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The Bill of Rights and Originalism

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THE BILL OF RIGHTS AND ORIGINALISM

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Professor Bradley begins the final installment of the University of Illinois Law Review*'s year-long tribute to the Bill of Rights by proposing that the first ten Amendments, like the Constitution itself, be interpreted according to the original understanding of their ratifiers. Professor Bradley, though, narrows the scope of the exegetical inquiry to what he proposes is the only sound originalism—plain meaning, historically recovered. Professor Bradley argues that interpreting the Bill of Rights according to the text's plain meaning among persons politically active at the time of drafting avoids both the inflexibility and philosophical deficiencies of "snapshot" conservative originalism and the inebriating rhetoric of liberal recovery of highly abstract value judgments of the founders.*

The Bicentennial of the Bill of Rights is upon us, and I propose we all take a vow of sobriety. I am not talking about staying off the sauce. I am talking about foreswearing intoxicating rhetoric. The following "Litany of the Amended Constitution" by then Justice Brennan is a potent sample of this inebriant. In its "majestic generalities,"[1] "the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being."[2] It "is the lodestar of our aspirations."[3] It "is a sublime oration on the dignity of man . . . ."[4]

Brennan worshipped at a hallowed shrine. In 1878 William Gladstone uttered what Cornell historian Michael Kammen calls the most commonly quoted observation about the United States Constitution, ever. Gladstone, who was then a Member of Parliament, wrote that

> as the British Constitution is the most subtle organism which had proceeded from the womb and the long gestation of progressive history, so the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and

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1. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986).
2. *Id.*
3. *Id.*
4. *Id.* at 438.

purpose of man.[5]

Never mind that Gladstone may have cribbed a little here. Forty-five years earlier, Supreme Court Justice William Johnson said that the Constitution was "the most wonderful instrument ever drawn by the hand of man."[6] At least Gladstone did not say that the Constitution was found in a burning bush, or that it was delivered from heaven on a spirit-propelled juristic meteor.

Not all the effects of hosannas like these—and of symposia like this one—are stupefying. One good effect may be to (re?)kindle in us a desire to retrieve the historical context in which our forefathers worked their impressive, but well short of divine, wonders. What distinguishes their achievements, after all, is that they were *not* angels but people working in a fixed set of historical circumstances. As Publius taught, if they had been angels, no Constitution or Bill of Rights would have been necessary.[7] Those of us—especially judges—who shape the present meaning of the amended Constitution may then ground our efforts in the document itself, glossed by what its creators thought it meant. If the Bicentennial abets such "originalism," we are better off for it.

I. THERE ARE ORIGINALISMS, AND THEN THERE ARE ORIGINALISMS

A. Some Defective Originalisms

There is a difference, to continue the metaphor, between originalism drunk and originalism sober. Some originalisms are terminally inebriated. A Mississippi federal judge invalidated certain Federal Energy Regulatory Commission powers because there was "literally nothing" in the Commerce Clause to justify such oversight of Mississippi's power industry.[8] "These public utilities were actually unknown at the writing of the Constitution," declared the court.[9] But, the State of Mississippi also was "actually unknown" in 1787. Apparently, Congress may regulate nothing within Mississippi's borders. Of course, (inane) judicial opinions written on word processors also were "unknown at the writing of the Constitution." Do federal district court judges have no power in Mississippi? (Given this performance, we may hope so.)

In *Lynch v. Donnelly*,[10] the Supreme Court said that without secular figures like Donner and Blitzen, Pawtucket's traditional Christmas display—which included a nativity scene—would have offended the Establishment Clause. The reindeer neutered the religious significance of the

5. MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 162 (1986).
6. *Id.*
7. THE FEDERALIST No. 51, at 265 (James Madison) (Max Beloff ed., 1948).
8. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 752 (1982) (quoting unreported district court opinion).
9. *Id.* at 752-53.
10. 465 U.S. 668 (1984).

Incarnation. Fine, but what if the Angel Gabriel is added to the ensemble? Do we need some nutcracker soldiers or snowmen to neuter *him*? (I hope that sentence is not sacrilegious). The *Lynch* Court wondered whether the Framers had nativity scenes in their courthouses.[11] And if so, were theirs similar to Pawtucket's? If not, did the Framers have a closely analogous practice of, say, opening prayers for legislative sessions? The litany continues until we figure out whether the Framers actually did this *kind* of thing. If so, our analogous practice is constitutional.[12]

No wonder a Seventh Circuit panel faced with these speculations—figuring the number of angels on a pinhead seems more manageable—pleaded for a high court indulgence:

> There are so many variations that discussion would not illuminate—though the appearance of ever-finer lines in the cases, coupled with never-ending small variations in the displays of thousands of municipalities, leads us to hope that the Supreme Court will decide [the then pending 1989 cases] in a way that diminishes the role of architectural judgment in constitutional law.[13]

The Supreme Court turned a deaf ear. Soon afterwards it heard argument in a Pittsburgh case where a privately owned, erected, and maintained creche was displayed in a county building.[14] The county decorated the creche with poinsettias and evergreens.[15] Justice Scalia asked counsel the right question, at least the question dictated by *Lynch*: did the poinsettias do for Pittsburgh's creche what Blitzen did for Pawtucket's? Seriously. Did they have poinsettias in Bethlehem?[16]

No answer is recorded. It is not even clear which way a positive response would have cut. A bare majority (not including Justice Scalia) affirmed the *Lynch* analysis in striking down the Pittsburgh creche, but upheld a nearby Hanukkah display.[17]

Lynch searched for what I call "ancient analogues."[18] This quest is an example of historical grounding in quicksand. Unfortunately, it is not limited to church-state issues. In the seminal search and seizure case of *Katz v. United States*,[19] Justice Black, in dissent, suggested that modern electronic surveillance (such as the bugging which captured Katz placing a bet) was analogous to eavesdropping.[20] The Framers of the Fourth Amendment, according to Black, purposely left eavesdropping outside the Amendment; therefore, the Fourth Amendment was agnostic on the

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11. *See id.* at 673-78.
12. *See id.* at 685-86.
13. Mather v. Village of Mundelein, 864 F.2d 1291, 1293 (7th Cir. 1989).
14. County of Allegheny v. ACLU, 492 U.S. 573 (1989).
15. *Id.* at 580.
16. See 57 U.S.L.W. 3563, 3564 (Feb. 28, 1989), for a summary of the oral argument.
17. *Allegheny*, 492 U.S. at 579.
18. *See* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 138-42 (1987).
19. 389 U.S. 347 (1967).
20. *Id.* at 366 (Black, J., dissenting).

subject.[21] The Court has deployed this technique in its burgeoning "automobile exception" corpus.[22] Starting from the historically verified practice of warrantless searches of wagons, the cases have likened cars to wagons,[23] and then mobile homes to cars, rather than to houses,[24] which are (again due to historical practices) relatively immune from such police invasions.[25] This picture is completed by the Justices' reliance upon the common law of search and seizure extant in 1789 as occasionally dispositive of modern problems, and almost always relevant to the decision.[26]

The difficulty in all these examples of defective originalism is that constitutional meaning is sought in a snapshot of the world as it was in about 1790 (and sometimes considerably earlier, like 4 B.C., when Jesus was born). Justice Brennan depicted this approach well enough in his Georgetown speech: "In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them."[27] Brennan had no difficulty dismantling this position.

