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I. Introduction

Over the years, United States Supreme Court Justices have customarily said that the first principle of constitutional construction is to capture and honor the intent of the persons who framed and adopted the Constitution.[1] "The whole aim of construction, as applied to a provision of the Constitution," said Justice Sutherland in 1934, "is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it."[2] Every clause of the Constitution must be construed so as to "express the intention of its framers," said Justice Strong speaking for the Supreme Court in 1874.[3] Justice Goldberg, writing in 1964, said: "Our sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purposes of the Framers."[4] "Any other rule of construction," said Chief Justice Roger Taney speaking for the Court in 1857 in the *Dred Scott* case, "would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."[5]

Scholars also have generally agreed that the originator's intent should be controlling. Joseph Story wrote in 1833: "The first and fundamental rule in the interpretation of all instruments, is to construe them according to the sense of the terms, and the intention of the parties."[6] Thomas Cooley, in his influential *Constitutional Limitations,* agreed that: "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it."[7]

While this principle of construction is easily stated, its application is perilously difficult. How is it possible to determine the intent of the framers as to the precise meaning of words written nearly 200 years ago? Records are, in most cases, meager; even when they exist, it often strains credibility to believe that the intent manifested by a letter or a recorded debate accurately represents the will of the mass of people. Nevertheless, courts and lawyers are often faced with the

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1 *See, e.g.,* Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 545 (1959). "Whenever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretations, it has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it." TenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction,* 27 CALIF. L. REV. 157 (1939).

2 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934).

3 Woodson v. Murdock, 89 U.S. (22 Wall.) 351, 369 (1874).

4 Bell v. Maryland, 378 U.S. 226, 288-89 (1964).

5 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857).

6 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (1833).

7 T. COOLEY, CONSTITUTIONAL LIMITATIONS 124 (8th ed. 1927) (emphasis supplied).

necessity of constitutional construction, and they have utilized numerous sources through the years to determine the framers' intent. Among these various sources are records of ratifying legislatures and constitutional conventions, the contemporary common law, and practical construction at the time of adoption. The use of these and other sources is detailed within this article.

Even when the intent of the framers is discerned with some degree of confidence, one must still ask whether it should control if it is in conflict with the needs of modern society. When is it appropriate to look to the larger purposes of the Constitution in implementing its language in a changing world? These questions are always present in any problem of constitutional construction and, therefore, are considered in the latter sections of this article.

II. The Search for Intent

A. *Ascertaining Intent from Legislative Records*

1. Records of the Ratifying State Conventions or Legislatures

Constitutional conventions and Congress can only propose a constitutional provision or amendment. The people of the states, through their representatives, actually make them the law of the land. Therefore, the proceedings of the state conventions and legislative sessions dealing with the adoption of the Constitution or amendments should be given considerable weight.[8] James Madison once stated that whenever it is necessary to go beyond the words of the Constitution to ascertain its meaning, it is essential to "look for [that meaning], not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution."[9] In 1821 Madison again emphasized that the meaning of the Constitution is to be found "in the sense attached to it by the people in their respective state conventions where it received all the authority which it possessed."[10] Ten years later, in a letter to a friend, Madison remarked:

> Another error has been in ascribing to the intention of the Convention which formed the Constitution, an undue ascendancy in expounding it. Apart from the difficulty of verifying that intention, it is clear, that if the meaning of the Constitution is to be sought outside of itself, it is not in the proceedings of the Body that proposed it, but in those of the State Conventions, which gave it all the validity and authority it possesses.[11]

Supreme Court Justices have looked many times to the statements and proceedings of the state ratifying conventions as guides to the construction of the United States Constitution. To illustrate, the Supreme Court in 1895 carefully examined discussions in the ratifying conventions of Connecticut, Massachusetts,

8 "The Constitution derives its force, not from the Convention which framed it, but from the people who ratified it; and the intent to be arrived at is that of the people." State v. Lanza, 27 N.J. 516, 527, 143 A.2d 571, 577 (1958).

9 6 WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1900).

10 9 WRITINGS OF JAMES MADISON 71-72 (G. Hunt ed. 1908).

11 *Id.* at 477.

New York, and Virginia to ascertain what the people adopting the Constitution meant by "direct" taxes.[12] In 1908, in *Twining v. New Jersey*,[13] the Court construed the due process clause of the fourteenth amendment and concluded that the term did not embrace a privilege against self-incrimination, since only four of the original 13 state conventions called to ratify the Constitution expressed any interest in demanding that the privilege be given constitutional protection.[14] In 1934, when the Supreme Court construed the Constitution to bar suits by foreign governments against the states without their consent, it gave great weight to the statements of Madison and Marshall in the Virginia convention, stating clearly that this was what the Constitution meant.[15] In 1964, when the court ruled in *Wesberry v. Sanders* that each congressional district must have approximately the same population, the Court stated: "In the state conventions, speakers urging ratification of the Constitution emphasized the theme of equal representation in the House . . . ."[16] Four years later, Justice Harlan referred extensively to the proceedings in the state legislatures which had ratified the fourteenth amendment to prove that they never intended to incorporate the Bill of Rights.[17] The following year, the Supreme Court in *Powell v. McCormack*[18] justified its conclusion by the statement: "The debates at the state conventions also demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution."[19]

Scholars have been in general agreement that if the intent of "the constitutional generation" is to be the guide to construction of the Constitution, then one proper inquiry is the intent of those responsible for its adoption or ratification.[20]

2. Statements of Delegates in the Constitutional Convention

Because it is extremely difficult, if not impossible, to ascertain the intent of those who originally adopted the Constitution in regard to a specific word or clause, both the Supreme Court and constitutional scholars, in construing the Constitution, have frequently looked to the statements of the delegates to the Constitutional Convention. To the extent that delegates made their understanding of various constitutional provisions known to their constituents, the delegates' manifest intent can be said to be that of the states.

As early as 1838, the Supreme Court recognized that construction of the Constitution requires attention to "the meaning and intention of the convention

12 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 427, 565 (1895).
13 Twining v. New Jersey, 211 U.S. 78 (1908).
14 *Id.* at 109.
15 Monaco v. Mississippi, 292 U.S. 313, 323-24 (1934).
16 Wesberry v. Sanders, 376 U.S. 1, 15 (1964).
17 Duncan v. Louisiana, 391 U.S. 145, 175-76 (1968) (Harlan & Stewart, JJ., dissenting). *See also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 460 (1934) (Sutherland, J., dissenting).
18 395 U.S. 486 (1969).
19 *Id.* at 540.
20 T. Cooley, Constitutional Limitations 101 (7th ed. 1903); C. Miller, The Supreme Court and the Uses of History 159 (1969).

which framed and proposed it for adoption and ratification . . . ."[21] From "the intention of the Convention," the Supreme Court concluded in 1869 that it was the framers' intent to confer the entire taxing power on Congress, subject only to the expressed limitations.[22] In 1895, the Court looked to the debates in the Constitutional Convention when it ascertained what were "direct" taxes within the constitutional language.[23] Five years later, the Court made extensive reference to the debates in the Constitutional Convention in holding that the uniformity clause was intended to require only geographical uniformity for indirect taxes levied by the federal government.[24]

To support a holding that the President could remove purely executive officers without congressional authority or control, Chief Justice Taft reasoned in 1926: "The debates in the Constitutional Convention indicated an intention to create a strong executive . . . ."[25] In a 1945 construction of the treason clause, the Court exhaustively analyzed the proceedings of the 1787 Convention, particularly noting the remarks of Madison, Mason, Dickinson, Franklin, and Wilson.[26] In 1964, the Supreme Court relied heavily upon debates in the Constitutional Convention to support its conclusion that congressional districts must be of approximately the same population.[27] Five years later, the debates in the Convention were largely responsible for the Court's ruling that Congress could not add to the constitutionally indicated qualifications for members of Congress.[28]

Reports of debates in the Constitutional Convention of 1787 are scanty, however, and at times are an inadequate source for the construction of organic law. Chief Justice Hughes, speaking for the Court in 1934, observed: "In the construction of the contract clause, the debates in the Constitutional Convention are of little aid.[29] The Court added in 1970: "The 'very scanty history [of this provision] in the records of the Constitutional Convention' sheds little light either way on the intended correlation between Article III's 'jury' and the features of the jury at common law."[30]

In construing state constitutions, state courts have also customarily utilized debates and remarks at the conventions responsible for proposing those documents.[31] The Maryland supreme court is representative: "In construing the Constitution we are to consider the circumstances attending its adoption and what appears to have been the understanding of the people when they adopted it, and one of the useful and most helpful sources is the debates of the convention."[32]

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21 Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).
22 Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 540 (1869).
23 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 562-63 (1895).
24 Knowlton v. Moore, 178 U.S. 41, 100 (1900).
25 Myers v. United States, 272 U.S. 52, 116 (1926).
26 Cramer v. United States, 325 U.S. 1, 22-23 (1945).
27 Wesberry v. Sanders, 376 U.S. 1, 10-11 (1964).
28 Powell v. McCormack, 395 U.S. 486, 532 (1969).
29 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934).
30 Williams v. Florida, 399 U.S. 78, 93 (1970), *citing* 39 HARV. L. REV. 917, 969 (1926).
31 *Ex parte* Southern Bell Tel. & Tel. Co., 267 Ala. 139, 99 So. 2d 118 (1957); Morgan v. Board of School Comm'rs, 248 Ala. 22, 25, 26 So. 2d 108, 110 (1946); Schwartz v. People, 46 Colo. 239, 104 P. 92 118 (1909); Woessner v. Bullock, 176 Ind. 166, 93 N.E. 1057 (1911); State v. Taylor, 22 N.D. 362, 133 N.W. 1046 (1911).
32 McMullen v. Shepherd, 133 Md. 157, 160, 104 A. 424, 425 (1918).

