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THE ROLE OF ORIGINAL INTENT IN READING A TWO HUNDRED YEAR OLD CONSTITUTION

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I. INTRODUCTION

America is celebrating the two hundredth anniversary of the nation's constitution, the most durable blueprint for self-governance ever written. Yet this very celebration has been the occasion for serious debate regarding the continued relevance of the Constitution and how the courts best should read it in a world so changed from that known to its framers. In a July 1985 speech to the American Bar Association, the Attorney General of the United States examined the judiciary's role as a bulwark of a limited constitution and called for a return to a jurisprudence of original intention.¹ He attacked the doctrine of incorporation which applies the federal bill of rights to the states, the activism of the current United States Supreme Court,² and recent rulings of that Court which he said were reflective of a "jurisprudence of idiosyncrasy."³ In advocating a jurisprudence of original intention, he admonished the members of the bar that "the Constitution is a limitation on judicial power as well as executive and legislative" and maintained that such a jurisprudence "would produce defensible principles of government that would not be tainted by ideological predilection."⁴

The Attorney General's simply phrased description of a jurisprudence of original intention is, on the surface, uncontroversial.

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¹ See Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701 (1985) (based on the ABA address).

² *Id.* at 704.

³ *Id.* at 702.

⁴ *Id.* at 704.

Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and the ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.⁵

United States Supreme Court Justice William J. Brennan countered the Attorney General's attack in a speech at Georgetown University, saying that his position "feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility."⁶ The Justice asserted that the Attorney General's presumption against claims of constitutional right would require judges to "turn a blind eye to social progress."⁷ According to Justice Brennan, it was not the purpose of the Constitution to enshrine the status quo, and the genius of the Constitution lies not in any static meaning, but rather in "the adaptability of its great principles to cope with current problems and current needs."⁸

With such emotionally charged statements, the seemingly arcane matter of constitutional interpretation has become an issue of importance to many outside of academia. Various theories of constitutional interpretation have become identified with degrees of judicial restraint or activism, leading the popular press and anyone with even a passing interest in the law to invade the once esoteric territory of jurisprudential scholars.⁹ This essay examines the different methods

⁵ Meese, *Construing the Constitution*, 19 U. C. DAVIS L. REV. 22, 26 (1985). While most would agree with Meese's description, his position appears to some to amount to a presumption against claims to constitutional rights, not merely taking care not to contradict the constitutional text. See Levy, *Pro Se*, 15 STUDENT LAW. 36 (1986).

⁶ Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986). Others agree with Justice Brennan that Meese's position is not completely guileless. His campaign for judicial restraint is said to have a fluctuating content, favoring activism when it comes to cutting back civil rights and civil liberties. Schwartz, *Mr. Meese and the Bill of Rights*, 6 CAL. LAW. 35, 38-39 (1986). According to Schwartz, "Meese's assault on the Bill of Rights is supported neither by history nor by any reasonable and practical constitutional interpretation. It is not a call to 'serious debate,' only a device for diminishing our basic freedoms." *Id.* at 63.

⁷ Brennan, *supra* note 6, at 436.

⁸ *Id.* at 438.

⁹ Colson, *Is the Constitution Out of Date?*, 30 CHRISTIANITY TODAY, 48 (1986) compares press coverage of the Meese-Brennan dispute to fast food, with each issue "served up in neat packages with catchy labels; an impatient public may get instant gratification but little nourishment."

of interpreting a written constitution, considers the concept of original intent, and reflects on the paramount importance of the words of the text in carrying out the judicial review function.

II. METHODS OF CONSTITUTIONAL INTERPRETATION

While legal writers use dozens of terms in describing methods of constitutional interpretation, for the purpose of this essay, these various methods may be categorized as either originalist or non-originalist.

An originalist "accords binding authority to the text of the Constitution or the intentions of its adopters."¹⁰ Originalists feel that those adopting the Constitution and its amendments "definitively order[ed] relationships, and that such an ordering is binding on all organs of government until changed by amendment."¹¹ Insofar as the judiciary is concerned, this premise is often stated in the maxim that "courts should apply, not make, law."¹² According to originalists, the framers "assumed the existence of an objective body of principles, largely Judeo-Christian in origin" and did not expect judges to operate according to their own concepts of fairness.¹³ The concept of originalism, holding that intent can be discerned from the Constitution, possesses what has been termed "rule of law" virtues, including promotion of certainty, predictability, and administrative efficiency.¹⁴

The first, and for the strict textualist the only, step in explicating the Constitution is the examination of the words of the document itself.¹⁵ To anyone with a textualist inclination, it would be an error

¹⁰ Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

¹¹ Monaghan, *Our Perfect Constitution*, 56 N.Y.U.L. REV. 353, 376 (1981).

¹² See Graglia, *How the Constitution Disappeared*, 20 COMMENTARY 19 (1986); Berger, *Constitutional Law and the Constitution*, 19 SUFFOLK U. L. REV. 1, 7-8 (1985).

