

1-1-1987

Constitutional Interpretation—The Uses and Limitations of Original Intent

Thomas B. McAfee
Southern Illinois University

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

Recommended Citation

McAfee, Thomas B. (1987) "Constitutional Interpretation—The Uses and Limitations of Original Intent," *University of Dayton Law Review*. Vol. 12: No. 2, Article 3.

Available at: <https://ecommons.udayton.edu/udlr/vol12/iss2/3>

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

Constitutional Interpretation—The Uses and Limitations of Original Intent

Cover Page Footnote

I wish to acknowledge the help of my research assistant, Marcia Mulcahy, in the preparation of this article and to thank Professor Patrick J. Kelley for many insightful conversations about the nature of our Constitution and the interpretive process.

I should also acknowledge an enormous intellectual debt to Professor Reed Dickerson. His rigorous, yet extremely readable, work on the interpretation and application of statutes has done more to illuminate for me the subject of legal interpretation than the largest amount of recent scholarly outpouring related to that subject. My debt will be obvious in the footnotes; indeed, I would be tempted to describe my effort as an attempt to apply his approach to statutory interpretation to the field of constitutional law—for it is nearly that—except that he will undoubtedly be disappointed that I view legislative history, with all its limitations, as a potentially relevant aspect of the context by which we ascertain statutory or constitutional meaning. In any event, the mistakes are mine; the genuine insights are largely his.

CONSTITUTIONAL INTERPRETATION—THE USES AND LIMITATIONS OF ORIGINAL INTENT

Thomas B. McAfee*

I. INTRODUCTION

It is fitting that in the decade of the Bicentennial of the Constitution we have seen a renewal of debate over the meaning of the Constitution and what is required to remain true to it.¹ An aspect of that debate has concerned constitutional interpretation and the role of “original intent”—or, perhaps more broadly, “original context”²—in any proper approach to the interpretive process.³ Unfortunately, the debate is frequently approached from virtually an either/or perspective, as though the intent of the Framers must either control all constitutional questions or be used as no more than window-dressing.⁴ While

* Associate Professor of Law, Southern Illinois University School of Law; J.D., University of Utah College of Law (1979). A condensed version of this article has appeared in the January 1986 issue of the Illinois Bar Journal. I wish to acknowledge the help of my research assistant, Marcia Mulcahy, in the preparation of this article and to thank Professor Patrick J. Kelley for many insightful conversations about the nature of our Constitution and the interpretive process. I should also acknowledge an enormous intellectual debt to Professor Reed Dickerson. His rigorous, yet extremely readable, work on the interpretation and application of statutes has done more to illuminate for me the subject of legal interpretation than the largest amount of recent scholarly outpouring related to that subject. My debt will be obvious in the footnotes; indeed, I would be tempted to describe my effort as an attempt to apply his approach to statutory interpretation to the field of constitutional law—for it is nearly that—except that he will undoubtedly be disappointed that I view legislative history, with all its limitations, as a potentially relevant aspect of the context by which we ascertain statutory or constitutional meaning. In any event, the mistakes are mine; the genuine insights are largely his.

1. See, e.g., Monaghan, *Our Perfect Constitution*, 56 N.Y.U.L. REV. 353 (1981); Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985).

2. To some minds, the search for “original intent” implies combing legislative (or convention) debates in search of actual or subjective intent. By “original context,” I refer to the Constitution or amendment read as a whole, extrinsic evidence as to the concerns leading up to the enactment, legislative history, and evidence of relationship to other enactments that might bear on meaning.

3. Most recently, the debate has broken free of the law journals and entered the public domain with the help of Attorney General Meese and various respondents, including two Supreme Court Justices. For addresses by Meese and Justices Brennan and Stevens, see Addresses, *Constructing the Constitution*, 19 U.C. DAVIS L. REV. 1 (1986). For the views of the newly-appointed Chief Justice, see Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

4. Although even Raoul Berger has acknowledged that “the framers’ intent is [not] a . . . generally applicable method of keeping faith with the Constitution,” Berger, *The Scope of Judicial Review: The Continuing Dialogue*, 31 S.C.L. REV. 171, 173 n.13 (1980), I have observed elsewhere that Berger has yet to devote substantial research time to a major constitutional issue without finding clearly binding intent that resolved any doubt presented by the text itself. McAf-

some advocates of original intent may overstate the extent to which historical evidence can aid constitutional construction, commitment to the principle that evidence extrinsic to the text *can* clarify meaning in ways that bind decision-makers does not entail seeing historical evidence as a grand key that removes most or all difficulties in constitutional interpretation or entirely resolves the riddle of determining the proper role for judicial review in a democratic society. It will hardly do to launch a broad-scale attack on the use of original context on the ground that claims as to its potential have been inflated.

Some seeming opponents of original intent have even been somewhat obscure as to whether they are opposed to seeing original intent as a panacea or are staking out the much stronger claim that, based on theoretical or practical objections, original intent can never raise binding obligations.⁵ Some have argued that the search for original intent does not provide answers to the difficult issues of contemporary application of constitutional provisions but have not clarified whether text read in context might resolve ambiguities or establish outside boundaries or, at least, some core applications of a particular provision.⁶ Those most emphatic about the total poverty of original intent seem in general to be those committed to the views that (1) the search for binding intent is practically impossible or even theoretically incoherent so that only

fee, *Berger v. The Supreme Court—The Implications of His Exceptions Clause Odyssey*, 9 U. DAYTON L. REV. 219, 236–37, 238 n.113 (1984). For the view that the Framers' intentions will always be relevant to our discourse, but *never* binding, see Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1069–72 (1981); Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 750 (1983).

5. For example, two prominent theorists who contend that original intent cannot (or should not) place substantial restraints on judges have focused near-exclusive attention on individual rights provisions, including extrinsic evidence that supports an essentially open-ended judicial role in that area. J. ELY, *DEMOCRACY AND DISTRUST* 11–41 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 717 (1975). See also Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647 (1985) [hereinafter *Moral Reasoning*]; Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984) [hereinafter *Objectivity*]. For evidence that such open-ended readings of the individual rights provisions of the Constitution need not preclude discovery of binding intent, see *infra* note 79 regarding the comments about David Richards.

