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Original Understanding and the Constitution

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ORIGINAL UNDERSTANDING AND THE CONSTITUTION

by

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INTRODUCTION

I confess a certain reticence about discussing "original understanding" or the "original intent" of those who framed the Constitution.[1] I feel rather like the woman who was asked how she felt about her husband. She said, "Compared to what?"

Somebody famous and wise told us that those who do not understand history are condemned to repeat it. I agree with that thought. It is simple, yet profound. I tell my students much the same thing every Fall: Those who do not understand civil procedure are condemned to repeat it.

So far as I know, I have never had a student who wanted to repeat civil procedure, or any other course that I taught. The person who warned us about history was suggesting, in a broader sense, that if you really understood the past, you would not want to do it over again. Rather, you would appreciate that in every field of human endeavor we try to stand on the shoulders of those who have gone before, so that we can see farther and maybe do better.

But now there are people telling us that we should seek out and follow the "original understanding" of two hundred years ago. They advance different reasons for doing this. Some say that this is the way the framers wanted us to behave. Others tell us that this is the way that lawyers solve problems, by tracing back to the most authentic precedent they can find and applying it.[2] Still others tell us that only by revisiting the constitutional text, debates, and history can we truly understand the frame of government that was erected for us to dwell in. In

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[1] This essay is a slightly revised and footnoted version of a lecture given at The University of Akron School of Law on April 7, 1988. The lecture was part of a discussion of the bicentennial of the constitution, and was designedly contentious. I have kept the conversational, argumentative tone of the original.

[2] The public interest in this question increased when Attorney General Meese waded into the fray. Meese, *Toward a Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL'Y. 5 (1987). See also articles cited in Hutson, *The Creation of the Constitution*, 65 TEX. L. REV. 1, 5 & n.30 (1986) [hereinafter Hutson]; Hutson makes a distinctive contribution to the debate by showing how little of the Constitutional Convention's debates actually survive in any form. Other contributions include *Symposium, 1787: The Constitution in Perspective*, 29 WM. & MARY L. REV. 113 (1987) (contributions by, e.g., Morton J. Horwitz, Mark Tushnet, Sanford Levinson, Jefferson Powell and Randall Kennedy). Dozens of works on the originalism issue are cited and discussed in Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177 (1987). Among the most valuable works are Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) [hereinafter Powell]; see also Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). An early work, still among the most-cited, is tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, (pts. 1 & 2) 26 CALIF. L. REV. 287, 437 (1938). I have found the Powell, Clinton, Hutson, and tenBroek works, and the reader is referred to them for discussion of points raised in this essay.

this essay I will explain why I reject the first two of these contentions, and embrace the third tentatively and reluctantly, like a porcupine on a hot date.

I confess that I am biased about this subject. I came to law school and to the practice of law believing in a certain view of democratic rights. I have been an advocate for all the intervening years, and it is too late for me to begin hiding what I think.

By the same token, I sometimes wonder about at least some of the "original understanding" crowd. Some of them seem to have a reactionary social agenda, and to be looking for a theory that endows their agenda with power and legitimacy. They claim — disingenuously, I think — that their theory is neutral and verifiable. I will address these claims in more detail later, but let me make my bias clear.

I have opposed the nominations to federal judgeships of some "original understanding" candidates. I mistrusted their ability to hold the scales of justice true. I wondered about the announced intention of the Department of Justice in the Reagan Administration to find judges who would fit a certain mold. I said of those judicial nominees what my mentor Edward Bennett Williams said one night of a judge before whom he had just had the misfortune to appear: "I will meet that S.O.B. on any field of human endeavor that he may name, at a time and place of his choosing, in a contest that he names . . . so long as the S.O.B. is not also the referee."

ORIGINAL INTENT AND THE ORIGINAL INTENDERS

Can it rationally be argued that those who made the Constitution wanted us to try and divine their true intent and then to follow it two hundred and more years down the road? I think not.[3]

There is, of course, James Madison's letter to Henry Lee, written in 1824.[4] Madison was among those most involved in the Constitutional Convention's work, and in the preservation of its debates. He went on to have a distinguished career. You all remember *Marbury v. Madison*,[5] which for some of the more doctrinaire original intent folks is original sin because it put the Supreme Court in the business of reviewing the constitutional validity of statutes, and because on the way to that result did not doubt that in a proper case the Court could tell the President he had to obey the law.