¹³ Colson, *supra* note 9, at 48.

¹⁴ See Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1482, 1485 (1985).

¹⁵ Although most writers speak of strict textualists and their absolute refusal to consider "parole evidence" in ascertaining constitutional meaning, see Monaghan, *supra* note 11, at 374, it is difficult to find anyone admitting to holding this interpretive theory since the eighteenth century anti-hermeneutic era. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887-94 (1985).

to seek the meaning of a constitutional provision as if it were something separate and apart from the meaning of the document's language.¹⁶ Madison's interpretive theory stressed that the text of the Constitution was the primary source of determining the framers' intent.¹⁷ Black's *Handbook on the Construction and Interpretation of Laws* explains that the people's intention "is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction."¹⁸ Consistent with this approach, Chief Justice Marshall wrote that although the spirit of the Constitution "is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."¹⁹

Larry G. Simon, a critic of the originalist school, accurately described its three underlying assumptions: that there existed an identifiable collective state of mind when the Constitution was adopted; that this intent can be discerned from the language of that document and the legal and social context surrounding its adoption; and that the meaning thus found should be authoritative.²⁰ These assumptions are eminently defensible. That there is such a thing as an identifiable collective state of mind and that this intent is to be followed are basic premises upon which our legal system deals with all written law. "The true object of all interpretation is to ascertain the meaning and will of the law-making body, to the end that it [sic] may be enforced."²¹ To accept what is apparently the nonoriginalist's contention — that there was no identifiable collective state of mind when our Constitution was drafted and adopted — is to say that the document upon which our government is founded is a meaningless scribble and that all of the grand constitutional debates and struggles were "as sounding brass, or a tinkling cymbal."²² This is not to say that there is no disagreement in the historical record

¹⁶ See G. A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 8 (1888).

¹⁷ Powell, *supra* note 15, at 937.

¹⁸ H. C. BLACK, HANDBOOK ON THE CONSTRUCTION AND THE INTERPRETATION OF LAWS 15 (1896).

¹⁹ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819).

²⁰ Simon, *supra* note 14, at 1483-84.

²¹ BLACK, *supra* note 18, at 8.

²² 1 *Corinthians* 13:1.

regarding the meaning of the Constitution or any of its provisions. Such disagreement was, after all, the reason for many of the debates. Rather, the originalist would contend that from the records of the proceedings and from an examination of the historical and social context, intent is discernible.²³ Debates at Philadelphia and state conventions, the Federalist essays, and even the writings of opponents to the proposed Constitution provide originalists with ample "contemporaneous expositions" upon which to draw the intent of any particular provision.²⁴

Closely related to the concept of determining original intent is the matter of "interpretive intent," how the adopters meant for the Constitution to be interpreted. The United States Constitution was the first written statement of a nation's fundamental laws. Thus, constitutional exegesis in the courts as we know it was a new development.²⁵ This is not to say that this judicial task occurred in a vacuum. The courts had a rich tradition in the common law, attempting to derive general principles from individual cases to provide consistency and uniformity in the legal system.²⁶ Accustomed to reading legal instruments according to set rules such as those detailed by Blackstone and others,²⁷ judges were both experienced and proficient at sorting through evidence surrounding the creation of a legal document to determine its underlying meaning. The Philadelphia drafters did not include in the Constitution any rules as to how

²³ Much constitutional scholarship has concentrated on the matter of *whose* intent was to be discerned. When Americans first sought to interpret the Constitution

the original intent relevant to constitutional discourse was not that of the Philadelphia framers, but rather that of the parties to the constitutional compact - the states as political entities To the extent that constitutional interpreters considered historical evidence to have any interpretative value, what they deemed relevant was evidence of the proceedings of the state ratifying conventions, not the intent of the framers. Only later, during the breakdown of the Republican consensus, did the attention of constitutional interpreters gradually shift from the "intention" of the sovereign states to the personal intentions of individual historical actors.

J Powell, *supra* note 15, at 888.

²⁴ *Id.* at 918 (quoting 5 ANNALS OF CONG. 495-96 (1796); see C. J. ANTEAU, CONSTITUTIONAL CONSTRUCTION §§§ 3.11-.12 (1982).

²⁵ Powell, *supra* note 15, at 887 n.11.