6. For example, the sources cited at *supra* note 5 do not address these separable questions. In particular, Robert Bennett and John Ely offer various objections to reliance on original intent, but each focuses concern on broadly worded, vague constitutional provisions. Even Larry Simon, who clearly argues that the intentions of the Framers are not knowable and have no authoritative status, nonetheless comments in passing that “the *Slaughter-House Cases* have gutted whatever meaning the privileges and immunities clause might have had.” Simon, *supra* note 1, at 603 n.2. Inasmuch as this assertion is literally false—the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), ascribed a meaning to the provision—it appears that Simon is here joining the host of modern scholars who agree that the *Slaughter-House Cases* adopted an incorrectly narrow view of that clause. As we shall see, such a view is only as obvious as Simon apparently finds it to be if

the text (if anything) binds us or that (2) the Framers lacked authority to bind us.

This essay will largely address the first of these claims. As to the second, it would require a separate article to defend fully the traditional assumptions that the Constitution binds us until it is amended and that we are bound by the ascertainable meaning of the document where it is clear from text and context.⁷ These assumptions are woven into the fabric of our law. At a more practical level, the view, for example, that we are not bound by the clear meaning of the text would not be sustained by the American public for a month if the Supreme Court announced it as the basis for "constitutional" judgment.⁸ Advo-

7. For skeptical treatment of one or both of these assumptions, see R. DWORKIN, *A MATTER OF PRINCIPLE* 34-38 (1985); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985); Simon, *supra* note 1. For a representative formulation of these assumptions, see Monaghan, *supra* note 1, at 374-75, 383.

This essay, however, will not address the difficulties presented by the doctrine of *stare decisis* for determining what is authoritative in constitutional law. At least some who see original context as binding on constitutional interpreters nonetheless see room for *stare decisis* to shield even some incorrect decisions. See Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 7-10 (1979).

8. As for example, in Richard Saphire's suggestion that the Court could treat article I's requirement that Senators be thirty years old as "a symbolic reference to maturity" and thereby allow a twenty-nine year old to serve. Saphire, *supra* note 4, at 795. Interestingly, while Saphire posits significant changes in the pace of physical and intellectual maturity to bolster the appeal of this example, his more general premise is that specific texts receive weight not because we are trying to do the Framers' will, but because such provisions seldom implicate important welfare issues, do not involve "prior authoritative interpretations," and because interpretation must at least begin with the text. *Id.* at 793-95. Elsewhere, Saphire makes clear his view that the Constitution's "writtenness" is not "its most crucial or determinative characteristic", *id.* at 801, and provides an example of a derogation from plain text. *Id.* at 801 n.201.

But if the whole point is not to do the will of the Framers as revealed in the text, it would be equally plausible to treat the thirty-year age requirement as a symbolic reference to "maturity" and to hold that, by today's values, a twenty-five year old is mature enough to be a Senator. If a poll revealed that 65% of all Americans agreed that twenty-five year olds were mature enough to be Senators, it is difficult to see why (in the light of the status of *stare decisis* in constitutional law) the absence of "prior authoritative interpretations" should make much difference. Given Saphire's broad premise, one can even imagine a court blithely telling the twenty-year-old that wants to be a Representative (the text requires him to be twenty-five) that the applicable text is also a symbolic reference to maturity, but that the same opinion poll suggested that the modern consensus is that congressmen should be twenty-five as well.

If we may so confidently substitute our own application of a purported underlying purpose of a text for the intent embodied in the text itself, it would seem equally legitimate to substitute a trivializing purpose to the end of simply gutting any meaning from even the most specific texts. It is little wonder that the most thoughtful commentator on statutory interpretation takes the view that legislative intent should prevail over legislative purpose. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 98-101 (1975). None of this is to deny that perplexing issues as to how literally texts should be interpreted do present themselves. A familiar example is whether the thirty dollar predicate to the seventh amendment jury trial right should be read in pre-inflation or post-inflation (real) dollars. For a critique of the view that such examples drive a large wedge through the assumption that specific provisions can present easy cases, see Hegland,

cates of such positions would have a difficult time convincing Presidents and legislators that they should consider themselves bound by Supreme Court decisions interpreting the Constitution if the Court viewed itself as empowered to amend clear text by ascribing a meaning of its own. If courts *are* bound by clear text, as most have supposed,⁹ it is difficult to see why they should not be equally bound by context fully capable of clarifying the meaning of text.

II. THE POSSIBILITY OF FINDING ORIGINAL INTENT

Perhaps the most universal charge against the use of original intent is the claim that it is simply impossible to find.¹⁰ A host of theoretical difficulties are presented, including problems involved in determining whose intentions should count¹¹ as well as in determining and counting the intentions of relevant collective bodies (congresses or state ratifying bodies).¹² The objections raised are formidable as well as complex, and perhaps the most articulate proponent of the use of original intent has acknowledged that the possibility of a stable theory of constitutional interpretation may depend on the ability of scholars with like views to confront the problems raised.¹³ Moreover, such objections are embraced not only by those opposed to the very notion that the meaning of the Constitution could or should ever be fixed, but also by some who defend the notion of a binding constitutional text.¹⁴

No detailed response to these various objections will be attempted in this short essay. Instead, this essay will offer, first, some general criticism about this sort of interpretive skepticism, followed by a counter-example designed to provide some confirmation of these general observations.

Goodbye to Deconstruction, 58 S. CAL. L. REV. 1203 (1985).

9. After rejecting resort to original intent as "a filioipietistic notion that [has] little place in the adjudicative process of the latter half of the twentieth century," Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 683 (1960), and contending that the Framers should not rule us from their graves, *see id.*, two critics of original intent acknowledged that clear text is binding, without offering to explain why the Framers in that case are not equally ruling us from their graves. After all, societal consensus changes even about so-called "housekeeping" issues; a majority of Americans right now might well favor allowing a third presidential term as a permanent feature of our constitutional system. Why must they struggle with article V? For helpful discussion, see Kay, Book Review, 10 CONN. L. REV. 801, 808 n. 28 (1978).

