

INTERPRETING THE CONSTITUTION: IS THE INTENT OF THE FRAMERS CONTROLLING? IF NOT, WHAT IS?

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'Tis funny about th' constitution. It reads plain, but no wan can undherstant it without an' interpreter.

—Mr. Dooley, *On the Recall of Judges*
(Finley Peter Dunne)¹

Though it is regularly denied that . . . decisions [on issues of constitutional law] are rooted only in the judges' moral predilections, it is difficult to see what else can be involved once the function of searching for the Framers' intent is abandoned.

—Judge Robert H. Bork²

There are those who find legitimacy in fidelity to what they call "the intention of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what

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1. Finley P. Dunne, *Mr. Dooley, On the Recall of Judges*, in *MR. DOOLEY ON THE CHOICE OF LAW* 168, 171 (Edward J. Bander ed., 1963).

2. Robert H. Bork, *Judicial Review and Democracy*, in 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1061, 1063 (Leonard W. Levy ed., 1986).

the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility.

—Justice William J. Brennan, Jr.³

I. ORIGINALISM AND *Brown v. Board of Education*

A. *Initial Hearing: Intent of the Framers Ignored*

In *Brown v. Board of Education*,⁴ decided in 1954, the Supreme Court held that public school segregation deprived black pupils of “equal educational opportunities” in violation of the Equal Protection Clause of the Fourteenth Amendment: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵ In reaching this conclusion, however, the Court said nothing about whether the Framers of the Fourteenth Amendment—the Congress that drafted the Amendment in 1866 and the States that ratified it in 1866-69—*intended* to outlaw segregation in the public schools; instead, the Court treated their intent as irrelevant, observing that “we cannot turn the clock back” to the era of the Framers.⁶

Long before the *Brown* case reached the Supreme Court, the courts had recognized that the Fourteenth Amendment, which embodied the constitutional settlement of the Civil War (along with the Thirteenth Amendment, forbidding slavery, and the Fifteenth, guaranteeing citizens the right to vote regardless of their race, color, or previous condition of servitude), was intended to give blacks the same rights as whites to enter into contracts, to sue and be sued, and to testify in court.⁷ But in *Plessy v. Ferguson*,⁸ decided in 1896, the Supreme Court held that a Louisiana law requiring railroads to provide “equal but separate” accommodations for blacks and whites was constitutional, even though the Court acknowledged that “the object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the

3. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433, 435 (1986).

4. 347 U.S. 483 (1954).

5. U.S. CONST. amend. XIV, § 1.

6. *Brown*, 347 U.S. at 492.

7. See Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982).

8. 163 U.S. 537 (1896).

two races before the law.”⁹ To justify this legal legerdemain, the Court announced that the Fourteenth Amendment “could not have been intended” to require racial “commingling,” and that if “the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the [Louisiana law], but solely because the colored race chooses to put that construction upon it.”¹⁰

Strictly speaking, *Plessy v. Ferguson* decided only that the Equal Protection Clause permitted the States to require segregation in public transportation. Predictably, however, the decision was promptly, universally, and correctly understood to put the Court’s imprimatur on segregated schools, parks, theaters, restaurants, prisons, and other places where the races might “commingle,” whether by design or happenstance. Laws against black-white marriages were upheld on the theory that the ban applied impartially to both parties to the illicit intimacy,¹¹ and some States prohibited integrated graveyards,¹² despite Andrew Marvell’s rueful comment that “none, I think, do there embrace.”¹³ Kentucky made it a criminal offense for a private school to educate both white and black students even if the races were separated, unless the classrooms were at least twenty-five miles apart.¹⁴ Florida required school books used by blacks to be stored separately lest they sully the hands (and the minds?) of whites.¹⁵ (There is no record, however, of a ban on sharing second-hand cigarette smoke.)

Although the “separate but equal” doctrine became the entrenched test of constitutionality for Jim Crow legislation, its promise of “equality” was dead on arrival; black schools (which by a bitter irony were often named after Abraham Lincoln, the Great Emancipator) were notoriously below the white level in measurable attributes like physical facilities, the training and experience of their teachers, staff salaries, and the range of courses offered to their pupils, although in themselves these deficiencies

9. *Id.* at 544.

10. *Id.* at 551.

11. See, e.g., *Pace v. Alabama*, 106 U.S. 583 (1882).

12. See CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL PERSPECTIVE* 202 (1987).

13. Andrew Marvell, *To His Coy Mistress* l.32 (1681), in *THE NORTON ANTHOLOGY OF POETRY* 337-38 (3d ed. 1983).

14. See *Berea College v. Kentucky*, 211 U.S. 45 (1908) (rejecting Berea College’s argument that a private school segregation statute violated the Fourteenth Amendment).

15. See LOFGREN, *supra* note 12, at 202.

may have been less demeaning than their symbolic function as badges of inferiority. The National Association for the Advancement of Colored People won a few lawsuits in the 1930s and 1940s in a campaign to compel Jim Crow states to raise the salaries of black teachers, but these victories were frustrated by delays in compliance and by stratagems, such as salary scales geared to discretionary judgments about the teacher's competence. Moreover, even the successful suits usually affected only a single school district, leaving its neighbors free to do business as usual.¹⁶

By 1950, however, the NAACP's lawyers decided to abandon gradualism and attack the separate-but-equal formula head-on. In *Brown v. Board of Education*—the generic label for five separate school segregation cases that originated in Kansas, South Carolina, Virginia, Delaware, and the District of Columbia—the plaintiffs renounced any claim that the black schools were inferior to their white counterparts, hoping by this concession to prevent the courts from evading the central issue by ordering palliatives like higher salaries, improved playgrounds, or enlarged courses of study. Thus, the NAACP staked everything on its allegation that segregation in and of itself violated the Equal Protection Clause by depriving black children of “equal educational opportunities.”¹⁷

Brown was argued before the Supreme Court three times: twice on the merits; and a third time, after the Court held that state-mandated segregation in public schools was unconstitutional, on the remedy to be ordered. At the first argument, on December 9-11, 1952, the Thurgood Marshall-led NAACP lawyers did not assert that the Framers *intended* Equal Protection Clause to outlaw school segregation. That claim would have been inconsistent with the virtually universal racial separation that was practiced in 1868, in the North as well as the South, and even in the District of Columbia, under the eyes of the very Congress that had drafted the Fourteenth Amendment. Facing this troublesome fact, the NAACP lawyers hoped to sidestep the “intent-of-the-Framers” issue by avoiding an excursion into 19th Century history and focusing instead on the here and now—that is, the

16. See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 82-104 (1987).

17. *Id.* at 136.

meaning of “equal protection of the laws” in the second half of the 20th Century.

This strategy was built on the Supreme Court’s own rationale in two 1950 cases in which the Court granted relief to black college students. One held that the University of Oklahoma could not assign a student to a “Reserved for Colored” area of a classroom or to a segregated desk in the library, because the isolation would “impair and inhibit his ability to study [and] to engage in discussions and exchange views with other students.”¹⁸ In the second case, the Court ordered Texas to admit a black student to its flagship law school at Austin because a newly-launched “separate but [allegedly] equal” black law school lacked “those qualities which are incapable of objective measurement but which make for greatness in a law school.”¹⁹ Furthermore, the Court asserted that the separation would cordon the student off from “most of the lawyers, witnesses, jurors, judges and other officials with whom [he] will inevitably be dealing when he becomes a member of the Texas Bar.”²⁰

Thus, the Justices had flatly ruled that segregation denied “equal protection of the laws” to black university students in 1950, whatever the Framers of the Fourteenth Amendment might have believed or intended when it was drafted and ratified. When the NAACP lawyers argued in *Brown* that the Court’s 1950 insight should be extended to elementary and secondary schools, they could point to findings by the trial judges in the Kansas and Delaware cases that legally-enforced segregation was detrimental to the educational development of the black children, even if the schools were otherwise “equal.”²¹

At the 1952 argument, this strategy of finessing the intent of the Framers seemed to be successful. The NAACP lawyers were not asked whether the Equal Protection Clause was intended to outlaw school segregation, and attempts by the defense lawyers—led by John W. Davis, a formidable and experienced appellate lawyer, who had been the Democratic Party’s candidate for President in 1924—to raise this issue were fruitless. Thus, Justice Bur-

18. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950).

19. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

20. *Id.*

21. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 424, 428 (1975); ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952-1955, at 539-64 (Leon Friedman ed., 1983) [hereinafter ARGUMENT].

ton interrupted Davis in the middle of a historical disquisition by observing, "But the Constitution is a living document that must be interpreted in relation to the facts of the time in which it is interpreted."²² Of course, oral argument before the Supreme Court is not a debate between the lawyers and the Justices (except when imaginatively reenacted on TV), and inferences drawn from judicial remarks often prove mistaken. Nonetheless, Justice Burton's comment suggested that one of the Court's most conservative Justices believed in a "living" Constitution rather than one with a meaning frozen in time by the intent of its Framers. Nothing said by the other Justices suggested that they felt constrained by, or even were curious about, the intent of the Framers of the Equal Protection Clause.

B. *Second Hearing: Intent of the Framers Resuscitated*

But appearances turned out to be deceiving. On June 8, 1953, about six months after the initial hearing, the Court set *Brown* down for reargument, requesting counsel to discuss five questions, the first of which was:

What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?²³

This question, of course, revived the painful historical issue that the NAACP lawyers hoped to dodge. The Court also asked whether, assuming that the Fourteenth Amendment was not intended to require the immediate abolition of school segregation, its Framers nevertheless understood that the courts could abolish it "in light of future considerations."²⁴ An affirmative answer would imply that the Framers of the amendment bequeathed us a "living" document, with a meaning that was expected to vary as the nation's values and circumstances change over time. Finally, the Court asked the lawyers to propose an appropriate remedy, "[a]ssuming that it is decided that segregation in public schools violates the Fourteenth Amendment."²⁵

22. KLUGER, *supra* note 21, at 573.

23. *Brown v. Board of Educ.*, 345 U.S. 972, 972 (1953).

24. *Id.*

25. *Id.*

The lawyers for the parties did not know what to make of the Court's unusual request. One of the NAACP lawyers reduced his earlier prediction of success from 75-25 to about 50-50, but thought that the Court's reference to a "remedy" for segregation showed that it was leaning in their direction.²⁶ Assessing the case from the defendants' side of the divide, however, John W. Davis predicted that when the historical evidence was assembled, it would bolster his earlier claim that "we've got it won, five-to-four—or maybe six-to-three."²⁷

The Supreme Court's questions about the intent of the Framers of the Fourteenth Amendment were brief, but before responding, the lawyers had to search out and analyze thousands of pages of old records, none of which were stored in an electronic data base. The task was described by Richard Kluger in *Simple Justice*, which analyzes the *Brown* case in microscopic but absorbing detail:

The Fourteenth Amendment could not be examined in a vacuum. It was the centerpiece in a decade of unprecedented congressional ferment, and to understand the intentions of its Framers, one had to comb through the spoken and written words of hundreds of lawmakers. And since there were thirty-seven states in existence at the time the amendment was ratified, the understanding of legislators, governors, and other public officials in every one of them would have to be examined as carefully as time and manpower allowed. It was a job for scholars—constitutional experts, historians of the period, authorities on the South and the Negro.²⁸

For the NAACP lawyers, this scholarly job required what Kluger calls a "six-month summer" of arduous research, which began with a disappointment.²⁹ They tried to recruit Henry Steele Commager, the country's leading constitutional historian, for their research team, but he was out of the country. Worse still, he wrote that the Framers of the Fourteenth Amendment "did not, so far as we know, intend that it should be used to end segregation in schools."³⁰ Commager went on to urge "dropping this particular argument"³¹—a remark showing that despite his

26. See KLUGER, *supra* note 21, at 618-19.

27. *Id.* at 581.