If *Marbury v. Madison* is original sin, Madison is the serpent in the garden, because he refused to turn over Marbury's judicial commission and provoked the lawsuit.

Anyway, Madison knew in 1824 that judges and lawyers were out there argu-

[3] *See generally* Powell, *supra* note 2.

[4] *Quoted* in Clinton, *supra* note 2, at 1179.

[5] 5 U.S. (1 Cranch) 137 (1803).

ing about the language he and his friends had labored over that sticky Philadelphia summer. And he wrote in an often quoted paragraph:

> What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense! And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption.[6]

We can look to the text of what the Framers left us, and be clear about their desire to dictate precisely the course of events in some respects. Every state will have two Senators. There are three branches of government. There is one Supreme Court. And so on. Other words carry no such precision: all one could know about "Commerce with foreign Nations, and among the Several States" is that such commerce had undergone great changes in the lifetimes of those then in Philadelphia and bade fair to change even more. I reject the view that those words have no meaning: They describe, and were intended to describe, a framework of decision against a knowable background of assumptions. But when we know the background of assumptions, I submit that they can liberate us to figure things out, not constrain us from learning.

Perhaps the most important constitutional debate in the 19th Century was over the question of slavery, to which the great abolitionists such as Frederick Douglass always linked the issue of women's rights.[7] The Framers put slavery in the Constitution, though not in so many words.[8] Justice Thurgood Marshall[9] and Professor Derrick Bell[10] have characterized that process for us, and I have written about it in reviewing Professor Bell's book.[11]

But what would an originalist have said about slavery, if asked to comment in 1855? A truthful one would have confessed that our records of the Constitutional Convention are fragmented and incomplete. Even those that survive, as recent scholarship has again shown us, were expurgated by their authors and editors.[12] So we would be uncertain, if only because original intent is like a suggestion I once heard on Dr. Ruth Westheimer's program — however interesting it might be — it is physically impossible for ordinary mortals.

We might look, as did some lawyers and scholars of the time, to the clause

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[6] *Id.*

[7] For much of this discussion, I have referred gain to P. S. Foner, The Life and Writings of Frederick Douglass (5 vols. 1950). Foner's historical discussion supplements this most complete collection of Douglass writings.

[8] U.S. CONST., art. I, sec. 9, cl. 1, 4; art. 5, cl. 2.

[9] *See* Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337 (1987).

[10] D. BELL, AND WE ARE NOT SAVED 26-50 (1987).

[11] Tigar, *Unfinished Business*, A.B.A.J., Oct. 1, 1987, at 146.

[12] *See* Hutson, *supra* note 2, at 5 & nn.32-35.

that guarantees a "Republican Form of Government" to every state.[13] We would then look at the provisions exempting from amendment until 1808 the limitations upon importation of slaves. We would consider article four, section two, setting out the obligation to render persons subject to service or labor.

We might say that the slaveowning delegates in Philadelphia were concerned that this new Union would put their human property in danger. They held firm and finally struck a bargain. That bargain represented the best they could get for their side. On paper, all that bargain arguably guarantees them is twenty years in the slave trade.[14]

The slaveowners had to know, as did everybody in Philadelphia, that the tide was moving against their brutal traffic.[15] So we would need, in our hypothetical nineteenth century inquiry, a lot more evidence than we have to find that slavery was beyond the power of Congress to regulate or even abolish. We could even argue that evolving "Republican Form of Government" notions would someday make a constitutional foundation for abolition of slavery.

In what is probably an apochryphal story, Benjamin Franklin is asked on coming out of the Convention in Philadelphia, "What have we got, a monarchy or a republic?" To which he is said to have replied, "A republic, if you can keep it."[16] "Keeping it" meant paying attention to the movement of history, and to the rise of voices for social change.

