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# Which is to be Master?: The People, The Judges, and the Constitution's Meaning

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ARTICLE  
WHICH IS TO BE MASTER?:  
THE PEOPLE, JUDGES, AND THE CONSTITUTION'S  
MEANING

*Thomas L. Jipping*<sup>†</sup>

I. INTRODUCTION

As a member of the Second Continental Congress and delegate to the Constitutional Convention in 1787, Benjamin Franklin helped draft and signed both the Declaration of Independence and the Constitution.<sup>1</sup> At the close of the Convention, it is said, he was asked what form of government the delegates had established. Franklin responded: "A Republic, if you can keep it."<sup>2</sup> In those few words, Dr. Franklin expressed both the substance and the fragility of the system of government America's founders had created.

In a speech to the Privy Council of Ireland upon his election as Lord Mayor of Dublin<sup>3</sup> in 1790, statesman and famed trial lawyer John Philpot Curran said:

It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt.<sup>4</sup>

President Andrew Jackson offered a slightly edited, though still potent, version of this axiom in his farewell address on March 4, 1837: "But you must remember, my fellow-citizens, that eternal vigilance by the people is the price

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<sup>†</sup> Counsel to United States Senator Orrin G. Hatch (R-UT), Senate Judiciary Committee. M.A., State University of New York (SUNY) at Buffalo, 1989; J.D. *cum laude*, SUNY-Buffalo (1987); B.A. with honors, Calvin College (1983). This article represents the author's personal views and is adapted from a lecture he gave in his personal capacity at Liberty University School of Law on April 25, 2007.

1. Franklin is the only person to sign all four documents associated with America's founding: the Declaration of Independence, the Treaty of Paris, the Treaty of Alliance with France, and the Constitution. BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY AND OTHER WRITINGS* (Kenneth A. Silverman ed. 2004)

2. SUZY PLATT, *RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS* 299 (1989).

3. The largely symbolic office of Mayor was created in 1229 and elevated to Lord Mayor in 1665. Lords Mayor were members of the Privy Council of Ireland, which was abolished in 1922. *Lord Mayor of Dublin*, WIKIPEDIA.ORG, [http://en.wikipedia.org/wiki/Lord\\_Mayor\\_of\\_Dublin](http://en.wikipedia.org/wiki/Lord_Mayor_of_Dublin).

4. PLATT, *supra* note 2, at 200.

of liberty, and that you must pay the price if you wish to secure the blessing.”<sup>5</sup> And by the time abolitionist Wendell Phillips spoke to the Massachusetts Antislavery Society in 1852, the principle had become the simple and now-familiar “eternal vigilance is the price of liberty.”<sup>6</sup>

Professor Richard Beeman writes that “democratic republics are not merely founded upon the consent of the people, they are also absolutely dependent upon the active and informed involvement of the people for their continued good health.”<sup>7</sup> Connecting Benjamin Franklin, Wendell Phillips, and Richard Beeman tells us that keeping this republic requires the people’s eternal vigilance and informed active involvement. If that is true, liberty’s price is not being paid. Consider, for example, some measures of Americans’ understanding of their system of government.

- More than twice as many Americans know the number of Rice Krispie characters as the number of Supreme Court Justices.<sup>8</sup>
- Three times as many American can name two of Snow White’s seven dwarves as can name two of the nine Supreme Court Justices.<sup>9</sup>
- Four times as many Americans say that having a “detailed knowledge” of the Constitution is “absolutely necessary” as say they actually have such knowledge.<sup>10</sup>
- Five times as many Americans can name a majority of the five *Simpsons* family characters as can name a majority of the five First Amendment freedoms.<sup>11</sup>

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5. Andrew Jackson, *Farewell Address*, Mar. 4, 1837, in *THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES* 957 (Edwin Williams ed. 1846).

6. PLATT, *supra* note 2, at 205.

7. Richard R. Beeman, *A Republic, If You Can Keep It*, CONSTITUTIONCENTER.ORG, <http://www.constitutioncenter.org/explore/ThreePerspectivesontheConstitution/ARepublic,IfYouCanKeepIt.shtml> (last visited Sept. 6, 2008).

8. *Shocking Poll: More Americans Can Name Rice Krispie Characters Than Supreme Court Justices!*, THE POLLING COMPANY, Apr. 19, 2002, <http://www.pollingcompany.com/News.asp?FormMode=ViewReleases&ID=50> (last visited Sept. 6, 2008).

9. *Snow White’s Dwarfs More Famous Than US Judges: Poll*, REUTERS, Aug. 14, 2006, archived at <http://forums.macrumors.com/showthread.php?t=226228> (last visited Sept. 6, 2008).

10. *Knowing It By Heart: Americans Consider the Constitution and Its Meaning at \*50*, CONSTITUTIONCENTER.ORG, 2002, [http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/asset\\_upload\\_file173\\_2678.pdf](http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/asset_upload_file173_2678.pdf) (last visited Sept. 6, 2008).

11. McCormick Tribune Freedom Museum, *Americans’ Awareness of First Amendment*

- Forty-two percent of Americans do not know the number of branches in the federal government and fewer than 60 percent can name any of them.<sup>12</sup>
- Fifty percent more young people can name the Three Stooges than the first three words of the Constitution.<sup>13</sup>
- Twenty-six percent of Americans believe that the text of the Constitution protects the right to an abortion.<sup>14</sup>
- Twenty percent of Americans believe that only lawyers can understand the Constitution.<sup>15</sup>

Author James Bovard calls this state of affairs “attention deficit democracy.”<sup>16</sup> If, as James Madison put it, a “well-instructed people alone can be permanently a free people,”<sup>17</sup> then such political and constitutional illiteracy<sup>18</sup> literally puts at risk our prospects for remaining a free people.

*Freedoms*, Mar. 1, 2006, at 7. Seventeen percent say that the First Amendment protects the right to drive a car, and 21 percent say it protects the right to own a pet. *Id.* at 6.

12. *Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll*, CONSTITUTIONCENTER.ORG, <http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCNationalPoll/index.shtml>. Fifty percent more Americans can name the Three Stooges than the three branches of the federal government. *Pop Culture/Political Survey Nationwide and in Ten Metropolitan Areas* (Aug. 10, 2006), ZOGBY.COM, <http://zogby.com/Soundbites/ReadClips.dbm?ID=13498>.

13. *New Survey Shows Wide Gap Between Teens' Knowledge of Constitution and Knowledge of Pop Culture*, CONSTITUTIONCENTER.ORG <http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCTeens'Poll.shtml> (last visited Sept. 6, 2008). *See also Constitutional Knowledge*, WASHINGTON POST, July 19, 2005, at A14.

14. *Id.*

15. *Id.*

16. James Bovard, *Attention Deficit Democracy*, LEWROCKWELL.COM, Jan. 26, 2006, <http://www.lewrockwell.com/bovard/bovard19.html>.

17. JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 127 (Gaillard Hunt ed. 1908).

18. This is not a new phenomenon. In 1984, Professor Jerry Combee reviewed surveys of political and constitutional knowledge and concluded: “In the National Assessment of Educational Progress (NAEP) surveys conducted in 1976, every indicator pointed to a decline since 1969 in seventeen-year-olds’ political understanding.” JERRY COMBEE, *DEMOCRACY AT RISK: THE RISING TIDE OF POLITICAL ILLITERACY AND IGNORANCE OF THE CONSTITUTION* 3 (1984). A 2006 survey revealed that only forty-six percent of college seniors know that the line “We hold these truths to be self-evident, that all men are created equal” comes from the Declaration of Independence. *Failing our Students, Failing America*, AMERICANCIVILLITERACY.ORG, [http://www.americancivilliteracy.org/report/major\\_findings\\_finding1.html](http://www.americancivilliteracy.org/report/major_findings_finding1.html) (last visited Sept. 6, 2008). The Intercollegiate Studies Institute commissioned this survey of 14,000 freshmen and seniors at 50 colleges and universities. This civic literacy exam explored knowledge of American history, political thought, international relations, and market economy. Seniors

In law as in life, “the right answer depends on the right question.”<sup>19</sup> This Article will address a question which, depending on the answer, will determine whether this republic and our liberty survive. Who has authority to determine what the Constitution is? Section II of this Article will examine the Constitution’s identity as the meaning of its words, its ownership by the people, and its function as limiting government, including the judiciary. These three principles establish that the people who own the Constitution, rather than judges who must be limited by it, have authority to determine its meaning. Section III will apply these principles in the contexts of judicial power and selection.

## II. RECURRING TO PRINCIPLES

The question of who has authority to determine what the Constitution is may be answered, as Madison urged, by “recurring to principles.”<sup>20</sup> Three of these principles concern the Constitution’s ownership, its identity, and its function. Whose is it, what is it, and what does it do? The first two principles establish that the people have authority to determine what the Constitution says and means. The third principle establishes that judges have authority to do neither.

### A. *The Constitution’s Identity: What Is It?*

The centrality of the Constitution to American government and to the concept of American liberty cannot be overstated. It is one of the four organic laws of the United States<sup>21</sup> and declares itself to be the “supreme law of the land.”<sup>22</sup> More than ninety percent of Americans say the Constitution is very important to them.<sup>23</sup> When Americans think of liberty, they think of documents, especially of the Constitution.<sup>24</sup>

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scored an average of just 54.2 percent, fewer than four points higher than freshmen. *Id.* These results were virtually identical to a similar survey conducted a year earlier. *Id.*

19. Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 839 (1986).

20. THE FEDERALIST NO. 39 (James Madison).

21. See 1 UNITED STATES CODE XLV-LXXIII (2000) (The four organic laws are the DECLARATION OF INDEPENDENCE, the ARTICLES OF CONFEDERATION, the NORTHWEST ORDINANCE, and the UNITED STATES CONSTITUTION. All four are reproduced in full at the front of every copy of the UNITED STATES CODE.). See generally FOUR PILLARS OF CONSTITUTIONALISM: THE ORGANIC LAWS OF THE UNITED STATES (Richard Howard Cox ed. 1998).

22. U.S. CONST. art. VI.

23. *Highlights of Survey*, CONSTITUTIONCENTER.ORG, <http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCNationalPoll/HighlightsofthePoll.shtml>.

24. See Steven Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and*

The Constitution requires that each President swear or affirm that he will “preserve, protect and defend *the Constitution* of the United States.”<sup>25</sup> It declares that “Senators and Representatives . . . and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support *this Constitution*.”<sup>26</sup> Federal statutes require that individuals “elected or appointed to an office of honor or profit in the civil service or uniformed services”<sup>27</sup> as well as enlisting or being commissioned an officer in the armed forces<sup>28</sup> must take the same oath to support and defend *the Constitution*.

What is this Constitution that Americans believe to be so important and public officials swear to support, protect, and defend? “Constitutions,” said philosopher Russell Kirk at the bicentennial of our national charter, “are something more than lines written upon parchment.”<sup>29</sup> As a written document, the Constitution is a collection of words that have meaning. Divorced from their meaning, words alone are simply groups of letters formed into sentences or paragraphs. They are nothing at all. There would be little use in swearing to support and defend words that have no meaning. It is meaning that gives words life and substance, making them able to do what words, especially legally binding words, exist to do, that is, to actively communicate particular ideas. The Constitution is indeed something more than mere lines written upon parchment. The Constitution is the meaning of its words.

Like other written documents, the Constitution has its writers and readers, its makers and interpreters. The Constitution’s identity as the meaning of its words defines both roles.<sup>30</sup> Creating, making, or as the Constitution itself puts it, “ordain[ing] and establish[ing],”<sup>31</sup> the Constitution involves choosing its words and, more importantly, giving those words their meaning. Similarly,

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*Burke*, 57 ALA. L. REV. 635, 637 (2006) (“our constitutional tradition . . . is one where we venerate the document above all else.”).