The Constitution is not a collage of photographs of early national America, much less of ancient Palestine. The Constitution is comprised of principles whose practical import changes with time—as America changes—even as the principles remain the same. Indeed, many constitutional principles, historically recovered, are intrinsically dynamic.[28] Others depend for their concrete application upon ever-changing contingent circumstances.[29] Many others are not terms of limitation at all.[30]

Someone dismayed by the drift of contemporary constitutional law—and there is enough unbecoming judicial behavior on both sides of the ideological divide to make us nostalgic for happier times—is tempted to relive the good old days. The common sense that giants walked the earth in 1787, and that generations of pygmies unfortunately have succeeded them, is quite appealing, as is Brennanesque Bicentennialism. Any reasonable person might grasp at the chance to refer thorny questions to our oversized forebears. But the giants' footprints, so to speak, are the clues to whatever wisdom the giants bequeathed. The clues are the language of the Constitution itself.

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21. *Id.*

22. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982); Carroll v. United States, 267 U.S. 132 (1925).

23. *Carroll*, 267 U.S. at 152-53.

24. California v. Carney, 471 U.S. 386 (1985).

25. *See* Steagald v. United States, 451 U.S. 204, 219 (1981).

26. *See, e.g.*, Payton v. New York, 445 U.S. 573, 591 (1976); United States v. Watson, 423 U.S. 411, 420 (1976).

27. Brennan, *supra* note 1, at 435.

28. *See infra* notes 57-71 and accompanying text.

29. *See infra* notes 61-67 and accompanying text.

30. *See infra* notes 115-16, 154 and accompanying text.

B. Some Defective Criticisms of Defective Originalisms

Drunken originalisms are not bad simply because of their eagerness to ground judicial lawmaking in historical learning. Rather, drunken originalisms just do not know *what* historical information should be incorporated into constitutional analysis. The situation will not right itself so long as critics lodge the wrong criticisms. In his Georgetown speech Justice Brennan derided "original intent" analysis as a thin veil for political conservatism.[31] Phillip Kurland seconded Brennan: "The phrase 'original meaning' has simply replaced 'strict construction' as the rallying cry for those who want a revamping of constitutional law to bring it into closer conformity to their own political philosophy."[32] The comparison to "strict construction" is not random, and is likely to conjure Agnewesque "law and order" hostility to civil rights and the rights of the criminally accused.

These criticisms are misguided. The critics fail to see that historical fidelity is not a monopoly of political conservatives, and that it may yield politically liberal results. One example Justice Brennan must recall is the Sixth Amendment right to proceed pro se which he approved in *Faretta v. California*.[33] The opinion, which he joined, wears its history like a straitjacket. Another example is a bloated (and generally unhelpful) church-state corpus which is more in debt to historical recovery than any other area of constitutional law.[34] (In a decision that engendered hysterical criticism, the Court recently squared Free Exercise with its plain meaning, historically recovered, after a twenty-seven-year detour guided by the political morality of liberal individualism.[35])

In other civil liberties cases the entire Court has taken an originalist approach to constitutional construction. One example is *McDonald v. Smith*,[36] a 1985 decision, where the Court held that false and damaging statements made to government officials do not enjoy an absolute privilege under the Petition Clause. Every member of the Supreme Court found current constitutional law in (as the Court phrased it) the "nature of the right . . . as it existed at the time the First Amendment was adopted"[37] and in how (according to the concurrence) the Framers "understood" that right.[38] Justice Brennan, writing separately for himself and for Justices Marshall and Blackmun, also rejected McDonald's claim to an absolute privilege for statements within the Clause's protection. There *was* evidence for this interpretation, but note the criteria and the

31. *See* Brennan, *supra* note 1, at 435-36.
32. Phillip B. Kurland, *History and the Constitution: All or Nothing at All?*, 75 ILL. B.J. 262 (1987).
33. 422 U.S. 806 (1975).
34. *See* BRADLEY, *supra* note 18, at 1-18.
35. *See* Employment Div. v. Smith, 490 U.S. 872 (1990).
36. 472 U.S. 479 (1985).
37. *Id.* at 483.
38. *Id.* at 489-90 (Brennan, J., concurring).

tiebreaker evident in Justice Brennan's account. Mr. McDonald, Justice Brennan wrote,

> contends that petitioning historically was accorded an absolute immunity and that the Framers included the Petition Clause . . . on this understanding. I agree with the Court that the evidence concerning 17th and 18th century British and colonial practice reveals, at most, "conflicting views of the privilege afforded expressions in petitions to government officials" and does not persuasively demonstrate the Framers' intent to accord absolute immunity to petitioning.[39]

More recently, the entire Court adopted an originalist methodology in deciding whether whopping punitive damage awards violated the Excessive Fines Clause.[40]

Illiberal results can follow the rejection of antiquarian practices in constitutional criminal procedure—an area usually thought desperately in need of judicial updating.[41] In *Warden v. Hayden*,[42] the Warren Court abandoned the "mere evidence" rule, which had stymied police officers searching for neither contraband nor the fruits or instrumentalities of crime. "Mere evidence" could not be obtained by intrusive search methods (in contrast to ordinary subpoena processes) due to the historically embedded, common-law preference for individual privacy in such situations.[43] Prompted by a more philosophically "avant-garde" approach to search and seizure—speaking systematically of privacy and authority instead of mundane historical practice—the Court greatly expanded police power.

Likewise, focusing on the one historical evil undeniably addressed by the Fourth Amendment—the abusive and now legendary "general warrant"—would probably invalidate the wiretap statute[44] as well as so-called "warrants" authorizing administrative searches.[45] (Who dares put the wiretap question to our Mississippi district judge? He might readily conclude that, because the Framers did not have telephones, police have no more authority to wiretap than judges have constitutional authority to stop them!)

Note well that the present Court's most avid originalist has championed the criminal defendant's right to confront, face-to-face, his accusers. Writing for the Court in *Coy v. Iowa*,[46] Justice Scalia relied upon "plain meaning" to protect individual rights against a collective interest in efficient prosecution. Add to this the respectable (though I suspect incorrect) opinion which holds that revivification through historical re-

39. *Id.* at 488.
40. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
41. *See infra* notes 131-68 and accompanying text.
42. 387 U.S. 294 (1967).
43. *Id.* at 301-10.
44. 18 U.S.C. §§ 2510-2521 (1988).
45. Camara v. Municipal Court, 387 U.S. 523 (1967).
46. 487 U.S. 1012.

covery of dormant provisions—the Ninth Amendment[47] and the Fourteenth Amendment's Privileges and Immunities Clause[48] are examples—and one might legitimate all sorts of liberal judicial activism. There is nothing inherently "conservative" about originalism.

C. Some Sound Criticisms of Defective Originalisms

The ideological critiques of Brennan and others are not only wrong, they are gratuitous. There are excellent reasons for rejecting most of the historically grounded methodologies now afoot. George Wright[49] and Jefferson Powell[50] have provided persuasive criticisms. I already have mentioned some of my own about "original intent," and herewith some more.

The term "original intent" lacks a helpful definition because it has too many of them. I have described some, and there are others with little more theoretical validity than the "snapshot" approach.[51] Common to all the various meanings is deflection of investigation from the words themselves to the intentions, interpretations, and designs of sundry individuals, collectively the "Framers" or the "founding fathers." Of profitably learning from this deflection, Forrest McDonald, who is no fan of judicial activism, observes:

> It . . . is meaningless to say that the Framers intended this or that the Framers intended that: their positions were diverse and, in many particulars, incompatible. Some had firm, well-rounded plans, some had strong convictions on only a few points, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromise; others were not.[52]

The term "original intent" suggests a distinction between the objective meaning of the words themselves and the users' private understanding of them—their "intent"—and implies the interpretive superiority of the latter. This interpretation is wrong. The language of the Constitution is the proper focus. "Original intent" implies too great a temporal

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

48. The Fourteenth Amendment, in part, states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. amend. XIV, § 1.

49. George Wright, *On a General Theory of Interpretation: The Betti-Gadamer Dispute in Legal Hermeneutics*, 32 AM. J. JURIS. 191, 233-34 (1987).

50. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); *see also* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

51. Asking not what the Framers *did* about this (or an analogous) problem, but what they *would* do about ours, is another example.

52. FORREST MCDONALD, NOVUS ORDO SECLORUM 224 (1985).

distance between the proffered "original" (that is, old) meaning and the present situation whose governance is under investigation. The phrasing thereby prejudices discussion by forcing the question upon us, What is the relevance or utility or applicability of the "old" meaning to modern times? before analysis begins. The propriety of that question is a matter for critical scrutiny.

II. A Sound Originalism and Some Reasons for It

For a host of reasons, I share the felt need to articulate a method of constitutional law which, in some decisive way, constrains judicial choice. (I leave aside how to make judges observe it; for now I shall work on a palatable account that reasonable people would agree should be observed.) I also share the insight of "original intenders" that the most important level of constitutional meaning—for me, that of principle sufficiently intelligible and determinate to guide contemporary decision—is to be found in the ratification era of 1787 to 1790. The tools of historical retrieval are thus vital implements. But the distortive properties previously detailed bar the phrase "original intent" from this discussion of historically grounded constitutional meaning. Its replacement: "plain meaning, historically recovered." "Plain meaning" refers to the standard or prevailing definition of terms, drawn from their customary usage among those active in the relevant field of discourse—here, the field of political and legal affairs. "Historically recovered" strives to ascertain the meaning of terms through their common usage by those who made them constitutionally operative—that is, the politically active Americans of 1787 to 1791.

Why must we seek the "plain meaning" of terms *when they were made part of the Constitution*? Because an "unvarnished" or an ahistorical plain meaning is not quite enough. If hermeneutical theory has established anything, it is that meaning *is* contextual. Human historicity permits no other position. We can and must talk about meaning in context. Most importantly, "unvarnished plain meaning" is, at many critical points, no ground at all for interpretation. Without historical gloss, it is hard to see that untethered philosophizing doing business as "equal protection" or "due process" is extraconstitutional, and impossible to see that neither the Ninth Amendment nor the Privileges and Immunities Clause legitimates such philosophizing.

The meaning of any text (including the Constitution) is relative to its context. (Maybe Gladstone thought otherwise, but originalists do not.) But "it does not follow that the context is unknown or, if it is unknown, that it remains undiscoverable."[53] It also is true that contexts change, and that some statements whose meaning and adequacy in their own context are obvious, cease to be adequate in another context. It

53. Bernard Lonergan, Doctrinal Pluralism 11 (1971).

remains that the text had a plain meaning in its original context, that sound historical and exegetical procedures can reconstitute the original context with adequate success and thus arrive at an understanding of the original meaning.[54]

The escape hatch of nonoriginalists has been to deny decipherability, at least where significant issues (and Clauses) are in play. Hard as we might try, we cannot recover determinate principles. The originalists' response is supplied by Professor George Wright. Such skepticism

> precipitates a line of questions whose answers can only be preposterous and perhaps dangerous: when did it become impossible to interpret the Constitution; why did this happen; could it have been avoided; what are the new principles which serve the functions reserved for the Constitution; does some translation language operate between this new set of constitutional principles and the Constitution itself; who knows it; how does one learn it.[55]

The normative significance of originalism is better grasped once we recognize the inevitability of at least *some* plain meaning, historically recovered. Some constitutional passages—those regarding "fugitive slaves"[56] and Confederation-era debts[57]—possess *only* historical meaning. That is, the past is the *only* context in which they have meaning.

Now we are liable to charges of invincible naivete. One charge, Brennan's, already has been fended off. He says that originalists parade a political neutrality, but assiduously follow their own ideological leanings, not the Framers' direction.[58] The response is that some originalists may be cynics, but probably no more than normal for persons in their line of work—law. We have seen that there is no *necessary* connection between originalism and conservatism. Practically, Brennan's charge is much overstated.

A deeper charge of naivete is levelled by, among others, Critical Legal Students. Because all law—if not all everything—is politics, originalism's political "neutrality" is bogus. This charge, if viewed as a historical behavioral claim, is (like Brennan's) well overstated. Besides, we may acknowledge that judges sometimes fail in their duty to give impartial decisions in accord with relevant legal principles. But nothing about the proper course for judges follows from that observation, least of all that there is no such thing as law.

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54. *Id.*

55. Wright, *supra* note 49, at 233.

56. No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

57. "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." U.S. CONST. art. VI, cl. 1.

58. *See* Brennan, *supra* note 1, at 435-36.

Where radical critiques of law do not thus illicitly deduce an "ought" (what judges *should* do) from an "is" (some judges behave thus), they usually posit a simple denial of legal reasoning. That is, radicals deny that legal reasons are, should be, or can be reasons for judicial action. This charge should be freely denied where it is freely asserted. Where it is asserted more studiously, originalists should refer their accusers to John Finnis's trenchant critique of Roberto Unger's work.[59]

A charge of still deeper naivete awaits us. There is no superneutral Archimedean point of judgment above or beyond human affairs. Therefore, no "impartiality" or "neutrality" exists in the requisite sense, the sense (critics say) that originalists propose. Originalists cannot avoid taking sides on contemporary political issues. So we are told. This "charge" is quite accurate, but no originalist should resist it. Originalist constitutional law is not and does not aspire to be neutral in political effect. It resolves disputes in favor of one litigant and against another, in favor of one supposed constitutional construction and against another. It does so based upon an authoritative enactment—the Constitution.

III. Some Formidable but Misguided Criticisms of Sound Originalism

Are we doomed to an archaic constitutional law? The answer is a resolute No! The straw man overdue for incineration here is the notorious "dead hand of the past," as in "If-we-worry-what-the-Framers-said-or-did-we-would-be-ruled-by-the . . . ." Terrance Sandalow's formulation typifies the genre.[60] Judicial improvisation is necessary "if the evolving needs of the nation are to be served."[61] The amending process (which uninitiates might think is the requisite manner of change) "simply will not sustain the entire burden of adaptation that must be borne if the Constitution is to remain a vital instrument of government."[62] Some people, especially students, think exclamations like, But this is 1991! or The Framers owned slaves! are enough to dispatch further talk of historically grounded constitutional law.

I believe it impossible to overstate the impact upon constitutional law of this argument. Its currency, however, cannot overcome its subsistence on a simple intellectual trick. The "dead hand" argument erroneously presumes that limiting courts to enforcement of traditional norms—and thus denying judges an opportunity to play Platonic Guardians—results in some kind of democracy of the dead. It does not. Rather, cabining judicial imagination begets democracy for the living. In practice, confining judges to constitutional text results in freedom for

59. J.M. Finnis, *On "The Critical Legal Studies Movement,"* 30 AM. J. JURIS. 21 (1985).
60. Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).
61. *Id.* at 1046.
62. *Id.*

"We, the people" to actually govern ourselves without judicial aggressions rooted in better ideals of how we should order our common life.

Exhibiting this error to public view probably will have little impact. I suspect its animating impulse is rooted precisely in a preanalytical commitment to the present mode and amount of judicial intervention in political life. Sandalow may really be saying only that we cannot carry on government by judiciary unless we make all methodological proposals pass a litmus test, and the test is whether the proposal validates government by judiciary. Well, if so, the straw man is no argument at all, but a sermon preached to the choir of converted "judicial activists."