The nineteenth century controversy about slavery and the Constitution provides us an interesting perspective on today's original intent debate. William Lloyd Garrison saw the constitution as a *covenant with death,* as inescapably a pro-slavery document. He counselled his followers to have nothing to do with it.[17]

For a time, the great Black abolitionist Frederick Douglass supported the Garrison view. In 1849, in correspondence with friends, he began to change, and on May 23, 1851, he publicly announced that if one went "behind the letter of the Constitution, . . . to seek its meaning in the history and practice of the nation," one would see that slavery "never was lawful and never can be made so."[18]

Douglass asserted that arguing the Constitution to be a pro-slavery document was essentially to argue "the slaveholders' side of the question." He conceded that the Garrisonites and slaveowners "are doubtless right so far as the intentions

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[13] *See* Comment, *Political Rights as Political Questions: The Paradox of Luther v. Border,* 100 HARV. L. REV. 1125 (1987). This excellent student work would have benefited from discussion of the republican form of government dispute over slavery, but is nonetheless first-rate.

[14] Professor Bell has brilliantly evoked the debate at Philadelphia. *See supra* note 10, at 25-41.

[15] *See* J. MACY, THE ANTI-SLAVERY CRUSADE 8 - 25 (1919). Macy notes that the original draft of the Declaration of Independence included a condemnation of slavery.

[16] *Quoted in* M. FARRAND, FATHERS OF THE CONSTITUTION 134-35 (1921).

[17] 1 P. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 41 (1950) [hereinafter 1 P. FONER].

[18] 2 P. FONER, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 155-56 (1950) [hereinafter 2 P. FONER]. *See also id.* at 52-53, 74.

of the framers of the Constitution are concerned." For this, Douglass had an answer: "But these intentions you fling to the winds. Your legal rules of interpretation override all speculations as to the opinions of the Constitution makers." [19] And on another occasion, he found himself in reason and conscience bound to search out the intentions of the framers "in the Constitution itself."[20] He took his guidance from a corterie of abolitionist lawyers who had worked out a constitutionally-based attack on slavery.[21]

Had not Jefferson supported the Constitution and had he not also written of the possibility of a conflict between slaves and slaveholders, "God has no attribute that could take sides with the oppressor in such a contest. I tremble for my country when I reflect that God is just, and that his justice cannot sleep forever." [22]

Douglass saw that conceding the Constitution to be a pro-slavery document was playing into the hands of slaveowners and legitimating them in retreating behind the Constitution to prevent any interference with their system. He saw that abolitionist proposals to take the free states out of the federal union could only dishearten the increasingly restive slaves in the South and limit the political effectiveness of white abolitionists. If such calls were ever successful, of course, the slaves would be delivered entirely into the hands of their masters, to rise up with scant hope of outside help.[23]

In the end, the constitutional debate came to nothing. Taney thought he would solve it in the *Dred Scott*[24] decision, and Justice Grier leaked the result to President-Elect Buchanan so that the latter could assure the nation in his inaugural that the issue of slavery would be put to rest.[25]

Ultimately, force of arms overthrew slavery, and the Civil War amendments were put in to clinch the North's victory.

If the Supreme Court had, however, moved decisively to strike at slavery, its decision would have been legitimate under prevailing views of the Constitution. The only question would have been whether the slave states would accept the decision. If they had not, a civil war would be inevitable.

The Court instead upheld slavery in *Dred Scott*, and civil war happened. By that time, even Douglass had seen that the slaveowners would not yield without force of arms. It is not, I hope, suggested that Chief Justice Taney was an

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[19] *Id.* at 149-50.

[20] *Id.* at 157.

[21] *Id.* at 155-56, 201. *See also* J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

[22] 2 FONER, *supra* note 18, at 149 (quoted from a lecture by Douglass *delievered in* Corinthian Hall, Rochester, N.Y., Dec. 8, 1850).

[23] *Id.* at 52-53.

[24] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[25] C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 294-300 (1947), *discussed in* Tigar, *Judicial Power, the "Political Question" Doctrine, and Foreign Relations*, 17 U.C.L.A. L. REV. 1135, 1148 (1970).

originalist; certainly nobody plausibly claimed him to be at the time. As soon as it became apparent that President Jackson would be naming Chief Justice Marshall's successor, the expressions of glee and foreboding — depending on one's politics — filled the air.