10. *E.g.*, *Objectivity*, *supra* note 5, at 474; Brest, *supra* note 7; Saphire, *supra* note 4, at 774-75.

11. Brest, *supra* note 7, at 222; *see also* Saphire, *supra* note 4, at 772-74.

12. Brest, *supra* note 7, at 214-15.

13. Monaghan, *supra* note 1, at 374-76.

14. *E.g.*, Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

A. Some General Observations

First, it seems apparent that the most powerful and cogent objections to discovering the original intent underlying constitutional provisions apply equally well to the attempt to discover the ordinary legislative intent underlying any statute.¹⁵ While there exists a parallel controversy in the world of statutory interpretation as to the role that extrinsic evidence of intent should play,¹⁶ it is at least noteworthy that the trend among modern courts has been in the direction of increased use of relevant context, including legislative history, to shed light on the intended meaning of statutes.¹⁷ Theoretical objections to our ability to discover the collective intent of large groups of individuals have given way to the practical experience of most judges that original context can shed light on statutory meaning. For example, despite his own reliance on the theoretical objections to the use of original intent in constitutional interpretation,¹⁸ Justice Brennan, for one, seems quite comfortable with the search for legislative intent in statutory interpretation.¹⁹ The question raised is whether something more is at work, such as a basic, underlying commitment to the general concept of a living constitution, without a fixed meaning.

Second, it is ironic that, at least with Justice Brennan, the objections to the search for original intent lie right alongside an eloquent appeal to "the vision of the individual embodied in the Constitution"²⁰ and on behalf of "the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure."²¹ Public officials are thus called on to "recognize human dig-

15. The common problems include the difficulty of ascribing intent to any individual, the complexities associated with counting intentions and determining the intent of large numbers of people, and the problems presented by distorting aspects of group decision-making. The constitutional context presents the unique problem of determining *whose* intentions count, whether ratifiers or Framers, and how the intentions of many ratifiers could reliably be determined. Virtually all the skeptical literature, however, treats the remaining problems associated with determining intent as being sufficient to suggest a skeptical position. For an argument that the Framers' intent should generally substitute as the ratifiers' intent, see Monaghan, *supra* note 1, at 375 n.130.

16. Compare Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) with R. DICKERSON, *supra* note 8, at 71-79 (critiquing Radin's skepticism as to the coherence of the notion of legislative intent).

17. See, e.g., Brest, *supra* note 7, at 211.

18. Adresses, *supra* note 3, at 4-5.

19. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (Brennan, J., majority). In fairness to Justice Brennan, his objection to the use of original intent in constitutional interpretation went to the meaningfulness of any notion of "legislative intent" when the "legislators" are the many people who ratify the document or amendment. While this objection is unique to the constitutional setting, equally cogent objections (of which Justice Brennan is surely aware) apply to the search for the intent of any collective body.

20. Adresses, *supra* note 3, at 8.

nity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage."²²

The appeal to the basic, yet very general, "vision" or "design" to preserve human dignity can be viewed realistically as a simple device of linking modern value choices to the most general formulation of the weight of our political tradition.²³ On this view, it is little more than window-dressing.²⁴ Perhaps it is nothing else. Still, it has a peculiar ring to it. The repetition of the appeal alone suggests something more—that Brennan is claiming fidelity to what is most basic about our constitutional system itself, to the Framers' own commitment to freedom and dignity.²⁵

But why should we be confident about our ability to discern what is central to the constitutional design if we cannot possibly divine what was intended by any particular provision? Some of the most thoughtful commentators on statutory interpretation have observed that one of the ironies of the attack on the concept of legislative intent is the frequent substitution of talk about " 'legislative purposes,' 'policies,' and 'objectives' " without any attempt to show "that arguments leading to the rejection of talk about legislative intent have no force against these new expressions."²⁶ Such observations seem equally applicable to appeals to the purpose of the Constitution as a guiding force to remaining true at least to the spirit of the document.

As with many forms of skepticism, when proponents of skeptical views complete their argument, they frequently turn (in other writings or sections) to familiar discourse about the purposes and intentions of those responsible for the Constitution or one of its important amendments—as if it were possible to discern such purposes and to apply them, to the extent that they are relevant, in interpreting constitutional provisions.²⁸ What this suggests is that, although real difficulties are

22. *Id.* at 9.

23. See Sandalow, *supra* note 4, at 1038-39.

24. In my view, this is what the uses of history espoused by Sandalow and Saphire amount to in large part. *Id.*; Saphire, *supra* note 4, at 799-801.

25. If so, Brennan's argument has a similar ring to David Richards' views. See Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 490 (1985). Richards appears to hold the view that historical intent is knowable, but that constitutional interpretation should look to abstract intent rather than the specific intentions of the Framers.

Admittedly, Justice Brennan's view does not suggest a static view of the content of these basic principles—but it does purport nonetheless to know that they are central to the purpose of the Constitution.

26. Mac Callum, *Legislative Intent*, 75 YALE L.J. 754, 754 (1966).

27. *Id.* at 755; accord R. DICKERSON, *supra* note 8, at 77.

28. At the end of an important skeptical piece, for example, Paul Brest acknowledges that the presumption that would "exert the strongest

presented by constitutional text and history in regard to discovery of a usable original intent, those difficulties often seem surmountable with respect to certain issues. As with some forms of philosophical skepticism, it is perhaps easier to accept that skepticism about original intent *cannot be* altogether correct than it is to offer overwhelming arguments as to *why*.²⁹ It is, in any event, not an infrequent experience in the arena of science or philosophy to see good reasons to proceed on the basis of less than perfect certainty, particularly as to *how* we might know something, in light of the available alternatives. The example which follows illustrates that it is possible to achieve sufficient certainty to warrant reliance sometimes decisive reliance, on extrinsic evidence of intended meaning.