3. Statements in the Congress that Proposed an Amendment

Just as courts have used statements in the Constitutional Convention in their construction of the original compact, so too have they utilized debates in the Congress that proposed a particular amendment. For example, when the Supreme Court ruled in 1898 that children of Chinese parents, who were ineligible for citizenship at that time, were citizens of the United States if born here, it placed such heavy reliance upon statements made on the floor of the 39th Congress, which had proposed the fourteenth amendment, that it found that this would be an effect of the amendment if ratified.[33]

Justice Hugo Black, in urging the "incorporation theory" upon his colleagues in 1947, placed emphasis upon remarks made on the floor of the 39th Congress, especially those of Representative Bingham.[34] In 1968, when the Supreme Court held that the thirteenth amendment enforcement clause enabled Congress to eliminate badges of servitude imposed by private individuals, Justice Stewart gave great weight to the statements made in the Congress that had proposed that amendment, especially those of Senator Trumbull and Representative Wilson.[35]

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist, in their dissent in the 1972 case *Furman v. Georgia,*[36] stressed the remarks of Representative Livermore in the first Congress as casting light upon the meaning of the Bill of Rights in general and the eighth amendment in particular.[37] Contrarily, Justice Douglas was rather unimpressed by the remarks of members of the first Congress: "[T]he debates of the First Congress . . . throw little light on its intended meaning."[38]

The Supreme Court in 1974 made extensive use of discussions in the Congress which had proposed the fourteenth amendment in ruling that equal protection of the laws was not violated when a state refused the voting franchise to convicted felons, even after they had served their sentences.[39] Again in the following year, the Court explored at length the debates in the first Congress that had proposed the double jeopardy clause, and concluded that no general ban on appeals by the government in criminal prosecutions was intended.[40]

Notwithstanding these examples, it must be acknowledged that the Supreme Court has at times refused to give any significant weight to statements by individual Representatives and Senators in the Congress that had proposed an amendment. For instance, the Court said in 1900:

> It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually used, and not by the speeches made regarding it.

33 United States v. Wong Kim Ark, 169 U.S. 649, (1898).
34 Adamson v. California, 332 U.S. 46, 94 (1947) (Black & Douglas, JJ., dissenting).
35 Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
36 408 U.S. 238 (1972).
37 *Id.* at 391-92.
38 Richardson v. Ramirez, 418 U.S. 24, 45 (1974).
39 Richardson v. Ramirez, 418 U.S. 24 (1974).
40 United States v. Wilson, 420 U.S. 332, 343 (1975).

> What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment . . . does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it.
>
> In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions in three fourths [*sic*] of the states before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.[41]

This lack of regard for statements made in a Congress that had proposed a particular amendment was manifested again the following year when the Court noted:

> The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts.[42]

Notwithstanding the language of the Supreme Court in the last two cases, the relative paucity of reliable information as to what the states intended when they ratified the various amendments, and the superiority of the reporting of congressional debates on proposed amendments, will probably lead the courts in construing the Constitution to continue utilizing remarks and debates in Congress, assuming implicitly that these were reported to the people of the states and are likely to represent their understanding of the meaning or purpose of the words used in a particular provision.

4. Development of the Specific Language Employed

The Supreme Court, in construing a clause in the original Constitution, has often been aided by an examination of the progress of the clause as it proceeded through the Convention. For example, in 1895 the Court followed such proceedings to determine what was meant by "direct taxes" in the Constitution.[43] Four years later, it looked to the proceedings in the Convention to help construe the uniformity of taxation clause.[44] In 1925, in construing the clause conferring the pardoning power upon the President, the Court carefully examined the

41 Maxwell v. Dow, 176 U.S. 581, 601-02 (1900) (citations omitted).
42 Downs v. Bidwell, 182 U.S. 244, 254 (1901).
43 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 568-69 (1895).
44 Knowlton v. Moore, 178 U.S. 41, 100 (1900).

progress of that clause through the Constitutional Convention.[45] Again in 1933, in determining the admiralty power, the Court was convinced that the proceedings in the Convention evidenced an intent to transfer to the new federal government all the admiralty powers formerly possessed by the Confederation.[46]

Constitutional construction has frequently been aided by an examination of various proposals rejected and language deleted by delegates at the Constitutional Convention.[47] In 1901, for instance, in construing the article conferring original Supreme Court jurisdiction, the Court pointed out that the original suggestion in the Convention proposal was to give to the Senate the resolution of disputes between the states, but that this had been rejected. The Court observed further that the Committee on Revision in the Convention "struck out the provision excluding from the jurisdiction of the Supreme Court disputes between the states in matters respecting jurisdiction and territory. The entire jurisdiction of controversies between states was bestowed upon the Supreme Court."[48] In 1926, when Justice Brandeis was endeavoring to construe Presidential power to remove federal personnel, he emphasized that in the Convention, "the outstanding fact remains that every specific proposal to confer such uncontrollable power upon the President was rejected."[49] In construing article III's limitations upon Congress, Justice Douglas in 1973 stressed that the Constitutional Convention had rejected, with only one state voting to adopt, a proposal that judges of federal courts be made removable by the Executive on application of the Congress.[50]

Comparably, in construing amendments to the Constitution the Supreme Court has often referred to the progress of an amendment through the Congress that had proposed the amendment. To illustrate, in an 1885 case construing the grand jury indictment clause with its reference to "infamous crimes," the Court gave weight to the form in which the clause had originally been introduced by James Madison at the first session of the House of Representatives.[51] Also, in 1920 Justice McKenna traced the changes made in the wording of the proposed eighteenth amendment as it progressed through the Congress.[52] In 1970, in construing the jury clause of the sixth amendment, the Supreme Court devoted much attention to the progress of that amendment through Congress.[53]

State courts, in construing their own constitutions, regularly consult proceedings in their constitutional conventions.[54] The proceedings of clauses through

45 *Ex parte* Grossman, 267 U.S. 87, 112 (1925).
46 United States v. Flores, 289 U.S. 137, 148 (1933).
47 Fletcher v. Peck, 10 U.S. (6 Cranch) (1810).
48 Missouri v. Illinois, 180 U.S. 208, 223 (1901).
49 Myers v. United States, 272 U.S. 52, 294 (1926) (Brandeis, J., dissenting).
50 Palmore v. United States, 411 U.S. 389, 412-13 (1973) (Douglas, J., dissenting).
51 *Ex parte* Wilson, 114 U.S. 417, 424 (1885).
52 Rhode Island v. Palmer, 253 U.S. 350, 402-03 (1920) (McKenna, J., dissenting).
53 Williams v. Florida, 399 U.S. 78, 94 (1970).
54 "The proceedings of the convention in which the constitution was framed may be examined in considering the purpose of a given article or section." Franklin Nat'l Bank v. Clark, 26 Misc. 2d 724, 733, 212 N.Y.S.2d 942, 953-54 (Sup. Ct. 1961). "When constitutional questions have arisen, the court has availed itself of pertinent records of the Constitutional Convention for an insight into the effect intended from the provision in question." Ward v. Stevens, 86 Ariz. 222, 344 P.2d 491, 495 (1959).

"If there is any ambiguity or uncertainty in sections of the Constitution, a court may look to proceedings of the constitutional convention for aid in construction." Williams v. Baldridge, 48 Idaho 618, 619, 284 P. 203, 204 (1930). *See also* Walters v. Cease, 388 P.2d 263 (Alas.

constitutional conventions, like statements made at such conventions, are legitimate sources for constitutional construction, since there is some probability that they disclose the intent of the people who adopted the constitution. This has been well expressed by the North Dakota supreme court:

> The intent of the convention is not controlling in itself; but, as its proceedings were preliminary to the adoption by the people of the Constitution, the understanding of the convention as to what was meant by the terms . . . goes a long way toward explaining the understanding of the people when they ratified it. The people depended largely upon the interpretation and construction placed upon the various constitutional provisions by the delegates who framed them.[55]

In the absence of better proof of what the people intended when they adopted constitutions or ratified amendments, courts will likely continue to be guided in their construction of those provisions by the development of the language employed in them.

B. *Ascertaining Intent from Contemporary Law and Social Conditions*

1. Conditions Leading to Adoption of the Clause

It has been recognized since the constitutional generation that the search for the intent of those responsible for our organic law can profitably include an inquiry into the contemporaneous evils that were deemed so unbearable that they must be guarded against permanently in constitutional language. James Madison wrote on December 20, 1828, to William Rives: "It must be allowed by all that the best key for the text of the Constitution . . . is to be found in the contemporary state of things and the maladies or defects which were to be provided for."[56] Two years later, Madison again stressed that sound constitutional construction requires an exploration of the evils and defects for which the Constitutional Convention was called.[57]

Courts and scholars have accepted ever since the propriety in constitutional construction of looking to the mischief designed to be avoided and the object to be accomplished by a constitutional clause.[58] In 1830 the Supreme Court explored the mischief intended to be prevented by the inclusion in the Constitution of the prohibition upon "bills of credit." After examining the antecedent evils, the Court rejected a literal reading of those words, and concluded instead that the clause should be construed to ban "any paper medium by a State government for the purpose of common circulation."[59] Eight years later

Sup. Ct. 1964); Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 370 P.2d 652 (1962); Higer v. Hansen, 67 Idaho 45, 170 P.2d 411 (1946); Loring v. Young, 239 Mass. 349, 132 N.E. 65 (1921); State v. Marsh, 149 Neb. 1, 29 N.W.2d 799 (1947); Yelle v. Bishop, 55 Wash. 2d 286, 347 P.2d 1081 (1959).

55 Miller v. Taylor, 22 N.D. 362, 369, 133 N.W. 1046, 1049 (1911).

56 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 663-64 (A. Rives ed. 1865).

57 9 WRITINGS OF JAMES MADISON 370-75 (G. Hunt ed. 1908).

58 Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 12 F. Supp. 37, 40 (W.D. Ky. 1935); COOLEY, *supra* note 7, at 141.