John Quincy Adams wrote in his diary that "all constitutional governments are flexible things," and hoped that Jackson would appoint someone with vision and ability. The Democrat paper, the *Richmond Enquirer*, wanted a "good old States-Rights" man, because — as they put it — "The Court has done more to . . . shape a new Constitution for us, than all the other departments of the Government put together." When they spoke of original intent, they meant slave-state intent.[26]

So here were people, living much closer to the time when the Constitution was adopted, frankly acknowledging that even on fundamental issues, the Constitution did not speak to us with a single, clear command, and that the occupants of judicial office would inevitably bring their social vision to the task of construing it.

In the constitutional debate over slavery, original intention had two meanings, neither one of them salutary. For the abolitionists, it was a counsel of despair for the uprising that was not yet ready to be born. For the slaveowners, it was a cloak for reaction.

Douglass did not suggest casting the words and structure of the Constitution aside. Rather, he sought plausible interpretations, based upon the document's indisputable references to liberty. He sought to find the open places where a textually-demonstrable and historically verifiable commitment to freedom might be argued. Only when events had closed up all those places would one believe armed struggle to be inevitable. And in the aruging over open places, the path that led to armed struggle would be clearer and the burden of destroying by force what could not be extirpated by interpretation more readily shouldered by those who would bear the battle.

The broader point is this: When we read through the Constitution, nothing in its words suggests an intention to do more than erect a framework. Its authors had, after all, just participated in a great social upheaval. They of all people knew that struggle is constant, while institutional forms either adapt or are swept away.

Sometimes, when we are being foolish, we want to live forever. I know it. We want to impose our vision of the world and see it last. We have children and try to run their lives so they will be a credit to us — by which we mean that they will be so much like us that we will know we are good people. We write articles and books. We teach school in the hope that our wise words will be gathered up by eager students. But if we have any sense, we understand that while we may alter

[26] *Id.* at 2-3, 9.

the direction of events, we cannot with assurance and precision determine their outcome. I identify with some of the framers, most particularly with bibulous, gout-ridden old reprobates like Ben Franklin. That's one reason I think they were not silly enough and vain enough to want to live forever.

John Prine wrote in a song, "Old man sleeps with his conscience at night, young man sleeps with his dreams." The transition he sings about — between the hopes you had and the fear that you fell short — comes upon you unbidden. One day it is just there. And it makes you anxious.

The framers of the Constitution included some forward-lookers and some backward-lookers. And I suggest to you that they understood what Madison expressed. I suggest that they, having rejected the idea of a state church, had no wish to chain us all to a secular orthodoxy such as the originalists — whether of today or in past times — have prescribed.

LAWYERS, PRECEDENT AND SOCIAL CHANGE

What is precedent? Is it that we justify the infamy of today by the infamy of yesterday, so that the law shows its a posteriori to the people, as God to his servant Moses?[27]

There have been judges and prosecutors who argue in this way. But they palter in a double sense. Originalism has usually meant, in the history of legal argumentation, a sleight of hand by which you are told to keep your eye on an unchanging legal category while somebody fills it up with new content.

Let me explain that, though only briefly. Those who want a longer version can look at Karl Renner's great book, *The Institutions of Private Law and Their Social Functions*,[28] my book *Law and the Rise of Capitalism*,[29] and Thurman Arnold's legal realist classic, *The Folklore of Capitalism*.[30] When we say that somebody has the freedom to contract, we are repeating a form of words that goes back several hundred years. The modern form in the common law tradition probably dates from 1602, the year in which *Slade's Case*[31] was decided. But if you hold freedom to contract constant, and consider that a contract once made should be kept, and ignore everything else, you will get results that are ludicrous. You will argue that legislation restricting the hours that women and children may work violates the freedom of contract — of the women and children. You will point out that labor unions have no place in capitalist society because they interfere with

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[27] *Quoted in* M. TIGAR, MAYMARKET: WHOSE NAME THE FEW STILL SAY WITH TEARS, SC. 3 (1987).