B. *The Counter-Example*

In the *Slaughter-House Cases*,³⁰ the Supreme Court adopted a reading of the basic thrust of the "privileges or immunities" clause of section one of the fourteenth amendment³¹ that ran against the purposes of the clause as revealed by the legislative history of Congress' deliberations. In terms of the present debate, the lesson can be stated more strongly: when the privileges or immunities clause is read in historical context, there are overwhelming grounds for rejecting the reading of the clause adopted by Justice Miller, writing for the majority, even though the arguments for the opposing view are neither overwhelming nor even conclusive on textual grounds alone. Since the theoretical objections to reliance on historical context apply equally to the issue regarding the basic thrust of the privileges or immunities clause as they do to more particular issues of intent arising under that clause or other provisions, the apparent implication (if our case is quite convincing) is that, as a practical matter, reasonable minds may correctly reach consensus about the resolution of at least some issues of original intent.

In the *Slaughter-House Cases*, New Orleans butchers challenged the constitutionality of a state legislative grant of a monopoly in butchering. They contended that the pursuit of a professional calling fell within the scope of the "privileges or immunities" protected by the

claims when they are contemporary and thus likely to reflect current values and beliefs" Brest, *supra* note 7, at 229. To exert even a strong claim, original understanding must be knowable. In much the same way, Professor Simon combines skepticism with implicit adoption of a construction of the privileges or immunities with roots in the original context. See *supra* note 6.

29. This kind of total skepticism represents, in Bertrand Russell's words, "one of those views which are so absurd that only very learned men could possibly adopt them." B. RUSSELL, *MY PHILOSOPHICAL DEVELOPMENT* 148 (1959), quoted in R. DICKERSON, *supra* note 8, at 75.

30. 83 U.S. (16 Wall.) 36 (1872).

Published by the University of Chicago Press, 1986. XIV, § 1.

man,³⁸ Crosskey,³⁹ Berger,⁴⁰ Curtis,⁴¹ Ely,⁴² Grey,⁴³ Tribe,⁴⁴ and Currie⁴⁵—an incredibly diverse group of commentators, both in their constitutional philosophies and in their conclusions on the remaining issues concerning the meaning of the privileges or immunities clause—all concur that Justice Miller abused section 1 in construing the privileges or immunities clause as being limited to a narrow group of uniquely national rights and privileges. Equally important, the conclusion reached by all these scholars is unassailable when the provision is read in historical context, even though the text is ambiguous.

It is tempting to believe that the text alone is sufficient to undergird this consensus of opinion. The phrase “privileges or immunities” in section 1 certainly suggests a possible connection to the antecedent article IV provision. It would be logical to construe the section 1 provision as giving national protection to the same sorts of rights protected by article IV—that is, the rights to contract, to own property, and to obtain access to judicial remedies, among others.⁴⁶ The problem, of course, is that the language of section 1 as easily supports in Justice Miller’s interpretation. Section 1’s language refers to the “privileges or immunities of citizens of the United States,”⁴⁷ as opposed to article IV’s “[p]rivileges and [i]mmunities of Citizens in the several States.”⁴⁸ Considering that the first sentence of section 1 specifically distinguishes state and national citizenship, it is equally plausible as a matter of textual construction to read the clause as recognizing a second, distinguishable set of rights.

It has been further argued that Justice Miller’s construction ren-

38. VI C. FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, pt. 1, at 1349–55 (1971).

39. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

40. R. BERGER, GOVERNMENT BY JUDICIARY 20–51 (1977).

41. Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980).

42. J. ELY, *supra* note 5, at 22–30.

43. Grey, *supra* note 5, at 716.

44. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 418–21 (1978).

45. Currie, *The Constitution in the Supreme Court: Limitations on State Power 1865–1873*, 51 U. CHI. L. REV. 329, 352 (1984).

46. *See, e.g., Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. (1823) (No. 3230) (construing article IV privileges or immunities clause).

47. U.S. CONST. amend. XIV, § 1 (emphasis added).

48. *Id.* art. IV, § 2, cl. 2 (emphasis added). Given that it is generally “presumed that the author has not varied his terminology unless he has changed his meaning,” R. DICKERSON, *supra* note 8, at 224, Miller plausibly concluded in effect that the relevant term was “privileges and immunities of citizens of the United States.” In fact, it remains obscure, so far as I know, why the language of section 1 took the final form it did. It is known that Bingham’s initial draft tracked the article IV language and referred to the earlier provision parenthetically.

ders the clause superfluous or trivial.⁴⁹ The construction is thought to be superfluous because, by Miller's own formulation, it is referring to rights which already receive protection under the Constitution, either implicitly or explicitly. The same, however, can be said about the tenth amendment⁵⁰ and the privileges or immunities clause as it was understood by John Bingham and others who were instrumental in its passage.⁵¹ The theory underlying the Civil Rights Act of 1866⁵² was that Congress had the power to protect the basic civil rights which all citizens possessed by virtue of their relation to the nation.⁵³ For some, the fourteenth amendment simply placed their constitutional theory beyond doubt and strengthened the civil rights protections in a changing political environment;⁵⁴ for Bingham, the only non-superfluous provision was section 5,⁵⁵ as it rectified a supposed lack of constitutional enforcement power in the federal government.⁵⁶

The charge that Miller's construction renders the provision trivial is equally lacking without the help of historical context. Providing greater security for several of the rights enumerated by Justice Miller, by making some of them explicit in the text and empowering Congress to enforce them, begins to look trivial only if we already agree that the immediate purpose of section 1 of the fourteenth amendment⁵⁷ was to protect the basic civil rights of the freedman against hostile state action.⁵⁸ Apart from our earlier observation that there appears to be no theoretical reason why original "purpose" should be easier to find than "intent,"⁵⁹ it is not clear that Miller's construction remains trivial when read in the context of his construction of the other two clauses of section 1. After all, the immediate and most often stated purpose of section 1—to constitutionalize the protections found in the Civil Rights Act of 1866—is completely fulfilled in Miller's construction of the

49. J. ELY, *supra* note 5, at 22–24 (superfluous). Justice Field in dissent said the majority opinion made it a "vain and idle enactment." *Slaughter-House*, 83 U.S. (16 Wall.) at 96. On the alternative construction of *The Slaughter-House Cases*, of course, some important new rights—and perhaps all of the bill of rights—are granted to individuals as against state deprivations. See *supra* note 35.