Besides the amendment process, the constitutional text itself also is flexible enough to encompass new circumstances. Congress is empowered not to "buy muskets" but to "raise an army"; it can regulate "commerce" not just "stagecoaches."[63] The topsy-turvy Commerce Clause jurisprudence exemplifies this potential for change even when constitutional law respects the Constitution. Ever since *Gibbons v. Ogden*,[64] the doctrine has been the same: Congress may regulate what "affects" interstate commerce, along with that commerce itself. Once that inquiry is seen as a factual one (a task not fully accomplished until the New Deal),[65] the Constitution is not made otiose by the rush of commercial progress. Congressional power expands while the Constitution remains the same.

A cognate example of how the pace of history may reshape the regime without necessitating constitutional "updating" involves the Executive branch, particularly the office of the President. From the outset it has been clear that the President occupies a special, predominant role in foreign affairs and in military command.[66] But Congress's prerogative to declare war was and is consistent with presidential authority to repel sudden attacks. Those principles may have then translated into a "weak" executive, but not now. *Why* and *how* have solely to do with the accents of a modern, interdependent, fast-moving international arena.

The First Amendment Nonestablishment Clause further exemplifies this point. Contrary to the prevailing judicial view, its plain meaning, historically recovered, is that the federal government may not deliberately discriminate among religious sects.[67] But what was *sect-neutral* in the wholly Christian America of 1790—like the Lord's Prayer—is *sect-preferential* in today's more diverse society. Public school prayer may

63. *See* U.S. CONST. art. 1, § 8, cl. 12; *id.* cl. 3.

64. 22 U.S. (9 Wheat.) 1 (1824).

65. *See generally* GERALD GUNTHER, CONSTITUTIONAL LAW 99-191 (11th ed. 1985).

66. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ." U.S. CONST. art. II, § 2, cl. 1. "He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ." *Id.* cl. 2.

67. *See* BRADLEY, *supra* note 18 *passim*.

have been constitutional in 1791—and so a snapshot would reveal it—it is not constitutional now. Thus, the "snapshot" method is wrong.

Another example of dynamic originalism is the heated originalism debate between Justices Scalia and Brennan in *Burnham v. Superior Court*.[68] Despite the deep ideological differences between them, they agreed that the state's assertion of personal jurisdiction depended for its constitutionality upon "traditional notions of fair play and substantial justice."[69] This principle joins constitutional law to some evolving community consensus about what is right. "Cruel and unusual punishment"[70] also might exemplify such an inquiry.

A final example involves the Sixth Amendment. It may be posited that the Constitution somewhere (in either the Sixth Amendment or the Due Process Clauses) guarantees a "fair trial" to criminal defendants, *and* that the Framers recognized no right to court-appointed counsel.[71] Constitutional law in this century has struggled with the proper role of defendants' attorneys in "fair trials."[72] But constitutional renvoi is not necessary now to detect a right to court-appointed counsel. The nature of criminal trials has changed sufficiently since 1789, in ways specific and dramatic,[73] to say both that counsel was not essential to a "fair trial" in 1749 but that it presently is. Furthermore, nothing in a sound account of originalism rules out, in principle, what John Ely suggests as the original understanding of the Privileges and Immunities Clauses: a delegation of authority to future constitutional decision operates to fill in constitutional meaning.[74]

IV. A FORMIDABLE BUT MISTAKEN CRITICISM OF SOUND ORIGINALISM

Perhaps the most common legal theoretical criticism of originalists is that they are positivists. This claim is made from all over the political spectrum. John Ely featured it on the first page of *Democracy and Distrust*.[75] Hadley Arkes, in *Beyond the Constitution*, repeats the charge.[76] Arkes links it to an underlying espistemological skepticism about reason's capacity to illumine objective moral and political norms.[77] Conservatives like Judge Bork and Chief Justice Rehnquist, Arkes says,

68. 110 S. Ct. 2105 (1990).
69. *Cf. id.* at 2110 (Scalia, J.); *id.* at 2120 (Brennan, J., concurring in the judgment).
70. *See* U.S. CONST. amend. VIII.
71. *See generally* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).
72. *See* Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainwright, 372 U.S. 335 (1963).
73. *See* Gerard V. Bradley, *Law Enforcement and the Separation of Powers*, 30 ARIZ. L. REV. 801 (1988).
74. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 38 (1980).
75. *Id.* at 1 n.*.
76. HADLEY ARKES, BEYOND THE CONSTITUTION 14-15 (1990).
77. *Id.* at 15-16.

exhibit their skepticism by a fetishistic reliance on legal "enactment," or, the rules laid down by political authorities (those who framed and ratified the Bill of Rights (1789 to 1791) and the Civil War Amendments (1865 to 1870)).[78] Conservatives' Clause-bound textualism seeks binding instruction from the past, and self-consciously brackets the independent claims of moral reasoning while doing so.[79]

Arkes' target is really the positivism of, for example, Max Weber: all norms, including legal norms, are created ("posited") by men.[80] "Normativity" issues from the authoritative law giver's will—a kind of legal voluntarism. For "positivism" so defined, enactment *is* everything. Michael McConnell recently described the positivism of Judge Bork and Chief Justice Rehnquist: the only basis for law is the will of the sovereign, "in our system, either the constitutional text or the acts of democratically elected officials."[81]

Some originalists may be positivists. Chief Justice Rehnquist is a prime example. I doubt that Judge Bork is, though sometimes he writes as if he is. I am sure Justice Scalia is not a positivist. And many academic originalists—myself included—are not only not positivists but are also natural law theorists. There is no particular empirical relation between originalists and positivists.

No necessary intellectual connection exists between the groups either. Some moral relativists are positivists, as Arkes asserts, but many positivists (H.L.A. Hart,[82] Neil MacCormick[83]) are not moral relativists. The rhetorical advantage of asserting otherwise is easy to see. As portrayed by McConnell, for instance, positivists appear opposed or indifferent to human rights *not* captured in the letter of the law. At worst, they are Hobbesian authoritarians. But McConnell contemplates a crude nineteenth-century British positivism—the command or will theory of law—which no sophisticated twentieth-century positivist holds.[84] A fuller refutation of the positivist accusation is not difficult to develop. On this occasion, it is enough to simply say "it ain't so": nothing in a sound account of originalism implies that law, including constitutional law, is beyond normative evaluation, or denies that there are natural or inalienable rights, some of them secured in the Bill of Rights.

It must nevertheless be conceded that "originalism's" defenders have proved an easy target for the philosophically sophisticated. Judge Bork, for instance, is palpably impatient with academic theorists in *The Tempting of America*.[85] To confuse matters a bit more, Judge Bork there

78. *Id.*
79. *See id.*
80. *See* ANTHONY T. KRONMAN, MAX WEBER 55 (1983).
81. Michael W. McConnell, *Trashing Natural Law*, N.Y. TIMES, Aug. 16, 1991, at A23.
82. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (1961).
83. *See, e.g.*, NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).
84. *See* McConnell, *supra* note 81, at A23.
85. ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

cites McConnell as an able originalist.[86] I submit that, despite the more formidable apologies for originalism by Christopher Wolfe,[87] Richard Kay,[88] and Earl Maltz,[89] the defense of originalism which can stand up to hostile philosophical scrutiny is not yet written.