28. *Id.* at 619.

29. *Id.* at 617.

30. *Id.* at 620.

31. KLUGER, *supra* note 21, at 620.

academic laurels, he did not understand that a court's "request" is not an invitation, but a command.

In the end, the NAACP lawyers managed to assemble a staff of more than two-hundred historians and lawyers, including such scholars as C. Vann Woodward, John Hope Franklin, and Horace Mann Bond, to search through the archives for the data needed to answer the Court's questions.³² For the defendants, John W. Davis relied on a smaller (but no doubt better paid) team—half a dozen summer trainees at his New York law firm, along with some lawyers based in Richmond. Allied with Davis, the Attorney General of Virginia was able to enlist the cooperation of his counterparts in the thirty-six other States that had ratified the Fourteenth Amendment in ransacking their local records.³³ The Department of Justice assigned still another squad of lawyers to the case, and their work produced a brief of 188 pages, buttressed by a historical appendix of 393 pages.³⁴ In addition, even before the Court propounded its questions to the litigants, Justice Frankfurter had instructed Alexander M. Bickel, his law clerk and soon to become the brightest luminary of his generation of constitutional scholars, to undertake a similar project.³⁵

None of these assiduous excavations unearthed any pay dirt for the plaintiffs. In fact, when the NAACP's scholars and lawyers assembled at the end of the summer to evaluate their findings, a dejected historian described the facts as "devastating."³⁶ Of the many legislators voting to ratify the Fourteenth Amendment, a few had expressed hopes that it would extirpate all racist legislation, but the lawyers could not make a silk purse of these bits and pieces of history. To claim that the Framers as a whole intended to create a color-blind America would have been inconsistent with three undeniable facts. First, there was virtually no contemporaneous discussion of the impact of the Equal Protection Clause on school segregation in the North, where it was a common practice. If the Framers of the Fourteenth Amendment intended to force these northern States to abandon their familiar ways, why was there not a wave of protest from legislative die-

32. *See id.* at 621-24.

33. *See id.* at 636.

34. *See id.* at 651.

35. *See id.* at 653.

36. *See KLUGER, supra* note 21, at 637.

hards against this federal intrusion into their "local" affairs?³⁷ Second, both before and after ratification of the Fourteenth Amendment, Congress itself maintained segregated schools in the District of Columbia and it refused to prohibit school segregation even when it enacted the Civil Rights Act of 1875.³⁸ Was it plausible that Congress intended to abolish segregation by the States when it maintained segregated schools in its own backyard? Finally, the Fourteenth Amendment did not guarantee blacks the right to vote; that was not assured until 1870, when the Fifteenth Amendment was adopted to prohibit the denial of suffrage "on account of race, color, or previous condition of servitude."³⁹ How could the Equal Protection Clause have been intended to abolish school segregation if it did not even give blacks the right to vote?

Hoping to escape from the dismal historical record, the NAACP lawyers eschewed a detailed analysis of the intent of the Framers in favor of a more abstract level of analysis. They argued that the Framers of the Fourteenth Amendment were animated by an overarching intent to outlaw racial discrimination, and that the Equal Protection Clause should be interpreted to eliminate *all* badges of servitude, whether they engaged the conscious attention of the Framers or not:

The evidence makes clear that it was the intent of the proponents of the Fourteenth Amendment, and the substantial understanding of its opponents, that it would, of its own force, prohibit all state action predicated upon race or color. The intention of the Framers with respect to any specific example of caste state action—in the instant cases, segregated education—cannot be determined solely on the basis of a tabulation of contemporaneous statements mentioning the specific practice. The Framers . . . could not list all the specific categories of existing and prospective state activity which were to come within the constitutional prohibitions. The broad general purpose of the Amendment—obliteration of race and color distinctions—is clearly established by the evidence.⁴⁰

This generous interpretation of the intent of the Framers is belied by their ambivalence about giving blacks a federally-guaran-

37. For one such protest, directed against legislation rather than the Fourteenth Amendment itself, see ARGUMENT, *supra* note 21, at 186.

38. See KLUGER, *supra* note 21, at 635.

39. U.S. CONST. amend. XV, § 1.

40. Brief for Appellants on Reargument at 18, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 531 (Philip B. Kurland ed., 1975).

teed right to vote, a reform that had to wait until Ulysses S. Grant captured the presidency and the Republican Party managed to force through the Fifteenth Amendment. Moreover, if the Framers intended to "prohibit all state action predicated upon race or color," their draft of the Fourteenth Amendment necessarily subsumed a constitutional right to interracial marriage—an idea so shocking in 1868 that by itself it might have sufficed to block ratification of the nascent amendment. Indeed, if the Fourteenth Amendment was the noble charter of equality portrayed by the NAACP brief, much of American racial history during the next century would be inexplicable.

Reminiscing about this attempt by the NAACP's lawyers to put a good face on the historical record, one of its consulting scholars said "I am very much afraid that . . . I ceased to function as an historian and instead took up the practice of law without a license. . . . It is not that we were engaged in formulating lies; there was nothing as crude and naïve as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts in a way to do what [Thurgood] Marshall said we had to do—'get by those boys down there.'"⁴¹

The implication that the NAACP brief played fast and loose with the facts of history was revived by the Senate Judiciary Committee in 1962, when the Committee held hearings on Marshall's nomination to the United States Court of Appeals for the Second Circuit.⁴² The charge surfaced again in 1967, when Marshall was nominated by President Johnson to the Supreme Court.⁴³ The allegation, however, was a red herring; lawyers are assiduous and adroit window-dressers, and their briefs routinely make use of "law office history" or, to use a more contemporary label, "advocacy scholarship."⁴⁴ This does not mislead the judges; as practitioners of the same art, they know it when they see it. In actuality, there was another explanation, more benign and perhaps more accurate, for Thurgood Marshall's assertion that the Fourteenth

41. KLUGER, *supra* note 21, at 640.

42. See *Hearings Before a Subcomm. of the Senate Comm. on the Judiciary on the Nomination of Thurgood Marshall, of New York, to be United States Circuit Judge for the Second Circuit*, 87th Cong., 2d Sess. 181-89 (1962) (testimony of Alfred H. Kelly, Professor of History, Wayne State Univ.).

43. See *Hearing Before the Senate Comm. on the Judiciary on the Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States*, 90th Cong., 1st Sess. 182 (1967) (statement of Michael D. Jaffe, General Counsel, Liberty Lobby).

44. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981).

Amendment was intended to “prohibit all state action predicated upon race or color”—that Thurgood Marshall, like Martin Luther King, Jr., had a dream that “this nation will rise up and live out the true meaning of its creed . . . that all men are created equal.”⁴⁵

C. *The Outcome: Intent of the Framers Reburied*

On September 8, 1953—three months before the *Brown* case was to be reargued—Chief Justice Vinson died. He evidently had been too conflicted about the case to exercise a leadership role in the Court’s preliminary discussions. Justice Frankfurter, who was strenuously trying to achieve a unanimous decision for the plaintiffs, was reported to say that Vinson’s death “is the first solid piece of evidence I’ve ever had that there really is a God.”⁴⁶ To succeed Vinson as Chief Justice, President Eisenhower nominated Earl Warren, who took his seat on the Court in time to hear the 1953 argument.⁴⁷

The NAACP lawyers naturally expected the reargument to focus on the questions posed by the Court after the initial argument, and especially on whether Congress and the state legislatures contemplated or understood in 1866-69 that the Fourteenth Amendment would abolish segregation in the nation’s public schools. But when they argued that the Fourteenth Amendment was *intended* to “deprive the states of all power to make or impose racial distinctions or classifications,” their claim seemed to arouse no interest. Indeed, only Justice Frankfurter reacted to the NAACP’s evidence of the Framers’ intent, and he intervened primarily to brush aside as irrelevant “individual utterances of this, that or [the] other Congressmen or Senators.”⁴⁸ Judging from the questions put to the lawyers during the reargument, the Justices no longer were troubled—if, in actuality, they ever had been—by the specter that had haunted the NAACP.

According to a careful analyst of the Court’s deliberations, when the Justices met three days later to discuss the *Brown* case,

⁴⁵ Martin Luther King, Jr., *I Have a Dream* (March on Washington, Aug. 28, 1963), in *A TESTAMENT OF HOPE* 217, 219 (James Melvin Washington ed., 1986).

⁴⁶ Philip Elman & Norman Silber, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 *HARV. L. REV.* 817, 840 (1987).

⁴⁷ Warren heard the 1953 argument as a recess appointee; he was not confirmed until March of 1954. See Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 *COLUM. L. REV.* 1867, 1869 n.9 (1991).

⁴⁸ ARGUMENT, *supra* note 21, at 187-88.

the conference was "striking for what was *not* discussed;" the issue of the intent of the Framers of the Fourteenth Amendment "appeared to be dead."⁴⁹ There already was a growing consensus in favor of outlawing segregation, which soon ripened into unanimity. When the Court issued its opinion on May 17, 1954, it announced that the evidence of the Framers' intent was "at best . . . inconclusive," explaining that when the Fourteenth Amendment was ratified, little attention was given to its effect on public education because free schools were rare in the South, and the school year in the North often was only three months long and compulsory attendance was virtually unknown.⁵⁰ The Court went on to say that "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted," but must instead "consider public education in the light of its full development and its present place in American life throughout the Nation."⁵¹ (If the NAACP historians were pained when the Court so bluntly consigned the fruits of their research to the dustbin of history, they did not mourn in public.)

After denying that the intent of the Fourteenth Amendment's Framers had any bearing on the constitutional issue before it, the Court needed—or at least, took—only two paragraphs to explain why school segregation deprives black children of "equal educational opportunities" in violation of the Equal Protection Clause. The Court first referred to its 1950 cases ruling that Texas could not shunt black students off to a segregated law school that lacked "those qualities which are incapable of objective measurement but which make for greatness in a law school,"⁵² and that Oklahoma could not subject a black graduate student to conditions impairing his ability to exchange views with other students.⁵³ Next, the Court held:

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . We conclude that in the field of public educa-

49. Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 *Geo. L.J.* 1, 40 (1979).

50. *Brown v. Board of Educ.*, 347 U.S. 483, 489 (1954).

51. *Id.* at 492-93.

52. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

53. *See McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

tion the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.⁵⁴

These brief and simple sentences—the crux of the opinion—were almost an anticlimax to the agonized arguments that had engulfed the NAACP's leaders and lawyers when they debated whether it was too risky to abandon gradualism in favor of a frontal attack on the separate-but-equal formula.