50. U.S. CONST. amend. X.

51. See Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

52. ch. 31, 14 stat. 27.

53. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474–75, 600 (1866) (statements of Senator Lyman Trumbull, the Senate sponsor of the Civil Rights Act).

54. See, *e.g.*, R. BERGER, *supra* note 40, at 23.

55. U.S. CONST. amend. XIV, § 5.

56. Curtis, *supra* note 41, at 59, 67–68.

57. U.S. CONST. amend. XIV, § 1.

58. In fact, Justice Miller himself saw this as the pervasive purpose of the amendment.

Slaughter-House Cases, 83 U.S. (16 Wall.) at 67–72.

<https://ecommons.udayton.edu/uldr/vol12/iss2/3>
 59. See *supra* notes 6–9 and accompanying text.

equal protection clause.⁶⁰ With the section's central purpose already met, the privileges or immunities clause could easily be a supplementary protection of certain national rights in the context of an environment of state hostility to all rights of the freedman, or simply an additional provision to clear up another area of rights in which some uncertainty had persisted.⁶¹

The real reason that Justice Miller's construction of the clause rendered it trivial is because there are good grounds for believing "that it was probably the clause from which the framers of the Fourteenth Amendment expected most."⁶² There is no question that article IV figured heavily in the arguments justifying the view that Congress could act to enforce civil rights belonging to individuals because of their United States citizenship.⁶³ The early construction of article IV in *Corfield v. Coryell*⁶⁴ became the foundation of an argument that all American citizens had fundamental rights that states could not violate. Further, *Corfield* was relied on in defense of the Civil Rights Act and the fourteenth amendment.⁶⁵ There is also no doubt that John Bingham held this view of article IV and purposely drafted the privileges or immunities clause to link it to article IV.⁶⁶ In short, there is no room for doubt that the link between article IV and section 1, rejected by Justice Miller, was specifically intended by the draftsman. Moreover it is clear that this link comports with the known purposes of section 1 and that Miller's interpretation finds absolutely no support in the legislative history of the provision.⁶⁷ Justice Miller's opinion demonstrates that textualism unaided by context may easily produce more confusion than the search for meaningful evidence of intended meaning.

It is consistent with the thesis that the text alone is not sufficient to conclude the issue that Thomas M. Cooley, a textualist and well-

60. *Slaughter-House*, 83 U.S. (16 Wall.) at 81 (Miller's treatment of the equal protection clause). As to protecting civil rights as being central, at least in the legislative debates, see R. BERGER, *supra* note 40, at 22-23.

61. Given that in reality Bingham thought that the Congress lacked enforcement powers as to article IV rights, see *supra* note 48, it would not have been inconceivable that similar apprehensions were held as to other sorts of rights.

62. J. ELY, *supra* note 5, at 22.

63. U.S. CONST. art. IV was explicitly invoked by Senators Trumbull, CONG. GLOBE, 39 Cong., 1st Sess. 600 (1866), and Howard, *id.* at 2765, and the Civil Rights Bill's house sponsor, Congressman James Wilson, *id.* at 1118.

64. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

65. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 10, 17 (1949).

66. See *supra* notes 51-56 and accompanying text.

67. Even Justice Miller's reliance on the first sentence of section 1 is rebutted by the legislative history: The clause was added to the amendment during floor debate and did not influence its

known constitutional commentator of the period, reached essentially the same conclusion as to the meaning of the clause as did Justice Miller in *The Slaughter-House Cases*.⁶⁸ In his supplement to the fourth edition of Story's *Commentaries on the Constitution*,⁶⁹ Cooley insisted that "privileges which pertain to citizenship under the general government are as different in their nature from those which belong to citizenship in a State as the functions of the one are different from those of the other."⁷⁰ Charles Fairman, one of our most distinguished scholars on the history of the fourteenth amendment, has concluded that there is a strong relationship between Cooley's textualism and this "product of an eminently respectable mind, free from any captivation of fancy."⁷¹

No doubt, Miller and Cooley were also animated by their own sense of the purpose of the fourteenth amendment, particularly as they saw the potential mischief that the article IV reading could work.⁷² Underlying policy concerns undoubtedly influenced each author's resolution of the ambiguity that clearly was present if one was willing to see it. On the other hand, Miller's constructions of article IV and *Corfield*⁷³ reflected more painstaking attention to these legal texts than to the thrust of the legislative history, which Miller must have viewed somewhat skeptically.⁷⁴ Nonetheless, even if Cooley and Miller simply

68. VI C. FAIRMAN, *supra* note 38, at 1370.

69. J. STORY, *COMMENTARIES ON THE CONSTITUTION* (4th ed. 1873).

70. *Id.* at 1368-69 (quoting T. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS* (1868)).

71. *Id.* at 1370. Fairman also stated:

[For Cooley a] constitution derived its force from ratification: one should act on the supposition that those who ratified accepted the text "in the sense most obvious to the common understanding;" in construing, one should not look "for any dark or abstruse meaning;" he cautioned against giving "a controlling force" to remarks in the debates of its framers, especially where to do so would give a meaning different from what the words would "most naturally and obviously convey." It is not surprising that when a mind so organized read the Fourteenth Amendment—and saw that two citizenships were identified, and that then a provision was made for the privileges of United States citizenship—the conclusion was that the privileges incident to State citizenship were not included.

Id. at 1369 (footnote omitted).

72. *Id.* at 1354, 1368.

73. 6 F. Cas. at 551.

