrongful limitation on their Article III powers.[47] Without a single authoritative court, such as the United States Supreme Court, to direct the development

40. *Id.* at 109.
41. *Id.* at 111.
42. *Id.* at 115.
43. *Id.* at 115-16.
44. *Id.* at 317 n.85.
45. *Id.* at 122.
46. 304 U.S. 64 (1938).
47. *Id.* at 128-29.

of the common law, there is a splintering into majority and minority approaches.[48] This unorthodox suggestion, Anastaplo admits, is not from a reading of the text or the intentions of the Framers, but rather from a philosophical argument about the "nature of law and how justice is to be arrived at by courts working on their own, somewhat independently of legislatures."[49] As such, the reader may have reservations about the prudence of this suggestion, not only because of the difficulties arising from the "two headed" system of "common" law[50] but also in light of the current caseload of the federal judiciary[51] and the difficulties of getting an authoritative ruling from a Supreme Court which grants hearings very sparingly.

The discussion with respect to judicial review is more troubling. It is not that the suggestion is unthinkable. Justice Holmes once said that the United States could survive without the power of the Court to review acts of Congress (but not without the power to review state legislation).[52] Rather, the analysis here is not as careful as the reader might expect from Professor Anastaplo.[53] He correctly notes that judicial review is not provided for in the text of Article III, but he also argues that "the Framers clearly rejected on more than one occasion attempts to provide for something like judicial review of acts of Congress."[54] The citations provided are to those instances in the Convention where the proposal for inclusion of federal judges on a Council of Revision which, along with the President, would exercise veto power over congressional legislation. This evidence, however, is probably more supportive of the opposite conclusion.[55] The rejection of the Council of Revision, with the federal

48. *Id.* at 132-33.

49. *Id.* at 132.

50. This difficulty is acknowledged by Anastaplo. *Id.* at 320 n.96.

51. *See, e.g.*, Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D.L. REV. 371 (1988).

52. O.W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 295-96 (1920).

53. For example, the discussion of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) appears to accept Marshall's construction of the statute at face value. THE CONSTITUTION OF 1787 at 140. It is reasonably certain that the asserted conflict between the Judiciary Act of 1789 and Article III of the Constitution arose only because of Marshall's questionable construction of the statute. *See, e.g.*, Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 14-16 (1969).

54. THE CONSTITUTION OF 1787 at 143.

55. The issue received its first full discussion on June 4, 1787. The proposal to include judges on a Council of Revision had strong support from James Wilson and James Madison. The opposition was more persuasive in detailing the weaknesses of the proposal. Mr. Gerry doubted "whether the Judiciary ought to form a part of it, as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 97 (1911). Mr. King agreed, "observing that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." *Id.* at 98. Mr. Gerry's motion to give the veto power to the President and to exclude the Judiciary from this control on the laws was passed that day. *Id.* at 104. On June 6, Wilson and Madison moved to reconsider the matter in order to give the federal judiciary a share in the veto power. The proposal was again defeated. *Id.* at 140. On July 21, Wilson and Madison again renewed the proposal. Mr. Gorham opposed the idea, saying that judges could not be "presumed to possess any peculiar knowledge of the mere policy of public measures." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 73 (1911). Mr. Gerry argued that it would make an improper coalition between the executive and judicial branches. It would involve the judges in politics. *Id.* at 75. Mr. Strong agreed, saying that the "power of making ought to be kept distinct from that of expounding, the laws." *Id.* Mr. Martin argued that the participation of the judges in the political process could jeopardize the

judiciary as co-participants, should be viewed as a prudent judgment that judges should not be actively involved in the political process. Judges are not well equipped for it and there would be inevitable politicizing of the judiciary, with foreseeable consequences for the independence of the judiciary. Anastaplo's reservations with respect to the exercise of judicial review of acts of Congress are nevertheless well taken:

> The *Dred Scott* case reminds us that whenever the Congress and the Supreme Court have differed on those great matters of Constitutional interpretation that have assumed crisis proportions in this Country, the Congress has been correct. The two most conspicuous instances have been the *Dred Scott* case and the early New Deal cases. The New Deal cases found the Court insisting, in effect, that Congress had no substantial power to attempt to bring the national economy out of a great depression. It is hardly an argument for judicial review to say that the Court can be relied upon when relatively minor Constitutional questions are before it but that it can cripple the Country when truly major questions arise.[56]

Even where the reader may disagree with Professor Anastaplo's meditations on the text, his observations, questions, and speculations are always stimulating. There are many gems in this book. One reminder is particularly pertinent during this Bicentennial period: "[W]e should not make too much of written constitutions, especially when a people's character and habits are sound."[57] The text is worthy of our most careful study, but the text itself has no power to preserve our structure of government and our liberties. "We should also notice that various other peoples, even when they have copied the American Constitution of 1787, have not been able to do very well governing themselves."[58] The unwritten constitutions of a people reflect their political habits and their enduring character. These are not easily changed by a document.

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confidence of the people. *Id.* at 76-77. The proposal was again defeated. *Id.* at 80. Madison and Wilson made one last attempt on August 15. Mr. Pinkney opposed the measure on the ground that it would involve the judges in the legislative process and political faction and thus taint their later decisions. *Id.* at 298. Mr. Mercer approved of the motion because he did not like the power of the judges, as expositors of the Constitution, to declare a law void. He thought that a law, once duly made, should not be subject to further review. *Id.* The proposal was then finally laid to rest. *Id.*

Realizing that Gerry, Martin, Pinkney, and Mercer are not the best witnesses generally for ascertaining the intention of the Framers, do not their arguments ring true here? Are judges equipped to make political judgments? What would have been the impact on the independence of the judiciary if they had become involved directly in the legislative process? Will not there be a sufficient check through the exercise of their power to declare laws unconstitutional? This last point seems to have been the underlying assumption running throughout the Convention. Whenever the judiciary was discussed, it was assumed that it had the power of judicial review. *See, e.g., id.* at 93 (Madison: "A law violating a constitution established by the people themselves, would be considered by the Judges as null & void."); *Id.* at 299 (G. Morris: "He could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law. . . . The most virtuous citizens will often as members of a legislative body concur in measures which afterwards in their private capacity they will be ashamed of."); *Id.* at 376 (Williamson argued for the inclusion of an ex post facto clause because it will give the judges something to take hold of). Even those who did not approve of the power acknowledged its existence. *Id.* at 462 (Mercer); *Id.* at 463 (Dickenson).

56. THE CONSTITUTION OF 1787 at 142-43.

57. *Id.* at 164.

58. *Id.* at 165.

The Constitution cannot guarantee that its powers will always be exercised justly. "Considerable discretion must be left with the public servants who, subject to our discipline, exercise these powers for us, and it is to misconceive the nature of a constitution to expect all troublesome questions about justice to be answered there."[59] The exercise of powers by public servants and the deliberations of the American people are better informed if the text of the Constitution is taken seriously. We should be grateful, therefore, for this thoughtful and challenging meditation by such a learned commentator.

59. *Id.* at 233.