25. U.S. CONST. art. II, § 1 (emphasis added).

26. U.S. CONST. art. VI (emphasis added).

27. 5 U.S.C. § 3331.

28. *Oaths of Enlistment and Oaths of Office*, United States Army Center of Military History, <http://www.history.army.mil/faq/oaths.htm>.

29. Russell Kirk, Lecture, *Burke, Hume, Blackstone, and the Constitution of the United States* \*11, available at <http://www.demischools.org/philadelphia.pdf>.

30. See Keith Whittington, Essay, *How to Read the Constitution: Self-Government and the Jurisprudence of Originalism* \*2 (2006), available at <http://www.heritage.org/research/political-philosophy/fp5.cfm> (last visited Sept. 6, 2008). Professor Whittington explains that “originalism,” or attributing to the Constitution its original meaning, “is implicit in the design of a written constitution.” *Id.*

31. U.S. CONST. pmb1.

amending the Constitution means to “formally alter”<sup>32</sup> it. The Constitution provides that “amendments to this Constitution” may be proposed by two-thirds of both houses of Congress or two-thirds of state legislatures. Proposed amendments become part of the Constitution upon ratification by three-fourths of either state legislatures or state ratification conventions.<sup>33</sup> No one disputes that changing the Constitution’s words changes the Constitution or that this is the only method for doing so. The Constitution, however, is more than its mere words. It is the meaning of its words. Changing the meaning of the Constitution’s words amends the Constitution as much as, and arguably much more than, changing its words.<sup>34</sup>

While the maker of a document chooses its words and their meaning, the receiver of a document has the role of interpreting it. Just as a written document is more than its words, interpreting a document is more than reading those words. Interpretation is defined as “determining what something . . . means; the ascertainment of meaning.”<sup>35</sup> Interpretation involves “discovering . . . the meaning which the authors . . . designed it to convey to others.”<sup>36</sup> The very act of “interpreting a document *means* to attempt to discern the intent of the author.”<sup>37</sup>

The Constitution is no different. Describing the judicial branch in the new system of government he helped establish, Alexander Hamilton wrote that the “interpretation of the laws is the proper and peculiar province of the courts.”<sup>38</sup> In *Marbury v. Madison*,<sup>39</sup> Chief Justice John Marshall described the duty of the judicial branch not as saying what the law says but “what the law is.”<sup>40</sup> Since the Constitution is the meaning of its words, interpreting the Constitution requires discerning the meaning given to the words by those who made the Constitution.

The implications of this principle for our system of government and the liberty it makes possible can be found in surprising places. Two decades after Wendell Phillips said that eternal vigilance is the price of liberty, Charles Dodgson, writing under the pseudonym Lewis Carroll, published *Through the*

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32. BLACK’S LAW DICTIONARY 89 (8th ed. 2004).

33. U.S. CONST. art. V.

34. See Whittington, *supra* note 30, at 8 (“To disregard or alter the meaning of the words in the Constitution is tantamount to disregarding or altering the words themselves.”).

35. BLACK’S LAW DICTIONARY 824 (7th ed. 1999).

36. *Id.*

37. Lino A. Graglia, “Interpreting” the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1024 (1992).

38. THE FEDERALIST NO. 78 (Alexander Hamilton).

39. 5 U.S. 137 (1803).

40. *Id.* at 177.

*Looking Glass and What Alice Found There*, the sequel to his popular work *Alice's Adventures in Wonderland*. In chapter six, Alice meets Humpty Dumpty, a large human-looking egg, whose observations about words and meaning are strikingly relevant nearly 150 years later.

When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you CAN make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."<sup>41</sup>

Humpty Dumpty likely did not have principles of government or constitutional interpretation in view during his discussion with Alice, but he might well have cited America's founders for the view that whoever determines the meaning of the Constitution's words is its master.

In his farewell address in 1796, for example, President George Washington said:

If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.<sup>42</sup>

Washington made three points relevant to the present discussion. First, usurpation, or changing the meaning of the Constitution's words, amends the Constitution as much as changing the words themselves.<sup>43</sup> Second, the cost of changing the Constitution's meaning by usurpation would be nothing less than liberty itself. Third, and the answer to the question posed by this Article, only

41. LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 159 (Wordsworth Editions Ltd. 1992) (1872).

42. 6 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 449 (James D. Richardson ed. 1897).

43. Rewriting the Constitution by usurpation, that is, by changing its meaning without changing its words, is actually the more powerful approach. It changes the actual operative substance of the Constitution, making possible achievement of previously unattainable political objectives, but it avoids the politically and culturally cumbersome amendment process outlined in Article V. As such, it effects sweeping constitutional and political change without anyone but a few lawyers, judges, activists, and perhaps reporters understanding what happened. For a libertarian perspective, see RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).



the people have authority to determine whether the Constitution needs to be changed.

Likewise, James Madison insisted that “the sense in which the Constitution was accepted and ratified by the nation” must be the guide for “expounding” it.<sup>44</sup> While words are read, meaning is expounded. Madison repeatedly asserted that the “legitimate *meaning* of the instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be . . . in the sense attached to it by the people in their respective state conventions where it received all the authority which it possesses.”<sup>45</sup> That is, the people who made the Constitution law have authority to determine the meaning of its words.

Thomas Jefferson expressed similar views. “On every question of construction,” he wrote, “[we must] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debate, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.”<sup>46</sup> Jefferson knew that words and meaning are two different things and that the Constitution’s legitimate meaning was provided by those who made it law. Significantly, he also understood that some might find other meaning, that which might be squeezed or invented, more desirable.

Jefferson warned that if the judiciary has the power of “exclusively explaining the Constitution,” it would become “a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.”<sup>47</sup> Once again, Jefferson was talking not about what the Constitution says but what its words mean, and knew that changing the Constitution’s meaning changes the Constitution. Jefferson went so far as to argue that a written Constitution is a “peculiar security” for liberty only if it is not made “a blank paper by construction.”<sup>48</sup>

This consistent view was shared by those who opposed, as well as those who supported, the Constitution’s ratification. George Mason, for example, represented Virginia in the Constitutional Convention and opposed the charter’s ratification. He argued that, even though written and with separated powers, the Constitution would give the judiciary too much power. “[T]he

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44. Letter from James Madison to H. Lee, June 25, 1824, in 3 LETTER AND OTHER WRITINGS OF JAMES MADISON 441-42 (J.B. Lippincott 1867).

45. 9 THE WRITINGS OF JAMES MADISON 191 (Hunt ed. 1900-10) (emphasis added).

46. THE JEFFERSON CYCLOPEDIA 193 (John P. Foley ed. 1900).

47. Thomas Jefferson, Letter to Spencer Roane, Sept. 6, 1819, in THE JEFFERSON CYCLOPEDIA, *supra* note 46, at 190.

48. Thomas Jefferson, Letter to Wilson Carey Nicholas, Sept. 7, 1803, in THE JEFFERSON CYCLOPEDIA, *supra* note 46, at 190.

power of construing the laws,” Mason said, “would enable the Supreme Court of the United States to substitute its own pleasure for the law of the land and that the errors and usurpations of the Supreme Court would be uncontrollable and remediless.”<sup>49</sup> Mason did not warn about the power of *writing* the laws, but of *construing* them, that is, determining what their words mean. Whoever determines what the Constitution means determines what the Constitution is and, therefore, is its master.

Washington’s “usurpation,” Madison’s “expounding,” Jefferson’s “explaining,” and Mason’s “construing” all refer to determining the meaning of the Constitution’s words. They all believed that the Constitution is the meaning of its words and that changing what the Constitution means changes what the Constitution is.<sup>50</sup>

#### *B. The Constitution’s Ownership: Whose Is It?*

Because changing the meaning of its words changes the Constitution, only those with authority to determine what the Constitution is have authority to determine the meaning of its words. The second principle examines the Constitution’s ownership to clarify who has authority to determine what the Constitution is.

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49. See Sam J. Ervin, Jr., *Judicial Verbicide: An Affront to the Constitution*, in FREE CONGRESS RESEARCH AND EDUCATION FOUNDATION, A BLUEPRINT FOR JUDICIAL REFORM 9 (1981).

50. Chief Justice Charles Evans Hughes’ famous statement that “the Constitution is what the judges say it is” follows the same pattern, albeit somewhat in reverse. Charles Evans Hughes, Lecture, *Speech Before the Elmira Chamber of Commerce* (May 3, 1907), in ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 133-39 (Robert H. Fuller & Gardner Richardson eds., 1908). His point was not that judges tell us what the Constitution says but what the Constitution means. Hughes embraced the principle that, as a written document, the Constitution is the meaning of its words and focused on who has authority to declare that meaning. While this Article focuses on the Constitution, as Justice Antonin Scalia observes, “[e]very issue of law resolved by a federal judge involves interpretation of text – the text of a regulation, or of a statute, or of the Constitution.” ANTONIN SCALIA, A MATTER OF INTERPRETATION 13 (1997) [hereinafter A MATTER OF INTERPRETATION]. Each of these is the meaning of its words. Justice James Wilson wrote that the “first and foremost governing maxim in the interpretation of a statute is to discover the meaning of those who made it.” 1 WORKS OF JAMES WILSON 75 (Robert G. McCloskey ed. 1967). He applied the same principle to the Constitution: “[W]hen [the Constitution’s] intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended.” *Gibbons v. Ogden*, 22 U.S. 1,223 (1824) (Wilson, J., concurring). Similarly, the Supreme Court recently said: “The interpretation of a treaty, like the interpretation of a statute, begins with its text.” *Medellin v. Texas*, No.06-984 (March 25, 2008), slip op. at 11. Interpretation, however, does not stop there because, like the Constitution, a treaty is the meaning of its words.

Dr. Franklin's statement that America's founders had established a republic is particularly relevant here. One of the "distinctive characters of the republican form"<sup>51</sup> of government guaranteed by the Constitution itself<sup>52</sup> is often called popular sovereignty. Madison defined a republic as "a government which derives all its powers directly or indirectly from the great body of the people."<sup>53</sup> The Declaration of Independence asserts that government derives its "just powers from the consent of the governed."<sup>54</sup>

The Declaration's philosophical principle of consent thus becomes the Constitution's system of republican government. In this sense, as Justice Clarence Thomas writes, the Constitution is "a logical extension of the principles of the Declaration of Independence."<sup>55</sup> Indeed, when Alexander Hamilton explained the American system of representative self-government, he

51. *Id.* The United States is a republic, not a pure democracy. This Article does not address this distinction itself or related issues such as the debate over whether, in addition to the amendment process outlined in art. V, the Constitution may be amended directly by the people. See, e.g., Akhil R. Amar, *Philadelphia Revisited: Amendment the Constitution Outside Article V*, 55 U. CHICAGO L. REV. 1043 (1988); Henry P. Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996). This Article focuses on the distinction not between *how* the people may assert the authority to determine what the words in our laws say and mean, but *whether* they alone have this authority. The distinction here is between the people, whether acting directly or through elected representatives, and the judiciary.