74. This caste of mind, of course, was not Justice Miller's alone. Only one brief filed in the case referred to the "legislative history" of the amendment. VI C. FAIRMAN, *supra* note 38, at 1348-49. Yet closer attention to context could have also allayed at least the most extreme fears held by Justice Miller. Miller's claim that the contrary reading would give Congress power to define all the basic civil rights in the first instance is supported by neither text nor history. When section 5 (and its history) is read in conjunction with section 1, it seems clear that the states were to retain sovereignty over basic rights subject to an essentially exclusive judicial responsibility to determine under what circumstances the protected privileges had been "abridge[d]." See, e.g., R. BERGER, *supra* note 40, at 46-47; Berger, *supra* note 4, at 183-92.

construed the text consistently with biases antithetical to the purposes of the fourteenth amendment, the text alone is insufficient to establish the point.

One might question how significant these conclusions are, particularly given the remaining controversy over the proper construction of the privileges or immunities clause.⁷⁵ Apart from the historical impact of the construction of section 1 in *The Slaughter-House Cases*,⁷⁶ the practical implication of modern skepticism about the search for intended meaning is that the application of many provisions is reduced to a debate about "constitutional policy": should we construe the clause broadly so as to maximize the protection given to individuals against the State, or are we more properly concerned about the potential impact of a broader reading on our federal system or on the exercise of judicial power? Our most absolute skeptics about intent frequently seem quite confident that they have the best answers to these sorts of questions, perhaps better than any the Framers intended to embody in the text.⁷⁷ For myself, I am much more certain that Justice Miller acted illegitimately in construing the clause contrary to the overwhelming evidence as to its intended meaning than I ever could be that his decision as to federalism and judicial power concerns was illegitimate as lacking judicial statesmanship. For those interested in preserving individual rights, the battle against original understanding could work in the long run to dislodge our commitment to abiding by the rights recognized in the text, properly read.

The privileges or immunities example demonstrates that, contrary

75. Virtually all of the commentators cited in *supra* notes 39–45 hold somewhat different readings of the clause. Significantly, however, the only one whose critique of the *Slaughter-House Cases* that even claimed it could stand on text alone was Crosskey's. Crosskey, *supra* note 39, at 4–10. In fact, while Crosskey insists that we look for what the words would mean to "in the mouth of a normal speaker of English, using them in [those particular] circumstances in which they [in fact] were used," *id.* at 4 (quoting HOLMES, COLLECTED LEGAL PAPERS (1921)), rather than for what the Framers meant to say, he draws from an extensive range of background law and other extrinsic evidence to establish "the meaning and purpose" of the provision. *Id.* One cannot read these pages on the "plain meaning" of the clause without concluding that Crosskey's analysis was deeply influenced by his familiarity with the rest of the statute's context, including the legislative history.

76. The Court's efforts not only dismantled the Framers' privileges or immunities clause, they also skewed interpretation of the other principal clauses of section 1. The substantive nature of the privileges or immunities clause cuts sharply against the doctrine of substantive due process—a construction with shaky textual and historical roots. *See, e.g.,* J. ELY, *supra* note 5, at 14–21. Moreover, with the equal protection clause pressed into service to ensure the protection of basic civil rights against hostile legislation, it became virtually inconceivable that the Court would consider whether that clause was more properly read as being limited to ensuring that all citizens actually received the "protection" promised them by state law. Currie, *supra* note 45, at 354; Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

to virtually all the skeptical writings on original intent, such questions are not all of the same order of magnitude. Particularly where basic questions as to the essential thrust of a provision are presented by an ambiguous text, the possibilities for discovering a determinative intent seem quite genuine. Clearly, such issues can have significant implications for constitutional interpretation purposes. For example, it is almost certain and of great importance that article I's grant to Congress of the power "[t]o declare War"⁷⁸ means, when read in context, that Congress holds the exclusive power to change the status of the nation from peace to war in order to advance the foreign policy objectives of the nation, as opposed to defending against sudden attack.⁷⁹ Of great consequence (at one time) for individuals, Justice Marshall's limiting construction of the bill of rights in *Barron v. Baltimore*,⁸⁰ was probably the correct resolution of the ambiguity of the text in light of the total context.

These issues do not raise the same problems for interpretation as are presented by generally worded, vague constitutional provisions like the free speech clause, the ban on cruel and unusual punishments, or

78. U.S. CONST. art. I, § 8, cl. 11.

79. For the best summary of the alternative possible readings of the war clause and the evidence for the reading described in text, see Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 5-10 (1972). See generally F. WORMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986). The fact that it took well into the twentieth century before any President ever claimed an independent war power as the commander in chief, and that judicial decisions throughout the years have confirmed the above reading, indicates that the weight of extrinsic evidence places the issue above the level of uncertainty. Interestingly, David Richards, a scholar known for his forceful criticism of "originalism" generally, has acknowledged that the weight of text, context, and history makes a compelling case that Congress has in recent decades abdicated its constitutional power and duty over war. Richards, *supra* note 25, at 519.

Most curiously, however, there are some who generally do not feel compelled by historical evidence of intended meaning, yet who have adopted the essential thrust of this view without offering a word of justification beyond the evidence of historical intent and traditional understanding. See e.g., L. TRIBE, *supra* note 44, at 172-81. If the need for a living constitution is as profound as Tribe has suggested, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 2 (1979 Supp.), one wonders why thoughtful arguments about the need for executive dispatch and secrecy in our modern world are referred to only in connection with somewhat less central issues as to the precise scope of the President's concededly somewhat vague power to repel sudden attacks, particularly in view of the long history of executive military actions.

The lesson is that once again it is much clearer what the text requires, in light of original context and confirming history, than what modern conditions require of constitutional "statesmen." Compare Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961) (expressing his early view that Presidents must have full responsibility for military decisions in a shrinking world; and questioning whether we can afford the luxury of 18th-Century procedures), with F. WORMUTH & E. FIRMAGE, *supra*, at 267-77 (arguing that need for deliberation and consensus is even greater in the nuclear age with so much at stake).

the equal protection clause, as traditionally construed. While there is no guarantee that all such problems of equivocation can be clearly resolved, there is usually little doubt that evidence of original intent is relevant and, if sufficiently clear, likely to be dispositive. With this much established, I turn to some fairly abbreviated comments on the problems raised by general and vague texts.