A year after ruling that school segregation was unconstitutional, the Court addressed what it called "the complexities arising from the transition to a system of public education freed of racial discrimination."⁵⁵ Blowing hot and cold, the Court acknowledged that the plaintiffs had a "personal interest . . . in admission to public schools as soon as practicable on a nondiscriminatory basis," but it sent the cases back to the lower courts, authorizing them to "take into account the public interest in the elimination of [administrative] obstacles in a systematic and effective manner" and to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit [the pupils in the cases before it] to public schools on a racially nondiscriminatory basis with all deliberate speed."⁵⁶ The age of desegregation was about to begin. Thirty-eight years later, we know that its end is not yet in sight; in fact, *Brown v. Board of Education* itself is still before the courts, which have not yet decided whether the Topeka school system has eliminated all vestiges of its pre-1954 segregation.⁵⁷

II. A CRITIQUE OF ORIGINALISM

If legal doctrines could die, the Supreme Court's opinion in *Brown* would have qualified as a death certificate for "originalism"—the theory that the meaning of the Constitution is fixed irrevocably by the intent of its Framers. But legal theories, no matter how debilitated, linger on in the law libraries, ready to be returned to duty by a new generation of lawyers, judges, and legal scholars. So with originalism; it was not merely resuscitated; within a quarter of a century after *Brown*, it became the *causus belli* in a struggle about constitutional interpretation that has en-

54. *Brown*, 347 U.S. at 494-95.

55. *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955).

56. *Id.* at 300-01.

57. See *Brown v. Board of Educ.*, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993).

gaged the nation's preeminent legal theorists. The initial battle field was the scholarly press, but the controversy spilled over into the public arena in 1987, when Judge Robert H. Bork, President Reagan's nominee to succeed Justice Lewis Powell on the Supreme Court, was quizzed by the Senate Judiciary Committee about his originalist convictions.⁵⁸ This *Kulturkampf* over what Attorney General Meese called the "Jurisprudence of Original Intent"⁵⁹ has produced numerous books with such titles as *Interpreting the Constitution*,⁶⁰ *On What the Constitution Means*,⁶¹ and *Original Intent and the Framers' Constitution*⁶² to rival in volume the recent tidal wave of published self-improvement manuals. Of the legal tracts, only one—Bork's *Tempting of America*,⁶³ written after the Senate refused to confirm him—managed to get on the *New York Times's* best-seller list; but perhaps that only was because readers believe that their psyches need more attention than the Constitution.

A. Historical Background

Disagreement about the proper way to interpret the Constitution began soon after its ratification in 1789. As early as 1833, Justice Joseph Story, serving simultaneously as Dane Professor of Law at the Harvard Law School, complained in his influential *Commentaries on the Constitution of the United States* that "the rules of interpretation have often been shifted to suit the emergency; and the passions and prejudices of the day . . . have not unfrequently furnished a mode of argument which would, on the one hand, leave the Constitution crippled and inanimate, or, on the other hand, give it an extent and elasticity subversive of all rational boundaries."⁶⁴ Justice Story went on to prescribe a series of interpretative principles that would, in his view, avoid both Scylla and Charybdis; but he first announced, "Where [the Constitution's] words are plain, clear, and determinate, they require no

58. See *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 123 (1987).

59. See Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988).

60. HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION* (1990).

61. SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984).

62. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988).

63. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

64. 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 398 (Thomas Cooley ed., 4th ed. 1873).

interpretation; and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil.”⁶⁵ Above all, Story declared:

Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.⁶⁶

Justice Story’s threshold assertion that there is no need for “interpretation” if the constitutional words “are plain, clear, and determinate”—the “plain-meaning rule” or pejoratively, “textualism”—often is dismissed as simplistic, fatuous, or disingenuous and it can lead to ridiculous results.⁶⁷ For example, even the dullest law teacher can drum up student merriment with *Olmstead v. United States*,⁶⁸ a 1928 opinion by Chief Justice Taft holding that federal officials who wiretapped the telephone conversations of a gang of bootleggers did not violate the Fourth Amendment (guaranteeing “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures”)⁶⁹ because the eavesdroppers did not “search” or “seize” any “persons, houses, papers and effects,” but merely listened.⁷⁰

65. 1 *id.* § 405. The same point had been announced with even greater majesty a few years earlier by Chief Justice Marshall, who said that if the “plain meaning” of a Constitutional provision is to be disregarded “because we believe the framers of that instrument could not intend what they said, [the case] must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the applicant.” *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819). *But see* the less superheated standard enunciated by McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819) (“It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies.”).

66. 1 STORY, *supra* note 64, § 451.

67. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* 11-41 (Harv. Univ. Press 1980); MARK TUSHNET, *RED WHITE, AND BLUE* 60-69 (Harv. Univ. Press 1980).

68. 277 U.S. 438 (1928).

69. U.S. CONST. amend. IV.

70. *Olmstead*, 227 U.S. at 464. The Supreme Court later overruled the case *sub silentio* in *Berger v. New York*, 388 U.S. 41 (1967) (holding that the Fourth Amendment applied to

Critics of the plain meaning principle sometimes concede, albeit grudgingly, that a few constitutional provisions have a clear meaning—for example, the requirement that a person be thirty-five years old to qualify to be President.⁷¹ But even this provision has its ambiguities, although so far they have arisen only in classroom exercises. For instance, the bare language—“No person except a natural born Citizen . . . shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States”⁷²—does not tell us whether the thirty-five year period is to commence on the day of birth, at the candidate’s conception (as in Chinese imperial astrology), or (as in some cultures) on the first day of the calendar year of birth; whether the candidate must be thirty-five years old on Election Day, on the day of the Electoral College’s report to Congress, or upon taking the oath of office; whether “natural born” includes conception by *in vitro* fertilization, delivery by Caesarian section, or birth on foreign soil to American parents; or whether time spent abroad as a member of our armed forces, as an American ambassador, or as a Rhodes scholar can be credited against the fourteen-year residence requirement.

Even if these ambiguities are dismissed as fanciful and the “core” of the Presidential constitutional requirements—thirty-five years of age, fourteen years of residence—is conceded to be “plain, clear, and determinate”⁷³ for practical purposes, constitutional litigation almost always requires the courts to interpret provisions that are fogged in ambiguity. For example, the courts must interpret the Equal Protection Clause, the Due Process Clause,⁷⁴ and more specialized phrases like the “rights . . . re-

the surreptitious use of an electronic listening device, even though the only “thing” that was “seized” was a conversation).

71. For a rigorous originalist, however, even the plainest and clearest language must give way if it is inconsistent with the intent of the framers. See, e.g., Raoul Berger, *The Founders’ View—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1062 (quoting Hatton’s statement that in interpreting an Act of the British Parliament, “a provable intention would override the words”); see also C. HATTON, A TREATISE CONCERNING STATUTES OR ACTS OF PARLIAMENT AND THE EXPOSITION THEREOF 14-15 (London 1677) (arguing that whenever there is a departure from the plain language to the intent, the intent must be well proved).

72. U.S. CONST. art. I, § 1, cl. 5.

73. 1 STORY, *supra* note 64, § 405.

74. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”).

tained by the people,"⁷⁵ "no law respecting an establishment of religion, or prohibiting the free exercise thereof,"⁷⁶ "the freedom of speech,"⁷⁷ "cruel and unusual punishments,"⁷⁸ and "a speedy and public trial."⁷⁹

Although Justice Joseph Story's default rules for interpreting text that is not "plain, clear, and determinate" do not defer explicitly to the intent of the Framers, Justice Story observed that "much . . . may be gathered from . . . contemporary interpretation,"⁸⁰ a catch-all that could include statements by the Framers manifesting their intent. But Justice Story warned that "contemporary interpretation must be resorted to with much qualification and reserve" because, among other reasons, "[n]othing but the text [of the Constitution] was adopted by the people."⁸¹ Even so, the Supreme Court often invoked the intention of the Framers in deciding constitutional disputes during the 19th Century, but usually only as a makeweight or buttress to a conclusion resting on an independent foundation.⁸² Moreover, the Framers' intent ordinarily was not gathered from the ratification debates or other "extrinsic" sources—the raw materials that today's originalists search through, in the manner exemplified by the NAACP lawyers in responding to the Supreme Court's questions in *Brown v. Board of Education*—but by inference from the constitutional language as adopted (in legal parlance, from within the "four corners" of the document).⁸³ Thus, by applying common sense to the constitutional provision forbidding federal officials to accept "any present, Emolument, Office or Title . . . from any King,

75. U.S. CONST. amend. X.

76. U.S. CONST. amend. I.

77. U.S. CONST. amend. I.

78. U.S. CONST. amend. VIII.

79. U.S. CONST. amend. VI.

80. 1 *id.* § 390.

81. 1 *id.*

82. In the first such instance, *Hylton v. United States*, 3 U.S. 171, 173 (1796), the Justices alluded to what the Framers "intended," "contemplated," and "meditated," but described at greater length their own views about the requirements of justice and equality. Justice Paterson even used an extract from Adam Smith's *Wealth of Nations* as the clincher to his concurrence. *Id.* at 180-81 (Paterson, J., concurring); cf. Joseph Tussman & Jacobus tenBroeck, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-53 (1949) (arguing that, in assessing the reasonableness of any legislative classification, one should examine the purpose of the law in question).

83. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 915. See generally Hans W. Baade, 'Original Intent' in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Berger, *supra* note 71; H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987) (reviewing RAOUL BERGER, *THE FOUNDERS' DESIGN* (1987)); LEVY, *supra* note 62.

Prince, or foreign State,"⁸⁴ a court could conclude that the Framers "intended" to prevent corrupt or secret bargains with a foreign power, even if they neither debated the issue nor left any other clues to their objectives.⁸⁵

For a century and a half, originalism consisted of little more than sporadic appeals by individual Justices to the intent of the Framers; not until the second half of this century was it converted into an article of faith, preached by a stern band of scholarly missionaries. Their trailblazer was Professor William W. Crosskey of the University of Chicago, who undertook to dispel the "sophistries" of the "living-document" school of constitutional interpretation⁸⁶ and to unveil nothing less than "the historic and intended meaning"⁸⁷ of the Constitution in a two-volume work entitled *Politics and the Constitution in the History of the United States*, published in 1953 and augmented by a posthumously published third volume. Combining prodigious erudition and revolutionary conclusions, Crosskey's book either illuminated or obfuscated—the reviewers were irretrievably split—almost everything under the constitutional sun, especially the meaning of Article I, Section 8 of the Constitution, empowering Congress "to regulate Commerce . . . among the several States."⁸⁸ As traditionally construed when Crosskey began his research, interstate commerce meant the exchange of goods across state lines; it did not include manufacturing, mining, agriculture, or other productive activities, even if the goods were destined for markets in other States. This constricted view of the Commerce Clause—epitomized as "Commerce succeeds to manufacture, and is not a part of it"⁸⁹—became a major constitutional obstacle to the early New Deal economic reforms. The view appeared to prevent Congress from regulating factory workers' hours and wages, requiring collective bargaining, or fixing agribusiness production quotas.