52. U.S. CONST. art. IV, § 4.

53. THE FEDERALIST NO. 39 (James Madison) (emphasis in original).

54. DECLARATION OF INDEPENDENCE (U.S. 1776). Many state constitutions similarly declare that, in the words of the Connecticut Constitution, "all political power is inherent in the people, and all free governments are founded on their authority." CONN. CONST. art. I, § 2. See also ALASKA CONST. art. I § 2 ("All political power is inherent in the people. All government originates with the people, is founded upon their will only"); ARIZ. CONST. art. 2, §2 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed"); FLA. CONST. art. I, § 1 ("All political power is inherent in the people"); GA. CONST., § II, para. I ("All government, of right, originates with the people, is founded upon their will only"); HAW. CONST. art. I, § 1 ("All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority"); KAN. CONST., BILL OF RIGHTS, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority"); LA. CONST. art. I, § 1 ("All government, of right, originates with the people, is founded on their will alone"); MISS. CONST. art. III, § 5 ("All political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only"); N.M. CONST. art. II, § 2 ("All political power is vested in and derived from the people, all government of right originates with the people, is founded upon their will"); OKLA. CONST., Section II-1 ("All political power is inherent in the people").

55. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. OF L. & PUB. POLICY 63, 64 (1989).

famously said: “Here, sir, the people govern; here, they act by their immediate representatives.”<sup>56</sup> Today, those words appear inscribed above the entrance to the U.S. House of Representatives in the Capitol,<sup>57</sup> a building that Thomas Jefferson described as “dedicated to the sovereignty of the people.”<sup>58</sup>

James Wilson served in the Continental Congress before, and in Congress after, he signed the Declaration of Independence. He was a delegate to the Constitutional Convention and one of the six original Justices of the Supreme Court appointed by President George Washington.<sup>59</sup> In his lectures on law, Wilson contrasted the systems of government in the United States and Great Britain by saying that “[h]ere, the people are masters of the government; there, the government is master of the people.”<sup>60</sup>

The people’s sovereignty is complete, including the creation, reformation, and abolition of government. The Declaration states that because the power of government comes from the consent of the governed, “it is the Right of the People to alter or abolish it, and to institute new government.”<sup>61</sup> State constitutions similarly assert that because “all political power is inherent in the people,”<sup>62</sup> they have “at all times an undeniable and infeasible right to alter their form of government.”<sup>63</sup>

56. PLATT, *supra* note 2, at 148.

57. *Quotations and Inscriptions in the Capitol Complex*, ARCHITECTOFTHECAPITAL.GOV, [http://www.aoc.gov/cc/cc\\_quotations.cfm](http://www.aoc.gov/cc/cc_quotations.cfm) (last visited Sept. 6, 2008).

58. THE JEFFERSON CYCLOPEDIA, *supra* note 46, at 48.

59. See generally PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742-1798 (1956); GEOFFREY SEED, JAMES WILSON (1978); MARK D. HALL THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742-1798(1997); JAMES H. READ, POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON (2000); NATALIE WEXLER, A MORE OBEYANT WIFE: A NOVEL OF THE EARLY SUPREME COURT (2007).

60. 2 THE WORKS OF JAMES WILSON 384 (1896).

61. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

62. ALA. CONST. art. I § 2.

63. *Id.* See also IND. CONST. art. I, § 1 (“the people have, at all times, an infeasible right to alter and reform their government”); IOWA CONST. art. I, § 2 (“Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same”); ME. CONST. art. I, § 2 (the people have “an unalienable and infeasible right to institute government, and to alter, reform, or totally change the same”); MD. CONST. art. I (the people “have, at all times, the inalienable right to alter, reform or abolish their form of government”); NEV. CONST. art. I, § 2 (“Government is institute for the protection, security, and benefit of the people; and they have the right to alter or reform the same”); N.J. CONST. art. I, § 2, cl. A (“Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same”); N.D. CONST. art. I, § 2 (“Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same”); OHIO CONST. art. I, § 02 (“All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the

The National Constitution Center explains that popular sovereignty is “based on the conception that ultimate political authority resides not in the government or in any single government official, but rather, in the people . . . The government’s legitimacy remains dependent on the governed, who retain the inalienable right to alter or abolish their government or *amend their Constitution*.”<sup>64</sup> State constitutions similarly assert that the people’s sovereignty means that the people may “alter or abolish the constitution.”<sup>65</sup> The Constitution open with the words: “We the people . . . do ordain and establish this Constitution.”<sup>66</sup> The Constitution, and therefore its meaning, belongs to the people.

### C. *The Constitution’s Function: What Does It Do?*

At this juncture, we may combine the first and second principles. Since the Constitution is the meaning of its words, changing its meaning changes the Constitution. Since the people are sovereign, they have authority to determine what the Constitution is and, therefore, what it means.<sup>67</sup> The third principle further establishes that the Constitution can limit government only if judges have no authority to determine what the Constitution means.

The Constitution, at the same time, both provides for and limits government. It provides for government because, as Madison explained, “[i]f men were angels, no government would be necessary.”<sup>68</sup> It limits government because, as Madison continued, “[i]f angels were to govern men, neither external nor internal controls on government would be necessary.”<sup>69</sup> That is, human nature means that liberty requires order to exist at all but, since government is “the

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right to alter, reform, or abolish the same”); OR. CONST. art. I, § 1 (the people “have at all times a right to alter, reform, or abolish the government”); PA. CONST. art. 1, § 2 (the people “have at all times an inalienable and indefeasible right to alter, reform or abolish their government”); S.C. Const. art. I, § 1 (“All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government”).

64. *Popular Sovereignty*, NATIONAL CONSTITUTION CENTER.ORG, <http://www.constitutioncenter.org/explore/BasicGoverningPrinciples/PopularSovereignty.shtml> (last visited April 13, 2008).

65. MONT. CONST. art. II, § 2. *See also* DEL. Const. pmb.; MO. CONST. art I, § 3; N.C. CONST. art I, § 3; R.I. CONST. art I, § 1.

66. U.S. CONST. pmb.

67. *See* Michael McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2416 (2006) (“To impute a meaning to the text that could not have been intended by the drafters and ratifiers divorces the words of the Constitution from the source that gives them authority.”).

68. THE FEDERALIST NO. 51 (James Madison).

69. *Id.*

greatest of all reflections on human nature,”<sup>70</sup> government requires limits so the order it provides does not destroy the liberty it protects. Former Secretary of State Bainbridge Colby once said that “America stands for liberty, but that means an ordered liberty.”<sup>71</sup> Ordered liberty requires limited government.

Madison further wrote that “dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”<sup>72</sup> Dependence on the people and the resulting requirement of elections is an ongoing, dynamic control on government. Madison explained that in a republic, the people “assemble and administer [the government] by their representatives and agents.”<sup>73</sup> As a result, Hamilton wrote that the legislature has “[t]he superior weight and influence”<sup>74</sup> in a republic. It should come as no surprise, therefore, that the process outlined in the Constitution for amending the charter involves only the legislative branch of either the federal or state governments,<sup>75</sup> the branch most accountable to the people.

The most important of the auxiliary precautions, the separation of powers, is a structural control on government. Madison wrote that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.”<sup>76</sup> Quoting the political philosopher Montesquieu, Hamilton insisted that “there is no liberty if the power of judging be not separated from the legislative and executive powers.”<sup>77</sup> America’s founders “viewed the principle of separation of powers as the absolutely central guarantee of a just Government.”<sup>78</sup> The Massachusetts Constitution of 1780 asserts that the separation of powers is necessary for this to be “a government of laws and not of men.”<sup>79</sup> In order to limit government,

70. *Id.*

71. HENRY GAINES HAWN, HAWN COURSE IN PUBLIC SPEAKING 266 (1921).

72. THE FEDERALIST NO. 51 (James Madison).

73. THE FEDERALIST NO. 14 (James Madison). *See also* THE FEDERALIST NO. 10 (James Madison) (“The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens, and greater sphere of country, over which the latter may be extended.”).

74. THE FEDERALIST NO. 74 (Alexander Hamilton). Madison agreed, writing that “[t]he legislative department thus derives a superiority in our governments.” THE FEDERALIST NO. 48 (James Madison).

75. U.S. CONST. art. V.

76. THE FEDERALIST NO. 47 (Alexander Hamilton).

77. THE FEDERALIST NO. 78 (Alexander Hamilton) (quoting Montesquieu, *The Spirit of the Laws* 152 (Rothman ed. 1991) (1748)).

78. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

79. MASS. CONST. art. XXX. *See also* *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (noting the separation

therefore, the federal<sup>80</sup> and virtually all state constitutions separate government power into the legislative, executive, and judicial branches. Actual separation necessarily means that each category is distinct, or different from the others. Most state charters emphasize this by explicitly prohibiting each branch from exercising the powers granted to the others.<sup>81</sup>

Legal historian Raoul Berger has observed that “[f]rom Francis Bacon on, the function of a judge has been to interpret, not to make, law.”<sup>82</sup> If the separation of powers is to be more than a theory or a diagram in a civics

of powers was “adopted by the Framers to ensure the protection of ‘our fundamental liberties.’”); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

80. U.S. Const. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States”); U.S. CONST. II, § 1 (“The executive power shall be vested in a President of the United States of America.”); U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

81. *See, e.g.*, ARK. CONST. art. IV, § 2 (“No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others”); COLO. CONST. art. III (“no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others”); IDAHO CONST. art. II, § 1 (“no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others”); ILL. CONST. art. II, § 1 (“No branch shall exercise powers properly belonging to another”); IND. CONST. art. III, § 1 (“no person, charged with official duties under one of these departments, shall exercise any of the functions of another”); MICH. CONST. art. III, § 2 (“No person exercising powers of one branch shall exercise powers properly belonging to another branch”); MINN. CONST. art. III, § 1 (“No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others”); S.D. CONST. art. II (“The powers of the government of the state are divided into three distinct branches”); TENN. CONST. art. II, § 2 (“No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others”); TEX. CONST. art. II, § 1 (“no person, or collection or persons, being of one of these departments, shall exercise any power properly attached to either of the others”); UTAH CONST. art. V, § 1 (“no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others”); WYO. CONST. art. II, § 1 (“no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others”); VT. CONST. art. II, § 5 (“The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others”); VA. CONST. art. III, § 1 (“The legislative, executive, and judicial departments shall be separate and distinct, so that none exercises the powers properly belonging to the others”); W. VA. CONST. art. V (“The legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others”).

82. Raoul Berger, *Original Intention in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 310-11 (1986).

textbook, it must involve not simply labels for the functions of government, but the actual substantive functions themselves. In other words, it is not enough to say that the legislative, executive, and judicial branches are separate; they must be separate in fact, which means that what they do must be separate.<sup>83</sup>

The Constitution's function of limiting government through the separation of powers, therefore, reinforces the conclusion established by the Constitution's identity and ownership. To put it simply yet profoundly, making and interpreting the Constitution are two fundamentally different powers. The people have the former, judges have the latter. Lawmaking, which involves choosing the words and meaning of our laws, is reserved for the people and their elected representatives. Interpretation, which involves discerning meaning the people have already provided, is the province of the courts. If judges change the meaning of the Constitution, they amend the Constitution and exercise a power that does not belong to them, upsetting the balance among the separated branches that should naturally characterize a republic.<sup>84</sup> Echoing his warning against the judiciary departing from the Constitution's legitimate meaning, Madison believed that judicial power to "stamp [a law] with its final character . . . makes the judiciary department paramount in fact to the legislature, which was never intended and can never be proper."<sup>85</sup>

Finally, the Constitution cannot limit government if government controls the Constitution. As Chief Justice Marshall wrote in *Marbury*, "the framers of the Constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."<sup>86</sup> The judiciary is part of the government the Constitution established and exists to limit.<sup>87</sup> If judges change the

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83. The fact that each branch may "check and balance" exercise of the others' powers does not mean that the underlying powers are themselves not distinct. The President's authority to veto legislation does not give him legislative power, "all" of which the Constitution gives to Congress. U.S. CONST. art. I, § 1. The requirement of Senate consent for appointments does not give the Senate executive power, which the Constitution gives to the President. U.S. CONST. art. II, § 1. Congress' authority to regulation the jurisdiction of appellate courts does not give it judicial power, which the Constitution assigns to the judiciary. U.S. CONST. art. III, § 1. The separation of powers discussed in this Article concerns the essential division of the powers themselves.