59 Craig v. Missouri, 29 U.S. (4 Pet.) 410, 438 (1830).

the Court stated generally: "In the construction of the Constitution we must look to the history of the times and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy."[60] Justice Miller was speaking for the Court's majority in the *Slaughter-House Cases* of 1873 when he said, in reference to the equal protection clause of the fourteenth amendment:

> In the light of the history of these amendments, and the pervading purpose of them . . . it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.[61]

Justice Miller, in his 1891 lectures on constitutional law, stated: "A very useful key to the construction of a statute or a constitution is to inquire what was the evil to be removed, and what remedy did the new instrument propose; so that when any question arises requiring a judicial construction of any of its clauses, it is important to go back and ascertain the evil that was intended to be remedied."[62]

Justice George Shiras, speaking for the Court in 1901, stated: "In this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look, not merely to its language, but to its historical origin . . . ."[63] Faced with the task of construing the contract clause in 1934, Justice Sutherland wrote:

> The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. The history of the times, the state of things existing when the provision was framed and adopted, should be looked to in order to ascertain the mischief and the remedy. As nearly as possible we should place ourselves in the condition of those who framed and adopted it. And if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted.[64]

Construction requires, the Supreme Court stated in 1941, that "we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes."[65] The Court added: "If we remember that 'it is a Constitution we are expounding,' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."[66]

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60 Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 627, 723 (1838).
61 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).
62 S. MILLER, LECTURES ON CONSTITUTIONAL LAW 82 (1891).
63 Missouri v. Illinois, 180 U.S. 208, 219 (1901).
64 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (citations omitted).
65 United States v. Classic, 313 U.S. 299, 317-18 (1941).
66 *Id.* at 316.

There were discernible weaknesses in the form of government under the Articles of Confederation; to overcome them it was the apparent consensus of those who framed and adopted the Constitution that an effective government needed a general taxing power, a power over interstate commerce, and power to declare and wage war. In construing the taxing power of Congress, the Supreme Court remarked in 1900:

> The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to correctly interpret its meaning.[67]

The Court, after noting "[t]he paralysis which the Articles of Confederation produced upon the Continental Congress because of the want of power in that body to enforce necessary taxation to sustain the government,"[68] readily concluded that the clause granting the taxing power to the federal government should be broadly construed.

When interpreting a number of other clauses in the original Constitution, such as the contract clause and the ban upon religious test oaths, courts have properly made reference to historical practices which the persons who adopted the Constitution found anathema. Concerned with the construction of the contract clause, the Supreme Court has pointed out that "following the revolutionary period . . . an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations"[69] was clearly the reason for the inclusion of that clause in the Constitution.

An analysis of the antecedent evils to be ameliorated aids in the construction of amendments perhaps even more than it does in giving meaning to the language of the original Constitution. Referring to the earlier stated orthodox rule of examining antecedent evils as a guide to construction, Justice Sutherland stated in 1920: "This sound rule is as applicable to the amendments as to the provisions of the original Constitution."[70] The fresh memory of such detested practices as the use of torture in punishing criminals, the use of general search warrants, and the financing of a preferred state church with its attendant discriminations against those who did not share its beliefs, stimulated many of the delegates in the state conventions called to ratify the Constitution to demand a bill of rights that would provide protection against these practices. Many of the persons in these state ratifying conventions later served in the first Congress, and their views are valuable in determining what was intended by those who ratified the Bill of Rights.[71] Those who adopted the Bill of Rights undoubtedly wished to repudiate much of the earlier English common law, and this has been appreciated by Justices and scholars concerned with constitutional construction. Cooley

67 Knowlton v. Moore, 178 U.S. 41, 95 (1900).
68 *Id.*
69 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
70 Evans v. Gore, 253 U.S. 245, 260 (1920).
71 Half of the members of the Senate and eight members of the House in the first Congress had participated in ratifying conventions. TenBroek, *supra* note 1.

wrote: "The English common-law rule which made libels on the constitution or the government indictable . . . seems to us unsuited to the conditions and circumstances of the people of America, and therefore never to have been adopted by the several States."[72] Similarly, Justice Holmes wrote in 1919: "I wholly disagree with the argument of the government that the First Amendment left the common law as to seditious libel in force."[73] Justice Black adverted many times to the unworthy practices of England and the Colonies, which those who adopted the first amendment wished to avoid, as a guide to proper construction of that amendment.[74] In ascertaining their intent, Black said for the Court in 1947 that it is necessary to look to "the conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity."[75]

Because many of the constitutional generation seem to have thought that citizens were recklessly and unnecessarily put to criminal trial, the grand jury indictment clause was recommended by the Massachusetts Convention of 1788 when it ratified the original United States Constitution. In construing this clause, the Supreme Court has given noticeable weight to the wording of the recommendation by the people of Massachusetts.[76]

In 1972, in attempting in *Furman* to construe the ban upon cruel and unusual punishment in the eighth amendment, a number of Justices made references to the remarks and proceedings in the state conventions which had ratified the original Constitution. Justice Brennan, in his concurring opinion, noted the remarks made in the Massachusetts and Virginia conventions.[77] Chief Justice Burger, in a dissent joined by Justices Blackmun, Powell, and Rehnquist, recognized the propriety of looking to the statements and proceedings in the state conventions called to ratify the Constitution: "The records of debates in several of the State conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that the framers' exclusive concern was the absence of any ban on tortures."[78]

Events antecedent to the ratification of later amendments throw equal light on the intent of the persons responsible for the adoption of those amendments. Undoubtedly it was to prevent federal courts from entertaining suits against the states, as permitted by the Supreme Court in *Chisholm v. Georgia,*[79] that caused the states to rush through the eleventh amendment; the clause has always been construed with that intent in mind.[80] It has been commonly accepted that repudiation of the infamous *Dred Scott* decision was the intent and purpose of those responsible for the adoption of the first clause of the fourteenth amendment.[81] And the Supreme Court has construed the fifteenth amendment so as to capture

72 T. Cooley, Constitutional Limitations 429 (4th ed. 1878).
73 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
74 *E.g.,* Talley v. California, 362 U.S. 60, 64-65 (1960).
75 Everson v. Board of Educ., 330 U.S. 1, 8 (1947).
76 *Ex parte* Wilson, 114 U.S. 417, 422-24 (1884).
77 Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).
78 *Id.* at 377.
79 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
80 Hans v. Louisiana, 134 U.S. 1 (1899).
81 Bell v. Maryland, 378 U.S. 226, 300-01 (1964) (Goldberg, J., concurring); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872).

the intent of those responsible for it: to end the injustice of denying black citizens the right to vote.[82] In 1873, the Court said in the *Slaughter-House Cases* that the civil war amendments were to be construed "in the light of the history of these amendments and the pervading purpose of them."[83] The Court added: "The existence of laws in the states where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden."[84] Chief Justice Vinson spoke for the Court in 1948 when he said:

> The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights from discriminatory action on the part of the States based on consideration of race or color.[85]

Referring to the *Slaughter-House Cases,* Vinson remarked: "Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."[86]

State courts are in general agreement that both the national and state constitutions "are to be interpreted in view of the history behind the enactment, the purpose sought to be accomplished by its enactment and the evil sought to be remedied."[87]

Courts will undoubtedly continue to construe constitutions by reference to those antecedent evils and inadequacies which those who adopted the constitutions desired to both avoid and rectify. However, since it is a constitution that is being construed, clauses generally stated are not to be limited in their construction to outlawing the particular evils known to the generation responsible for the clause. The Supreme Court customarily acknowledges that corrective constitutional clauses are to be construed broadly and liberally. In 1910, the Court refused to restrict the eighth amendment ban upon cruel and unusual punishment to those particular punishments known and despised by the generation that gave us the Bill of Rights. Speaking for the Court, Justice McKenna stated:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care

82 Guinn v. United States, 238 U.S. 347 (1915); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872).
83 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872).
84 *Id.*
85 Shelley v. Kraemer, 334 U.S. 1, 23 (1948).
86 *Id.*
87 Ruth v. Industrial Comm'n, 107 Ariz. 572, 575, 490 P.2d, 828, 831 (1971).

> and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.[88]

Indeed, to satisfy the emerging moral standards of a maturing society, the Supreme Court will construe clauses such as the ban upon cruel and unusual punishment so as to ban practices which, if known to them, the constitutional generation was apparently prepared to accept.[89] The intent and purpose of those who gave us the Bill of Rights can be understood in their broader dimensions as efforts to safeguard human dignity and to confine the temporary trustees of political power in their relations with the citizenry. These larger objectives represented by the eighth amendment are honored when courts ban such punishments as death, branding, and whipping, even though they were condoned by the constitutional generation.

2. The Common Law Contemporaneous with Adoption

In construing certain clauses of the Constitution, the Supreme Court has at times been guided by the earlier English and American common law. Justice Wayne, speaking for the Court in 1856, examined the pardoning power of the English Crown when he construed the Presidential pardoning power under our Constitution.[90] In construing the same power 69 years later, Chief Justice Taft said:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Convention of the thirteen states, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusion into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.[91]

"The interpretation of the Constitution of the United States," noted the Court in 1888, "is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."[92]

88 Weems v. United States, 217 U.S. 349, 373 (1910).
89 Furman v. Georgia, 408 U.S. 238 (1972).
90 *Ex parte* Wells, 59 U.S. (18 How.) 307, 310-12 (1855).
91 *Ex parte* Grossman, 267 U.S. 87, 108-09 (1924).
92 Smith v. Alabama, 124 U.S. 465, 478 (1887).