84. U.S. CONST. art. I, § 9, cl. 8.

85. In fact, the provision was evidently inspired by an "accident" (as it was described in the debates of the Philadelphia Convention) in which Benjamin Franklin, while serving as ambassador to France, accepted a snuff box with a miniature portrait of Louis XVI. See 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 327 (1911).

86. 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1172 (1953).

87. 1 *id.* at vii.

88. U.S. CONST. art I, § 8, cl. 3.

89. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

To establish that this perceived barrier to federal regulation of the national economy was a constitutional red herring, Crosskey ransacked a daunting array of old dictionaries, treatises, legal decisions, political pamphlets, and newspapers to compile what he called "a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas, which are needed for a true understanding of the Constitution."⁹⁰ Armed with this glossary, Crosskey announced that the wording of the Commerce Clause was broad enough to include not only trade that crossed state boundaries, but also "the gainful activities of [the] nation, as a whole,"⁹¹ so that Congress was authorized to regulate factories and farms, even if their products were sold only to local consumers.

Had Crosskey's expansive interpretation of the Commerce Clause been accepted by the Supreme Court in President Franklin D. Roosevelt's first term, it would have been manna from heaven for the lawyers of the early New Deal; but by 1953, when his treatise was published, its conclusion was of interest only to antiquarians. It had become irrelevant because, completing a process that began even before Crosskey commenced his research, the Supreme Court had demolished the legal wall between "local" manufacturing and "interstate" trade by ruling that Congress's power to regulate commerce included the power to regulate economic activities that "affect" interstate commerce⁹²—a test that, the Court later held, was satisfied by even such minuscule enterprises as raising crops on a family farm for home consumption.⁹³

Because of his obsessive quest for the 18th Century meaning of the words used by the Constitution's authors, Crosskey's originalism was diluted with textualism. He was soon overshadowed by a purist, however, for whom the intent of the Framers was paramount no matter what words they chose to use: Raoul Berger.⁹⁴

90. 1 CROSSKEY, *supra* note 86, at 5.

91. 1 *id.* at 89.

92. *See, e.g.,* United States v. Wrightwood Dairy, 315 U.S. 110, 119 (1942).

93. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

94. A self-described "fiddler turned lawyer," Berger abandoned his post as a orchestral violinist for a conventional career in law, and then became a free lance scholar, working in Harvard's law library without the benefits or distractions of a tenure track appointment. Still active in his nineties, Berger has been called "the dean of scholars of the American Constitution" by Professor Philip B. Kurland, Distinguished Service University Professor at the University of Chicago. As a leading candidate for the post himself, Kurland may not have the right to transfer his claim to a rival; but his opinion, suitably dis-

Less than two decades after Crosskey's work faded from popular attention, Berger focused on the issue of original intent in his book *Impeachment: The Constitutional Problems*.⁹⁵ This book undertook to refute "bald assertions proceeding from assumptions that are at war with the intention of the Framers" and to rescue their "grand design" from obscurity.⁹⁶ Berger followed up this entry into the originalist arena with an ambitious series of other disquisitions on the death penalty, executive privilege, federalism, the Fourteenth Amendment, and other disputed constitutional issues, proclaiming that the courts had violated the intent of the Framers in each of these areas. Almost alone among constitutional historians, Berger somehow contrives to fit every fragment of history into a flawless mosaic; there are never any holes, any superfluous pieces, or any room for argument. Moreover, although he is more prolific than the entire faculty of many law schools, Berger evidently never has investigated a controversial decision without reaching the conclusion that it flouts the intent of the Framers. This is strange; one might have thought that even a Supreme Court that cannot shoot straight would score an occasional bull's-eye by a lucky ricochet.

Judge Robert H. Bork, whose constitutional theories first came to public attention when President Reagan nominated him to fill the Supreme Court vacancy created by Justice Lewis F. Powell's resignation in 1987, also is a tireless advocate of originalism; though his *métier* is to hurl thunderbolts rather than to assemble meticulously patterned mosaics. In *The Tempting of America*, a spirited work written after the Senate refused to confirm his nomination, Bork fulminates against "today's constitutional cognoscenti, who would have judges remake the historic Constitution from such materials as natural law, conventional morality, prophetic vision, the understanding of an ideal democracy, or what have you."⁹⁷ This "heresy," as Bork terms it, is propagated by "left-wing activists," who fear a revival of "the orthodoxy of original understanding" because they want to use the Constitution as a weapon

counted for modesty, must be taken seriously. See Philip B. Kurland, *Foreword* to RAOUL BERGER, *SELECTED WRITINGS ON THE CONSTITUTION* (1987).

95. RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973).

96. *Id.* at 5. Written "for scholars and jurists," Berger's treatise was republished a year later in paperback because his views on impeachment had "suddenly ceased to be merely of antiquarian interest"—thanks largely to the inadvertent cooperation of Richard Nixon and the Watergate scandal. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* xi (paperback ed. 1974).

97. BORK, *supra* note 63, at 6.

in a class struggle over social and political values.⁹⁸ For Bork, the clash over his nomination was “simply one battle in this long-running war for control of our legal culture;”⁹⁹ his opponents had to “defeat a nominee who had for long expressed in writing the philosophy of original understanding and had tried to show the lack of any constitutional foundation for some of the liberal culture’s most important victories.”¹⁰⁰

In Bork’s interpretive philosophy, the intent of the Framers is not merely a clue to the meaning of the Constitution to be weighed along with other sources of enlightenment. Instead, Bork makes the arresting preemptive claim that originalism is inherent in the very idea of a constitution, which would become a will-o’-the-wisp if interpreted more loosely. In espousing “the rule that judges must stick to the original meaning of the Constitution’s words,” Judge Bork goes so far as to assert that if this principle had been unknown to the Framers themselves, we would have to invent it, because “[n]o other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters, perhaps radically, the design of the American Republic.”¹⁰¹ If this portentous warning is valid, a “living constitution”—one with a meaning that changes over time—is, at best an oxymoron; at worst, a fraud.

In contending that the only legitimate way to interpret the Constitution is to search out and follow the intent of the Framers, Bork and his fellow originalists make much of a so-called counter-majoritarian difficulty—the idea that when the Supreme Court rules that a federal or state law is unconstitutional, it necessarily rejects a decision made by the people’s elected representatives. Such action by the Court, we are admonished, is anomalous in a democratic society because the Justices are not elected and they hold office for life. This is why Professor Alexander M. Bickel, who had been Justice Frankfurter’s law clerk when the *Brown* case was before the Court, asserted in an eloquent and probing book entitled *The Least Dangerous Branch* that “judicial review is a deviant institution in the American democracy.”¹⁰² But Bickel never advocated the abandonment of judicial review

98. *Id.* at 7-8.

99. *Id.* at 2.

100. *Id.* at 9.

101. *Id.* at 154-55.

102. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (2d ed. 1986).

in order to bring our institutions into harmony with democratic theory. He was an accommodationist, not a rebel, and after catching the reader's attention with his "deviant institution" label, he acknowledged that we live in a hybrid democracy of which judicial review is a component part, not a deplorable lapse from an imagined Platonic ideal.¹⁰³ Indeed, Bickel himself could rhapsodize about the benefit of having federal judges as guardians of our constitutional rights and liberties:

[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. . . . Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.¹⁰⁴

B. *Problems in Ascertaining Original Intent*

Accepting *arguendo*, however, the originalist assertion that adherence to the intent of the Framers will shield us against judicial tyranny by diminishing the opportunities for interpretive discretion, how do we ascertain what the Constitution's Framers—all long dead—intended? Originalists assure us that we need not rummage through colonial attics for unpublished diaries or engage in posthumous psychoanalysis, because what counts is the public record, not the Framers' private ruminations. So far, so good. But on reflection, one finds that "so far" is not very far. This is because most of the documents from which originalists reconstruct the Framers' intent, although useful today, were not known to the ratifiers and hence might just as well have been secret diaries.

At the summit of the canon of originalist sources is the official journal of the Philadelphia Convention of 1787, which drafted the Constitution to replace the rickety Articles of Confederation of 1781. But James Madison, the "Father of the Constitution," maintained that the Philadelphia proceedings "can have no authoritative character," because the document emanating from its

103. In contrast to Bork's magisterial pronouncement on the essentiality of original intent, Bickel argued that it is relevant, but that complete observance threatens disaster for a written Constitution. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 3 (1955).

104. BICKEL, *supra* note 102, at 25-26.

fifty-five delegates “was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through [the state] Conventions”¹⁰⁵ that ratified the Constitution in 1788-89. In short, the Philadelphia delegates offered a proposal to a political community that its preamble called “We the People;”¹⁰⁶ it was the 1,750 members of the state conventions (or possibly, as some argue, the people who elected these delegates) who created the Constitution, and who, therefore, were its true “framers” or “founders.”¹⁰⁷

By its actions, the Philadelphia Convention confirmed Madison’s view that it was a body of theorists and scribes, not a nation-builder. To insulate themselves from public pressure, the delegates met under a rule of secrecy (a practice deplored by Jefferson as “abominable”),¹⁰⁸ and they preserved the confidentiality of their records even when they adjourned. After a delegate argued that “if suffered to be made public, a bad use [might] be made of [the records] by those who would wish to prevent the adoption of the Constitution,”¹⁰⁹ the delegates adopted with virtual unanimity a motion to deposit the records with George Washington, the Convention’s presiding officer, to be turned over to Congress if and when the Constitution was ratified. After all the “loose scraps” were burned (in what may have been the first paper-shredding episode in our nation’s history), the transfer took place and the records remained in confidential limbo until 1818, when they were collated by John Quincy Adams and published.¹¹⁰ A persistent problem for originalists is the behavior of the delegates to the Philadelphia Convention: if they thought that their intent *ought* to be controlling in interpreting the Con-

105. 5 ANNALS OF CONG. 776 (1796). Madison’s emphasis on the ratifiers, and the irrelevance of his *Notes*, may reflect the Philadelphia delegates’ violation of their mandates. See THE FEDERALIST No. 40 (James Madison). Thomas M. Cooley went further by suggesting that plain meaning should prevail over intent, because all that was enacted was the language; and the intent that matters is not that of the ratifiers or members of the constitutional convention, but that of “WE THE PEOPLE.” See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 66-67 (1868).

106. U.S. CONST. pmbl.

107. See MICHAEL A. GILLESPIE & MICHAEL LIENESCH, RATIFYING THE CONSTITUTION ix (1989).

108. See CLINTON ROSSITER, 1789: THE GRAND CONVENTION 168 (MacGibbon & Kee 1968).

109. 2 RECORDS OF FEDERAL CONVENTION OF 1787, at 648 (M. Farrand ed., 1911).

110. 1 *id.* at xi-xiii; see also James Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 6-9 (recording the history of the records).

stitution, how could they have justified keeping the delegates to the state conventions in the dark during the ratification debates?

Originalists are also embarrassed, or should be, by the strange history of a second source that often is used to reconstruct the intent of the Framers: Madison's *Notes*, his daily record of the Philadelphia debates. This is the fullest and evidently the most accurate of several unofficial reports, even though according to a recent estimate it covered no more than ten percent of the proceedings.¹¹¹ But Madison treated his notes as private property, refusing to publish them during his lifetime because, as he put it, the Philadelphia proceedings "could never be regarded as the oracular guide in expounding the Constitution."¹¹² After Madison's death, Congress purchased the *Notes* from his widow, and they were at last made public in 1840, more than half a century after the Constitution was ratified. Originalists have never explained why the intent of the Framers should be reconstructed from a privately-owned document that was withheld from the delegates to the state ratifying conventions—the very persons who, according to Madison himself, converted the Philadelphia Convention's "draft of a plan" into a legally effective Constitution.