84. See Diarmuid F. O'Scannlain, *On Judicial Activism*, OPEN SPACES QUARTLERLY, available at <http://www.open-spaces.com/article-v3n1-oscannlain.php> (last visited Sept. 6, 2008) ("In short, the judge must defend the constitutional compromise between law and liberty as memorialized in the text of the Constitution itself. To alter the compromise (or to allow it to be altered) is not faithfully to apply the Constitution but to amend it-to usurp a power reposed exclusively in the people of the United States.").

85. 1 LETTER AND OTHER WRITINGS OF JAMES MADISON 194 (1884).

86. *Marbury v. Madison*, 5 U.S. 137, 179-80 (1803).

87. See Whittington, *supra* note 30, at 1 ("the constant touchstone of constitutional law



Constitution by changing its meaning, judges control the Constitution and are no longer limited by it. Just as it makes little sense for public officials to swear protection and defense of words with no meaning, judges swearing to support a Constitution they control amounts to judges swearing to support themselves. That would truly make them the master.

### III. APPLYING THE PRINCIPLES

The Constitution's identity, ownership, and function establish that the people have authority to determine what the Constitution is, what it says as well as what it means. Judges do not. These principles are generally necessary for the people to be their own master, that is, for keeping this republic. They find specific application in the exercise of judicial power and in the process of judicial selection.

#### A. *Judicial Power*

The Constitution provides that judges may exercise "judicial power,"<sup>88</sup> which means to interpret and apply law to decide the "cases or controversies"<sup>89</sup> that come before them. Judge Robert Bork has argued that "any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges."<sup>90</sup> The theory derived from the Constitution's identity, ownership, and function is often called originalism, whereby judges recognize that the Constitution's words have the meaning the people gave them when the people made the Constitution law.<sup>91</sup> The essence of originalism is that "the

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should be the purposes and values of those who had the authority to *make* the Constitution—not of those who are charged with governing under it and abiding by it).

88. U.S. CONST. art. III, § 1.

89. *Id.*

90. Robert H. Bork, *Remarks Before the University of San Diego Law School* (Nov. 18, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 45 (1986).

91. In a 2005 speech at the Woodrow Wilson International Center for Scholars, Justice Antonin Scalia identified himself as "one of a small number of judges . . . who are known as originalists. Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people." Justice Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way* (remarks given at the Woodrow Wilson International Center for Scholars in Washington, D.C., on March 14, 2005), available at [http://www.cfif.org/htdocs/freedomline/current/guest\\_commentary/scalia-constitutional-speech.htm](http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm) (last visited August 23, 2008). Justice Clarence Thomas puts it this way: "People can say you are an originalist, I just think that we should interpret the Constitution as it's drafted, not as we would have drafted it." David A. Rivkin and Lee A. Casey, *Mr. Constitution*, WALL ST. J., Mar. 22, 2008, at A25. For more exposition and analysis of originalism and the consequences of departing from it, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE*

meaning of a written constitution should remain the same until it is properly changed.”<sup>92</sup> Our third principle, the Constitution’s function, establishes that originalism “accords with the constitutional purpose of limiting government”<sup>93</sup>

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POLITICAL SEDUCTION OF THE LAW (1990); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed. 2007). Some writers, advocates, and commentators use phrases such as “original intent” or “the intent of the framers” of the Constitution. These formulations are sloppy at best, misguided at worst. If they refer to the objective meaning given to the Constitution, their general perspective is correct but should focus on the meaning provided by those who made the Constitution law by ratifying it, not by those who drafted the Constitution. If, however, phrases such as “the intent of the framers” refer instead to the subjective intention of individuals rather than objective meaning of constitutional text, then its perspective is misguided whether it refers to the Constitution’s framers or ratifiers. Even if it were possible to discern such subjective thoughts, intentions, expectations, assumptions, or feelings (which it is not), the result would be irrelevant because subjective intentions or expectations are not law. One federal appeals court’s recent observation about statutes applies equally to the Constitution: “Congress did not enact its members’ *beliefs*; it enacted a text.” *Jones v. Harris Assoc.*, 527 F.3d 627, 633 (7th Cir. 2008) (emphasis in original). The Constitution is not the intentions of its drafters, or even of its ratifiers, but the meaning of its words. See Stephen J. Markman, *On Interpretation and Non-Interpretation*, 3 BENCHMARK 219, 219 n.1 (1987) (“Original meaning should be distinguished from the subjective intent of the Framers; that subjective intent, as expressed in statements made by the Framers, may be relevant to an understanding of the meaning of the text to their society, but it was the language of the text, not the views of individual Framers, that was ratified as the Constitution.”). Justice Scalia rigorously distinguishes between the subjective intent of the lawmaker and the objective meaning of the law, saying that “I am first of all a textualist, and secondly an originalist.” Antonin Scalia, *Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation*, Speech at Catholic University of America (October 18, 1996). See, e.g., A MATTER OF INTERPRETATION, *supra* note 50, at 17. “[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated . . . . Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver.” *Id.* “Scalia does not find intent authoritative. Instead, he searches for ‘original meaning,’ which he defines as the original understanding of the text at the time it was drafted and ratified.” KEVIN A. RING, SCALIA DISSENTS 8 (2004). Professor Randy Barnett describes Justice Scalia as “perhaps the first defender of originalism to shift the theory from its previous focus on the intentions of the framers of the Constitution to the original public meaning of the text at the time of its enactment.” Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. OF CINCINNATI L. REV. 7, 9 (2006). See also Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA. L. REV. 611 (1999).

92. Randy Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 120 (2004).

93. DAVID F. FORTE, THE ORIGINALIST PERSPECTIVE, in THE HERITAGE GUIDE TO THE CONSTITUTION 14 (2005). See also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. OF CINCINNATI L. REV. 849, 862 (1989) (“originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system.”).

in general, and limiting the judiciary in particular, because it insists that the people, rather than judges, control the Constitution that judges use to decide cases.

This approach, flowing as it does from the principles of America's founding, was long the accepted definition of how judicial power should be exercised. The Rhode Island Constitution, for example, lists the right to make and alter the charter first among "essential and unquestionable rights and principles"<sup>94</sup> held by the people. Quoting George Washington, it declares that "the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, *till changed by an explicit and authentic act of the whole people*, is sacredly obligatory upon all."<sup>95</sup>

In 1827, Chief Justice Marshall acknowledged that so much had already been said "concerning the principles of construction which ought to be applied to the Constitution of the United States"<sup>96</sup> that more "elaborate discussion" was unnecessary. He summarized those well-settled principles as follows:

To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; is to repeat what has been already said more at large, and is all that can be necessary.<sup>97</sup>

A few years later, Marshall's colleague Justice Joseph Story wrote that the Constitution "is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, today, and for ever."<sup>98</sup> In 1872, the U.S. Senate Judiciary Committee issued a report affirming that giving the Constitution "a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution,

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94. R.I. CONST. art. I.

95. *Id.* at § 1 (emphasis added).

96. *Ogden v. Saunders*, 25 U.S. 213, 228 (1827).

97. *Id.* Significantly, he referred to the "intention of the instrument," not the intention of the instrument's framers.

98. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 193 (1833).

would be unconstitutional as a departure from the plain and express language of the Constitution.”<sup>99</sup> In 1905, the Supreme Court offered a similar view:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded.<sup>100</sup>

Justice Scalia has highlighted “one other example about how not just the judges and scholars believed in originalism, but even the American people.”<sup>101</sup> America’s founders believed, as Pierce Butler of South Carolina told the Constitutional Convention, that there is “no right of which the people are more jealous than that of suffrage.”<sup>102</sup> Oliver Ellsworth of Connecticut told the gathering that limiting suffrage would prevent ratification of the Constitution altogether.<sup>103</sup> The Fourteenth Amendment, ratified in 1868, prohibits a state from denying “to any person within its jurisdiction the equal protection of the laws.” During the women’s suffrage movement, advocates did not simply ask the Supreme Court to use the Fourteenth Amendment’s equal protection clause to “update” the Constitution and extend the right to vote to women. As Justice Scalia explains it: “But that’s not how the American people thought in 1920 . . . . [S]ince it wasn’t unconstitutional [to deny the vote to women], and we wanted it to be, we did things the good old fashioned way and adopted an amendment.”<sup>104</sup>

There was thus consensus about the definition of judicial power and “widespread agreement” about the basic rules of interpretation.<sup>105</sup> This

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99. Berger, *supra* note 82, at 297-98.

100. *South Carolina v. United States*, 199 U.S. 437, 448-49 (1905).

101. *Constitutional Interpretation the Old Fashioned Way*, *supra* note 91.

102. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 202 (Max Farrand ed., 1911). Madison called the right to vote one of the “fundamental articles” of republican government. *Id.* at 203.

103. *Id.* at 201.

104. *Constitution Interpretation the Good Old Fashioned Way*, *supra* note 91. The Nineteenth Amendment was ratified on August 18, 1920.

consensus lasted for approximately 150 years, the Supreme Court “insist[ing], with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated an instrument or of the people who adopted it.”<sup>106</sup>

The debate about originalism in recent decades does not mean that it is a recent invention now challenging the established constitutional order. As described above, what today is called originalism is merely the prescription for the exercise of judicial power flowing from basic principles and envisioned by America’s founders. The controversy instead stems from what has more recently been invented against originalism.

Limiting government by a written constitution and separated powers means that the people, acting through their elected representatives, must decide most policy issues. Those whose political or cultural objectives fare poorly under this system have sought to empower judges to make, rather than merely interpret, the law. They favor activist judges who will change the meaning of the Constitution in order to achieve particular objectives. While in the traditional restrained order the process legitimates the results, in this new activist order the political ends justify the judicial means. Judicial restraint places the emphasis on who the master is, judicial activism on what the master does. If the people as their own master will not make law that favors particular political interests, the activist would make judges the master in order to accomplish those objectives.

George Washington had warned against amendment by usurpation,<sup>107</sup> a step Madison said would render the Constitution illegitimate<sup>108</sup> and Jefferson

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105. Christopher Wolfe, *From Constitutional Interpretation to Judicial Activism: The Transformation of Judicial Review in America*, First Principles Series No. 2, 1(2006) available at <http://www.heritage.org/Research/LegalIssues/fp2.cfm>. See also Forte, *supra* note 93, at 15-16; Horan, Forsythe & Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUB. L. REV. 229, 250 (1987). The fact that the proper definition of judicial power and the objective of constitutional interpretation are clear does not make the process of actually exercising that power or conducting that interpretation easy. It is not. See Whittington, *supra* note 30, at 1 (“In those early days, few seriously objected to the notion that the Constitution should be read in accord with its original meaning, though there were plenty of debates over how best to ascertain that original meaning”); A MATTER OF INTERPRETATION, *supra* note 50, at 856 (“Let me turn next to originalism, which is also not without its warts. Its greatest defect, in my view, is the difficulty of applying it correctly . . . . [I]t is often exceedingly difficult to plumb the original understanding of an ancient text.”); Thomas Gibbs Gee, *Book Review*, 88 Mich. L. Rev. 1335, 1338-39 (1990).

106. Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 399, 399 (1939).