In construing the fifth amendment privilege against self-incrimination, the Supreme Court looked for guidance to the English common law and practice. Said the Court:

> As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them.[93]

Two years later the Court remarked: "The Constitution . . . must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. . . . The language of the Constitution . . . could not be understood without reference to the common law." The Court added generally:

> In construing any act of legislation, whether a statute enacted by the legislature, or a Constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment; but also to the condition, and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted.[94]

Speaking for the Supreme Court in 1905, Justice Brewer stated: "One other fact must be borne in mind, and that is that in interpreting the Constitution we must have recourse to the common law."[95] Two years later, again speaking for the Court, Justice Brewer added: "The common law throws light on the meaning and scope of the Constitution of the United States."[96] In 1966, Justice Harlan construed the speech and debate clause, and observed that the language was almost identical to the English Bill of Rights of 1689. After exploring English common law and history, he concluded that the privilege was primarily created to prevent intimidation by the Executive and accountability before a possibly hostile judiciary.[97]

It is in construction of the procedural clauses of the Constitution that the Supreme Court has been most willing to be guided by antecedent English and American common law.[98] The fifth amendment provision for grand jury indictment, said the Court in 1884, "manifestly had in view that rule of the common law."[99] The Court added: "The scope and effect of this, as of many other provisions of the Constitution, are best ascertained by bearing in mind what the

93 Brown v. Walker, 161 U.S. 591, 600 (1895).
94 United States v. Wong Kim Ark, 169 U.S. 649, 653-54 (1898).
95 South Carolina v. United States, 199 U.S. 437, 449 (1905).
96 Kansas v. Colorado, 206 U.S. 46, 94 (1906).
97 United States v. Johnson, 383 U.S. 169, 178-85 (1966).
98 "For eighty years the Supreme Court has maintained the general position that in determining whether a given procedure satisfies the due process guarantees, it is necessary to inquire into English common law and American colonial practice." Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 557 (1938).
99 *Ex parte* Wilson, 114 U.S. 417, 423 (1884).

law was before."[100] In 1956 the Court, in studying English and American common law, reported that "grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory," and went on to hold that an indictment would, therefore, be valid even though based entirely on hearsay evidence.[101]

The sixth amendment clauses have also been construed with reference to the common law. In 1904, the Court ruled that the sixth amendment right of trial by jury in criminal cases was to be read in the light of the English and American common law, and concluded that this constitutional right was unavailable in prosecutions for "petty offenses."[102] In passing upon the question whether government employees could sit on juries in criminal prosecutions, the Supreme Court in 1936, through Chief Justice Hughes, made reference to English and Colonial practices and said generally: "Whether a clause in the Constitution is to be restricted by a rule of the common law as it existed when the Constitution was adopted depends upon the terms or nature of the particular clause."[103] Justice Harlan said in 1970: "Sound constitutional interpretation requires, in my view, fixing the federal jury as it was known to the common law." "History," he reflected, "continues to be a wellspring of constitutional interpretation."[104] Again, in construing the sixth amendment right of confrontation, the Court said in 1895: "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted. . . ."[105]

Speaking for the Supreme Court in 1935, Justice Sutherland stated that the seventh amendment right of trial by jury in civil cases is to be construed according to "the rules of the common law in respect of trial by jury as these rules existed in 1791,"[106] since the persons responsible for the adoption of this amendment allegedly intended to adopt the rules of the common law. The Court claimed in 1970 that it has consistently looked "at common law carrying the right to jury trial, at the time the Seventh Amendment was adopted."[107] The dissenters acknowledged: "All agree that this means the reach of the Amendment is limited to those actions that were tried to the jury in 1791 when the Amendment was adopted."[108]

Construction of the due process clauses in their procedural aspects has often been abetted by reference to English and American common law. Due process of law in procedural matters, the Court said in 1856, will ordinarily reflect the common law. It stated:

> To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to

100 *Id.* at 422.
101 Costello v. United States, 350 U.S. 359 (1956).
102 Schick v. United States, 195 U.S. 65, 70 (1904).
103 United States v. Wood, 299 U.S. 123, 142 (1936) (dissenting opinion).
104 Williams v. Florida, 399 U.S. 78, 124 (1969) (dissenting opinion).
105 Mattox v. United States, 156 U.S. 237, 243 (1895).
106 Dimick v. Schiedt, 293 U.S. 474, 487 (1934).
107 Ross v. Bernhard, 396 U.S. 531, 534 (1970).
108 *Id.* at 543. (Burger, C.J., Harlan & Stewart, JJ., dissenting).

> those settled usages and modes of proceeding existing in the common and statute law[s] of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[109]

Procedural due process should be construed, said Justice Harlan in 1969, according to those "concepts which are part of the Anglo-American heritage."[110]

Even Justice Harlan, however, was willing to acknowledge that historical materials antedating adoption of the Constitution and its amendments may often be so meager as to provide little aid in current construction. "History," he said, "seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."[111]

Even when historical materials are adequate to indicate the common law at the time a constitutional clause was added, they should not control construction of the procedural or any other clauses, for to do so would be to impede development of the law. In 1908, Justice Moody commented on construction according to the common law: "If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment."[112] To construe the Constitution solely by reference to the earlier common law, in the language of Justice Matthews, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement."[113]

Indeed, even the Justices who have been most willing to construe parts of the Constitution according to the earlier common law have admitted that construction of some clauses and amendments should not be guided by the common law. Justice Sutherland, speaking for the Court in 1935, said: "Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question."[114]

It has generally been held that clauses conferring power upon the federal government are not to be confined by the earlier common law. Speaking of the rules favoring construction according to the common law, Justice Sutherland noted: "Certainly, these rules have no such restrictive effect in respect of any constitutional grant of governmental power. . . ."[115] The second Justice Harlan, a strong believer in using historical materials for constitutional construction, wrote in 1969: "It cannot be seriously argued as a general matter that the

109 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276-77 (1855), *followed in* Holden v. Hardy, 169 U.S. 366, 390 (1898). *See* Twining v. New Jersey, 211 U.S. 78, 100 (1908).

110 Sniadach v. Family Fin. Corp., 395 U.S. 337, 342-43 (1960) (Harlan, J., concurring, Black, J., dissenting).

111 California v. Green, 399 U.S. 149, 174 (1969) (Harlan, J., concurring).

112 Twining v. New Jersey, 211 U.S. 78, 101 (1908).

113 Holden v. Hardy, 169 U.S. 366, 388 (1898).

114 Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 669 (1934); *see* United States v. Wood, 299 U.S. 123, 142 (1936).

115 Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 669 (1934).

constitutional limits of Congressional power are coterminous with the extent of its exercise in the late 18th and early 19th centuries."[116]

Nor should the broad constitutional guaranties of liberty and equality be construed narrowly or restricted to the preexisting common law or conditions of society. The Supreme Court held in 1936 that the Anglo-American common law is not to control construction of the first amendment, stating:

> Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. . . . And, obviously, it is subject to the qualifications that the common-law rule invoked shall be one not rejected by our ancestors as unsuited to their civil and political conditions.[117]

Admittedly, the Court said in 1925 that "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."[118] Nevertheless, the Supreme Court today is properly prepared to find a search or seizure unreasonable for practices utterly unknown to the persons responsible for the adoption of the amendment.[119]

Chief Justice Warren, with Justices Black and Douglas, warned in 1958 against construing the jury right of the sixth amendment solely according to common law criteria. They said:

> Those who formed the Constitution struck out anew free of previous shackles in an effort to obtain a better order of government more congenial to human liberty and welfare. It cannot be seriously claimed that they intended to adopt the common law wholesale. They accepted those portions of it which were adapted to this country and conformed to the ideals of its citizens and rejected the remainder. In truth there was widespread hostility to the common law in general and profound opposition to its adoption into our jurisprudence from the commencement of the Revolutionary War until long after the Constitution was ratified.[120]

The suggestion that the cruel and unusual punishment clause of the eighth amendment should be construed according to common law practices in England and the Colonies at the time of adoption of the Bill of Rights has been conclusively repudiated.[121]

Those persons responsible for the framing and adoption of the Constitution and the Bill of Rights rejected the common law in many areas, and undoubtedly would have been opposed to straitjacketing federal practices forever to the rules and practices of their times. The common law existing at the time of ratification

116 O'Callahan v. Parker, 395 U.S. 258, 280 (1969).
117 Grosjean v. American Press Co., 297 U.S. 233, 248-49 (1936) (citation omitted).
118 Carroll v. United States, 267 U.S. 132, 149 (1925).
119 Berger v. New York, 395 U.S. 41 (1969); Katz v. United States, 389 U.S. 347 (1967).
120 Green v. United States, 356 U.S. 165, 212 (1958).
121 Furman v. Georgia, 408 U.S. 238 (1972).

of the Constitution (or any of its amendments), therefore, should seldom prevent construction of the Constitution in a manner necessitated by the demands of contemporary society. Indeed, Justice Harlan remarked: "It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend of historical understanding and the adaptation of purpose to contemporary circumstances."[122] State courts also have often construed their own constitutions by reference to the common law.[123]

3. The History and Circumstances of the Times

To ascertain the intent of those who proposed and adopted a constitutional provision, courts frequently look to the history and circumstances of the times when the clause or amendment was adopted. "The most helpful rule for interpreting the Constitution," one federal court has concluded, "is to look to the history of the times and examine the state of things existing when it was formed, and adopted."[124] The court added: "In applying this rule, we may look to conditions at the time of its adoption, the general spirit of the times, and the prevailing sentiment among the people."[125]

The Supreme Court has always endorsed examination of the history and circumstances of the times as a guide to intent in constitutional construction. In 1838, that tribunal stated: "In the construction of the Constitution we must look to the history of the times and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy."[126] Looking there, the Court soon discovered that 11 of the original 13 states were involved in boundary disputes and held accordingly that it was the intent of those responsible for the Constitution that the Court have jurisdiction to resolve such controversies.[127]

The Civil War amendments have been interpreted by the courts only after referring to "the history of the times" when they were adopted.[128] Justice Black, in 1964, looked at this history and concluded that the purpose of the fourteenth amendment was, *inter alia,* to legitimize the provisions of the Civil Rights Act of 1866. A careful examination of the Act, which resulted in finding no provision for equality of accommodation in private restaurants, led Justice Black to decide that the amendment was not to be construed to outlaw this type of racial discrimination, at least without congressional action.[129]

Noting that the word "religion" was not defined anywhere in the Constitution, the Court, in construing the first amendment in 1878, said: "We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately,

122 Williams v. Florida, 399 U.S. 78, 124-25 (1970) (dissenting opinion).
123 *See, e.g.,* Bohannon v. Corporation Comm'n, 82 Ariz. 299, 313 P.2d 379 (1957).
124 R.C. Tway Coal Co. v. Glenn, 12 F. Supp. 570, 588 (W.D. Ky. 1935).
125 *Id.*
126 Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723 (1838).
127 *Id.*
128 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67 (1872).
129 Bell v. Maryland, 378 U.S. 226, 338 (1964) (dissenting opinion).

we think, than to the history of the times in the midst of which the provision was adopted."[130]

When nine years later the Supreme Court was called upon to construe the grand jury clause of the fifth amendment, it looked to the history of the times when this amendment was added to the Constitution.

> Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the Crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value.[131]

"The safe way" to construe the Constitution, according to the Supreme Court in 1900, "is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted."[132] In construing the Constitution, a court "must necessarily consider it in the light of the circumstances as they existed at the time. . . ."[133]

The "common, contemporary understanding" of the American community at the time the Constitution or an amendment was adopted has been sought as a guide to intent on a number of occasions. In 1930, the Supreme Court ruled that article III was to be construed so as not to render the Court's jurisdiction exclusive in domestic relations suits involving foreign diplomats situated in this country. Justice Holmes, speaking for the Court, said: "If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly. . . ."[134] Justice Goldberg agreed in 1964 that constitutional provisions were to be construed with reference to "the contemporary understanding" at the time of adoption.[135] As he read the history and circumstances surrounding the adoption of the fourteenth amendment, the "contemporary understanding of the general public was that freedom of discrimination in places of public accommodation was part of the fourteenth amendment's promise of equal protection," and it was this construction that he gave to the amendment.[136]

Conditions prevailing at the time of adoption were again considered helpful in 1974 when the Court had to construe whether the fourteenth amendment allowed the states to disenfranchise convicted felons. In reaching an affirmative

130 Reynolds v. United States, 98 U.S. 145, 162 (1878).
131 *Ex parte* Bain, 121 U.S. 1, 12 (1887).
132 Maxwell v. Dow, 176 U.S. 581, 602 (1900).
133 Ken-Rad Tube & Lamp Corp. v. Badeau, 55 F. Supp. 193, 198 (W.D. Ky. 1944).
134 Popovich v. Agler, 280 U.S. 379, 383-84 (1950).
135 Bell v. Maryland, 378 U.S. 226, 289 (1964) (concurring opinion).
136 *Id.* at 290.

conclusion to that question, the Court noted that light is shed "on the understanding of those who framed and ratified the Fourteenth Amendment, and thus on the meaning of section two, by the fact that at the time of the adoption of the Amendment, twenty-nine States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes."[137]

Courts will likely continue to look to the history and conditions of the times when a clause or amendment was adopted as an aid to construction. However, practices condoned by the populace in 18th or 19th century America are often poor guides as to how the Constitution might best serve our contemporary society; a larger appreciation of human dignity should not be denied in constitutional construction, nor should the growth of the law be thwarted, because of earlier conditions.

4. The Meaning Given to Words at the Time of Adoption

Sometimes in its quest for intent, the Supreme Court has insisted that words and language used in the Constitution are to be construed according to their meaning when the relevant clause or amendment was adopted. "The language used in the Constitution," said Justice Wayne for the Court in 1856, "must be construed with reference to its meaning at the time of its adoption."[138] The Court stated in 1887: "It is never to be forgotten that in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[139]

It is suggested that words used in a constitution intended to endure for untold generations should not be restricted to their meanings at the time the provision was first adopted:

> The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[140]

Similarly, Justice Frankfurter concluded: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[141]

In dealing with the great general phrases of the Constitution, the Supreme Court has ordinarily understood that the intent of the framers is better honored by a construction that abjures literal meanings found in dictionaries or practices of the times when the provision was adopted; this understanding has furthered

137 Richardson v. Ramirez, 418 U.S. 24, 48 (1974).
138 *Ex parte* Wells, 59 U.S. (17 How.) 307, 311 (1856).
139 *Ex parte* Bain, 121 U.S. 1, 12 (1887).
140 Compers v. United States, 233 U.S. 604, 610 (1914).
141 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

both the evolution of the law and a growing perception of human dignity.[142]

5. Proceedings in the Continental Congress

A few of the Constitution's clauses have their parallel in the prior Articles of Confederation, adopted by the Second Continental Congress; here the search for the intent of the Founding Fathers can be aided by recourse to the proceedings of the Continental Congress. To illustrate, when the Supreme Court in 1900 was construing the federal taxing power, it concluded that only geographical uniformity was required for the indirect taxes because "the proceedings of the Continental Congress . . . make it clear that the words 'uniform throughout the United States,' which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference to a geographical uniformity."[143]

In ascertaining intent of those who framed and adopted the privileges and immunities clause of article IV, as well as the privileges and immunities clause of the fourteenth amendment, a court could well note the clause contained in the Articles of Confederation assuring to the people "all privileges and immunities of free citizens"[144] and construe the constitutional language accordingly.

C. *Ascertaining Intent from Contemporary Exposition or Construction*

1. Contemporary Legislative Exposition

Courts have frequently made reference to contemporary legislative exposition to fix the meaning of a constitutional provision or phrase. For example, in 1829 a New York court stated: "Great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and may be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded."[145]

The Supreme Court has often construed the Constitution according to the meaning provided by contemporary Congresses. The acts of the first Congress, especially the Judiciary Act of 1789, have always been deemed high authority in construing the Constitution. After remarking that "great weight has always been attached, and very rightly attached, to contemporaneous exposition,"[146] Chief Justice Marshall, speaking for the Court in 1821, added: "A contemporaneous exposition of the Constitution, certainly of not less authority than that which has just been cited [the *Federalist Papers*], is the judiciary act itself. We know, that in the congress which passed that act were many eminent members of the convention which formed the constitution."[147] The Court has frequently

142 *See, e.g.,* Furman v. Georgia, 408 U.S. 238 (1972); Katz v. United States, 389 U.S. 347 (1967).
143 Knowlton v. Moore, 178 U.S. 41, 96 (1900).
144 C. ANTIEAU, 1 MODERN CONSTITUTIONAL LAW § 9:13, (1969).
145 People v. Green, 2 Wend. 266, 274-75 (N.Y. 1829).
146 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).
147 *Id.* at 420.

stressed the fact that many Senators and Representatives in the first Congress had served in either the Constitutional Convention or the state ratifying conventions, or both, as ample justification for respecting constructions expressed in that Congress.[148] When the Court held in 1816 that it possessed appellate jurisdiction on federal questions decided by the state courts, Justice Story emphasized that this jurisdiction had been established by legislation of the First Congress, "composed as it was . . . of men who had acted a principal part in framing, supporting, or opposing that constitution."[149] In reference to the Judiciary Act of 1789, Justice Sutherland wrote in 1930: "That act was passed shortly after the organization of the government under the Constitution, and on the day preceding the proposal of the first ten amendments by the first Congress. Among the members of that Congress were many who had participated in the convention which framed the Constitution and the act has always been considered, in relation to that instrument, as a contemporaneous exposition of the highest authority."[150] Three years later, Justice Sutherland added: "The Judiciary Act of 1789 has always been regarded as practically contemporaneous with the Constitution, and as such, of great value in expounding the meaning of the judiciary article of that instrument."[151]

In construing the Presidential power to remove federal personnel, the Supreme Court, speaking through Chief Justice Taft, indicated that the views expressed on the floor of the first Congress by Oliver Ellsworth were "entitled to great weight."[152] The views expressed in that Congress are so influential, said the Chief Justice, "because this was the decision of the First Congress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification; and . . . because that Congress numbered among its leaders those who had been members of the Convention."[153] The first Congress, said Taft, was "a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument."[154] The Chief Justice continued: "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and the framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given to its provisions."[155] Professor Miller has pointedly observed: "In the case on the presidential removal power, the First Congress was treated as if it were a second session of the Constitutional Convention."[156]

Construction of the Bill of Rights has been aided by reference to various acts of the first Congress, since it was this Congress that proposed the first ten

148 TenBroek, *supra* note 1, at 171.
149 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816).
150 Patton v. United States, 281 U.S. 276, 300-01 (1930).
151 Williams v. United States, 289 U.S. 553, 573-74 (1933).
152 Myers v. United States, 272 U.S. 52 (1926).
153 *Id.* at 136.
154 *Id.* at 174-75.
155 *Id.* at 175.
156 MILLER, *supra* note 20, at 190.

amendments. By way of example, the Supreme Court in 1886 asserted in dictum that it would not violate the fourth amendment for federal officials to seize goods concealed to avoid federal duties payable on them. This had, according to the Court, been specifically authorized by the first Congress; and the Court added: "As this act was passed by the same Congress which proposed for adoption the original Amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment."[157]

In construing the original Constitution, the Supreme Court has looked not only to the first Congress but to other early Congresses as well.

> The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.[158]

When the Supreme Court held in 1900 that an inheritance tax was not a direct tax within the meaning of the constitutional clause and, consequently, could be levied by the federal government without apportionment among the states, it was impressed with the fact that legacy taxes had been imposed by Congresses as early as 1797. This legislation, noted the Court,

> was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the Convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds.[159]

It can legitimately be questioned whether influences of colonial times "must have been" vividly impressed upon the minds of Congressmen in 1797, or whether they "must have had a keen appreciation of the influences which shaped the Constitution." It is a significant and perhaps presumptuous step to say that the views of Congressmen at the turn of the century represented the intent of the people who ratified the Constitution in 1788. Statements and proceedings in Congress may frequently represent views so parochial as to be completely at odds with the spirit of those who gave us the Constitution.

2. Contemporaneous Exposition Generally

Almost since the ratification of the Constitution, jurists have generally endorsed the use of contemporaneous exposition in construing that document.

157 Boyd v. United States, 116 U.S. 616, 623 (1886).
158 Burrows-Giles Litho. Co. v. Sarony, 111 U.S. 53, 57 (1884).
159 Knowlton v. Moore, 178 U.S. 41, 56 (1900).

James Madison wrote that, in construing the Constitution, "the intention of the parties to it ought to be kept in view; and that as far as the language of the instrument will permit, this intention ought to be traced in the contemporary exposition."[160] John Marshall, writing in 1821, could say: "Great weight has always been attached, and very rightly attached, to contemporaneous exposition."[161]

Thomas Jefferson's letter to the Danbury Baptists[162] has been largely responsible for the "wall of separation" construction given to the first amendment establishment ban, although he had been a member neither of the Constitutional Convention nor of the Virginia ratifying convention.