But anyone who, following Madison's lead, seeks to extract the intent of the Framers from the proceedings of the thirteen state ratifying conventions faces formidable obstacles.¹¹³ The conventions, which met separately during the period 1787-90, were open to the public, but there were no official reporters, and the unofficial versions of the debates hawked by entrepreneurs are partisan, inaccurate, garbled, and fragmentary.¹¹⁴ Writing in 1833, Justice Joseph Story rejected the possibility of distilling a homogenized intent of the Framers from what little is known of the ratification debates:

111. See Hutson, *supra* note 110, at 34; cf. LEVY, *supra* note 62, at 287-88 (calculating that at best Madison could have recorded only twenty percent of the debates).

112. 5 ANNALS OF CONG. 776 (1796).

113. See LEVY, *supra* note 62, at 289-91.

114. See *id.* at 268 (describing the unsatisfactory state of the records of the debates); see also Hutson, *supra* note 110, at 34 (stating that Madison's *Notes* for any particular day take only a few minutes to read aloud). Even the most trustworthy record of the state debates, that of Virginia's convention, was described by Madison as containing an "abundance of chasms, and misconceptions of what was said." H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 963 n.79 (1993); see also NATIONAL HISTORICAL PUBLICATIONS COMM'N, A NATIONAL PROGRAM FOR PUBLICATION OF HISTORICAL DOCUMENTS 84 (1954) (describing ELLIOT'S DEBATES as "crudely" edited and asserting that the "texts are unreliable").

Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favor. And there can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it.¹¹⁵

If it were true that the ratifiers wanted their intent to control the courts in deciding constitutional issues, they can be justly accused of gross negligence for failing to take even rudimentary steps to preserve their precious thoughts.

Finally, originalists frequently rely on the *Federalist Papers* for evidence of the intent of the Framers. But this "debater's handbook,"¹¹⁶ written by James Madison, Alexander Hamilton, and John Jay to arm the pro-ratification delegates of several wavering States (primarily New York and Virginia), is even less official and more partisan than the records of the Philadelphia Convention, Madison's *Notes*, and the records of the state ratifying conventions. An eminent constitutional historian ranked the *Federalist Papers* as "third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history," but he nevertheless concluded that it had little influence on the outcome of the struggle for ratification.¹¹⁷ The most recent scholarly analysis asserts that its impact was "negligible" even in New York.¹¹⁸ Moreover, one of the few things known with certainty about the impact of the *Federalist Papers* is that more than half of the essays were published after five of the state conventions had completed their work and adjourned, and hence could have had no influence on their delegates.¹¹⁹

Turning from the original Constitution to the Bill of Rights, one finds that the surviving documents are, if anything, even less adequate as a record of the intent of the Framers—the members of the first Congress, which drafted the amendments, and of the state legislatures, which ratified them. The principal version of

115. 1 STORY, *supra* note 64, § 406.

116. Clinton Rossiter, *Introduction to THE FEDERALIST PAPERS* xi (Clinton Rossiter ed., 1961).

117. *Id.* at vii, xi.

118. John P. Kaminski, *New York: The Reluctant Pillar*, in *THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE CONSTITUTION 71-72* (Stephen L. Schechter ed., 1985).

119. See Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235, 270-73 (1989).

the House debates was written by an author described by Madison as "a votary of the bottle" whose reports "abound in errors; some of them very gross,"¹²⁰ and no one, drunk or sober, recorded the debates in either the Senate or the state legislatures.

The debates leading up to later amendments are better documented, but the intent of the Framers of the Fourteenth Amendment—whose Due Process¹²¹ and Equal Protection Clauses are the most pervasively influential of all the additions to the Constitution since its ratification—"must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh," as Justice Jackson said in an analogous context¹²² and as was demonstrated by the time-consuming efforts of the NAACP lawyers to answer the questions posed by the Supreme Court when it set the *Brown* case down for reargument.¹²³ Although the Equal Protection Clause was drafted and ratified more than a century ago, there is still no scholarly consensus on whether its Framers intended to prohibit the States from enacting laws that treat citizens differently if they vary in such attributes as gender, sexual orientation, ethnic origin, native language, age, family status, or place of birth.¹²⁴ Another provision of the Fourteenth Amendment, forbidding states to abridge "the privileges and immunities of citizens of the United States,"¹²⁵ is either a trivial or a crucial element of constitutional law, depending on how one interprets the meager evidence of the Framers' intent.

120. LEVY, *supra* note 62, at 293.

121. See U.S. CONST. amend, XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law").

122. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

123. See *supra* Part I.B.

124. As Henry Louis Gates recently observed in the *NEW YORKER*, prejudices are not easily compared; they "all come with distinctive and distinguishing historical peculiarities." Henry Louis Gates, *Blacklash*, *NEW YORKER*, May 17, 1993. For a rigorous originalist, the constitutional promise of "equal protection of the laws" was made to blacks emerging from slavery and it must be stretched beyond its proper limits to encompass legal discrimination based on religion, ethnic origin, descent, national origin, gender, or, for that matter, even to free northern blacks. See, e.g., *The Slaughter House Cases*, 83 U.S. 36 (1872) (describing the main purpose of the Thirteenth, Fourteenth, and Fifteenth Amendments as the elimination of slavery, the grant of U.S. citizenship to former slaves, and the prevention of oppression by former slave owners).

125. U.S. CONST. amend. XIV, § 1.

C. *The Problem of the Passage of Time*

Even if the records from which the intent of the Framers is to be extracted were more complete and reliable than the fragmentary and garbled scraps that have survived, we cannot escape the inconvenient fact that the Framers' views and our constitutional issues emerge from very different worlds. Originalists do not deny this, but they sometimes suggest that a diligent search of the archives will discover the answers that the Framers, if resurrected and asked what they intended, would give to today's constitutional questions.

Is this mission impossible? Not necessarily. The Justices in the *Brown* case, for example, might have tried to imagine how the Framers, while living in the America of 1868, would have responded if they had encountered a few black parents who demanded that their children be admitted to white schools then and there. Another way to recover—or would it create?—the Framers' intent would be to exhume and resurrect them, send them on an imaginary tour of the America of today, and then ask: "If in 1866-1869 you had foreseen *our* world, how would you have intended the Equal Protection Clause to be applied to the facts in the *Brown* case?" (Presumably we would refuse to accept responses like: "Had we envisioned this heaven-on-earth (or this earthly hell), we would have proposed a wholly different form of government.") Of course, the words attributed to the Framers in either of these fanciful discourses would come from our lips, not theirs. When we embark on an excursion into history, we take our intellectual baggage with us; if some of it is labeled "not needed on the voyage," we necessarily use our criteria, not the Framers', in deciding what to set aside. Nonetheless, we routinely invoke the "lessons of history"—for example, what we learned or should have learned from appeasing Hitler, or from the Viet Nam war—and references to the intent of the Framers are not much different.

Raoul Berger, originalism's most prolific exemplar, seems to contemplate an exercise of this type, but Judge Bork asserts flatly that "we cannot know how the Framers would vote on specific cases today, in a very different world from the one they knew."¹²⁶ Bork, however, dismisses this difficulty as "entirely beside the

126. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986).

point," because his model originalist "attempts to discern the principles the Framers enacted, the values they sought to protect."¹²⁷ At first blush, this version of originalism seems to simplify the quest for the intent of the Framers, but in application, it substitutes one fuzzy target for another—the "principle" or "core value" (an alternative label often used by Bork)¹²⁸ intended by the Framers instead of the "result" they intended. For example, the principle that the Supreme Court in *Plessy* perceived in the Equal Protection Clause was that the States must treat blacks and whites the same but can avoid racial "commingling" by providing separate facilities on an equal basis (blacks being confined to black schools, but, tit-for-tat, whites being confined to white schools). The principle described by the NAACP's brief in the *Brown* case was that no state action can be predicated upon race or color. The principle announced by the Supreme Court in *Brown* was that blacks may not be deprived of the equal opportunity to enjoy the benefits of public programs. Still others find far broader principles in the Equal Protection Clause: that the States cannot use nonvoluntary characteristics like race and gender in granting benefits and imposing liabilities on their citizens, or that all citizens—black or white, rich or poor, young or old, male or female, married or single, sick or well, criminal or law-abiding—must be treated alike unless the distinction is "reasonable" or serves a compelling public interest.

D. *The Problem of Precedent*

1. *Threatened Decisions*

Difficulties in reconstructing the intent of the Framers do not, of course, deter historians and political theorists from making the attempt; indeed, we can pick and choose from a menu that offers something for every taste. Even so, originalists are sure that countless Supreme Court decisions were decided in lawless violation of the intent of the Framers. An index of these condemned

127. Robert H. Bork, *Original Intent and the Constitution*, 7 HUMAN, 22, 26 (1986). A perceptive critic, who is on the whole sympathetic to originalism, writes that all cases can be justified at a high enough level of generality. See Henry P. Monaghan, *Stare Decisis and Constitutional Law*, 88 COLUM. L. REV. 723, 739-740 (1988); see also Frank Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 368 (1992) (arguing that there is no "right" level of generality).

128. See Bork, *supra* note 126, at 826. However it is applied, Bork's gambit sacrifices much of the precision claimed by the originalists, and hence restores much of the judicial freedom that originalism is supposed to eradicate.

decisions would include not only *Brown v. Board of Education*,¹²⁹ but also *Roe v. Wade*,¹³⁰ *Griswold v. Connecticut*¹³¹ (holding unconstitutional Connecticut's prohibition on the use of birth control devices), *Loving v. Virginia*¹³² (holding Virginia's antimiscegenation law unconstitutional), *Baker v. Carr*¹³³ (requiring Congress to be reapportioned on a one-person, one-vote principle), and *Enmund v. Florida*,¹³⁴ holding that in certain circumstances the death penalty constitutes "cruel and unusual punishment."

In addition to condemning important cases like these, the systematic application of originalism to constitutional law would demolish the fundamental principles on which hundreds of other decisions rest. A notable target is the so-called "incorporation doctrine," used by the Supreme Court for more than half a century to impose on the States most of the constitutional guarantees of the Bill of Rights—for example, freedom of speech and religion,¹³⁵ protection against unreasonable searches and seizures,¹³⁶ and just compensation when private property is taken for a public use.¹³⁷ In 1833, the Bill of Rights was held by Chief Justice Marshall to apply only to the federal government—so clearly, in his view, that oral argument to the contrary was stopped by the Court.¹³⁸ However, the Bill of Rights was nationalized by a series of much more recent hotly contested decisions proclaiming that the Fourteenth Amendment, especially its Due

129. 347 U.S. 483 (1954). Judge Bork objects to the opinion in the *Brown* case, not to the result, which he argues should have been reached on a different ground. Judge Bork argues that the Framers of the Fourteenth Amendment wanted both equality and segregation, but would have preferred equality to segregation had they realized that these two concepts were incompatible. Judge Bork acknowledges that this rationale would have left unscathed the segregated schools in the District of Columbia, which was not subjected by the Framers to the Equal Protection Clause. See Bork, *supra* note 63, at 82-83. He might have added that the same bizarre result would be applicable to the Topeka schools in the *Brown* case because the district court found that the conditions at black and white schools were "equal," and its conclusion was not challenged by the NAACP.