107. See *supra* note 42.

insisted would make the charter nothing but a malleable piece of wax<sup>109</sup> or a blank paper.<sup>110</sup> They expressed the common understanding of America's founders.<sup>111</sup> Justice George Sutherland would make the same point in 1937 when he insisted that the "judicial function . . . does not include the power of amendment under the guise of interpretation."<sup>112</sup> But he had to do so from the dissent, less than forty years after the Supreme Court had declared that the Constitution's "meaning does not alter."<sup>113</sup> Justice John Marshall Harlan's protest against the Court's "exercise of the amending power"<sup>114</sup> and Justice Hugo Black's criticism of the Court's "day-to-day constitutional convention"<sup>115</sup> came also from the dissent.

There thus arose in the twentieth century active and aggressive debate about the definition of judicial power, the nature of the Constitution, and the objective of interpretation. Writing in 1981, Professor Henry Monaghan noted that "[s]ome lawyers, many judges, and perhaps most academic commentators view the constitution as authorizing courts to mollify the results of the political process on the basis of general principles of political morality not derived from the constitutional text or the structure it creates."<sup>116</sup> While the identity,

108. See *supra* note 45.

109. See *supra* note 48.

110. See *supra* note 49.

111. Professor Jeffrey Anderson explores this consensus in another way. He reviews consideration during the Constitutional Convention of a proposal for the executive and judges to serve as a "council of revision" in the legislative process. The convention narrowly defeated that proposal. Anderson concludes that there was disagreement about whether judges "should or should not be

involved in considerations of policy in an explicitly authorized, extra-judicial capacity, as members of a council of revision." But, "they fundamentally *agreed* . . . that absent such explicitly authorized membership in a council of revision (or in a similar body), justices should not be involved in considerations of policy;" and that "the people's elected representatives—or a super-majority thereof—must have the final say on all matters of policy."

Jeffrey H. Anderson, *Learning from the Great Council of Revision Debate*, 68 THE REVIEW OF POLITICS 79, 98-99 (2006) (emphasis added).

112. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).

113. See *supra* note 104.

114. *Reynolds v. Sims*, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting).

115. *Griswold v. Connecticut*, 381 U.S. 479, 520 (1965) (Black, J., dissenting). See also *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 686 (1996) (Scalia, J., dissenting) (criticizing "this Court's Constitution-making process").

116. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353 (1981) [hereinafter *Our Perfect Constitution*]. See also Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 384, 384 (1985) [hereinafter *Styles in Constitutional Theory*] ("It was not until the latter half of this century, so far as I can tell, that it began to be suggested seriously,

ownership, and function of the Constitution compel a judiciary focused on the process of applying law given meaning by the people, these new theories contemplate a judiciary focused on the results obtainable through applying law given meaning by judges. In Humpty Dumpty's words, while the traditional restrained model of judicial power makes the people the master, the new activist model makes judges the master. The kind of text in a given case—statutory or constitution—did not matter. The result was the same: “The people’s text, whether made by majorities or, in the case of the Constitution, supermajorities, would be displaced by the judges’ text. The justices became lawmakers.”<sup>117</sup>

This new movement continues today and is driven by “legal theorists, perceiving the social progress that was being made and could continue to be made through the abandonment of constitutional procedures.”<sup>118</sup> These theorists urge the Supreme Court to perform “a function akin to that performed in other contexts by the amending process”<sup>119</sup> by changing its meaning. Professor Edward Corwin argued that “what the framers of the constitution or the generation which adopted it intended it should mean . . . have no application to the main business of constitutional interpretation, which is to keep the constitution adjusted to the advancing needs of the time.”<sup>120</sup> Significantly, this is not about *applying* the Constitution to the advancing needs of the time, which courts do naturally as they decide cases. Corwin argued instead that the meaning of the Constitution itself must be changed by “regarding it as a living statute, palpitating with the purpose of the hour.”<sup>121</sup>

These theories use different language, perspective, or emphasis, but all seek to justify empowering judges to control the Constitution, what Judge Thomas Gee calls “free judging”<sup>122</sup> and Justice Scalia has dubbed “power-judging.”<sup>123</sup>

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and with elaborate argument, that courts had power to create and enforce against the majority will values that were not in some real sense to be found in the Constitution.”). Reflecting that this movement is indeed driven by legal theorists, a search of the LEXIS database found 14 state court decisions and 23 federal court decisions, but 1201 law review and journal articles, using the phrase “living Constitution.”

117. Terry Eastland, *The “Good Judge”*, THE WEEKLY STANDARD, Nov. 13, 2006, at 15-16, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/905supsw.asp>.

118. Forrest McDonald, INTERPRETING THE CONSTITUTION: JUDGES VERSUS HISTORY, THE JOHN M. OLIN LECTURES ON THE BICENTENNIAL OF THE U.S. CONSTITUTION 22 (1987).

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

120. EDWIN S. CORWIN, *Constitution v. Constitutional Theory*, in AMERICAN CONSTITUTIONAL HISTORY 108 (1964).

121. *Id.*

122. Gee, *supra* note 105, at 1339.

It is difficult to argue that judges controlling the Constitution by controlling its meaning results in anything but imposition of “raw judicial power.”<sup>124</sup> Some may argue that judges who thus become the master intend to exercise their power from the best motives and with the best intentions. Daniel Webster, the renowned Supreme Court practitioner, member of the House and Senate from two states, and Secretary of State under three Presidents, had the appropriate response: “There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.”<sup>125</sup> Senator Orrin Hatch (R-UT) has compared judges resisting such an invitation to the wizard Gandalf in the motion picture *The Lord of the Rings: The Fellowship of the Ring*.<sup>126</sup> Frodo urged Gandalf to take the ring left to him by his uncle Bilbo after discovering it was indeed the One Ring of Power. Gandalf responded: “I would use this ring from a desire to do good . . . but through me, it would wield a power too great and terrible to imagine.”<sup>127</sup> No matter the purpose or motivation, the result of judges determining what the Constitution is by determining what it means is the substitution of judges for the people as the master.

This begs the question of what standards judges should use for determining the Constitution’s meaning, once they have set aside the meaning provided by the people. Some theorists say the Constitution’s words should be given a meaning that will further “the well-being of our society”<sup>128</sup> while others say that meaning should be consistent with “deeply embedded” cultural<sup>129</sup> or social<sup>130</sup> values. Justice William Brennan said that the Constitution is “a sparking vision

123. *Dickerson v. United States*, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting).

124. *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting). See also GARY L. McDOWELL, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* (1985); *Styles in Constitutional Theory*, *supra* note 116; *Our Perfect Constitution*, *supra* note 116; Scalia, *supra* note 50, at 853-56.

125. EDWIN PERCY WHIPPLE, *THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER* 481 (1889).

126. 109 CONG. REC. S10122 (daily ed. Sept. 20, 2006 (statement of Sen. Hatch)).

127. This quote comes from the recent blockbuster movie trilogy the *Lord of the Rings*. The series was originally written by J.R.R. Tolkien, and produced for the big screen by New Line Cinema under the direction of Peter Jackson. *LORD OF THE RINGS: THE FELLOWSHIP OF THE RING* (New Line Cinema 2001). The script may be found reproduced at *Lord of the Rings: The Fellowship of the Ring*, INTERNET MOVIE SCRIPT DATABASE, <http://www.imsdb.com/scripts/Lord-of-the-Rings-Fellowship-of-the-Ring,-The.html>.

128. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 226 (1980).

129. G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 160 (1978).

130. Lupu, *supra* note 119, at 1040.



of the supremacy of the human dignity of every individual.”<sup>131</sup> One scholar offers “distinctive public morality”<sup>132</sup> as a standard while another opines that “the settled weight of responsible opinion”<sup>133</sup> should determine the Constitution’s meaning.

Like Corwin, many of these theorists see the Constitution as a living thing, changing not only in application of settled meaning to new circumstances but changing in its very meaning. Justice Brennan framed the “ultimate question” of interpretation as “what do the words of the text *mean* in our time.”<sup>134</sup> Judge Michael McConnell describes the “living Constitution” as “the idea that judges should interpret the broad provisions of the Constitution in light of modern needs and values, as discerned by the judges themselves.”<sup>135</sup>

The common thread running through all of these theories is that judges may, and perhaps even should, determine what the Constitution is by determining what the Constitution means. “Activist judges are those who decide cases in ways that have no plausible connection to the law they purport to be applying, or who stretch or even contradict the meaning of that law. They arrive at results that were never contemplated by those who wrote and voted for the law.”<sup>136</sup>

Justice Sutherland had warned that eliminating the distinction between interpreting and amending the Constitution converts “what was intended as inescapable and enduring mandates into mere moral reflections.”<sup>137</sup> Justice Robert Jackson later lamented what had become a “widely held belief” that the Supreme Court “no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices.”<sup>138</sup> Constitutional meaning provided by the people, who have the authority to determine what the Constitution is, constitutes an

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131. William J. Brennan, Address to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 18 (1986).

132. Owen M. Fiss, *The Supreme Court 1978 Term – Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 11 (1979).

133. Mark Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 *SUP. CT. REV.* 261, 279 (1975).

134. Brennan, *supra* note 131, at 17 (emphasis added). The Washington Post described Justice Brennan as leading a “social revolution” on the Supreme Court, finding “the essential meaning of the Constitution not in the past but in contemporary life.” Not surprisingly, this activist approach “compelled him to reach out to right perceived wrongs.” Joan Biskupic, *Justice Brennan: Voice of Court’s Social Revolution*, *WASH. POST*, July 25, 1997, at A1.

135. McConnell, *supra* note 67, at 2388.

136. ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 8 (2004).

137. *Id.*

138. *Brown v. Allen*, 344 U.S. 443, 535 (Jackson, J., concurring).

enduring mandate and the rule of law. Constitutional meaning provided by judges, who have no authority to determine what the Constitution is and must instead be limited by it, amounts to moral reflections and personal impressions. This contrast may further be demonstrated by comparing the Supreme Court in 1795, only six years after the Constitution's ratification, and a modern advocate addressing the question of what the Constitution is.

Enduring Mandates and Rules of Law	Moral Reflections and Personal Impressions
<p>What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental law are established. The Constitution is fixed and certain; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it.<sup>139</sup></p>	<p>[T]he "real" Constitution is . . . in a certain frame of mind, written on our spirits, feeding the hunger of the heart to engage in at least a portion of that 'comprehensive ocean of business' that Dickens' Jacob Marley's ghost ignored because of a misplaced trust in the 'letter' of the law of his trade. In that sense the "real" Constitution is not a final achievement but an endless task of constituting its meaning in the crucible of the impassioned claims of citizens, the forceful arguments of lawyers and, above all, the principled decisions of judges.<sup>140</sup></p>

Examples abound of court decisions based on personal impressions rather than rules of law, on a Constitution created by judges rather than the one

139. VanHorne's Lessee v. Dorrance, 2 U.S. 304, 308 (1795).

140. Michael Kelbley, *Where is the 'Real' Constitution?*, PHILADELPHIA INQUIRER, Feb. 13, 1987, at 23a. Another writer on this wavelength wrote that "the constitution is the dominant ideology within us" at the moment, so that "innumerable government actions that are at odds with the Constitutional document as well as with the principles of a free society are in fact constitutional." Donald J. Bordreux, *What Is the American Constitution?*, 48 THE FREEMAN: IDEAS ON LIBERTY 7 (July 1998), available at <http://www.fee.org/publications/the-freeman/article.asp?aid=3460> (last visited June 22, 2008). Others have simply argued that "the Supreme Court has evolved into a new institution . . . [that] can no longer be described with any accuracy as a court, in the customary sense. Unlike a court, its primary function is not judicial but legislative . . . It has become the major societal agency for reform." W. Forrester, *Are We Ready for Truth in Judging?*, 63 ABA J. 1212, 1214 (1977). At least the candor is refreshing.

created by the people. These decisions “have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it ought to mean.”<sup>141</sup> Judge Gee writes that the “central fact of modern constitutional law” is that “courts, both state and federal, following the Supreme Court’s lead, have been issuing great numbers of ‘constitutional law’ decision that are not based on the Constitution and cannot be justified by reference to it.”<sup>142</sup> In these decisions, judges change the Constitution by changing its meaning in order to achieve results they desire but that the people had not chosen for themselves. As these few examples demonstrate, the Supreme Court has amended the body of the Constitution regarding the powers of government, the amendments to the Constitution regarding the rights of individuals, by changing the meaning of existing constitutional provisions, and by creating provisions that do not appear in the Constitution at all.