A full-orbed defense would place little weight upon the two most common buttresses of originalism: the antidemocratic or countermajoritarian quality of judicial review, and the (related) distinction between "law" and politics (or "reason" and "will"), corresponding to the division of labor between courts and legislature. As Alexander Bickel wrote three decades ago, "[t]he root difficulty is that judicial review is a countermajoritarian force in our system."[90] Judge Bork follows his mentor here. In *Tempting* he wrote that the "central problem for constitutional courts is the resolution of the 'Madisonian dilemma,'" which opposes two basic principles: self-government through majority rule and limits upon majority rule in favor of minorities and individuals.[91] "The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty."[92] Consequently, "[w]e have placed the function of defining the otherwise irreconcilable principles of majority power and minority freedom in a nonpolitical institution, the federal judiciary, and thus, ultimately in the Supreme Court of the United States."[93]

Because Judge Bork is the most prominent contemporary originalist, it is important to note that his "originalism," such as it is, *follows* from this starting point. His law/politics distinction, inseparable from his originalism, does too. It is important to point out, then, that Judge Bork makes no attempt—besides the misleading attribution to Madison—to ground his originalism in either a broad philosophical account of practical reasoning or in the historical materials. This omission owes, in my opinion, to Judge Bork's fundamental commitment to "judicial restraint," defined as moderate opposition to "liberal activism." It is not, at root, originalistic at all. We therefore should not be surprised to

86. *Id.* at 223-24.

87. *See, e.g.*, CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (1986); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 213-30 (Eugene W. Hickok, Jr. ed., 1991) [hereinafter Wolfe, *Original Meaning*].

88. *See, e.g.*, Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57 (1987).

89. *See, e.g.*, Earl Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987); Earl Maltz, *Foreword: The Appeal of Originalism*, 25 UTAH L. REV. 773 (1987); Earl Maltz, *Some New Thoughts on an Old Problem: The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811 (1983).

90. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1961).

91. BORK, *supra* note 85, at 139.

92. *Id.*

93. *Id.*

discover that in *Tempting* he does very little history at all.[94]

V. ORIGINALISM IN ACTION

This is not the occasion for more than the foregoing sketch of originalism's defense works. This is the occasion to outline the visage of plain meaning, historically recovered, to help establish its plausibility. Some basic distinctions may help to accomplish the task. In doing historically grounded constitutional law, we must not give in to the lure of certainty. We must resist the temptation to substitute what we certainly do know for what it is that we need to find out. We are sure, for example, that in 1802 Jefferson opined that the First Amendment erected a "wall of separation" between church and state.[95] Jefferson's interpretation was not the plain meaning of the Amendment, but attempts to demonstrate that inevitably fall short of the certainty acquired through, for instance, expert identification of Jefferson's handwriting. Sophisticated historical recovery also can reconstruct the common law of search and seizure as it was in 1789. Distinguishing reasonable from unreasonable searches is tricky business in the high-tech, fast-moving world of modern crime and punishment. But, it surely requires a lot of explanation to take a musty body of judge-made doctrines, entirely subordinate to legislative designs when they were conceived two centuries ago, and proclaim them today's "supreme law of the land."[96]

It helps to recall that *some* constitutional law is, by universal acclaim, just plain meaning. Provisions like the age requirements for presidential[97] and congressional[98] service may be understood without resort to historical information, but they are not "contextless." We are governed by many provisions which require only English literacy to understand. (For these provisions, "historical recovery" adds little to "plain meaning.") The electoral college for presidential election is a good example,[99] as well as why we shall never have the opportunity to vote John Sununu into the Oval Office. He is well over thirty-five, but having been neither born in the United States (in Cuba, as a matter of fact) nor naturalized at the time of the Constitution's adoption in 1787, he is clearly ineligible.[100]

Three more demonstrations of the plausibility of plain meaning, historically recovered, follow. The paramount issue facing the Philadelphia Framers unquestionably was state representation in the national govern-

94. *See generally* Gerard V. Bradley, *Slaying the Dragon of Politics with the Sword of Law: Bork's Tempting of America*, 1990 U. ILL. L. REV. 243.

95. Reynolds v. United States, 98 U.S. 145, 164 (1878).

96. *See* cases cited *supra* note 26.

97. U.S. CONST. art. II, § 1, cl. 5.

98. *Id.* art. I, § 2, cl. 2; *id.* § 3, cl. 3.

99. *Id.* art. II, § 1, cls. 2-3.

100. *Id.* cl. 5.

ment.[101] Upon this issue their endeavor almost foundered. But the political difficulty, endless argument, and conflicting theories and intentions of the delegates on the topic do not muddy the obvious meaning of the constitutional text which contains the resolution of those disputes. We *know* how many senators each state gets and how to apportion representatives.[102]

Federalism was the paramount issue in judge-made constitutional law until the twentieth century.[103] That opinions about it varied intensely understates the passion of political debate during that time. Yet, as political theorist Christopher Wolfe observes:

> While there was certainly a great deal of disagreement about very important questions of constitutional interpretation, especially federalism and slavery, the most striking fact [the forest that *should* be lost for the trees] is that there was general agreement on the question of *how* to go about interpreting the Constitution what the rules of interpretation were.[104]

That agreement was, as I understand Wolfe's conclusions, just about what I mean by "plain meaning, historically recovered." For example, in the debate over the national bank, Hamilton argued (with respect to a proposal at the Constitutional Convention) that

> whatever may have been the nature of the proposition, or the reasons for rejecting it, it includes nothing in respect to the real merits of the question . . . . [W]hatever may have been the intention of the framers of the Constitution or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction.[105]

Wolfe mentioned my third demonstration. Slavery was the decisive political issue of the nineteenth century, perhaps in all American history.[106] Yet its constitutional handling (by the Fugitive Slave[107] and Three-fifths Clauses[108]) is easily understood. That does not mean that the Constitution is morally upright, just that its meaning is apparent.

Ascertaining meaning through historical usage is admittedly a challenging task. But the effort cannot be as difficult as reinventing the wheel

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101. In other words, on what basis states should be represented—and thus share power—in the legislative branch.

102. U.S. CONST. art. I, § 2, cl. 3; *id.* § 3, cl. 1.

103. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 1789-1888 (1985).

104. CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY 12 (1991).

105. 3 THE WORKS OF ALEXANDER HAMILTON 463 (Henry C. Lodge ed., 1903).

106. I do not cite authority for this proposition. I leave it to the reader to figure the importance of slavery as a cause of our Civil War, and of the enduring problem of racism in our society.

107. For the text of this Clause, see *supra* note 56.

108. The Constitution provides:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amends. XIV, § 2, XVI.

of political theory—which is what concocting a full-orbed theory of "equality" amounts to. The theoretically adept—especially among academics—may find this vision of constitutional law unedifying, but the Supreme Court in *Ex parte Siebold* [109] stated the alpha point in terms that I cannot surpass:

> We may mystify any thing. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.[110]

Siebold is over one hundred years old, but its instruction hardly could be less current; its holding played a central role in the dispute about the constitutional validity of an "independent counsel."[111] But its theoretical insight overshadows the practical light it casts on present controversies. The *Siebold* Court faced a familiar dilemma: Is a practice seemingly warranted by the plain meaning of the text constitutional, even if the practice seems at odds with the theory or system of the Constitution? The question there was whether the Appointments Clause[112] validated judicial selection of election inspectors when that seemingly "executive" task,[113] according to separation of powers theory, belonged to the President?[114] *Siebold* said yes, and properly so. I have argued elsewhere that the Constitution does not create a system of separated powers.[115] *Siebold* correctly put "plain meaning" at the apex of its methodology. That meaning was undeniable, and the debate ended. Other sources of constitutional meaning—structure, governmental practice, and precedent—play an important role in interpretation and *can* be decisive, but *not* at the expense of plain meaning.[116]

A few more basic distinctions may dissipate lingering resistance to plain meaning, historically recovered. One example is the distinction between ignorance on the reader's part and "vagueness" or "ambiguity" in the material being read. How many readers know that the term "Letters

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109. 100 U.S. 371 (1879).