130. 410 U.S. 113 (1974) (ruling prohibitions on abortion unconstitutional).

131. 381 U.S. 479 (1965).

132. 388 U.S. 1 (1967).

133. 369 U.S. 186 (1962).

134. 458 U.S. 782 (1982).

135. See U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech").

136. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

137. See U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").

138. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

Process Clause¹³⁹ somehow “incorporates” or “absorbs” the restrictions that the Bill of Rights imposed on the federal government. Particularly important instances are the cases holding that the practices of holding prayers in the public schools and placing Nativity scenes on village greens violate the Establishment Clause of the First Amendment,¹⁴⁰ even though its language—“Congress shall make no law respecting an establishment of religion”—clearly refers to the actions of a branch of the *federal* government, not to the decisions of state and local officials. Originalists also inveigh against the judicial recognition (or “invention”) of constitutional rights that are not explicitly listed in the Bill of Rights or elsewhere in the Constitution, even though some of these so-called “unenumerated rights,” such as the right to privacy and the right to travel from State to State, have been long protected by judicial decisions,¹⁴¹ and others are taken for granted, like the right to marry or to remain single, to conceive or refrain from conceiving children, to receive a passport to facilitate foreign travel, and to speak a foreign language in public places.¹⁴²

In 1988 Henry P. Monaghan, a reflective scholar who is sympathetic to originalism, acknowledged that “insistence upon original intent as the only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order.”¹⁴³ There is no hyperbole in this assessment; the logic of originalism demands unconditional surrender by the enemy in what Judge Bork calls the “war for control of our legal culture.”¹⁴⁴

139. U.S. CONST. amend, XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law”).

140. See *Allegheny County v. ACLU*, 492 U.S. 573 (1989) (holding that a Nativity scene placed on courthouse steps violates the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that prayer in schools violates the Establishment Clause); see also *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (holding that the Due Process Clause of the Fourteenth Amendment made the Establishment and Free Exercise Clauses of the First Amendment applicable to the States).

141. Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 FLA. L. REV. 219 (1992).

142. For a more complete list, see Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI-KENT L. REV. 37, 58 (1988); see also David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Rights*, 61 FORDHAM L. REV. 895, 897-903 (1993) (discussing the difference between originalism and fundamental rights as exemplified in the opinions of Justices O'Connor and Scalia).

143. Monaghan, *supra* note 127, at 727.

144. BORK, *supra* note 63, at 2.

2. *Stare Decisis as an Empty Vessel*

In the last hours of the Gulf War, our military commanders recoiled from the “turkey shoot” that became possible as Iraq’s forces abandoned Kuwait and fled homeward across the desert. Originalism’s marksmen also become less ruthless when they contemplate the legal carnage that would result from pressing their theory to the extreme. Judge Bork, for example, tells us that it is now “too late” for the Supreme Court to declare paper money unconstitutional, despite the Supreme Court’s violation of the intent of the Framers in 1871, when it held in the *Legal Tender Cases* that Congress could compel creditors to accept Treasury notes in payment of their claims, even if the debtors had promised to pay in gold or silver.¹⁴⁵ Realism can be a great pacifier, even in a war for control of our legal culture.

Judges wanting to emulate Bork’s uncharacteristic tolerance of entrenched error, however, must confront a troublesome line of Supreme Court decisions. In many areas of the law, if the repudiation of an earlier decision would unduly disturb settled expectations, the Supreme Court applies the principle of *stare decisis*—“let the decision stand”—and refrains from overruling the earlier decision, even on concluding that it was wrong. The Court usually refuses to apply this doctrine of repose to constitutional cases, however, following instead the principle that constitutional issues are never settled until they are correctly decided.¹⁴⁶ The conventional rationale for this distinction is, in Justice Brandeis’s words, that in non-constitutional cases, “it is [often] more important that the applicable rule of law be settled than that it be settled right,”¹⁴⁷ especially because erroneous decisions ordinarily can be nullified for the future by legislative action. But in constitutional cases, the Court’s decision often ties the hands of Congress; and if the Court does not reverse itself in this situation, its error can be corrected only by the cumbersome process of amending the Constitution.¹⁴⁸

145. *Id.* at 158; see *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870) (upholding the constitutionality of the Legal Tender Acts being applicable to contracts both retroactively and proactively).

146. *But see* *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (refusing to overturn constitutional protection of abortion on the grounds of *stare decisis*).

147. *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 406 (1931) (Brandeis, J., dissenting).

148. The inapplicability of *stare decisis* to constitutional issues has recently been reasserted in Justice Scalia’s dissent to *South Carolina v. Gathers*, 490 U.S. 805 (1989), in which he quotes Justice Douglas’s statement that “it is the Constitution which [a Supreme

As a result, originalists who are uneasy about originalism's "massive repudiation of the present constitutional order"¹⁴⁹ find themselves in a quandary. If they accept the existing corpus of constitutional law, asking only that originalism be applied prospectively—by telling the judges, "Go and sin no more"—they betray the faith they preach with such fervor; but if they import *stare decisis* into the constitutional area, they necessarily empower today's judges to perpetuate or reject earlier decisions in their virtually untrammelled discretion, thus fostering the very government-by-judges that originalism promises to prevent. Judge Bork, for example, would apply *stare decisis* to decisions "validating *certain* New Deal and Great Society programs"¹⁵⁰ even though he condemns them as unlawful interpretations of the Constitution, because overturning them would "plunge us into chaos."¹⁵¹ He does not specify, however, which programs should be preserved and which can be terminated without disastrous consequences. Moreover, Bork's tolerance diminishes when he turns away from the economic area. For example, he declares that "it will probably never be too late to overrule the right of privacy cases, including *Roe v. Wade*, because they remain unaccepted and unacceptable to large segments of the body politic, and judicial regulation could at once be replaced by restored legislative regulation of the subject."¹⁵² Judge Bork's eclecticism also opens the door to an awesome range of judicial discretion when he argues that even if an erroneous decision "is so thoroughly embedded in our national life that it should not be overruled," it should not be allowed to metastasize into new areas, creating still more errors.¹⁵³ Alas, whether a constitutional principle is firmly embedded or hangs loose depends on the eye of the observer.

Confronting these vaporous distinctions—reflecting little more than Judge Bork's personal preferences?—Professor

Court Justice] swore to support and defend, not the gloss which his predecessors may have put on it." *Id.* at 825; see William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

149. Monaghan, *supra* note 127.

150. BORK, *supra* note 63, at 158 (emphasis added).

151. *Id.*

152. *Id.* "Legislative regulation" is, of course, precisely what *other* "large segments of the body politic" abhor.

153. *Id.* Similarly, Raoul Berger argued that although judicial decisions can be overruled, events that follow from judicial decisions, in many cases, cannot be changed. For example, assuming *arguendo* that *Brown v. Board of Education* should and could be overruled, "blacks cannot be forced back into the ghetto." RAOUL BERGER, *DEATH PENALTIES* 83 n.29 (1982).

Monaghan laments the law's failure to develop "a coherent rationale for the intermittent invocation of stare decisis," a deficiency that causes the principle to strike "with the randomness of a lightning bolt."¹⁵⁴ Monaghan goes on to observe that "the central problem for originalism is whether the cost of embracing stare decisis is too high—whether, in the end, the embrace destroys originalism's bedrock assumption that, until formally amended, the Constitution establishes a permanent ordering binding on all organs of the government, including the courts."¹⁵⁵ In a wistful, even elegiac tone, he says that the task of constitutional scholars is "to make sense out of a nonoriginalist universe."¹⁵⁶ In short, tears shed for the intent of the Framers are shed in vain.

III. NONINTERPRETIVISM

A. *Historical Background*

Advocates of a "living Constitution," who collectively are viewed by originalists as the Great Satan of constitutionalism, use contemporary values and aspirations as the raw material of their interpretive method. Because these liberated spirits proclaim that judges are not confined either by the words of the Constitution or by the intent of its Framers, their approach is often called "noninterpretivism"—a term that is confusingly reminiscent of the once-popular "plain meaning" theory that the Constitution can be understood by ordinary citizens without the intervention of professional interpreters. Rejecting this comforting but outmoded notion, today's "noninterpretivists"—a portmanteau term that describes many theorists who are uncomfortable with the label, and some who reject it—argue that such crucial provisions as the Due Process and Equal Protection Clauses are too vague ("indeterminate" is the favored adjective) to *have* a meaning that can be discovered, deduced or teased out by the reader. Instead, the judges must *create* meanings for these open-ended phrases. In support of this assertion, noninterpretivists sometimes draw on the deconstructionist theories of contemporary literary critics, blithely oblivious to the fact that this is not the best way to win legal friends or to influence the profession.

¹⁵⁴ Monaghan, *supra* note 127, at 743.

¹⁵⁵ *Id.* at 767.

¹⁵⁶ *Id.* at 771.

If they were not so eager to be hailed as today's avant garde, however, the noninterpretivists could invoke the authority of many paragons of the legal establishment who made their mark when Derrida was still in grade school. Felix Frankfurter, for example, wrote in 1938 that open-ended provisions of the Constitution like the Equal Protection and Due Process Clauses are so ambiguous that the Supreme Court "is compelled to put meaning into the Constitution, not take it out."¹⁵⁷ Indeed, two decades earlier, Woodrow Wilson wrote that "the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age,"¹⁵⁸ describing the Supreme Court as "a kind of Constitutional Convention in continuous session."¹⁵⁹ The same corrosive realism, which would be denounced as cynicism if it came from an outsider, can be found in a trio of the most-quoted aphorisms in the law, each by a jurist who in his day was the toast of countless testimonial dinners:

"The life of the law has not been logic: it has been experience."

—Oliver Wendell Holmes, Jr.¹⁶⁰

"We are under a Constitution, but the Constitution is what the judges say it is."

—Charles Evans Hughes¹⁶¹

"The words [of the Constitution] are empty vessels into which [a judge] can pour nearly anything he will."

—Learned Hand¹⁶²

To lighten these sober judgments, one might add Chief Justice Taft's definition of a constitutional lawyer as someone who "abandoned the practice of the law and [went] into politics."¹⁶³

B. *Noninterpretivism Today*

As seen by an influential exponent of noninterpretivism, Stanford's Professor Thomas Grey, the judiciary "is the expounder of

157. Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, in MR. JUSTICE HOLMES 50 (Felix Frankfurter ed., 1931).

158. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 69 (1908).

159. EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 5 (14th ed. 1978).

160. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

161. Charles Evans Hughes, *Speech Before the Elmira Chamber of Commerce, May 3, 1907*, in ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 139 (1908).