In 1803, when it was objected that the Judiciary Act of 1789 unconstitutionally assigned Supreme Court Justices to circuit duty, the Court responded: "To this objection, which is of recent date, it is sufficient to observe that practice, and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."[163] In 1827, Justice Johnson wrote that contemporaneous exposition is to be resorted to freely in construing the original Constitution: "It proceeds upon the presumption, that the contemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them."[164]

Justice Story wrote: "Contemporary construction is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause and in proportion to the uniformity and universality of that construction, and the known ability and talents of those, by whom it was given, is the credit to which it is entitled."[165] The Supreme Court has indicated that the contemporary construction placed on the Constitution by Justices Ellsworth, Paterson, and Wilson, who had all been members of the Constitutional Convention, is to be given great weight.[166]

In 1851, when the Supreme Court sustained the imposition of pilot fees by the port of Philadelphia, it noted that such charges had levied frequently both before and after the adoption of the Constitution: "[T]his contemporaneous construction of the Constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the Constitution."[167]

In fixing the meaning of language used in the Constitution, the Supreme Court has been impressed with contemporaneous construction given by executive

160 WRITINGS OF JAMES MADISON, *supra* note 57, at 59.
161 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).
162 S. PADOVER, THE COMPLETE JEFFERSON 518-19 (1943).
163 Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803).
164 Ogden v. Saunders 25 U.S. (12 Wheat.) 213, 290 (1827).
165 STORY, *supra* note 6, § 407.
166 Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 545 (1869). *See also Ex parte* Grossman, 267 U.S. 87, 115 (1925).
167 Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 315 (1851).

and administrative officials. In 1891 the Court said: "In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."[168] The Supreme Court in 1892, after noting that the states had provided for the choice of such electors in the first four Presidential elections, ruled that a state could permit the election of Presidential electors by congressional districts. "[T]he contemporaneous practical exposition of the Constitution was too strong and obstinate to be shaken or controlled."[169]

Willoughby wrote in 1929 that the Supreme Court has never held itself bound by legislative or executive construction, "however contemporaneous their first statement with the adoption of the Constitution."[170] Contemporaneous construction by persons who did not participate either in a Convention or in a state convention that ratified the Constitution only provides a possible intent of those responsible for the Constitution. The same is true in the case of amendments when the construction given was by someone who was neither in the Congress that proposed nor in the state legislatures or conventions that ratified the amendment. As Story suggested long ago, this kind of contemporaneous construction should be subject to qualification and reserve.[171] The value of this constructional aid grows weaker as years intervene between ratification of the constitutional clause and the proffered practice or statement. "Upon the question of the true meaning and effect of the Constitution," said Justice Gray in 1895, "opinions expressed more than a generation after the adoption of the Constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage."[172]

3. Contemporary Statements Outside the Constitutional Convention or the Congress

In construing the Constitution and its amendments, the Supreme Court has noted contemporary statements made by prominent Americans outside the Constitutional Convention or outside the Congress that proposed the amendment being construed.

For example, in 1900 the Supreme Court referred to the statements of a delegate to the Constitutional Convention, Luther Martin, made after the Convention before the Maryland Legislature to which he was reporting on the proposed Constitution, to show that the uniformity clause of article I, § 9 was intended only to ensure geographical uniformity of federal taxation.[173] In defending his thesis that the fourteenth amendment incorporated the Bill of Rights, Justice Hugo Black in 1947 placed heavy reliance upon remarks by Representative Bingham of Ohio, made in a later Congress than that which had proposed the amendment. Justice Black asserted generally: "Formal statements sub-

168 Schell's Executor v. Fauche, 138 U.S. 562, 572 (1891).
169 McPherson v. Blacker, 146 U.S. 1, 27 (1892).
170 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 29 (2d ed. 1929).
171 STORY, *supra* note 6, § 406.
172 Sparf v. United States, 156 U.S. 51, 169 (1895).
173 Knowlton v. Moore, 178 U.S. 41, 106 (1900).

sequent to adoption of the Amendment by the congressional leaders who participated in the drafting and enactment of it are significant."[174]

There is additional evidence of construction according to remarks of leading Americans outside the Convention and the Congress. In 1964, when the Supreme Court ruled that each congressional district must be of approximately the same population, it relied in part upon a speech by James Wilson, a delegate to the Convention, made soon after the Constitution was adopted.[175] To aid in construction of the jury clause of the sixth amendment, the Court in 1970 looked to a letter sent by James Madison to James Pendleton in 1789.[176] Similarly, there is no doubt that some Justices, in construing the establishment ban of the first amendment, have been strongly influenced by remarks of James Madison before and after the ratification of that amendment.[177]

It is probable that the remarks of leading Americans made about the time of ratification sufficiently represent the views of a considerable segment of the electorate to justify the courts noting such as a guide to constitutional construction. However, casual remarks made many years later should be used cautiously; memory fades and minds change with later events.

4. Publications Widely Circulated at the Time of Ratification

James Madison once stated that the Constitution must be given "its true meaning as understood by the Nation at the time of its ratification."[178] And in construing federal and state constitutions, courts have frequently looked to publications which were widely circulated in the community during the time when ratification was being considered.

On many occasions the *Federalist Papers* have been used by the Supreme Court in construing the Constitution. As early as 1819, Chief Justice John Marshall observed: "[T]he opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution."[179] Two years later Marshall added:

> The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitled it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it.[180]

174 Adamson v. California, 332 U.S. 46, 110 (1947) (Black, J., dissenting).
175 Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
176 Williams v. Florida, 399 U.S. 78, 95 (1970).
177 Walz v. Tax Comm'n, 397 U.S. 644, 712 (1970) (Douglas, J., dissenting).
178 *See* note 160 *supra.*
179 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 433 (1819).
180 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

Speaking of the *Federalist Papers,* Chief Justice Chase said in 1870 that "the views which it promulgated may be fairly regarded as the views of those who voted for adoption."[181] Seven years later, the Supreme Court held that the property in a vessel could be taxed by the state of the owners without violating the constitutional ban on tonnage duties, explaining: "Support to that view is also derived from one of the numbers of the Federalist, which has ever been regarded as entitled to weight in any discussion as to the true intent and meaning of the provisions of our fundamental law."[182] In 1934, the Supreme Court utilized *Federalist Paper No. 44* to explain the rationale of the contract clause.[183] In that same year the Court recorded the influence of Hamilton's general remarks in *Federalist Paper No. 81* to the effect that the states would not ordinarily be subject to suits in the federal courts.[184]

The *Federalist Papers* were once again used by the Supreme Court in 1966 to aid in construction of the speech and debate clause, and the protection it should afford Congressmen.[185] Three years later, they were largely influential in persuading the Court that Congress could not constitutionally add to the qualifications of its members.[186] There are several other instances in which the Court has turned to the *Federalist Papers* for guidance in construing the Constitution.[187]

The theory that the *Federalist Papers* probably represented the views of the people in the state ratifying conventions is somewhat weakened, however, when it is realized that a number of the conventions had completed their work before the *Papers* were published.[188] Nevertheless, the Supreme Court and other tribunals will likely continue to refer to them as reliable guides to the intent of the American community in ratifying the original Constitution.

State courts, in construing their own constitutions, have been willing to consider publications widely circulated in the community prior to a vote on a proposed constitution or amendment.[189] According to the California supreme court, arguments contained in a pamphlet sent to the voters "may be resorted to as an aid in determining the intent of the framers of the measure and of the electorate when such aid is necessary."[190]

5. The Practical Construction Given to a Constitutional Provision

A practical construction given to a constitutional clause by going back to the time of its adoption is customarily thought to mirror the intent of those re-

181 Legal Tender Cases, 79 U.S. (12 Wall.) 457, 585 (1870).
182 Wheeling, Parkersburg & Cincinnati Transp. Co. v. City of Wheeling, 99 U.S. 273, 280 (1879).
183 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934).
184 Monaco v. Mississippi, 292 U.S. 313, 323 (1934).
185 United States v. Johnson, 383 U.S. 169 (1966).
186 Powell v. McCormack, 395 U.S. 486, 539 (1969).
187 *See* Pierson, *The Federalist in the Supreme Court,* 33 YALE L.J. 726, 728-35 (1925); TenBroek, *supra* note 1.
188 TenBroek, *supra* note 1, at 171.
189 Ward v. Stevens, 86 Ariz. 222, 344 P.2d 491 (1959); California Inst. of Tech. v. Johnson, 55 Cal. App. 2d 856, 132 P.2d 61 (1942); Baumbaugh v. San Diego County, 44 Cal. App. 2d 898, 113 P.2d 218 (1941). *But cf.* McGuire v. Wentworth, 120 Cal. App. 340, 7 P.2d 729 (1932).
190 Carter v. Commission on Qualif. of Judicial Appoint., 14 Cal. 2d 179, 93 P.2d 140, 143 (1939).

sponsible for the provision and, as such, be an acceptable guide to an interpretation of the Constitution. Courts in construing the basic law can properly look, said James Madison, writing in 1830, at the "early, deliberate and continued practice under the Constitution."[191]

The Supreme Court has often relied on the early practice under the Constitution as a guide to construction of that document. The Court in 1803 held that its members could sit in circuit, largely because this had been the practice since the adoption of the Constitution. Such practice, said the Court, "affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."[192] In reference to this decision, Cooley has aptly remarked: "The practical construction was regarded as conclusive."[193]

In 1816, the Supreme Court, in holding that it possessed appellate jurisdiction from the state courts on federal questions, explained that this practice had been generally accepted from the organization of the high court.[194] "The early understanding and practice" under the grand jury indictment clause convinced the Supreme Court in 1885 that the benefits of this clause should be available to anyone subject to imprisonment in a federal prison for a term of years.[195] In 1942, the Court ruled that persons could be tried by military commissions when charged with crimes against the laws of war, because this had been the accepted understanding since the adoption of the Constitution and the Bill of Rights. "It is a construction of the Constitution which has been followed since the founding of our government, and is now continued," remarked the Court, adding, "such a construction is entitled to the greatest respect."[196] Construing the ban upon establishment of religion, the Court concluded in 1970: "It is significant that Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate exemption to religious bodies."[197] In concurring, Justice Brennan said: "Significantly, within a decade after ratification, at least four States passed statutes exempting the property of religious organizations from taxation." He continued:

> The existence from the beginning of the Nation's life of a practice, such as tax exemption for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemptions. This Court's interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation. . . . The more long-standing and widely accepted a practice the greater its impact upon constitutional interpretation.[198]

191 *See* note 160 *supra.*
192 Stuart v. Laird, 5 U.S. (1 Cranch) 299, 308 (1803).
193 COOLEY, *supra* note 7, at 149.
194 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816).
195 *Ex parte* Wilson, 114 U.S. 417, 426 (1895).
196 *Ex parte* Quirin, 317 U.S. 1, 41-42 (1942).
197 Walz v. Tax Comm'n, 397 U.S. 664, 677 (1970).
198 *Id.* at 681 (concurring opinion).