110. *Id.* at 393.

111. *See* Morrison v. Olson, 487 U.S. 654, 673-77 (1988).

112. Article II states:

> [A]nd [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

113. The task appeared "executive," for instance, because the marshalls noticeably resembled other law *enforcement* agents, they assuredly did not *make* law, and otherwise hardly resembled judicial functionaries.

114. *Siebold*, 100 U.S. at 397-98.

115. *See* Bradley, *supra* note 73.

116. *See* WOLFE, *supra* note 104, at 11.

of Marque and Reprisal" appears in the Constitution?[117] How many know what it means? If you do not, does it follow that the term is either "vague" or "ambiguous" or "open-ended." (If you said yes, you are probably qualified to be either a judge or a professor of constitutional law.) It seems that every judicial and scholarly critique of theories like mine includes charges that the Constitution is characterized by "majestic" but stubbornly "vague," "ambiguous," and "open-ended" Clauses. Judges cast themselves as reluctant volunteers for the dirty but necessary task of telling us how we shall be governed. Yet most of the vague Clauses—for example, Free Exercise[118] and Due Process[119]—yield manageable, discreet meanings upon historical investigation. These Clauses are marginally more ambiguous than "Letters of Marque and Reprisal," which refers, by the way, to government-authorized privateering.

Much of the Constitution no longer speaks to us, and we might as well admit it. Originalists do. The initial twenty-year ban on congressional attempts to end the slave trade[120] was critical to the Framers, but is not to us. The Clause rendering Congress liable for the debts of its Confederation predecessor is moot.[121] The bulk of the Fourteenth Amendment, which tackled problems of Southern Reconstruction,[122] is similarly moot. When the plain meaning of a constitutional term is recovered or grasped, and that meaning turns out to be antiquated, then the Constitution is to that extent antiquated.

Traditional metaphysics distinguished the "antique" from the "primitive." That which is "primitive" is the substance of that which is now existing. Antiques are simply outmoded objects of curiosity, just as the fashions of one era are to another. Antiques are irrelevant, but provisions which survive in substance are not. A second sort of "irrelevancy" consists of those few provisions with no ascertainable meaning, past or present. The provisions were never intended to, nor have they been regarded as, stating operative legal norms. The Preamble[123] is one example of mere exhortatory or precatory language; the first Clause of the Second Amendment[124] is another. The Tenth Amendment offers a third

117. As Article I states, "The Congress shall have Power . . . To . . . grant Letters of Marque and Reprisal . . . ." U.S. CONST. art. I, § 8; *see also id.* § 10, cl. 1 ("No State shall . . . grant Letters of Marque and Reprisal . . . .").

118. *See* Gerard V. Bradley, *Beguiled: Free Exercise Conduct Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1992).

119. *See* Wolfe, *Original Meaning*, *supra* note 87.

120. U.S. CONST. art. I, § 9, cl. 1.

121. *See supra* note 57.

122. *See* U.S. CONST. amend. XIV, §§ 2-4.

123. We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Id. pmbl.

124. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *Id.* amend. II; *see also id.* amend. III ("No

example.[125]

Another caveat requires us to label certain outcomes—*Dred Scott*[126] is one—as simple mistakes. Judicial attempts to draw a federalism line—abandoned (for now) by *Garcia*[127]—may be another mistake. Political passions may have obscured from some the quite legitimate view that judicial enforcement of federalism limitations on congressional power, as opposed to those limitations themselves, was ill-advised. But a mistake is not as bad as a defective methodology, and that mistakes can happen is not enough to brand the methodology defective.

As a final clarification, one cannot reasonably expect any methodology—even in constitutional law after it is conceded to be the interpretive exercise I think it is—invariably to yield a single correct answer. I hope by now to have suggested some reasons why those occasions may be few enough to render this method an attractive, usable one. Comes the question: what to do when two (or more) equally plausible alternatives present themselves? Many conclude that judges not only *may* but *must* choose between them, and do so legitimately upon subjective criteria. Another alternative arises in the context of a lawsuit. In lawsuits, only one side has the burden of persuasion or proof on any given question. Where equally plausible alternatives arrange themselves on either side of the case, the party with the burden simply fails. A variation on this theme carries a highly respectable pedigree. The Supreme Court has developed an intricate set of rules for calibrating the presumed validity of the governmental action challenged. Sometimes (in economic regulation, for instance) legislation is presumed valid;[128] at other times (where Bill of Rights freedoms are threatened) laws or their enforcement are presumed invalid.[129] These are essentially tiebreakers, analogous to allocating a burden of persuasion. At some point these presumptions may be so intertwined with the rule of law itself that distinguishing them from the fruits of methodological operations is hopeless. I merely note here that this proposal does not rule out, in principle, devices to yield answers to lawsuits, if not to all questions of constitutional meaning. And nothing here is inconsistent with a respect for precedent which permits that—at least on occasion—it is better that the law be settled than that it be right.[130]

Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

125. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend. X.

126. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

127. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

128. This result is precisely the effect of employing a "rational basis" test.

129. This result shows the effect of "heightened scrutiny," which requires that a law serve "compelling state interests" via the "least restrictive means available."

130. The best treatment of what has proved to be an almost intractable problem is Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

VI. THE FINAL TESTING GROUND OF ORIGINALISM

I propose criminal procedure as a litmus test of originalism's viability. Consider that the relevant constitutional provisions were put together between 1787 and 1791, nearly fifty years before the first modern police officers—Sir Robert Peel's metropolitan London police, "bobbies" after their founder—appeared. They formed about 100 years before the development of modern communications—technology that is the "Big Brother" specter so much in the foreground of current debates. Looking from the reverse angle, the Constitution and Bill of Rights drafters were crafting the skeleton of a phenomenon surely unknown to them and perhaps to history: a federal system in which the national government and states simultaneously would enforce laws directly upon individuals.

We Americans rightly distinguish ours from oppressive regimes, ours from societies dominated by the arbitrary exercise of power—from the Gulag. But what constitutionally accounts for that distinction is a matter of plain meaning, historically recovered. The prohibition on Bills of Attainder[131] assures that criminal legislation will be general, not group- or individual-specific. The Ex Post Facto Clause[132] assures that these general laws will operate prospectively. And a 175-year-old precedent[133] insures that it is the Legislature, operating generally and prospectively, that will write criminal laws, and neither the Executive nor the Judiciary. Further, due process requires the Legislature to prohibit with clarity,[134] so that a moral agent can know what her choices are. Different portions of the First Amendment—again through its plain meaning, historically recovered—protect against punishment for belief, opinion, and (with limited exceptions) speech.[135]

The original 1787 Constitution places one citizen buffer between the individual and the potentially predatory state—the trial jury;[136] and the Fifth Amendment another—the grand jury.[137] Certain specifics of a fair trial, including confrontation of adverse witnesses and compulsory process for one's own witnesses,[138] are substantially the same as they were two hundred years ago. Prolonged detention prior to the intervention of

131. U.S. CONST. art. I, § 10, cl. 1.

132. *Id.*

133. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

134. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

135. U.S. CONST. amend. I.

136. "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." *Id.* art. III, § 2, cl. 3.