162. Learned Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930).

163. 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 625 (1951).

basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."¹⁶⁴ Thus, instead of purporting to "interpret" the Constitution, noninterpretivism uses it as a springboard:

[T]he broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values. These values may be seen as permanent and universal features of human social arrangements—natural law principles—as they typically were in the 18th and 19th centuries. Or they may be seen as relative to our particular civilization, and subject to growth and change, as they typically are today.¹⁶⁵

Enlarging (or, perhaps, only embroidering) this summary of noninterpretivism, other scholars have said that it is "a search for political-moral knowledge, for answers to the various questions as to how we, the polity, should live our public, collective life, our life in common,"¹⁶⁶ "a model of open-ended modernism," which "permits the Court to give meaning to all constitutional provisions on the basis of contemporary values that the Justices regard as worthy of constitutional protection [recognizing] that their decisions are inevitably based on their personal values,"¹⁶⁷ a process of adjudication that "should enforce those, but only those, values which are fundamental to our society,"¹⁶⁸ a judicial search "for values deeply embedded in the society, values treasured by both past and present, values behind which the society and its legal system have unmistakably thrown their weights,"¹⁶⁹ "an expression of the possibilities of democracy," built on "the classical conception of a republic, including its elements of relative equality, mobilization of the citizenry, and civic virtue,"¹⁷⁰ and a process of reaching "into the Constitution's spirit and structure" to "promote the fullest development of human faculties and ensure

164. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975).

165. *Id.* at 709.

166. Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 573 (1985).

167. Erwin Cheminsky, *Interpreting the Constitution* 109 (1987). Cheminsky, however, does not explicitly use the label "noninterpretivist."

168. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 227 (1980).

169. Ira C. Lupu, *Untangling the Standards of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1040 (1979).

170. Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 258-259 (1981).

the greatest breadth to personal liberty and community," without being deterred by the "obviously incomplete listing [of rights] in the Bill of Rights."¹⁷¹

In giving content to these values and aspirations, the judges are advised by a prominent noninterpretivist to hearken to "the prophetic voices that emerge, from time to time, in the community (Martin Luther King, Jr.'s voice, for example, or Abraham Joshua Heschel's or Dorothy Day's)."¹⁷² A spiritual guide of a more ecumenical persuasion might add Jerry Falwell, Elijah Muhammad, and Cardinal O'Connor. This would no doubt infuriate some campus audiences, but when were prophets welcomed by happy faces? At a minimum, the raw material for a noninterpretivist Constitution seems to encompass the entire reading list of a college survey course in Western Civilization; and if noninterpretivists are closet devotees of multiculturalism, despite their incessant appeals to "our" values, perhaps the judges should also peruse the bibliography of *World Thought and Culture* 101.

C. *Whither Noninterpretivism?*

Descriptions of noninterpretivism vary and the authors undoubtedly believe that they each have added a unique ingredient to the potpourri. Reading them in rapid succession, however, is like listening to a dozen Fourth of July orations; the speakers differ in eloquence and decibel level, but a homogenized message comes through: Ever Onward, Ever Upward. This impression that noninterpretivism has no limits is enhanced by its own internal logic. If the judges cannot expect to find any fixed meaning in the words of the Constitution but must instead pour meaning into them, they should presumably follow the same interpretive strategy and insert their own "meanings" into the "aspirations," "ideals," "basic shared values," and "prophetic voices" that are endorsed by the theorists of noninterpretivism.

It should occasion no surprise, therefore, that originalists like Judge Bork, on reading the writings of contemporary noninterpretivists, fear that a horde of reformist judges, zealous to reinvent society, will be inspired to go on the prowl for targets of opportunity. This anxiety, however, is not unique to originalists. Noninterpretivists are also wary of a hyperactive judiciary, and

171. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1308 (2d ed. 1987).

172. MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 146 (1988).

agree that, as one commentator has observed, judicial review of legislation "ought to be limited or constrained in some way to assure that the Justices will not end up doing what they think is good or just and calling it constitutional law."¹⁷³ Some disturbers of the peace might wish to revise this caveat to read: "The judges ought to be constrained to assure that they do not end up doing what *we* think is *not* good or just and calling it constitutional law."

But how, we may ask, can a noninterpretivist judge distinguish between plausible incremental changes and what have been called utopian dangers?¹⁷⁴ If, for example, our "deeply imbedded values" entitle resident aliens to a full-scale hearing on claims for political asylum, should the courts lay the cornerstone for a still more benign society by ordering the State Department to issue visas and free airline tickets to politically oppressed people throughout the world so they can come here to present their claims for asylum in person? If the political-moral responsibilities of a democratic superpower permit the President as Commander-in-Chief of our armed forces to assign troops to serve abroad under the command of the United Nations, should the courts also support the President if he authorizes the Secretary General of the United Nations to extend their terms of service beyond the date fixed when they enlisted and to shoot any American soldier who refuses to obey orders? In the same vein, should our judges cut through legislative bickering and executive vacillation by ordering the government to provide universal medical care, reduce the federal deficit, raise the minimum wage, send humanitarian aid to the hundred neediest foreign countries, withdraw our troops from Korea, call up the National Guard to police the streets of the nation's capital, and improve the teacher-student ratio in our public schools?

To justify issuing orders like these, the judges could point to the noninterpretivist canon of national traditions, values, aspirations, ideals, and prophetic voices. For instance, the pediment of the building housing United States Supreme Court promises "Equal Justice for All;" one of the goals of the Constitution is to "insure domestic Tranquility;"¹⁷⁵ we pledge allegiance to a country "with liberty and Justice for all;" Franklin D. Roosevelt's 1944

173. Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 605 (1985).

174. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2276 (1990).

175. U.S. CONST. pmbl.

message to Congress promulgated an Economic Bill of Rights, declaring that everyone has the right "to a useful and remunerative job . . . adequate medical care . . . adequate protection from the economic fears of old age, sickness, accident and unemployment [and] a good education;"¹⁷⁶ the Statue of Liberty invites the world to send us "Your huddled masses yearning to breathe free;" and the Universal Declaration of Human Rights proclaims that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks on his honour and reputation" and that everyone has "the right . . . to a social and international order in which [these rights] can be fully realized."¹⁷⁷

The conventional response to conundrums of this type, which are the daily bread of legal education, is that we are blessed with an "interpretive community" (a beguiling self-description of the professoriat, the voluntary watchdogs of the legal world) that recognizes limits on judicial discretion that are powerful, objective, and commonly shared, even though they cannot be reduced to a formula. By praising or hectoring the judges, it is asserted, academicians can enforce these standards, thereby impelling the courts to give us a "living" Constitution without unduly superseding the social, political, and economic choices made by Congress. In this vein, a member of the imaginary academic supercourt writes, "It will be up to us not only to evaluate the [Supreme] Court's moral vision, but to guide it as well." In an appealing burst of realism, he then concedes, "Clearly, that will be a heavy burden."¹⁷⁸

D. *Ascertaining "Shared Values"*

Fifty years ago, constitutional law *was* the domain of an "interpretive community"—a little band of brothers (they had no academic sisters), teaching at a few national law schools ("national" being a euphemism for "elite," contrasting with "regional," a euphemism for "provincial"), who professed to know instinctively

176. Franklin D. Roosevelt, *Annual Message to Congress, January 11, 1944*, in NOTHING TO FEAR: THE SELECTED ADDRESSES OF FRANKLIN DELANO ROOSEVELT 1932-1945, at 396 (B.D. Zevin ed., 1946).

177. U.N. UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 12, 14 (1948), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS (Ian Brownlie ed., 1992).

178. Richard B. Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 MICH. L. REV. 782, 800 (1983) (reviewing MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982)).

what was *de rigueur*, and what was *infra dig*. In those golden days, Felix Frankfurter, without tongue in cheek, could assert, "In the last analysis . . . the law and the lawyers are what the law schools make them."¹⁷⁹ Even when they were riding high, however, the professors of constitutional law rarely spied out the land and signaled the Supreme Court to move forward; instead they savored its opinions at leisure, and delivered their evaluations in formal lectures and graceful essays. Moreover, since the heyday of the mandarins, the number of teachers of constitutional law has grown from about one hundred (in 1930) to nearly fifteen thousand. This increase by itself has produced fissures in profusion—nodding assent to one's elders is not the best route to tenure these days—but the professoriat is split still further by clusters of talented and dedicated dissenters, such as political radicals, feminists, gays and lesbians, Native Americans, blacks, narrative-tellers, and other groups seeking, in the language of the day, to change the legal structure in order to "empower" people who have been systematically "marginalized" by the law. These academic advocates for society's underdogs and outsiders concur in charging that the legal establishment's claim to be objective and dispassionate is camouflage—self-deluding at best, deliberate at worst—to protect the political and economic status quo. This, however, does not mean that they are entirely comfortable with noninterpretivism. To the contrary. They welcome its insistence that judges can, or must, seek guidance from sources outside the four corners of the Constitution; but no dissenting group can accept the notion that all extra-constitutional sources are equally legitimate or that the "values deeply embedded in the society" necessarily are benign. These advocates claim, instead, that some values serve to justify oppression and must be pulled up by the roots.

The result is that today's academic "interpretive community" is too fragmented to agree upon the sources that ought to govern judges wishing to practice noninterpretivism; the preferences of the would-be tutors are as diverse as the material itself. Moreover, "our" shared values, "our" traditions, "our" life in common, and the other noninterpretivist sources of constitutional meaning

¹⁷⁹ Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (quoting Letter from Felix Frankfurter, Professor of Law, Harvard Law School, to Mr. Rosenwald (May 13, 1927) (Felix Frankfurter papers, Harvard Law School Library)).

emanate from the citizenry as a whole, not merely from the legal academy or the judiciary. Lawyers and judges feed the stream, of course, but their contribution is quickly absorbed and diluted. This suggests that the watchword of noninterpretivism should be "Follow the Public" and that its goal should be an accurate depiction for the judges of the values and ideals that the public accepts and by which it lives.

As it happens, noninterpretivism swept the legal academy at the same time that popular culture witnessed the relentless conversion of legal events into commercial "products" in a process that has pushed the boundaries of "the interpretive community" outward to include anyone who owns a TV set. During the Senate Judiciary Committee's televised hearings on the nominations of Judges Bork, Souter, Kennedy, Thomas, Ginsburg, and Breyer to be Justices of the Supreme Court, citizens everywhere heard talk in abundance about the intent of the Framers, strict construction, judicial activism, natural law, and the other girders of constitutional law's infrastructure; and they quickly took to their new-found roles as participant-observers. Millions of Americans have learned from *The Paper Chase* and TV reconstructions of law school classrooms that legal propositions almost always have soft cores and that a precedent usually turns into a bed of Procrustes if it must accommodate a later case with somewhat different facts.

In short, the public has learned that the life of the law is ambiguity, and that they can debate the disputed issues in much the same way that these issues are debated by the experts. Schooled in legal jargon, TV watchers can respond as fast as the actors to phrases like "move to suppress," and they know that if a handcuffed suspect is not "given his rights" in the first scene of a crime show, the drama's turning point will be a clash of legal claims about exceptions to the *Miranda* rule. Aficionados of the legal culture who need a fix after hours can now turn to Court TV, a twenty-four hour forensic convenience store offering trials, appellate arguments, commentary and lectures, which advertises that its audiences can watch "the real life drama of justice" and "decide for themselves some of the most important questions facing the nation today." Once President Clinton's Information Superhighway is completed, perhaps even earlier, this volunteer interpretive community will no doubt be served by interactive devices, so that panels of couch potatoes, performing as shadow ju-

ries, will be able to announce their verdicts on everyone's electronic bulletin board before the courtroom jurors complete their deliberations.