As it construed the fourteenth amendment in 1974 to determine if the states could constitutionally disenfranchise convicted felons, the Court found most impressive "the Congressional treatment of States readmitted to the Union following the Civil War,"[199] noting that disenfranchisement for crime was regularly accepted by the Congress as a proper provision of the constitutions of the former Confederate States as they were readmitted to representation in Congress.[200]

Since practical construction as a guide to constitutional meaning has ordinarily been justified by the Supreme Court because it purportedly casts light upon the intent of those who framed and adopted a constitutional clause or amendment, it is most valuable when it exists shortly after adoption and of lesser value when it occurs only many years after ratification. In 1969, when the Court refused to recognize a power in Congress to exclude from membership for reasons not mentioned in the Constitution, it considered precedents but concluded they did not control the decision.

> Had these Congressional exclusion precedents been more consistent, their precedential value still would be quite limited. . . . The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.[201]

The Supreme Court will likely continue to note congressional and Presidential practices under the Constitution as guides to construction, with the justification that they indicate, at least to some extent, the intent of the persons responsible for the ratification of the Constitution or its subsequent amendments.[202] However, as the Court shifts increasingly from a historical to a sociological jurisprudence, it will in its jurisprudence of interests continue to make such references, not because the practices necessarily reflect the intent of 18th century Americans, but because they represent contemporary interests and values deserving constitutional consideration.

III. The Search for Intent: Particular Matters Involved in the Construction of Amendments

Amendments to the Constitution "must be construed with the . . . clauses of the original Constitution and the effect attributed to them before the Amendment was adopted," according to the Supreme Court.[203] Thus, in construing the sixteenth amendment to determine if Congress could tax stock dividends, the Court remarked: "The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted."[204]

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199 Richardson v. Ramirez, 418 U.S. 24, 48 (1974).
200 *Id.* at 49.
201 Powell v. McCormack, 395 U.S. 486, 546-47 (1969).
202 Ray v. Blair, 343 U.S. 214 (1952); Wheeler Lumber, Bridge & Supply Co. v. United States, 281 U.S. 572 (1930); Myers v. United States, 272 U.S. 52 (1926).
203 Eisner v. Macomber, 252 U.S. 189, 205 (1920).
204 *Id.*

In construing the first 10 amendments—the Bill of Rights—the Supreme Court has readily acknowledged that an examination of the work of the state conventions called to ratify the original Constitution is helpful, especially since their demands were the basis for these amendments.[205]

It has sometimes been suggested that phrases from the original Constitution, or from earlier amendments repeated almost verbatim in later amendments, are to be consistently construed. For example, the four dissenters in the *Slaughter-House Cases* urged that the privileges and immunities clause of the fourteenth amendment was to be construed like the same clause in article IV on the theory that both were designed to protect fundamental rights.[206] Regrettably, they failed to convince their brethren. Somewhat similarly, due process of law in the fifth amendment protects the claim to equality before the law where the federal government is involved, while in the fourteenth amendment due process is not generally used to secure freedom from discrimination, since the equal protection clause of that amendment is readily available. So too is fourteenth amendment due process more compendious than than of the fifth, embracing many of the rights safeguarded against the federal government by specific provisions of the Bill of Rights.

Where later amendments have been expressed in language earlier used by the Supreme Court, that tribunal has indicated the amendment should be construed in the manner intended by the Court on the occasion of its earlier use of the words. The Court has said:

> The words "in the United States, and subject to the jurisdiction thereof," in the first sentence of the Fourteenth Amendment of the Constitution, must be presumed to have been understood and intended by the Congress which proposed the Amendment, and by the legislatures which adopted it, in the same sense in which the like words had been used by Chief Justice Marshall in the well known case of The Exchange.[207]

Finally, it is generally accepted that "an amendment shall not be extended by loose construction, so as to repeal or modify" earlier provisions of the Constitution, unless the intent is unmistakable.[208]

IV. Construction According to the Larger Purposes and Objectives of the Framers

Respect for those who gave us the Constitution and later amendments need not be manifested solely by inquiring into the meaning they attributed to certain words and phrases. Indeed, they are more fittingly honored when, in constitutional construction, their larger purposes and objectives are sought and the organic law is interpreted accordingly. As the Supreme Court has noted on numerous occasions, inquiry into the specific intent underlying particular words is often fruitless, and it is not unreasonable to assume that those Americans who

205 Everson v. Board of Educ., 330 U.S. 1 (1947).
206 Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).
207 United States v. Wong Kim Ark, 169 U.S. 649, 687 (1898).
208 Eisner v. Macomber, 252 U.S. 189, 206 (1920).

enshrined the concepts of due process, equal protection, and privileges and immunities intended these words to be a commitment to the larger and enduring values of our society.[209]

Virtually from the Supreme Court's beginning it has been clear that the larger purposes and objects of the framers were discoverable and preferable to the specific intent behind particular words and phrases. Justice Wilson, writing in *Chisholm v. Georgia*[210] in 1793, stated that reference to the Preamble divulged the framers' intent "to establish justice," "to form a more perfect Union," and "to ensure domestic tranquility," whereupon the Court "deduced from the declared objects, and the general texture of the constitution of the United States," the conclusion that the people had intended to make the states suable in the federal courts.[211] Justice Story commented in his influential work on the Constitution[212] that the Preamble to the Constitution indicates the larger purposes to be respected by a court.

> It may well be presumed, that the language used will be in conformity to the motives, which govern the parties, and the objects to be attained by the Instrument. Every provision in the instrument may therefore fairly be presumed to have reference to one or more of these objects. And consequently, if any provision is susceptible of two interpretations, that ought to be adopted, and adhered to, which best harmonizes with the avowed intentions and objects of the authors, as gathered from the declarations of the instrument itself.[213]

When the Supreme Court was faced in 1869 with construing the taxing powers of Congress, the Court acknowledged a constant difficulty existed in construing that provision, and moved on readily and more successfully to the general intent of the Constitution. This allowed a conclusion that Congress was to have a general taxing power, subject only to the limitations contained in that document.[214] Two years later in the *Legal Tender Cases,*[215] the Court, stressing that the larger objects and purposes of the framers must guide constitutional construction, noted that "when investigating the nature and intent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted."[216] The Court added:

> This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered.[217]

209 Williams v. Florida, 399 U.S. 78, 92-95 (1970); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426-30 (1934).
210 2 U.S. (2 Dall.) 419 (1793).
211 *Id.* at 465.
212 STORY, *supra* note 6, at 38.
213 *Id.*
214 Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 540 (1869).
215 Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870).
216 *Id.* at 521.
217 *Id.* at 531-32.

Again in 1901, although the Court found no proof of any specific intent on the part of the framers to ban stamp taxes on export bills of lading, it held them unconstitutional as violative of the clause prohibiting taxes on exports. After looking at the larger purposes and intents of the framers, the Court concluded: "The requirement of the Constitution is that exports should be free from any governmental burden."[218]

Because "[t]he debates in the Constitutional Convention indicated an intention to create a strong executive,"[219] the Court in 1926 ruled that the President had power to remove purely executive officers, free from congressional control.

Noting that the persons who adopted our Constitution and Bill of Rights were concerned generally with protecting individual integrity and privacy, Justice Butler said in 1932 of the Constitution: "The direct operation or literal meaning of the words used does not measure the purpose or scope of its provisions."[220] He added significantly: "[T]his Court has always construed provisions of the Constitution having regard to the principles upon which it was established."[221]

In 1934, the Supreme Court ruled that the states were immune from suits brought by foreign governments before it, notwithstanding the language of article III and the fact that the eleventh amendment contains no words banning such litigation. Chief Justice Hughes, speaking for the Court, explained:

> Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article 3, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a "surrender of this immunity in the plan of the convention. . . ." The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State.[222]

After the Supreme Court decided that a dominant purpose of those who ratified the Constitution was to ensure citizens the right to choose members of the House of Representatives, it held that Congress controlled the primaries for such elections. The language of Chief Justice Stone is worth quoting at length.

> We may assume that the framers of the Constitution in adopting that section [article I, § 4] did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject

218 Fairbank v. United States, 181 U.S. 283, 290 (1901).
219 Myers v. United States, 272 U.S. 52, 116 (1926).
220 United States v. Lefkowitz, 285 U.S. 452, 467 (1932).
221 *Id.*
222 Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934), *citing* THE FEDERALIST No. 81 (A. Hamilton).

> matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.[223]

Chief Justice Stone concluded: "We turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes."[224]

In 1942, Chief Justice Stone, in paying tribute to the late Justice Brandeis and referring admiringly to Brandeis' approach to constitutional construction, said:

> He was emphatic in placing the principles of constitutional decision in a different category from those which are guides to decision in cases where the law may readily be altered by legislative action. He never lost sight of the fact that the Constitution is primarily a great charter of government, and often repeated Marshall's words: "it is a *constitution* we are expounding . . . intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Hence, its provisions were to be read not with the narrow literalism of a municipal code or a penal statute, but so that its high purpose should illumine every sentence and phrase of the document and be given effect as a part of a harmonious framework of government.[225]

Stone's words are, of course, beautifully descriptive of himself.