137. The Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. amend. V.

138. The Sixth Amendment provides:

judge and jury is precluded by the speedy trial guarantee,[139] as are secret proceedings by the constitutionally required publicness of trials.[140]

Two other institutions constitutionally enshrined in 1787 serve to make these guarantees a reality. The writ of habeas corpus,[141] and not the basic criminal appeal (which is not constitutionally compelled), grants the aggrieved individual access to an institution, the independent judiciary,[142] whose chief purpose from the beginning has been to declare what the law is. Finally, the wild card in the process—the President's power to pardon—is still judicially interpreted through historical lenses.[143]

The grand design of a regime of liberty and fairness is present, and the substance of each remains about the same as in 1787. No claim is made, for instance, that the Framers' view of a speedy trial is the same as the modern view. In fact, delays were much greater then due to, among other things, the irregular schedule of federal court proceedings and difficulties of travel. The principle remains the same, even as its precise contours change with the times. A necessary reminder is that such a constraint upon judicial inventiveness at the level of principle is *all* one responsibly should seek and expect. It satisfies the desire for a constraining methodology, and anything more threatens a kind of constitutional fundamentalism. The earmark of the more familiar biblical fundamentalism is to ignore, or deny, the contextual and the culturally contingent elements in the text. God's will and a particular time-conditioned human expression of it differ. Constitutional fundamentalism fails to make a similar distinction and thus reproduces—in snapshot form—*both* principles implanted in the Constitution *and* the coincident applications of those principles in 1787.

Now, you are probably asking, how can I stage *Hamlet* without the Prince. Surely, no account of criminal procedure is complete without that infamous trio of cases: *Gideon*,[144] *Mapp*,[145] and *Miranda*.[146] Re-

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> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. amend. VI.

139. *Id.*

140. *Id.*

141. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.* art. I, § 9, cl. 2.

142. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." *Id.* art. III, § 1.

143. *See* Schick v. Reed, 419 U.S. 256 (1974) (looking at evolution from English common law of President's power to grant pardons and reprieves).

144. Gideon v. Wainwright, 372 U.S. 335 (1963).

145. Mapp v. Ohio, 367 U.S. 643 (1961).

146. Miranda v. Arizona, 384 U.S. 436 (1966).

spectively, these cases concern the guarantee of counsel for indigent defendants, the exclusionary rule (derivatively, search and seizure), and police interrogation. Many think these cases represent just about all there is to constitutional criminal procedure. As the preceding recitation shows, they do not.

I purposely have sketched the theory first and how it provides the outline of a system of individual liberty. Why? Because that is the only way to give the theory a chance of acceptance. Starting with *Miranda*, a case about which people have strong opinions, almost certainly would result in rejection of the theory by those unhappy with its treatment of that one case. Second, these *are* practically important cases, but not as important as both critics and supporters would make them. The face of modern policing would not change very much if these cases went away, just as these cases did not greatly change the face of modern policing when they were announced in the sixties. For example, the liberal (i.e., Brennan-Marshall) party line is that the exclusionary rule exists to make officers observe the Fourth Amendment.[147] But it is easy to see that the rule is not intended to accomplish very much along those lines. Anyone who seriously wanted to eliminate police misconduct would opt for other very simple and very effective means. For example, every cop who offended the rules would be docked a month's, or two months' pay. I guarantee that police illegality would all but vanish. Of course, effective law enforcement also would vanish. Very few officers would risk an arrest where such a high price for error was exacted. This "chilling effect" on law enforcement makes us settle for exclusion and not for more serious sanctions. We seem to forget that we neither expect nor want officers studiously to observe the law of search and seizure. The moral bombast in so many "good faith" exception cases is therefore disingenuous.

The social and cultural changes which made these cases possible ultimately would have caused the desired changes in police practices regardless of Supreme Court action. I cite, most especially, achievements in the struggle for racial equality (to some extent abetted by the judiciary). Increased minority representation on police forces leavens police racism and reduces unjustified harassment of African-Americans more than the exclusionary rule. The civil rights revolution has, among other things, produced urban African-American communities which will not silently tolerate abusive police practices. As it is, and coming as they did in the mid-to-late sixties, Warren Court opinions like these are too easily presumed to have wrought, rather than to have been caused by, coincident social changes. Finally, and most importantly, these three cases are fair challenges to judicial ingenuity, but they are not difficult in theory, and that is all I am talking about here. Besides, the holdings of *Mapp*, *Gideon*, and (with a caveat) *Miranda can* be squared with "plain meaning, historically recovered."

147. *See* United States v. Leon, 468 U.S. 897, 918-19 (1984).

Let us start with *Gideon*.[148] The Court held that a felony defendant must be afforded a lawyer regardless of his ability to pay; otherwise, there was no "assurance" of a fair trial.[149] Apparently, the rule in *Gideon* is prophylactic in nature, designed to "overprotect" against risks of an unfair trial. *Gideon* also purported to be a Sixth Amendment "right to counsel"[150] case. But it cannot be traced to that part of the Amendment. Historical recovery reveals that that part—"In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel"—meant only that *any* defendant who retained counsel could actually bring that lawyer into court.[151] (Tradition had it that defendants in treason trials, for example, had to appear alone.)[152] There is nothing about publicly appointed counsel in the Sixth Amendment.

That argument establishes only that *Gideon* was improperly decided on Sixth Amendment "right to counsel" grounds. But the guarantee of a *fair* state *trial* has long been a component of the Due Process Clause.[153] In the federal system, the Article III (or possibly Sixth Amendment) guarantee of jury trial implies a similar adversarial proceeding. It may be that the Framers did not think an attorney was necessary to a fair trial, at least in the great majority of cases. But, for a variety of reasons, the delicate balance of functions among judge, jury, prosecution, and defendant has changed.[154] Add to these changes in the nature of a jury trial the special considerations of *when* to articulate a prophylactic rule, and the (difficult) question presented in *Gideon* appears. At no point does plain meaning, historically recovered, have to be denied, overcome, or displaced. Curiously, the so-called conservative wing of the Court has been steadfast in approaching these problems from the fair trial/due process angle,[155] while Justices Brennan and Marshall joined Justice Stewart in an unconvincing originalist analysis in the *Faretta* pro se case.[156]

Miranda is much like *Gideon*. I would have left the Fifth Amendment privilege against compulsory self-incrimination where history places it: in the courtroom.[157] But for a long time before *Miranda*, the Due Process Clause handled Fifth Amendment voluntariness concerns.[158] The defects of the voluntariness test may or may not be remedied by the now infamous warnings. But those defects do *not* justify or

148. *Gideon*, 372 U.S. 335.

149. *Id.* at 344.

150. *Id.* at 339-40.

151. BEANEY, *supra* note 71, at 28-29.

152. *Id.*

153. So much is apparent from the pre-*Gideon* right to counsel cases, like Betts v. Brady, 316 U.S. 455 (1942).

154. *See* Bradley, *supra* note 73, at 871-74.

155. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 684-85 (1984); United States v. Cronic, 466 U.S. 648, 653-54 (1984).

156. Faretta v. California, 422 U.S. 806, 814-36 (1975).

157. *See* KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 422-28 (7th ed. 1990).

158. *See id.* at 438-41.

require *Miranda*'s plunge into the Fifth Amendment.[159]

The exclusionary rule grows out of respectable theoretical roots. The *Weeks* case[160] articulated a primitive version of the rule under the influence of the simple *Marbury* imperative to remedy police misconduct.[161] Later, another theoretically legitimate but perhaps empirically dubious rationale—deterrence—was added.[162] These *are* theoretically tenable justifications for the rule, though they do tend to evoke empirical considerations. Again, curiously, Justices Brennan and Marshall championed an originalist argument that the Fourth Amendment contains a "personal right" to exclusion.[163] This effort also is unconvincing.