The Constitution gives Congress the power to “regulate . . . commerce among the several states.”<sup>143</sup> This is one of what Madison called the “few and defined” powers delegated to the federal government.<sup>144</sup> In 1936, the Supreme Court held that “the Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides.”<sup>145</sup> Writing for the Court, Justice Sutherland concluded that the commerce the Constitution allows Congress to regulate “is the equivalent of the phrase ‘intercourse for the purposes of trade,’ and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states.”<sup>146</sup> It does not include activities such as production or manufacture.<sup>147</sup> As such, the Court struck down the Bituminous Coal Conservation Act of 1935 which regulated coal production, rejecting the notion that Congress’ authority to regulate interstate commerce extended to everything that “has some effect upon interstate commerce.”<sup>148</sup>

In 1942, the transformation of the commerce clause appeared to be complete. The Court rejected the distinction it previously found fundamental, holding that whether an activity could be called production, consumption, or even marketing

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141. A MATTER OF INTERPRETATION, *supra* note 50, at 852.

142. Gee, *supra* note 106, at 1335.

143. U.S. CONST. art. I, § 8.

144. THE FEDERALIST NO. 45 (James Madison).

145. *Carter v. Carter Coal Co.*, 298 U.S. 238, 296 (1936).

146. *Id.* at 298.

147. *Id.* at 299. See also *United States v. Lopez*, 514 U.S. 549, 586 (1995) (Thomas, J., concurring) (“As one would expect, the term ‘commerce’ was used in contradistinction to productive activities such as manufacturing and agriculture.”).

148. *Carter*, 298 U.S. at 307.

is “not material for purposes of deciding the question of federal power.”<sup>149</sup> Congress’ power to regulate interstate commerce, the Court said, is no longer limited to regulating interstate commerce but extends to activities ““which so affect interstate commerce...as to make regulation of them appropriate means to the attainment of a legitimate end.””<sup>150</sup> Even if an activity “be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”<sup>151</sup> Having changed Congress’ power by changing the Constitution’s meaning, the Court upheld the Agricultural Adjustment Act of 1938 which limited wheat production.

Not until 1995 did the Supreme Court find that any legislation exceeded Congress’ authority under the Commerce Clause. In *United States v. Lopez*,<sup>152</sup> the Court struck down the Gun-Free School Zones Act, which prohibited possession of a gun within one thousand feet of a school.<sup>153</sup> Writing for the five to four majority, Chief Justice William Rehnquist concluded that, even under the Court’s amended and expanded Commerce Clause, piling “inference upon inference”<sup>154</sup> to connect gun possession with interstate commerce was finally too much.<sup>155</sup> For the dissenters, Justice Stephen Breyer argued that, no matter what it says, the Constitution empowers Congress to regulate “the Nation’s economy.”<sup>156</sup> He insisted that Congress could control anything it deems “commensurate with the national needs” or anything it “decrees inimical or destructive of the national economy.”<sup>157</sup>

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149. *Wickard v. Filburn*, 317 U.S. 111, 124 (1942).

150. *Id.* (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)). *See also United States v. Darby*, 312 U.S. 100, 118 (1941) (“the power of Congress over interstate commerce is not confined to the regulation of commerce among the states”).

151. *Wickard*, 317 U.S. at 125.

152. *See United States v. Lopez*, 514 U.S. 549 (1995).

153. *Id.* at 567.

154. *Id.*

155. Justice Thomas joined the majority, but wrote in a concurring opinion: “Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.” *Id.* at 584 (Thomas, J., concurring). *See also United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (“Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.”).

156. *Morrison*, 529 U.S. at 620.

157. *Id.* at 625.

Another constitutional amendment “in the guise of interpretation”<sup>158</sup> involves the role of religion in American public life. The First Amendment begins with these words: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>159</sup> Justice Thomas has explained what those who put this provision in the Constitution intended it to mean: “At the founding, establishment involved “coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*”<sup>160</sup> Because the First Amendment prohibits laws “respecting an establishment of religion” rather than laws “respecting religion,” it does not “preclude Congress from legislating on religion generally.”<sup>161</sup> This specific focus on government coercion allowed for general support of religion by government and protection of protecting individuals’ freedom of conscience, separately guaranteed in the First Amendment.<sup>162</sup>

In 1947, the Supreme Court amended the Constitution by changing the First Amendment’s specific prohibition against government coercion of religious belief or behavior into a general prohibition against government support for religion. In *Everson v. Board of Education*,<sup>163</sup> the Court said that the First Amendment’s “clause against establishment of religion by law *was intended* to erect a ‘high wall of separation between Church and State.’”<sup>164</sup> This wall, the Court explained, must be “high and impregnable,” strong enough to prevent “the slightest breach.”<sup>165</sup>

The Court came to this conclusion about what the Establishment Clause was intended to mean by citing Thomas Jefferson.<sup>166</sup> Jefferson, however, was not a delegate to the convention that drafted the Constitution. He was not a member of the Congress that proposed the First Amendment. He was not a member of any state legislature that debated and ratified the First Amendment. In fact, he

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158. *See supra* note 112.

159. U.S. CONST. amend. I.

160. *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (internal citations omitted) (emphasis in original).

161. *Id.* at 729

162. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion]”).

163. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

164. *Id.* at 16 (emphasis added).

165. *Id.* at 18.

166. The Court stated, “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’” *Id.* at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

was not even in the United States at the time, serving as ambassador to France.<sup>167</sup>

Jefferson was, however, the one who warned against making our written Constitution a “blank paper by construction.”<sup>168</sup> That is what the Supreme Court has continued to do in its Establishment Clause cases. Just five years after creating a “high and impregnable” wall of separation between church and state, the Court denied that the First Amendment “say[s] that in every and all respects there shall be a separation of church and state.”<sup>169</sup> Two decades later, the wall of separation had become a “blurred, indistinct, and variable barrier.”<sup>170</sup> And within another decade, it had dissolved into nothing but a “useful signpost.”<sup>171</sup> In 1989, the Court amended the First Amendment once again, insisting that it prohibits what a “reasonable observer” would consider to be an “endorsement of religion.”<sup>172</sup> If the Constitution is the meaning of its words, each of these substantive changes in the First Amendment’s meaning effectively amended the Constitution. Drawing on another of Jefferson’s images, the Court appears to be treating the Constitution as “a mere thing of wax . . . twist[ing] and shap[ing it] into any form they please.”<sup>173</sup>

The Court has also amended the Constitution by creating individual rights that do not appear in the constitutional text at all. By the Constitutional Convention in 1787, legislatures had been regulating abortion for at least seventy years.<sup>174</sup> State legislatures did so thereafter, beginning with

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167. MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY* (1975).

168. *See supra* note 48.

169. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

170. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). In *Lemon*, the Court again changed the meaning of the First Amendment, creating a new three-part test for identifying an establishment of religion. The Court held that “[e]very analysis in this area” must use three “tests . . . gleaned from our cases.” *Id.* at 612. These tests require that a statute have a “secular legislative purpose,” that its “primary effect . . . neither advances nor inhibits religion,” and that it “must not foster ‘an excessive government entanglement with religion.’” *Id.* at 612-13. This new formulation fared even worse than its predecessor. Within just two years, the Court said these three parts are “helpful signposts.” *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

171. *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123 (1982).

172. *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989). The Court found that a Nativity scene on a county courthouse stairway endorsed religion while a menorah outside the city-county building did not. The difference apparently had to do with the presence or relative placement of such things as plants, gingerbread men, reindeer, sleds, and candy canes. Justice Anthony Kennedy condemned this “unguided examination of marginalia,” *id.* at 676, as a “jurisprudence of minutiae.” *Id.* at 674.

173. *See supra* note 47.

174. *See* Dennis J. Horan & Thomas J. Marzen, *Abortion and Midwifery: A Footnote in Legal History*, in *NEW PERSPECTIVES ON HUMAN ABORTION* 199 (Thomas W. Hilgers, David

Connecticut in 1821.<sup>175</sup> In 1965, in a case challenging a Connecticut birth control statute,<sup>176</sup> the Supreme Court declared that “penumbras formed by emanations” from the Bill of Rights give “life and substance” to an independent, free-standing right to privacy.<sup>177</sup> This unenumerated right, the Court said in that case, included the use of contraception by married couples,<sup>178</sup> but it would later expand this right to include such things as use of contraception by individuals,<sup>179</sup> abortion,<sup>180</sup> and same-sex sodomy.<sup>181</sup> Since this right has no roots in the Constitution, it is perhaps not surprising that it has acquired even more ethereal and intangible qualities. The Court has, for example, said that the right to privacy is “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>182</sup>

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Mall, Dennis J. Horan eds. 1981). The Common Council of New York City enacted an ordinance in 1716 prohibiting midwives from counseling or helping pregnant women obtain an abortion.

175. See Joseph Dellapenna, *Abortion and the Law: Blackmun’s Distortion of the Historical Record*, in *ABORTION AND THE CONSTITUTION* 146 (Edward R. Grant, Dennis J. Horan, & Paige C. Cunningham eds., 1987).

176. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

177. *Id.* at 484. Interestingly, several online legal dictionaries and glossaries do not recognize the term *penumbras*. See, e.g., LAW.COM DICTIONARY, <http://dictionary.law.com/default2.asp?typed=penumbras&type=1> (last visited Sept. 6, 2008); WORLD WIDE LEGAL INFORMATION ASSOCIATION, <http://www.wwlia.org/dict-p.htm> (last visited Sept. 6, 2008); NOLO.COM LEGAL DICTIONARY, <http://www.nolo.com/definition.cfm/alpha/P> (last visited Sept. 6, 2008); LAW DICTIONARY.ORG, <http://www.law-dictionary.org/Pe.asp?q=~Pe> (last visited Sept. 6, 2008); LAW INFO.COM LEGAL DICTIONARY, <http://resources.lawinfo.com/index.cfm?action=dictionary&show=P> (last visited Sept. 6, 2008); DUHAIME.ORG LEGAL DICTIONARY, <http://www.duhaime.org/dictionary/dict-p.aspx> (last visited Sept. 6, 2008). The few that do aptly define it as “an area within which distinction or resolution is difficult or uncertain,” and simply cite the Supreme Court’s decision in *Griswold* for its creation. See, e.g., LAWYERS.COM LEGAL DICTIONARY, <http://research.lawyers.com/glossary/penumbra.html> (last visited Sept. 6, 2008); FINDLAW.COM LEGAL DICTIONARY, <http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=2b/2b465bd146ff8ed51505355e5967ab17> (last visited Sept. 6, 2008). Justice Hugo Black dissented from the Court finding an unwritten right in a written Constitution, identifying the majority’s approach as based on judges “own appraisal of what laws are unwise or unnecessary. This power to make such decisions is of course that of a legislative body.” *Griswold*, 381 U.S. at 511-12 (Black, J., dissenting).