[28] K. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTION 87 (A. Schwarzchild trans. 1947), *discussed in* M. TIGAR, LAW AND THE RISE OF CAPITALISM 303-09 (1977) and in Tigar, *Crime Talk, Rights Talk and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice*, 65 TEX. L. REV. 119-20 (1986).

[29] *See supra* note 27.

[30] T. ARNOLD, THE FOLKLORE OF CAPITALISM (1937).

[31] SLADE'S CASE, 4 CO. REP. 92B (1602), *discussed supra* note 27, at 211-27.

the right of individual workers to bargain with individual employers.

You will make all of these arguments in perfect harmony to an originalist position that looks to the constancy of legal norms and ignores the changes in social relations that decisively change the impact of norms upon people.

The Supreme Court went through a time of getting just such silly results based upon just that sort of alleged reasoning. That is how we got *Lochner v. New York.* [32]

Lawyers who cared about justice in the here and now have never chained themselves to the past in this way. Who was, for those who wrote the Constitution, the greatest legal scholar of the age? A good case could be made for Blackstone, but I rather think they had Lord Coke in mind. Coke, as lawyer, author and judge, had been a key architect of the English Revolution and therefore of the great seventeenth century changes in English law that the American revolutionaries considered their birthright.[33]

Coke sat down early in the 1600's to figure out what could be done to legitimize the role of common law courts in restraining royal power, and in vindicating the rights of freeholders who would be among the shock troops of the coming conflict with royal autocracy.

Among these freeholders were folks whose predecessors in title had hanged the manor lord's steward in the yard, and burned up the documents binding them to service.[34]

Lord Coke needed to build a system. He had the lawyer's good sense that investing that system with immemorial usage — even as immemorial as last Wednesday,[35] if need be — was the expedient thing to do. If we look at the injustices against which the English Revolution contended, and the claims of right that it vindicated, I think we will agree that Coke's goals were not only expedient but right.

And how did he propose to do it? He wrote: "Let us now peruse our ancient authors, for from the old fields must come the new corne." [36] He meant that he was not an original intent or original understanding person.

Thinking back to Magna Charta, he was not interested in finding out what King John was worried about — such as saddlesores or Maid Marian or the Sheriff of Nottingham — on that fateful day in 1215. Rather he wanted two things: some plausible language and a plausible understanding of the relationship between the subject and the prince. He could not just make things up, for the only innovation

[32] 198 U.S. 45 (1905), *discussed in* Tigar, *Whose Rights? What Danger?,* 94 YALE L.J. 970, 987 (1985).

[33] *See generally* M. TIGAR, *supra* note 27, at 257-74. *See also* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 50-51, 242-45 (5th ed. 1956).

[34] On Coke's defense of the copyholders, *see generally* T. PLUCKNETT, *supra* note 33, at 311-12.

[35] *Compare* THOMAS, A CHILD'S CHRISTMAS IN WALES (1954) ("the eternal snows--eternal, ever since Wednesday").

[36] *Quoted in* M. TIGAR, *supra* note 27, at 218.

certain of a cordial reception would be innovation that sat down to dine in familiar garb.

Consider the measure of his success — and the success of those who came after. Magna Charta guarantees justice according to "the law of the land." From these words, and from other texts in the document, the common law courts of the seventeenth and eighteenth centuries erected a system of freedom of contract and a system of due process of law. The latter system acquired so definite a meaning that many colonial and state constitutional documents use the phrase "law of the land" interchangeably with or in place of "due process" in a procedural sense.[37]

In another great coup for the merchant class, Mansfield blessed the incorporation of merchant contract rules into the common law by saying "the law merchant is the law of the land." [38]

Coke's other great contribution was, in *Dr. Bonham's Case*,[39] to have written forcefully of the judiciary's role in policing sovereign compliance with fundamental duties. Not only does his work put at rest debate about the propriety of *Marbury v. Madison*, it gives us a framework within which to understand compelling questions about the role of courts today in curbing excesses of executive power.