The Information Superhighway seems tailor-made, if that term can be applied to a high-tech venture, to clarify the benchmarks—like “our basic shared values” and the “deeply imbedded ideals and traditions of our society”—that noninterpretivists recommend to judges as sources of enlightenment in giving meaning to the Constitution. Instead of sending their law clerks to the library to discover the values and traditions that “we the people” share and respect, the judges could listen directly to the voices of the people at their electronic town meetings; and the judges will be able to refresh their recollections in tranquility by calling up the transcript of the public debate from an ever-ready, random-access data base. But will the judges be willing to turn from books, augmented by introspection, to the electronic fast track? For a case study, we can examine the way Justices Thurgood Marshall and William J. Brennan, Jr., both of whom opposed the death penalty, responded to assertions that the public disagreed with their verdict.

In 1972, Justice Marshall announced that in his opinion capital punishment “violates the Eighth Amendment [prohibiting the infliction of “cruel and unusual” punishment] because it is morally unacceptable to the people of the United States at this time in their history”¹⁸⁰—a quintessentially noninterpretivist standard of constitutionality. Acknowledging that public opinion polls did not support his reading of the common conscience, Marshall asserted that “American citizens know almost nothing about capital punishment”¹⁸¹ (citing, perhaps because of a law clerk's error, three books that make no such claim). But he announced that they would agree with him that the death penalty is morally unacceptable if they were fully informed,¹⁸² provided they also satisfied another condition, the suppression of any desire for vengeance. This condition is required by the Constitution, according to Justice Marshall, because “no one has ever seriously advanced retribution as a legitimate goal of our society.”¹⁸³

180. *Furman v. Georgia*, 408 U.S. 238, 360 (1972) (Marshall, J., concurring).

181. *Id.*

182. *See id.*

183. *Id.* at 363. Perhaps the eye-for-an-eye principle, *see Exodus* 21:24, went out with school prayer.

It is unlikely, however, that Justice Marshall would have wished to submit these conjectures—public ignorance and the rejection of retribution as a goal of the criminal justice system—to a reality check in the form of an electronic plebiscite, even if opponents of the death penalty were given unlimited time to present their arguments before the public voted. Justice Marshall's assertion that the death penalty is "morally unacceptable" to his countrymen is best understood not as a statement of fact but as the expression of a noble dream that cannot be punctured by unwelcome evidence, much like his argument in the *Brown* case that the legislators who drafted and ratified the Equal Protection Clause in the late 1860s intended to prohibit all state action predicated upon race or color. In both cases, Justice Marshall appealed to the better angels of our nature, who cannot be questioned by pollsters.

Like Justice Marshall, Justice William J. Brennan, Jr. believed that the death penalty is unconstitutional, declaring in 1972 that "its rejection by contemporary society is virtually total."¹⁸⁴ In a 1985 speech announcing that originalism is "little more than arrogance cloaked as humility," he asserted that constitutional interpretation "must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought."¹⁸⁵ Taken in context, this reference to the "community" meant the citizenry as a whole, not the professoriat or the legal profession; but Justice Brennan quickly rejected any implication that "the community's interpretation" of the Constitution could be ascertained by polling the members of the community. Indeed, Justice Brennan admitted that "a majority of my fellow countrymen" did not subscribe to his view that the death penalty is morally repellent; but their dissenting voices, Justice Brennan declared, merely compelled him, because of "a larger constitutional duty to the community, to . . . point toward a different path" and thereby "to embody a community striving for human dignity for all."¹⁸⁶ Like Justice Marshall, Justice Brennan claims that he speaks for his fellow citizens when they are on their best behavior, and that their lapses from this standard are unfortunate but irrelevant aberrations. In this spirit, Justice Brennan would unquestionably brush aside his countrymen's responses to

184. *Id.* at 305 (Brennan, J., concurring).

185. Brennan, *supra* note 3, at 434.

186. *Id.* at 444.

a 1991 questionnaire sponsored by the American Society of Newspaper Editors, which reported that more than half of the respondents would grant no legal protection to persons who advocate "Satanism or other religious cults," burn the flag as a political protest, or use obscene gestures in public, and that more than a third would deny legal protection to persons advocating homosexual behavior, taking the Lord's name in vain, or "using slang words that refer to sexual acts."¹⁸⁷ With public opinion polls like these staring them in the face, it is not surprising that even the most avowedly populist of our judges prefer introspection as a source of inspiration when interpreting the Constitution.

IV. JUDICIAL TEMPERAMENT

But if the courts are unleashed by noninterpretivism to pour meaning into the Constitution, why don't they set fundamental reformist goals for themselves, as Judge Bork fears? The answer is to be found more in their temperament than in the content of these noninterpretivist sources or the words of the Constitution. Judges are cautious and reflective, if not by nature, then by nurture: legal education is respectful of precedent and favors incremental changes over convulsions; the profession confers its greatest rewards on lawyers who adapt to the system; and candidates for appointment to the federal courts must go through a process of Presidential nomination and Senate confirmation that subliminally proclaims that mavericks need not apply. Presidents may yearn for a Supreme Court that mirrors America, its margins as well as its middle; but even if there is a Presidential will, there is not necessarily a political way. President Clinton announced that he wanted to "hit a 'home run'" with his first nominee to the Supreme Court by choosing someone "who would make everyone stand up and say, 'Wow.'"¹⁸⁸ When the names on the presidential short list leaked out, however, there were many nods of approval, but little if any amazement. This was, or should have been, no surprise. If a nominee for a judgeship is described as "outside of the mainstream," the synonyms that come to mind are not "bold," "daring," and "innovative," but "reckless," "arbi-

187. ROBERT O. WYATT, *FREE EXPANSION AND THE AMERICAN PUBLIC* 153-65 (1991).

188. Thomas L. Friedman, *The Supreme Court: News Analysis—The 11th Hour Scramble: After Hoping for a "Home Run" in Choosing a Justice, Clinton May Be Just Home Free*, N.Y. TIMES, June 15, 1993, at A1.

trary," and "dogmatic;" and if an instinctive flight toward the middle fails, the nomination is soon, as the journalists say (and as Judge Bork quickly learned), in deep trouble.

Federal judges, to be sure, have life tenure, so candidates who survive the appointment filter are free to break with tradition. This sometimes happens. Observers familiar with Chief Justice Warren's background, for example, would not have predicted that he would push vigorously for the result in *Brown v. Board of Education*, and the same could have been said of Justice Blackmun and *Roe v. Wade*. But these are exceptions. By and large, the Supreme Court's occasional John the Baptist stays in the wilderness because a critical mass of the other Justices cannot be persuaded to go along with bold, daring and innovative constitutional principles. Indeed, in most constitutional cases, even judges who are partisans of reform seek to convince their colleagues that the "correct" result can be found in the web of existing cases, or that it requires only a marginal refinement of a doctrine that is already widely accepted. Seldom do judges reexamine the foundations on which their prior decisions rest, and hence they seldom are forced to choose between originalism and noninterpretivism.

Judge Bork predicts that judges who are not faithful to the intent of the Framers will rely on their "moral predilections" in deciding cases.¹⁸⁹ This claim (which in actuality may not shock the laity as much as Judge Bork thinks it should) is too ambiguous to be either accepted or rejected. If "moral predilections" are the convictions that the judge would espouse as a private citizen, politician, or policy wonk, few students of judicial behavior would agree with Judge Bork; but if the term encompasses the attitudes of the men and women who are nominated and confirmed as federal judges in our society, Bork's claim is scarcely more than a tautology. Judges, of course, behave like *judges*; and their moral predilections are not the preferences and prejudices of private citizens, but instead reflect the training and experiences of lawyers as well as the judge's own ever-present knowledge of the difference between judges and legislators.

An illustration of what might be called the federal judiciary's moral predilections about its proper role in constitutional cases can be found in the Supreme Court's deliberations before it de-

189. Bork, *supra* note 2, at 1063.

cided *Brown v. Board of Education*. According to all reports, the Justices agreed that school segregation was a repellent practice; and this, by Judge Bork's lights, should inexorably have driven them to attack the dragon with zeal, once they decided that the intent of the Framers of the Equal Protection Clause was either irrelevant or inconclusive. But, except perhaps for Justice William O. Douglas, there were no impulsive knights among them. Instead, facing their greatest opportunity in this century to repudiate a social evil, their collective mood was hesitant, anguished, gloomy, foreboding. When Chief Justice Warren managed to muster a unanimous vote to condemn school segregation, the opinion suggested that the decision did little more than apply the principles announced in the Court's two 1950 decisions prohibiting segregated facilities in state universities, as though the Justices wanted to comfort themselves or the public with a security blanket.

It is possible that in time, law schools will indoctrinate their students with a passion for the wilder shores of noninterpretivism; if so, this taste may spread through the profession and generate a more ambitious and daring breed of would-be judges. Perhaps the Information Superhighway will speed up the process, for example, by staging previews of the President's nominees to the Supreme Court before the Senate Judiciary Committee can bestir itself to schedule its formal hearings. With a few lawyers skilled in cross-examination disguised as Senators and an impresario who can command prime time, such a TV show might get a higher Nielsen rating than the real thing. If a future President announces that he or she plans to nominate a candidate for the Supreme Court who will evoke a "Wow" from the American public, the national electronic data base (protected, of course, against tampering by hired or mischievous hackers) could be searched for all utterances by everyone on the Presidential short list, using key phrases like "intent of the Framers," "right to life," "hate speech" and "humanitarian mission;" and then the candidates could be given real "Wow" ratings in real time by real people.

If this imagined electronic rating of aspirants to the federal judiciary should materialize, however, it may turn out to be only a harmless video game; but perhaps political life will imitate electronic art. If so, it might produce more judges with a zest for social reform; but a more likely outcome is a narrowing of the

spectrum as controversial candidates are blackballed, leaving fewer Borks, fewer Hugo Blacks (who briefly belonged to the Ku Klux Klan as a young lawyer), and fewer Earl Warrens (who, as Attorney General and then Governor of California during World War II, vigorously supported the Japanese exclusion orders). The survivors would then be centrists with résumés attesting explicitly to their diligence, intelligence, moderation, and prudence, and implicitly to their skill in avoiding controversy, with perhaps a sprinkling of candidates who managed to ply their trade without generating a paper trail, unless they are eliminated after being portrayed as dunces or Trojan horses.

V. CONCLUSION

All in all, the best bet is that our judges will continue to invoke “the American scheme of justice,” “ordered liberty,” “community standards,” and other noninterpretivist ideals, values and aspirations, but will not take these concepts anywhere near their logical extremes. Of course, glaciers sometimes melt into raging streams, but not even the *Old Farmer’s Almanac* ventures to predict when. At least for the foreseeable future, we can expect judges to draw copiously on noninterpretivist sources when embellishing their opinions, but to decide cases, well, judiciously.