178. *Griswold*, 381 U.S. at 484.

179. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

180. *Roe v. Wade*, 410 U.S. 113 (1973). Justice White dissented from the Court “simply fashion[ing] and announc[ing] a new constitutional right,” calling the decision “an improvident and extravagant exercise of the power of judicial review.” *Doe v. Bolton*, 410 U.S. 179, 221-22 (White, J., dissenting).

181. *Lawrence v. Texas*, 539 U.S. 558 (2003).

182. *Planned Parenthood v. Casey*, 505 U.S. 833,851 (1992) (plurality opinion).

More recently, the Court has said that it is the “liberty of the person both in its spatial and more transcendent dimensions,”<sup>183</sup>

The practical impact of judicial activism is essentially the same whether the Supreme Court changes the meaning of a constitutional provision that does exist or creates one that does not. In either case, the Court strikes down statutes the people’s elected representatives did make by using a Constitution the people did not make. When the Court declared in 1973 that its created right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,”<sup>184</sup> for example, “the people and the legislatures of the 50 States [became] constitutionally disempowered” to make abortion policy.<sup>185</sup> Professor Mark Tushnet writes that “[m]ost academic commentators probably believe that, as a matter of sound public policy, access to abortions should be relatively unrestricted. But none has been able to provide conclusive arguments that the Supreme Court correctly found that policy in the Constitution.”<sup>186</sup>

Examples of the Supreme Court effectively amending the Constitution by changing its meaning are not limited to decisions appealing to liberal ideological or political interests. In fact, one of the most important differences between the restrained and activist models of judicial power is the difference between process and results, between means and ends. In the restrained model, the process of applying law with the meaning provided by the lawmaker legitimates whatever results occur. In the activist model, desirable results are reached through applying law with meaning provided by the judge. Undesirable results reached through a restrained process are legitimate. Desirable results reached through an activist process are illegitimate.

In *Troxel v. Granville*,<sup>187</sup> for example, a state law permitted “any person” to petition for visitation rights “at any time.” A mother seeking to limit visitation

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183. *Lawrence*, 539 U.S. at 562.

184. *Roe*, 410 U.S. at 153.

185. *Doe*, 410 U.S. at 222 (White, J., dissenting).

186. Mark V. Tushnet, *The Supreme Court on Abortion: A Survey*, in *ABORTION, MEDICINE, AND THE LAW* 165 (J. Butler & D. Walbert, eds., 3d ed. 1986). Tushnet is not the only scholar identified as a supporter of *Roe*’s result who finds the decision flawed. See, e.g., Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 784 (1973) (“leaves the impression that the abortion decisions rest in part on unexplained precedents, in part on an extremely tenuous relation to provisions of the Bill of Rights, and in part on a raw exercise of judicial fiat.”); Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 690 (1976) (“it is difficult to find a case that raises methodological problems as severe as those left in the wake of *Roe*.”); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569 (1979) (“The result in the case . . . was controversial enough. Beyond that, even people who approve of the result have been dissatisfied with the Court’s opinion.”).

187. *Troxel v. Granville*, 530 U.S. 57 (2000).



between her children and their paternal grandparents claimed this law violated her constitutional right to direct the upbringing of her children. The Supreme Court agreed, affirming that the “fundamental right of parents to make decisions concerning the care, custody, and control of their children” may be found in the “liberty” protected by the Fourteenth Amendment.<sup>188</sup> Just as the Supreme Court was wrong in *Roe v. Wade* to find in the word “liberty” an unenumerated right to abort children, however, the Court was wrong in this case to find in that word an unenumerated right to rear children. Justice Scalia dissented, writing that our written Constitution does not authorize judges to identify unenumerated rights,

and to enforce the judges’ list against laws duly enacted by the people . . . . I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”<sup>189</sup>

Constitutional amendments by judges achieved through construction or usurpation in “the guise of interpretation”<sup>190</sup> are illegitimate because judges have no authority to amend the Constitution. The Supreme Court displaces the people as the Constitution’s master, and undermines our liberty, no less when it amends the Constitution in ways one applauds as in ways one opposes.

In each of these examples, the Supreme Court has effectively taken ownership of the Constitution from the people and is no longer being restrained by the charter that exists to limit government. Such judicial activism makes “an end run around popular government” that would “impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution.”<sup>191</sup> Judicial activism, by therefore making judges rather than the people the master of the Constitution, is “genuinely corrosive of the fundamental values of our democratic society.”<sup>192</sup> Because the Constitution is the meaning of its words and that meaning belongs to the people, judicial restraint is the only model of judicial power that keeps the people their own

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188. *Id.* at 66. The Court previously had said that the Fourteenth Amendment “guarantees more than fair process” and protects “against government interference with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1993).

189. *Troxel*, 530 U.S. at 72 (Scalia, J., dissenting).

190. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).

191. William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976).

192. *Id.*

masters and limits government. The more recent model of judicial activism was crafted by those “who did not wish to see constitutional restraints on government” and saw political value in “adopt[ing] a rule of interpretation which would grant themselves wide latitude . . . by following or creating changes in language.”<sup>193</sup> It is the inherent difference between these models of judicial power, judicial restraint and judicial activism, that has led to the growing conflict over judicial selection.

### *B. Judicial Selection*

The Constitution’s identity, ownership, and function establish that the people, rather than judges, have authority to determine what the Constitution is. The people, rather than judges, may determine what the Constitution means. This view offers a defined role for the judiciary in our system of separated powers, one that Justice Thomas has described as “a judiciary active in defending the Constitution, but judicious in its restraint and moderation.”<sup>194</sup> Since judicial power is exercised by judges, those whose end run around popular government requires changing the Constitution by changing its meaning seek appointment of judges willing to implement their theories on the bench. The argument over “the proper role of [judges] in American society, and about the nature and extent of judicial power under a written Constitution”<sup>195</sup> naturally means that, in the judicial selection process, the “real issue is . . . what kind of judges”<sup>196</sup> will be appointed. “In not so subtle terms, the political battles have shifted away from legislative battles towards who will sit on our courts, who will determine our moral ideology, and who will control our Constitution.”<sup>197</sup>

If there were today the same consensus about judicial power that existed for most of American history,<sup>198</sup> the question of who controls our Constitution would have a ready answer and there would be much less at stake in judicial

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193. B. Nelson Ong, *James Madison on Constitutional Interpretation*, 3 BENCHMARK 17, 21 (1987). See also Melvin E. Bradford, *Such a Government as the People Will Approve: The Great Convention as Comic Action*, in ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 1 (1993) (our “fundamental charter [may] be drawn out of character by the strategies of interpretation and the interested manipulation of those who are responsible for its application.”).

194. Thomas, *supra* note 55, at 63, 64.

195. Gary L. McDowell, *Doubting Thomas*, NEW REPUBLIC, July 29, 1991, at 12.

196. Thomas Sowell, *Real Judicial Crisis is Judges Who Ignore the Law*, POST & COURIER, Jan. 14, 1998, at A11.

197. *Preface*, 39 U. RICH. L. REV. ix (2005) [hereinafter *Richmond Preface*].

198. See *supra* notes 99-109 and accompanying text.

selection. Judges would be “merely interpreting an instrument framed by the people”<sup>199</sup> who remain the “ultimate source of authority.”<sup>200</sup> Today, however, “the United States finds itself in an era of unprecedented judicial power.”<sup>201</sup> Legal commentator Stuart Taylor colorfully, and correctly, observes that “[l]ike a great, ever-spreading blob, judicial power has insinuated itself into every nook and cranny.”<sup>202</sup> With the judiciary asserting increasing control over the Constitution and theorists and activists urging this trend along, however, today there is much at stake.

The debate over judicial selection as a debate over judicial power has been much more pronounced since the 1987 Supreme Court nomination of Judge Robert Bork. He had long argued that the people, rather than judges, supply the Constitution’s meaning and had previously criticized the Supreme Court for “performing not a constitutional but a legislative function.”<sup>203</sup> Opposition to his nomination came from those who “focused on how such an originalist view of interpretation would cramp American constitutional law and the willingness of the Court to create new rights such as that of the right to privacy in *Griswold* and that of abortion in *Roe*.”<sup>204</sup>

In a pattern that would repeat itself in future confirmation battles, grassroots activists and Senators were guided in their opposition to the Bork nomination by theorists of judicial activism such as Harvard law professor Laurence Tribe. He had argued that the legitimacy of Supreme Court decisions came from their “outcome” rather than the “method” of reaching the outcome.<sup>205</sup> He advocated a creative judiciary that would interpret the Constitution utilizing “judicial creation”<sup>206</sup> to “put meaning *into* the Constitution.”<sup>207</sup> Based on this model of judicial power, Tribe urged the Senate to evaluate judicial nominees based on

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199. Rehnquist, *supra* note 190, at 696. See also Whittington, *supra* note 30, at 2. Attributing to the Constitution the meaning the people gave it “recognizes and emphasizes that the Constitution is a communication, an instruction, from an authorized lawgiver, the sovereign people, and that the task of the faithful interpreter is to discover what that instruction was and to apply it as the situation demands.”

200. Rehnquist, *supra* note 191.

201. *Richmond Preface*, *supra* note 197.

202. Stuart Taylor, Jr., *Imperial Judges Could Pick the President – Again*, 36 NAT’L J. 2877, 2877 (Sept. 2004).

203. Robert H. Bork, *Inside Felix Frankfurter*, 65 PUB. INT. L. REP. 108, 109 (1981).

204. Gary L. McDowell, *Bork was the Beginning: Constitutional Moralism and the Politics of Federal Judicial Selection*, 39 U. RICH. L. REV. 809, 810-11 (2005).

205. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 52 (1st ed. 1978).

206. See Gary L. McDowell, *God Save This Honorable Court – And My Place On It*, 4 BENCHMARK 185, 188 (1990).

207. LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 42-43 (1985) (emphasis in original).

how, if confirmed, they could be expected to rule on issues such as “gun control, capital punishment, or the right to life.”<sup>208</sup>

As Senator Orrin Hatch put it during the debate on the nomination of John Roberts to be Chief Justice:

The standard a Senator applies reflects a particular job description, what a Senator believes judges should do in our system of government. For some Senators, it is a political job description. They see judges as playing a political role, delivering results favoring certain political interests, setting or changing policy, creating new rights, defending social progress, and blazing a trail toward justice and equality.<sup>209</sup>

Like the theories about expanded judicial power on which they are built, these standards for judicial selection are means of achieving particular political objectives. Those who favor a politically activist judiciary, therefore, want to know how a judicial nominee will, if confirmed, rule on certain issues. “For a number of reasons, the view that the identities of judges are inextricably related to the results they will reach in constitutional law cases has achieved an unprecedented dominance in the contemporary political and legal landscape.”<sup>210</sup> The following are some examples from the debate on the Roberts nomination:

- Senator Barack Obama (D-IL) said that judges decide “truly difficult” cases on the basis of their “deepest values . . . core concerns . . . broader perspectives on how the world works, and the depth and breadth of one’s empathy . . . . [I]n those difficult

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208. *Id.* at 97. In his 1986 Tanner Lecture at the University of Utah, Professor Tribe rejected “an empty, or an infinitely malleable, Constitution” and argued that there must be at least some line between what “you think the Constitution *says* and what you wish it *would say*.” Laurence H. Tribe, *On Reading the Constitution*, THE TANNER LECTURES ON HUMAN VALUES \*12, \*15 (1986), available at <http://www.tannerlectures.utah.edu/lectures/documents/Tribe88.pdf> (last visited Sept. 6, 2008). He appeared to distinguish between “*reading* the document and *writing* one of your own . . . .” *Id.* at \*27. Nonetheless, Tribe sees the Constitution as “a text to be interpreted and reinterpreted in an unending search for understanding . . . .” *Id.* at \*33-34, a search in which the text of the Constitution merely “guides interpretation.” *Id.* at \*34. His distinctions between the “mysterious” and the “mystical,” *id.* at \*16, between a “fanciful, ingenious argument about the Constitution” and a “plausible interpretation,” *id.* at \*18, or between reading the Constitution by “*dis*-integration and reading by *hyper*-integration,” *id.* at \*19, are all in the context of judicial control of the Constitution’s meaning.