The examples could be multiplied. When the legal scholars of the eleventh and twelfth centuries pored over the words of Justinian in the *Corpus Juris Civilis* — those sixth century compilations of Roman law — they were building systems to use in their time. We would be poor historians of that time if we took seriously the contention — made by some of them — that they were discovering original intent. First, they were clearly attempting to accommodate the old, and therefore venerable, rules to expanding commercial economies. Second, whose intent would be relevant? Justinian's codification was itself largely composed of snippets from the works of classical Roman legal writers the bulk of whose work does not survive, so we cannot evaluate whether the snippets accurately capture the original author's meaning.

Yet from the works of Justinian a newly-emergent class began to build the legal ideology that would defend its right to grow and prosper.[40]

It is certainly true that the farther we get from an original text — constitution, code or scripture — the more likely we are to look to earlier construals of it rather than returning each time to the text itself. The legitimacy of this method of building up legal ideology is hardly open to question. But we always have open the possibility of reverting to the text in the informing light of its history.

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[37] *E.g.*, Maryland Declaration of Rights, 1776, art. 17.

[38] *Quoted in* M. TIGAR, *supra* note 27, at 271.

[39] 8 Co. Rep. 114 (1610), *discussed in* Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

[40] *See generally* M. TIGAR, *supra* note 27, at 3-114.

The same story can be told over and over again. The lawyers who stood at the forward edge of social change were conscious of the dual and sometimes contradictory tasks they faced. They had the old doctrine, the old ideology that would in some measure persist no matter how sharply the struggle for change reordered the system of social relations. They also were advocates for what they hoped was the winning side of the struggle's current battle.

The lawyers who did their work in this fashion have been the ones we most consistently honor, and in whose tradition the constitution was fashioned. I have written before of Andrew Hamilton, who in 1735 represented the colonial newspaper editor John Peter Zenger in a daring display of old precedent and modern audacity. The Constitution-framer Governor Morris said Hamilton's work was "the morning star of that liberty which subsequently revolutionized America."[41]

LAWYERS, JUDGES AND THE INSISTENT PRESENT

Now to my third and final theme. Someday, we are going to run out of room. There will be no more space to argue about interpretation, no more space to accommodate claims for justice made by people who have been deprived and dispossessed. I don't want that to happen, and I am not urging it. I simply believe that the tide of human events has shifted violently every so often and it is likely to do it again.[42]

Perhaps next time the demands will come from the third world and not from within our borders. Maybe the peoples of those lands will tire of a rifle diet, and wonder how the rich nations can consume an ever-larger share of the world's resources.

But we have not run out of room quite yet. There is still a challenge there for lawyers to meet. There is a challenge to think through legal theories and try to accommodate old ideas to new reality. From the old fields, we must gather our harvest for the days to come, and take care if we can of those who have tilled for so long and have the first right to sit at the table.

I am not for ignoring or trivializing the Constitution. I am for seeking within its words, as seen in the informing light of history, open spaces to accommodate claims for justice that evoke old concepts in new ways.

As lawyers, with some responsibility for shaping legal ideology, we confront challenges: a shrinking base of legal services in a time when the need for them is rising; an increasing disparity between rich and poor, black and white, urban and rural, union worker and the unorganized; new technologies and bureaucracies of privacy-invasion. In this time of need, the originalists are, objectively, apostles of doom and reaction. They have the sausage theory of constitutional interpreta-

[41] *See* Tigar, *supra* note 28, 65 TEX. L. REV. at 121.

[42] *See* M. Tigar, *supra* note 27, at 310-30; Tigar, *supra* note 28, 65 TEX. L. REV. at 118-27.

tion. If we assemble all the right ingredients, based on careful research, and grind them up just so, and put them in just the proper shape . . . voila!, the answer.[43]

When I argue that this approach is itself ahistorical, and seems in most versions to do proxy for a reactionary social agenda, I do not deny the role of constitutional interpretation. The framers left us with a structure of government. They left us with devices to restrain the power of government over the lives of people. They left us with mechanisms for judicial control of executive action that violated individual rights, international law, or the clear commands of coordinate branches.[44]

Does it make you wonder, as I wonder, why the same folks who bring you original intention on Mondays are bringing you the saber-rattling, freewheeling executive on Tuesdays and then invoking such things as the "political question doctrine" to forestall inquiry into these exercises of executive power?[45]

The Constitution is not a sacred object. If it has any meaning for us, it is because it addresses our needs, our claims of right. I have written a great deal of late, wondering how much farther the process of constitutional interpretation — or rights rhetoric, to use a more inclusive term — can carry us. I confess I do not know.