III. REFLECTIONS ON THE IDEA OF A LIVING CONSTITUTION

There is a conventional wisdom that the Constitution is *sui generis* and requires an entirely different interpretive method than a statute. Frequently, this view is summarized with the metaphor of the "living Constitution," or by reference to Justice Marshall's famous reminder "that it is *a constitution* we are expounding."⁸¹ It is not easy to separate the senses in which these ways of speaking tell us something accurate and important, and the point at which they become dangerously misleading. For one thing, while the Constitution is obviously not a code, it unquestionably contains provisions that are as specific and unambiguous as those found in any statute.⁸² If the notion of a living Constitution is to be applied to these provisions, then there is truly no written Constitution, because it has been turned it into a blank check. As we have seen, a number of questions presented by ambiguous and somewhat vague texts can be resolved with the aid of original context; to ignore what that context tells us is quite simply to amend the Constitution by construction—something that Marshall would not have countenanced.

Occasionally, even thoughtful scholars have suggested that the Constitution must change in meaning to confront technological changes—such as privacy invasions through electronic eavesdropping—that the Framers could not possibly foresee.⁸³ While our changing world can create difficult choices for constitutional interpreters,⁸⁴ many such examples, including new methods of invading privacy, can readily be seen as falling within the original meaning and intent of

81. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

82. See Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). For a more skeptical view, see Tushnet, *A Note on The Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985).

83. Tribe, *On Our Constitution, Meese Is True Radical*, USA Today, Oct. 17, 1985, at 14A, col. 5 ("Madison didn't even have a telephone; why try to imagine how he would feel about wiretapping?").

84. See, e.g., Sandalow, *supra* note 4, at 1048-49 (commenting that changing conditions in the national economy made it virtually impossible to remain true both to the Framers' intentions to enable Congress to regulate commerce that affected more states than one, as well as to leave the duty of Commerce outside the scope of federal regulatory power).

relevant provisions.⁸⁵ No one has doubted that Congress' power to regulate commerce includes—and was intended to include—not only commercial shipping, but railroads and air transportation as well, although neither existed in 1787. Lon Fuller long ago pointed out that a more limiting approach to “original meaning” reflected the conceptual confusion involved in the assumption that we think in particulars rather than in general concepts—a view that he called “the pointer theory of meaning.”⁸⁶ To insist that electronically stored data receives no protection under the fourth amendment because the Framers did not know of it would make as much sense as contending that a 1920 statute dealing with “motor cars” could not be read as covering Volkswagens.⁸⁷ But that is not how we use language.

Nor does it require a special theory of constitutional interpretation to acknowledge that the meaning of constitutional provisions are not necessarily circumscribed by the immediate purposes of the Framers. Experts on language and statutory interpretation have long recognized that meaning can outstrip intent,⁸⁸ for “[a]n author inevitably encompasses in what he says more than he has specifically in mind and often encompasses even more than he has generally in mind.”⁸⁹

Even so, Professor Dickerson has observed that in many instances “the limiting force of context” can guide courts to recognizing boundaries to the meaning of statutory terms.⁹⁰ Thus, courts have frequently found tacit assumptions that serve to limit the general language of a statute.⁹¹ A classic example in constitutional law is Justice Marshall's discussion of marriage “contracts” as being beyond the scope of article I's contract clause.⁹² While application of this principle is not always clear, “the fact that the court can do little more than balance reasonable probabilities, does not invalidate the basic principle;”⁹³ nor does it preclude that one judgment may rest on a more persuasive treatment of the relevant data than another even though we lack an instrument with which to measure precisely.⁹⁴

85. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 32–33 (1982); Kay, *supra* note 9.

86. L. FULLER, *THE MORALITY OF LAW* 84 (rev. ed. 1969).

87. R. DICKERSON, *supra* note 8, at 129.

88. *Id.* at 23–24; see also A. AYER, *LANGUAGE, TRUTH AND LOGIC* 86 (2d ed. 1946); J. KOHLER, *Judicial Interpretation of Enacted Law*, in *SCIENCE OF LEGAL METHOD* 187, 188 (1921).

89. R. DICKERSON, *supra* note 8, at 80.

90. *Id.*

91. *Id.* at 198–200.

92. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 627–29 (1819).

93. R. DICKERSON, *supra* note 8, at 200.

94. An example is the current debate over article III's broadly worded exceptions clause.

Finally, there may be constitutional provisions that are sufficiently vague and general as to require supplementation and whose meaning can hardly be equated with the expectations held for them.⁹⁵ This problem, too, is not unique to constitutional construction, as modern anti-trust legislation demonstrates,⁹⁶ although the constitutional setting, with its premise that the Constitution is intended to endure for the ages and is not lightly to be amended, may well reinforce the inference that general and vague terms were used intentionally. These clauses require constitutional decision-makers, and in particular courts, to develop the provision's contours. This is not to imply that such provisions are meaningless; but one implication is that the language, even read in relevant context, cannot resolve a large number of contemporary issues.⁹⁷ In such cases, the notion that original intent provides us with the meaning of the provision is largely misconceived, and the result is that we inevitably have a living constitution (at least to some extent).

Even so, two further points must be emphasized. The first is that the living Constitution metaphor can easily become so intoxicating as to blind commentators to occasions in which meaning is ascertainable. For example, the due process clause is simply not terribly vague or "open-textured," despite claims to the contrary.⁹⁸ John Ely has argued that the text is manifestly opposed to the substantive reading of the clause that undergirds the right of privacy.⁹⁹ While his textual point seems quite sound, Laurence Tribe has responded that Ely's focus on the term "due process" has failed to recognize that the textual point of departure for the doctrine is the explication of the concept of "law" that is required prior to substantive deprivations.¹⁰⁰ Tribe also stresses that the doctrine incorporates theories about separation of powers and individual expectations at common law.¹⁰¹

While Tribe's argument is intriguing, it establishes at most an apparent ambiguity that is more plausibly resolved in favor of Ely's construction. For one thing, given the described construction of "law," an

for a limiting construction of the provision based on an inference of a tacit assumption that the power would not extend to the Supreme Court's "essential function" in a constitutional scheme. Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to Ongoing Debate*, 36 STAN. L. REV. 895, 901-10 (1984). Any decision to read in such a limitation would be a decision based on contemporary values and an illegitimate example of derogating from the text.