What of the Fourth Amendment itself and the judicial regulation of police search and seizure? The Warrant Clause[164] holds up pretty well. Its terms include some very fact-intensive examples like "probable cause" which, being historically contingent, are properly rendered by succeeding generations of jurists. While the Court occasionally has bludgeoned the Warrant Clause,[165] it has done so not because the Clause's meaning is "vague" or "open-ended," but simply because a majority of Justices did not like it. It is quite evident that the relevant uncertainty has not been *what* the clause entails but *when* it applies. On that matter the Constitution is silent.

Can one "plainly" read the bare proscription of "unreasonable search and seizure" to yield the literally countless opinions and volumes of judicially crafted rules, sub-rules, and footnotes. No. At *this* point I discard not the theory of plain meaning, historically recovered, but those volumes of judicial opinions. As a body of common-law doctrines, they are theoretically legitimate. However, they do not belong in the Fourth Amendment. Historical recovery reveals that the Reasonableness Clause did not state operative limits on governmental power.[166] The ratifiers did not apprehend the right of the people specified by the Fourth Amendment to refer to an individual's general "right" to be governed by particular laws notwithstanding the community's evident desire and political

159. My caveat pertains to the distant history of the confessions problem. Until the twentieth century, voluntariness was an evidentiary matter unrelated to constitutional law. *See* JOHN H. WIGMORE, 3 WIGMORE ON EVIDENCE § 823 (3d ed. 1940). My tentative judgment is that "voluntariness" was properly received into the Fourteenth Amendment Due Process Clause, on the theory that a coerced confession, received into evidence, made a farce or mockery of the ensuing (and quite anticlimactic) trial. And due process does guarantee a real—not sham—trial to anyone facing deprivation of life, liberty, or property due to criminal prosecution.

160. Weeks v. United States, 232 U.S. 383 (1914).

161. *See* Gerard V. Bradley, *Present at the Creation? A Critical Guide to* Weeks v. United States *and Its Progeny*, 30 ST. LOUIS U. L.J. 1031, 1037-38 (1986).

162. *See id.* at 1096-1102.

163. United States v. Leon, 468 U.S. 897, 935 (1984) (Brennan, J., dissenting).

164. "[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

165. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).

166. *See* Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817 (1989).

authority to enact them. This is our interpretation. But the plain meaning, historically recovered is this: the *people's* right to govern search and seizure through laws of their choosing. That is the "right of the people," and individuals have no claim to be governed by particular laws, other than the ban on general warrants.

The result divorces practical governance of search and seizure from the first Clause of the Fourth Amendment. Although many parts of the problem are addressed elsewhere (arbitrary arrest by the Due Process Clause and habeas corpus, retention of illegally seized evidence by the Takings Clause), I think there is no other constitutional home for that specific problem. Most emphatically, this result does *not* mean that cops will be out of control, that they will begin random, house-to-house search patterns tomorrow, just for their amusement. Such suspicions are a good barometer of how far we have come on the way to identifying constitutional judicial superintendence with effective regulation of the police. The police will be under control largely because we want them to be. They are not some autonomous KGB-type secret force pursuing unknown, sinister objectives. Thus, another point comes into focus—one at odds with some very prominent opinions, including those of counsel to Michael Deaver and the recently liberated Oliver North.[167] Law enforcement is *entirely* subject to legislative direction. It is *not* an "executive function" in the specialized sense that its supervision is a presidential, not a congressional, prerogative.[168]

VII. CONCLUSION

At the root of nonoriginalist constitutionalism is the presumption that most of the Constitution, and virtually the entire Bill of Rights, is meaningful only at a very high level of abstraction. Justice Brennan seconds Justice Robert Jackson in saying: "[T]he burden of judicial interpretation is to translate 'the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century.' "[169]

I suspect that one observation explains most of the current malaise in constitutional law, a predicament in which academics pursue novel, fanciful, and crudely reductionist approaches to the neglect of "mere" doctrinal work. Judicial opinions claim the features of law review articles, especially their colorless prolixity, and have sunk to ideological posturing where they possess any intellectual integrity at all. The observation explains the malaise because, once the only undeniable "control" of the debate—the Constitution—is effectively neutered, no gener-

167. *See* Bradley, *supra* note 73, at 802-04.

168. That is the central thesis of Bradley, *supra* note 73.

169. Brennan, *supra* note 1, at 437 (quoting Board of Educ. v. Barnette, 319 U.S. 624, 639 (1942) (Jackson, J.)).

ally accepted criteria of validity are possible. The Constitution cannot be misinterpreted.

Originalism offers an escape from this predicament. The modern liberal individualism which engulfs us did not engulf the Framers or the Constitution they begat. I prescind from the debate presently among early American historians over when "liberalism" became the idiom of our public life. I believe (with the "republican" side of the debate) that "liberalism" did not win out until sometime in the mid-nineteenth century. The shortest route to proof of this assertion is to invite the reader to actually *read* the first ten Amendments. Other than procedural protections (particularly the Sixth Amendment) there is very little concerning *individual* liberty. There is much, however, relating to the "people's" right to collective self-governance.

I am quite sure that resistance to originalism owes much more to the influence of contemporary liberal philosophers (like Ronald Dworkin[170] and John Rawls[171]) than to any inquiry into our constitutional tradition. The constitutionalism of Justice Robert Jackson is again prototypical:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[172]

Constitutional law is here understood as judicial vindication of individual rights over and against legislative pursuit of collective interests. Only the nonpolitical forum of principle—courts—can resist the allure and depredations of our majoritarian politics whose wont is intolerance and conformity. But this construction is fundamentally at odds with the restricted nature of judicial review in antebellum America, and the constitutional tradition up to around World War II. That point is dispositive for originalists. But that argument does not finish the job. The liberal construction usually is offered as a philosophical critique of the constitutional tradition, and as a reason to *reject* originalism. If so, the construction is warranted, if at all, by critical reason. From the standpoint of critical reason, it has been subjected to cogent, even fatal, criticism by John Finnis[173] and Robert George.[174]

There is additional reason for guarded hope that constitutional law eventually will emerge in correct form. Historical recovery of some kind

170. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

171. JOHN RAWLS, A THEORY OF JUSTICE (1971).

172. *Barnette*, 319 U.S. at 638.

173. John Finnis, *On Reason and Authority in* Law's Empire, 6 LAW & PHIL. 357 (1987).

174. Robert P. George, *Individual Rights, Collective Interests, Public Law, and American Politics*, 8 LAW & PHIL. 245 (1989).

is essential to restoring the integrity of constitutional law. That recovery will yield a rich, diverse constitutional tradition. It promises a breakthrough in the methodological impasse, and simultaneously yields a communitarian corrective to liberal distortions. Therefore, it appeals to both cultural conservatives and some leftist critics of traditional constitutional law. Liberalism has lost its stranglehold on the intellectuals. But the generation reared on the judicial triumph in *Brown* [175] is graying, and probably will go to its grave singing the hosannas of liberal judicial activism. By the time that generation passes, its immediate descendants no longer will regard the Supreme Court as the paladin of liberty. *Roe* [176]—the next generation's *Brown*—also will be in its grave. Without these lightning rods, and with the problems of race, crime, and education appearing impervious to solutions, there likely will be little market for judicial messianism. By the time the present generation of law students takes over lawmaking in about twenty years, I suspect—and hope—that plain meaning, historically recovered, will be the central feature of constitutional law.

175. Brown v. Board of Educ., 347 U.S. 483 (1954).
176. Roe v. Wade, 410 U.S. 111 (1973).