209. 109 CONG. REC. S10412 (daily ed. Sept. 26, 2005) (statement of Sen. Hatch).

210. William P. Marshall, *Constitutional Law as Political Spoils*, 2005 CARDOZO L. REV. 193, 194 (2005).

cases, the critical ingredient is supplied by what is in the judge's heart."<sup>211</sup>

- Senator Barbara Boxer (D-CA) said that “before we vote, it is important to know where Judge Roberts stands on key issues that define us as Americans and what kind of country we will leave behind for our children.”<sup>212</sup> She said that Senators must know “the way Judge Roberts approaches civil rights, reproductive health, the separation of church and state, environmental protection, and more.”<sup>213</sup>
- Senator John Kerry (D-MA) said that “I can’t say with confidence that I know on a sufficient number of critical constitutional issues how he would rule or what his legal approach would be.”<sup>214</sup>
- Senator Debbie Stabenow (D-MI) said that she needs to know “whether Judge Roberts will stand with us and with our families or be on the side of major special interests”<sup>215</sup> and asked: “How will he rule on cases” in various areas.<sup>216</sup> “Americans,” she said, “are entitled to know where he stands”<sup>217</sup> and how he “will approach and decide these questions of law.”<sup>218</sup>
- Senator Edward Kennedy (D-MA) expressed a similar view. Interviewed on NBC’s *Today Show*, Senator Kennedy said the “real question” is: “Whose side is Judge Roberts really on, on the really important issues of our times?”<sup>219</sup> Will he be “on the side of the major corporate interests or is he going to be on the consumers’ interests? Will he be on the side of the polluters or will he be on the side of those that believe that the Congress has the right to pass important legislation on the environment? And

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211. 109 CONG. REC. S10366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

212. 109 CONG. REC. S10273 (daily ed. Sept. 21, 2005) (statement of Sen. Boxer).

213. *Id.* at S10274.

214. *Id.* at S10261 (statement of Sen. Kerry).

215. *Id.* at S10641 (statement of Sen. Stabenow).

216. *Id.*

217. *Id.*

218. *Id.*

219. *NBC/Today Show Interview by Matt Lauer of Ted Kennedy*, TEDKENNEDY.COM, <http://www.tedkennedy.com/journal/165/senator-kennedy-nbctoday-show-interview> (last visited Sept. 6, 2008).

will he be on the side of workers or is he going to be on the side of the bosses?”<sup>220</sup>

- In a speech to the AFL-CIO’s fiftieth anniversary convention, Senator Kennedy said: “For our future—for our children’s future—for our nation’s future—we need to know whose side Mr. Roberts is on . . . . Will he stand with the workers of America or the Wal-Marts of America? When a worker is injured, will he stand with corporations—or with average Americans? When insurance companies deny health care—will he stand with the HMOs or with average Americans? When polluters poison our water and our air, will he stand with the polluters—or with the people? And when Benedict Arnold companies use tax loopholes to send job overseas, will he stand with corporations—or will he stand with hard-working Americans? That’s what we need to know. Whose side is he on?”<sup>221</sup>
- On the Senate floor, Senator Kennedy said that courts exist “to continue the great march of progress, to never turn back and never give up our hard-won gains.”<sup>222</sup> As such, the “basic issue” is whether a nominee would bring to the judicial office “the values and ideals that would enable our struggle for equality and opportunity to continue, or would he stand in the way?”<sup>223</sup>

Each of these statements reflects an activist view of judicial power, a judiciary with the power to change the Constitution by changing its meaning in order to achieve political or ideological results. The contrast between these statements and the fundamental principles of the Constitution’s identity, ownership, and function is obvious. Under those principles, “how [a] decision is reached, the interpretive road followed, is what judging ultimately is all about.”<sup>224</sup> But when the “desire for results is greater than the respect for process, and, when theory fails, power remains.”<sup>225</sup> Senator Hatch put it:

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220. *Id.*

221. Senator Ted Kennedy, Address at the 50th Anniversary AFL-CIO Constitutional Convention in Chicago (July 25, 2005), <http://www.aflcio.org/mediacenter/prsptm/sp07252005c.cfm>.

222. 109 CONG. REC. S10258 (daily ed. Sept. 21, 2005) (statement of Sen. Kennedy).

223. *Id.*

224. Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, in JUDICIAL SELECTION 3, 5 (1990).

225. *Styles in Constitutional Theory*, *supra* note 116, at 388.

“[f]ocusing on the political correctness of a judge’s results rather than the judicial correctness of his reasoning is a political standard.”<sup>226</sup> Under this standard, “[w]hat counts is who wins and who loses, which political and cultural causes prevail and which are relegated to the dustbin.”<sup>227</sup>

The cases involving Congress’ power to regulate interstate commerce demonstrate the difference judicial selection makes. Between 1936, when the Supreme Court decided that Congress could only regulate interstate commerce, and 1942, when the Court decided that Congress could regulate anything that affects interstate commerce, President Franklin D. Roosevelt replaced eight of the Supreme Court’s nine Justices.<sup>228</sup> Four of them, including Justice Sutherland, had voted in 1936 to restrict Congress’ power to regulate coal production.<sup>229</sup> Their replacements voted in 1942 to uphold Congress’ power to regulate wheat production.<sup>230</sup> Replacing Justices committed to letting the people determine the Constitution’s meaning with Justices who believed they

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226. 109 CONG. REC. S10412 (daily ed. Sept. 26, 2005).

227. Robert H. Bork, *A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES* xxv (2005).

228. With an average of 70 Democratic Senators during this period, these nominees were confirmed in an average of just 12 days after their nomination. One of them, James Byrnes, former U.S. Representative and Senator from South Carolina who would later become Governor of that state, was confirmed the same day. Byrnes resigned 15 months later to enter the executive branch, giving President Roosevelt a record ninth appointment. President Roosevelt nominated Hugo Black on August 12, 1937, to replace Willis Van Devanter, a 1911 Taft appointee, and the Senate confirmed him five days later; he nominated Stanley Reed on January 15, 1938, to replace George Sutherland, a 1922 Harding appointee, and the Senate confirmed him 10 days later; he nominated Felix Frankfurter on January 5, 1939, to replace Benjamin Cardozo, a 1932 Hoover appointee, and the Senate confirmed him 12 days later; he nominated William Douglas on March 20, 1939, to replace Louis Brandeis, a 1916 Wilson appointee, and the Senate confirmed him 15 days later; he nominated Frank Murphy on January 4, 1940, to replace Pierce Butler, a 1923 Harding appointee, and the Senate confirmed him 12 days later; he nominated James Byrnes on June 12, 1941, to replace James McReynolds, a 1914 Wilson appointee, and the Senate confirmed him the same day; he nominated Robert Jackson on June 12, 1941, to replace Harlan Fiske Stone, a 1925 Coolidge appointee, and the Senate confirmed him 25 days later; and he nominated Justice Stone on June 12, 1941, to replace Chief Justice Charles Evans Hughes, a 1930 Hoover appointee, and the Senate confirmed him 15 days later. Justice Byrnes, who previously served in the U.S. and Senate from South Carolina and would later be elected governor of that state, resigned 15 months later to enter the executive branch, giving President Roosevelt a ninth appointment. See *Biographical Directory of Federal Judges*, Federal Judicial Center, [http://www.fjc.gov/history/home.nsf/judges\\_frm](http://www.fjc.gov/history/home.nsf/judges_frm) (last visited Sept. 6, 2008).

229. *Carter v. Carter Coal*, 298 U.S. 238 (1936).

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

could do so allowed the Supreme Court, rather than the people, to become the Constitution's master.

Speaking at the State University of New York School of Law, Justice Scalia warned that as judges become the source of the Constitution's meaning, selection of judges "becomes a very political hot potato. Every time you need to appoint a new Supreme Court justice, you are going to have a mini-plebiscite on what the Constitution means."<sup>231</sup> The fight over judicial selection, then, is really a fight over judicial power. It is a fight over whether the people or judges will control the Constitution by controlling its meaning. It is over whether the people or judges will be the master.

#### IV. CONCLUSION

The Kentucky Constitution asserts that among its purposes is that "the great and essential principles of liberty and free government may be recognized and established."<sup>232</sup> Professor Steven Calabresi likewise writes that "in the United states we have a tradition of venerating the written Constitution and resorting to first principles."<sup>233</sup> This Article has reviewed three of those principles regarding the Constitution's identity, ownership, and function, concluding that the Constitution is the meaning of its words, that its meaning belongs to the people, and that judges do not have authority to change that meaning.

On September 15, 1987, the U.S. Senate Judiciary Committee opened its hearing on the Supreme Court nomination of United States Circuit Judge Bork. In his opening statement, the nominee argued that the judge "is applying the law and not his personal values" and, therefore, "must be every bit as governed by law as is the Congress, the President, the state governors and legislatures, and the American people. No one, including a judge, can be above the law. Only in that way will justice be done and the freedom of Americans assured."<sup>234</sup> The "only legitimate way" to do so, he explained, "is by

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231. *Back to Basics*, UB LAW FORUM, Fall 2002, at 19, available at <http://law.buffalo.edu/forum/fall2002/default.asp?firstlevel=1&secondlevel=1&filename=scalia> (last visited Sept. 6, 2008). He made the same point in an April 2007 speech at the University of Delaware: "It's like having a mini constitutional convention every time you assign somebody to the Supreme Court and, as you know, it's even moved down to the appeals level now. I think it's very sad." *Justice Scalia Says "Originalism" Protects American Liberty*, UD DAILY, Apr. 30, 2007, <http://www.udel.edu/PR/UDaily/2007/apr/scalia043007.html>.

232. KY. CONST., Bill of Rights.

233. Calabresi, *supra* note 24, at 638.

234. *The Bork Hearings; Bork Statement: 'Philosophy of Role of Judge'*, N.Y. TIMES, Sept. 16, 1987, <http://query.nytimes.com/gst/fullpage.html?res=9B0DE7D81E31F935A2575AC0A961948260&sec=&spon=&pagewanted=1>.



attempting to discern what those who made the law intended.”<sup>235</sup> Otherwise, the judge “diminishes liberty instead of enhancing it.”<sup>236</sup>

In 1777, the patriot Reverend Samuel Webster said that a “knowing and a learned people are the least likely in the world to be enslaved.”<sup>237</sup> Today, however, nearly as many Americans believe the Supreme Court should decide cases based on “a sense of fairness and justice” rather than on “what is written in the Constitution and legal precedents.”<sup>238</sup> Dissenting in *Dred Scott v. Sandford*,<sup>239</sup> Justice Benjamin Curtis explained the results:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.<sup>240</sup>

Humpty Dumpty was right. Those who control the Constitution are the masters of the people.

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235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Dred Scott v. Sandford*, 60 U.S. 393 (1957).

240. *Id.* at 621.