95. For a brief treatment, see McAfee, *supra* note 4, at 268-71.

96. R. DICKERSON, *supra* note 8, at 240.

97. Schauer, *supra* note 14, at 801, 806-07.

98. *E.g.*, Richards, *supra* note 25, at 546.

99. J. ELY, *supra* note 5, at 18-19.

100. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1066 n.9 (1980).

do not resolve the question, but that courts are intended to play a special role in scrutinizing laws to determine whether they are sufficiently connected to a public purpose.¹⁰⁶ But however dubious the move to the rationality test is historically, it can at least be linked (however tenuously) to the initial concern that some substantive "rules" or "laws" might be characterized as mere shams that in effect bypass adjudicatory safeguards.

On the other hand, when courts take the final step of purporting to determine that some rights are so "fundamental" that a weighty justification (rather than lack of arbitrariness) is required before such rights may be adversely affected, the logical link to preserving the right to adjudication has dropped out altogether. The problem with the "fundamental rights" due process doctrine is not merely that it creates implied rights, but that it does so by reference to a text (and a theory of the text) that does nothing through its terms to create the ability to trump other public interests that fundamental rights are deemed to have.¹⁰⁷

The second point to emphasize is that even when clauses are found that fit the description of vague, open-textured provisions, there remains the issue as to the meaning to be ascribed to them. This issue is what constitutional scholar Reed Dickerson refers to as the creative function.¹⁰⁸ Yet simply because constitutional language, read in context, is not dispositive, it does not follow that the Supreme Court is free to go directly to moral theory or societal consensus to supplement the provision's meaning.¹⁰⁹

In the analogous field of statutory interpretation, it is usually

106. The text speaks to the cogency of the rationale for the rational basis test in substantive due process cases. The application of the same test under the equal protection clause would be a quite separate issue.

107. The theory that substantive due process can yield specially-weighted individual rights that are capable of trumping otherwise valid public purposes for legislation is illustrated in the modern Court's treatment of first amendment rights applied through the fourteenth amendment as well as its development of the right of privacy since the mid-1960's. While critics of substantive due process have voiced disapproval of this tendency to give "cherished status" to certain rights or interests, their focus has tended to be on the implications of such doctrine for the role of courts in a democratic system. See, e.g., G. GUNTHER, *CONSTITUTIONAL LAW* 458 (11th ed. 1985).

The point here is that the move to recognizing fundamental rights by means of the due process clause is not even plausibly linked to that text, quite apart from whether *any* substantive reading of it can be justified. Whether these developments might be justified on the basis of other theories—incorporation theory, ninth amendment analysis, the privileges or immunities clause, stare decisis—is another question.

108. R. DICKERSON, *supra* note 8, at 238.

109. For varying approaches as to the role of courts in performing this role, see M. PERRY, *supra* note 85; *Moral Reasoning*, *supra* note 5; Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL. 87 (1984); Brest, *Who Decides*, 58 S. CAL. L. REV.

thought that the court should create a rule that is at least not inconsistent with what extrinsic evidence reliably shows were the purposes and intentions of the legislature.¹¹⁰ Lacking any such clear evidence, courts are thought to have a duty to make their decision cohere with what is already settled by the legal order.¹¹¹ It seems clear that even if these basic assumptions were transferred to the constitutional arena, the debate over basic values would to some extent remain simply because the history is frequently quite unclear and the vague text invites consideration of whether contemporary problems are sufficiently like those confronting the Framers to warrant their inclusion within the scope of the provision.

The larger issue is whether we *ought* to seek authoritative guidance from the reasonably knowable intentions and purposes of the Framers in these circumstances. This question presents a fertile ground for debate and may well require resort to political and institutional theory. Such a debate will include discussion of the nature of our constitutional system and the appropriate role of courts. Many contend that changing conditions and moral conceptions make it appropriate and inevitable that we will basically “go it alone” in filling out the meaning of the Constitution’s open-textured provisions, with due regard for continuity and the lessons of history.¹¹² There is certainly reason to doubt whether we ought to feel compelled by the “original understanding” of broadly worded provisions to the extent that it appears that the relevant individuals were essentially involved in the same process we are now, namely imputing meaning to the instrument by attempting to determine the appropriate implications of the principle being invoked.¹¹³

There are, on the other hand, valid concerns as to whether untethered creativity in developing the potentially open-ended constitutional principles suggested by some texts does justice to the Constitution or would lead to the optimum balance of decision-making power in our democratic society. Such open-ended power is especially troubling for those of us who are inclined to believe that, however ill-defined the scope of the provisions in question are, no one set out to issue the judiciary a totally blank check.¹¹⁴ Dean Sandalow has suggested that judges are clearly institutionally and professionally suited to protect in-

110. R. DICKERSON, *supra* note 8, at 243, 246–47.

111. *Id.* at 247. For theories of interpretation that begin with this general sort of duty as its initial premise, see R. DWORKIN, *supra* note 7, at 119–80; Richards, *supra* note 68.

112. See Sandalow, *supra* note 4.

113. A good example is Madison’s flip-flop on the constitutionality of legislative prayer. See *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (Brennan, J., dissenting). It is difficult to believe his original position represented a view of the “meaning” of the establishment clause so much as a position on the appropriate scope and application of a principle whose contours awaited defining.

114. A good example is *McGowan v. Maryland*, 368 U.S. 160 (1962).

dividuals and minority groups by dispassionately applying law despite competing pressures, that it is much less clear that they are specially suited to discern or generate society's fundamental values.¹¹⁵ These are issues to be pursued elsewhere. For present purposes, the matter of greatest concern to me is that the expansive doctrine of judicial creativity, and the arguments used to support it, seem to be having an acid-like effect on the fundamental duty of courts to seek first to ascertain the meaning of the text, with the aid of relevant context, before turning to any creative function at all. To do that is to make a nullity of a binding legal document.