But this I do know. It makes no sense to try and roll back the clock, and chain us up to the framers' perceptions. If new technologies of snoopery threaten to ravage our privacy, must we limit constitutional remedies to those thought right in 1789 or 1791? Or will we seize the basic sense of the document, with its answers to arbitrary executive power, and make it work for today?

Will we be willing to say that the power and ubiquity of modern government requires rethinking constitutional protections of privacy? I think so. Slavish and petty attention to a supposed original intent might not get us there. But the framers knew of the great privacy-protecting cases of *Entick v. Carrington* and *Wilkes v. Wood*,[46] and they feared governmental intrusion. If to this we add the textual basis for recognizing such rights, the right of privacy finds sound and logical support.

Now that most Americans depend in one way or another upon public licenses to do their work, or public assistance when they are injured, or unemployed, or retired, shall we treat these public entitlements like the largesse dispensed under the Elizabethan poor laws, and echo that old Supreme Court case that spoke of the "moral pestilence of paupers?"[47] Or will we continue as we have done, to

[43] *See* the penetrating critique of traditional legal research methodology in Barkan, *Deconstructing Legal Research: A Law Librarian's Commentary on Critical Legal Studies*, 79 L. LIBR. J. 617 (1987).

[44] *See* Tigar, *supra* note 25, 17 U.C.L.A. 1135; Tigar, *Foreign Relations and the Judicial Power: the "Political Question Doctrine"* Revisited, ____ MIAMI L. J. ____ (1988).

[45] *See supra* note 44.

[46] Both cases are cited and discussed in Boyd v. United States, 116 U.S. 616, 625-30 (1886).

[47] Miln v. New York, 36 U.S. (11 Pet.) 102, 142 (1837) *discussed in* Bendich, Privacy, Poverty and the Constitution, in The Law of the Poor 83 (tenBroek, ed. 1966).

recognize a broader, deeper consensus about due process of law?

Shall we continue to be among the few advanced countries that retains the death penalty, in the face of arguments that it is atavistic savagery? Or will we be open to perhaps unintended but supportable arguments for declaring it cruel and unusual in today's world according to arguments that make textual and historical sense?

I do not offer a formulaic approach to constitutional interpretation. Indeed, one burden of this essay is that such an approach must be based upon false assumptions about the knowability of yesterday's history. I do not reject the lessons of history. I urge learning from history, not aping the conduct of our ancestors. To learn, one must understand and yield to the constant tension between the past from which we are moving and the future we are trying to build.

This I do know. I know, with the poet Shelley, that "the cloud of mind is discharging its collective lightning, and the equilibrium between institutions and opinions is now restoring, or about to be restored."[48] That is, I know that when the deep sentiments of people run up against hard, unyielding interpretations of legal ideology, then this tendency of opinions and institutions to be in equilibrium will assert itself. And your charter will then be simply a lie the regime tells the people, as is the case in other countries that we know of.

And I know this. Keep on smoking that originalist weed and it will stunt your intellectual growth and make you a toady and not an advocate. There are voices out there asking for justice. It will not do you any good to stand on your balcony and say, "Let them eat original pie." To be a lawyer means to accept the challenge of figuring out what the Constitution means. You will soon take an oath to that effect. And because you are a lawyer, you will have to take responsibility for whatever you decide the Constitution stands for. Which side will you be on? Which century will you be in?

[48] Quoted from Shelley's introduction to Prometheus Unbound in G. Thomson, Aeschylus and Athens 322 (3d ed. 1968). Shelley was writing about writers, but we might also use his words to describe lawyers: "The great [lawyers] of our own age are, we have reason to suppose, the companions and forerunners of some unimagined change in our social condition or the opinions which cement it."