In 1948, the Supreme Court noted that the Preamble reveals that one of the larger purposes of the Constitution was "to provide for the common defence." In passing upon the constitutionality of congressional legislation authorizing the recapture of excess war profits, the Court did not inquire whether the framers intended to authorize such a statute, but stated rather that "the constitutional structure and controls of our Government . . . must be read with the realistic purposes of the entire instrument fully in mind."[226] The same year, in construing the fourteenth amendment, the Court did not ask whether those responsible for the amendment intended specifically to outlaw state court actions enforcing racially restrictive covenants. Rather the Court noted that "the primary concern" of those who gave us the amendment was to preserve the basic civil and political rights from discriminatory action. "[T]he provisions of the Amendment," said Chief Justice Vinson, "are to be construed with this fundamental purpose in mind."[227]

Benjamin Cardozo, in his influential book, *The Nature of the Judicial Process,* written in 1921 before he assumed his place on the Supreme Court,

223 United States v. Classic, 313 U.S. 299, 316 (1941).
224 *Id.* at 317-18.
225 Tribute to Justice Brandeis, 317 U.S. xlii, xlvii (1942).
226 Lichter v. United States, 334 U.S. 742, 782 (1948).
227 Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

forecast that the Court will increasingly minimize a search for specific intent and emphasize instead a concern for the larger purposes and objects of those who gave us the Constitution and its amendments. It is this kind of construction, he wrote, that "with increasing frequency will be applied in the future, to fix the scope and meaning of the broad precepts and immunities in state and national conventions."[228]

Professor Edward Corwin, in his 1934 criticism of Justice Sutherland's dissenting opinion in *Home Building & Loan Ass'n v. Blaisdell*,[229] asserted that the framers had no concept of 1933 conditions prevailing in America, but that they almost certainly had a broad intention that the contract clause, like all other provisions of the Constitution, be adapted intelligently to the needs and crises of later generations.[230] The same year Professor Karl Llewellyn wrote:

> [T]here is no quarrel to be had with judges *merely* because they disregard or twist Documentary language, or "interpret" it, to the despair of original intent, in the service of what those judges conceive to be the inherent nature of our institutions. To my mind such action is their duty. To my mind, the judge who builds his decision to conform with his conception of what our institutions must be if we are to continue, roots in the deepest wisdom . . . certain fundamental features of our institutions need expression in the rulings of the Supreme Court of the United States, whatever be the language of the Document.[231]

In construing language of the Constitution, intended by the framers and those who adopted it as a guide to posterity, a court is to be concerned only secondarily with what was intended for 1789 and primarily with adjusting competing societal interests. The same is true of amendments. During the oral argument in *Brown v. Board of Education*,[232] the Supreme Court asked counsel to respond to the following question:

> [W]as it nevertheless the understanding of the framers of the Amendment (a) that future Congresses might, in their exercise of their power under section 5 of the Amendment, abolish such segregation, or (b) that it would be within the judicial power, in the light of future conditions, to construe the Amendment as abolishing such segregation of its own force?[233]

With similar concern for ascertaining possible intent as to future solutions, Professor Alexander Bickel wrote:

> Should not the search for congressional purpose . . . properly be twofold? One inquiry should be directed at the congressional understanding of the immediate effect of the enactment or conditions then present. Another

228 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).
229 290 U.S. 398 (1934).
230 Corwin, *Moratorium Over Minnesota*, 82 U. PA. L. REV. 311, 313-14 (1934).
231 Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 33 (1934) (emphasis supplied).
232 Brown v. Board of Educ., 345 U.S. 972 (1953).
233 *Id.*

> should aim to discover what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.[234]

The continued vitality of the Code Napoleon is certainly due in part to the willingness of French jurists to inquire what the draftsmen would have intended for modern France. The distinguished president of the highest French court, M. Ballot-Beaupre, has explained that construction is according to *le sens evolutif*. "We do not inquire," he has said, "what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be."[235] So too in construing a constitution, courts concerned with framers' intent are obligated to at least search for the kind of solutions the persons responsible for the document would probably find acceptable under the conditions of contemporary society. "The Constitution of the United States," one federal court has concluded, "must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time."[236]

V. Conclusion: Going Beyond the Framers' Intent in a Changing Society

It is exceedingly difficult, if not impossible, to determine with accuracy what those who adopted the original Constitution meant by their use of particular words and phrases, especially since the work of the state ratifying conventions was poorly reported. And although there are better records of more recent amendments, on what is undoubtedly the most important addition to the Constitution, the fourteenth amendment, there is a useful record of debate and discussion in only one state, Pennsylvania. The search for the intent of those responsible for the adoption of constitutions and amendments is not a skill that is generally mastered by the American bar and, as in the past, future courts will receive little light from such inquiries.

More importantly, even when the intent of the persons responsible for a constitutional phrase seems apparent, this is only the beginning of constitutional construction. Magnification of the framers' intent can blind justices to the development of the law since the constitutional provision was adopted; it also tends to deny that potential for growth that must be inherent in constitutions intended for later generations, and neglects the necessary task of identifying, weighing, and adjusting the values and interests competing in contemporary society.

It can be safely said that many of the Founding Fathers themselves would not have wanted constitutional construction to be limited to application of the framers' intent. Thomas Jefferson, writing to a friend, Samuel Kercheval, on July 12, 1816, said:

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234 Bickel, *The Original Understanding and the Segregation Decision*, 89 HARV. L. REV. 1, 59 (1955).
235 M. SMITH, JURISPRUDENCE 29-30 (1908).
236 White v. Crook, 251 F. Supp. 401, 408 (M.D. Ala. 1966).

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. . . . Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.[237]

In constitutional construction, the Supreme Court must go beyond the original intent to ascertain both how an 18th century concept has changed with maturing social values and how the courts have recognized the newer meanings given to older words. Justice Holmes, ever unwilling to confine constitutional construction to an analysis of framers' intent, wrote in 1914:

> But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions. . . . Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[238]

Six years later, Justice Holmes was again speaking for the Court when he said:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.[239]

"[T]he present has a right to govern itself," said Justice Holmes.[240] He looked forward, he reported, "to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."[241]

Supreme Court Justices have often understood that constitutions are designed for the future, and that in construing them it is imperative that they be given the capacity for growth that can better serve the needs of a changing society. Justice McKenna was speaking for the Court in 1910 when he said:

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237 10 WRITINGS OF THOMAS JEFFERSON 42-43 (P. Ford ed. 1899).
238 Gompers v. United States, 233 U.S. 604, 610 (1914).
239 Missouri v. Holland, 252 U.S. 416, 433 (1920).
240 O.W. HOLMES, COLLECTED LEGAL PAPERS 139 (1920).
241 *Id.* at 195.

> A principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas.[242]

The Supreme Court has not often allowed the framers' intent to obstruct a decision necessary for contemporary America. In *Blaisdell,* over Justice Sutherland's insistence that the intent of the framers was clearly controlling of the decision, Chief Justice Hughes responded: "To ascertain the scope of the constitutional prohibition [the Court must] examine the course of judicial decisions in its application." He added that "full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope."[243]

Justice Felix Frankfurter refused to limit constitutional construction to a search for framers' intent. Justices must look to "the pervasive feeling of society" in construing the Constitution, he wrote.[244] Two years later he added:

> Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the due process clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as "due process," the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.[245]

Constitutional construction and the broad concept of ordered liberty "were not frozen as of 1789 or 1868, respectively," said Justice Frankfurter and the second Justice Harlan; they added: "While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning."[246] The words of the Constitution, said Justice Fortas in 1968, "were not written with a meaning that persists for all time." Such words, he observed, "are subject to the changes that a restless life brings upon them."[247]

Notwithstanding his great respect for the use of historical materials, the second Justice Harlan readily acknowledged that the broad concepts abounding in the Constitution are to be construed "in light of evolving needs and circum-

242 Weems v. United States, 217 U.S. 349, 373 (1910).
243 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934).
244 Haley v. Ohio, 332 U.S. 596, 605 (1948).
245 Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (dissenting opinion).
246 Sweezy v. New Hampshire, 354 U.S. 234, 266 (1957).
247 P. CLANCY, JUST A COUNTRY LAWYER 219 (1974).

stances."[248] In 1972, a majority of the Court construed the "cruel and unusual punishment" clause with a noticeable disregard for the limited meaning those words had in 1791; Justice Powell lamented in dissent: "The Court rejects as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty."[249]

Adoption of a sociological jurisprudence has inclined some scholars to virtually reject the legitimacy of the search for framers' intent in constitutional construction. Miller and Howell in 1960 wrote of judicial deference to framers' intent as "a filiopietistic notion that can have little place in the adjudicative process of the latter half of the twentieth century—if, indeed, it ever did."[250] The late Professor TenBroek characterized the Supreme Court's traditional emphasis upon framers' intent as one of its "fundamental doctrinal fallacies," and forecast in 1939 that such intent will readily be overlooked when the majority of the Justices agree upon another construction.[251]

The Supreme Court's construction of the Constitution will increasingly be the result of a conscious identification, weighing and balancing of societal interests. Inquiries into the values of the Founding Fathers, however, will remain important; generally the interests placed on the scales of a jurisprudence of interests will be not the ephemeral interests of a fleeting majority but the long-range interests of our society. The commitment of the constitutional generation to the dignity of the individual, to freedom of communication, and to an open society will not readily be forgotten by a court methodologically committed to such a jurisprudence.

248 Welsh v. United States, 398 U.S. 333, 346 (1970) (concurring opinion).
249 Furman v. Georgia, 408 U.S. 238, 417 (1972) (dissenting opinion). *See also* Weems v. United States, 217 U.S. 349, 382 (1910) (White, J., dissenting).
250 Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 683 (1960).
251 TenBroek, *supra* note 1, at 234.