²⁶ Note, *Penumbra and Privacy: A Study of the Use of Fictions in Constitutional Decision-Making*, 87 W. VA. L. REV. 859, 862 (1985).

it was to be read.²⁸ Based on discussion surrounding the ratification process, it appears that the adopters were primarily concerned that the words themselves be emphasized and believed that the rules relevant to statutory construction would be applied if necessary.²⁹ The individual opinions and intentions of the founding fathers were not given particularly great import in defining constitutional parameters until the 1830's.³⁰ Rather, the adopters and courts of the framers' era often made recourse to the plain meaning rule, indicating what was essentially a textualist interpretive approach.³¹

Not all originalists are classified as textualists or intentionalists. Moderate originalists are those who believe that the Constitution's text is authoritative, but who read the language of many of its provisions as inherently open-textured. This approach is consistent with an assumed high level of generality in the adopter's interpretive intent.³² Moderate originalists view the Constitution as consisting of two types of clauses: specific clauses, usually referring to institutions of government, which must be given their historical meaning; and more open-textured clauses, usually dealing with rights and powers, which may be properly adapted to more modern meanings.³³ While moderate originalists fully accept the idea that constitutional law may properly be adapted to a changing world, their position is that "the specific intentions of the framers establish a minimum or core meaning of the various provisions of the Constitution. Although subsequent generations may expand constitutional provisions beyond that core meaning, the core itself is inviolable."³⁴

Nonoriginalists are not willing to wear even that loose fitting mantle. They give weight to the text and history of the Constitution, but feel that with changing experiences and perceptions, the courts

²⁸ *Id.* at 17. The text of the Constitution, however, does indicate that framers recognized that the normal rules of construction and the common law would be applied. *See* U.S. CONST. amend. XI, & amend. VII.

²⁹ Powell, *supra* note 15, at 887, 904; Monaghan, *supra* note 11, at 392.

³⁰ Powell, *supra* note 15, at 945-47. (Powell's article contains an excellent, detailed historical account of the evolution of the concept of interpretive intent.)

³¹ Brest, *supra* note 10, at 215.

³² *Id.* at 205, 223.

³³ Monaghan, *supra* note 11, at 361.

³⁴ Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1061 (1981).

should be guided by a "normative thesis" based on the ends of constitutional government.³⁵ They regard "constitutional law not as an expression of values written into the Constitution by the framers, but as the product of a continuing process of valuation carried on by those to whom the task of constitutional interpretation has been entrusted."³⁶ As nonoriginalist Paul Brest explained, "one can better protect fundamental values and the integrity of democratic processes by protecting them than by guessing how other people meant to govern a different society a hundred or more years ago."³⁷ Non-originalists argue that it is impossible to ascertain the exact intent of the adopters, that the adopters themselves may not have meant to bind future generations to their interpretation, and that original intent jurisprudence weakens the role of the judiciary in our system of checks and balances.³⁸ Nonoriginalists also argue that modern generations did not forge the social compact which is the written Constitution and that "those who did are dead and gone."³⁹ Simon argues that the true basis of the Constitution's authority is found in what he describes as an attitude of political morality. He believes that this attitude is shared by many Americans, based on a belief in values such as democracy, freedom, equality, and justice.⁴⁰

III. THE CONCEPT OF ORIGINAL INTENT

Controversy over "original intent" is not new among readers of the Constitution. Around 1800, the Republicans called for an interpretive strategy which adhered to the original intent underlying the Constitution. This original version of original intent emphasized the importance of conceptualizing the Constitution as a compact entered into by sovereign states.⁴¹ More recently, William Winslow Crosskey and Raoul Berger have produced works on constitutional

³⁵ Brest, *supra* note 10, at 205.

³⁶ Sandalow, *supra* note 34, at 1034.

³⁷ Brest, *supra* note 10, at 238.

³⁸ Tepker, "The Defects of Better Motives": Reflections on Mr. Meese's Jurisprudence of Original Intention, 39 OKLA. L. REV. 23, 26 (1986); see Simon, *supra* note 14, at 1501; Sandalow, *supra* note 34, at 1036.

³⁹ Brest, *supra* note 10, at 225.

⁴⁰ Simon, *supra* note 14, at 1487-89.

⁴¹ Powell, *supra* note 15, at 887.

history setting forth theories of judicial review based on their concepts of original intent.⁴² Each of these ideas of original intent shares, along with the Attorney General's current campaign, the goal of restricting the federal judiciary's power over the state governments. Thus, the recurring calls for a jurisprudence of original intent are, in all likelihood, more ideologically based than grounded in any purely intellectual effort to purify the judicial process.

Under a textualist's approach to the concept of original intent, the word original may be defined as "of or relating to a rise or beginning: existing from the start . . . constituting a source, beginning, or first reliance."⁴³ Intent includes "[T]hat which is intended; purpose . . . [T]he state of mind operative at the time of an action."⁴⁴ Thus, in seeking to apply a jurisprudence of original intent, we should first rely on the state of mind of the framers and adopters when the Constitution was born.

The men who wrote the Constitution were heavily influenced by the rationalist social theory of the Enlightenment.⁴⁵ Thomas Jefferson had incorporated the theories of John Locke into the Declaration of Independence.⁴⁶ After it became necessary to replace the Articles of Confederation, that Declaration was the only existing document of precedential importance available to the framers. The Enlightenment was characterized by the idea of the possibility of progress; "[a]s social dissatisfaction, and hopes, mounted late in the 18th century, the idea of scientific and intellectual progress quietly slipped into a belief in the general progress of man, moral no less than material."⁴⁷ These men drafting the Constitution were progressives,⁴⁸ believing in a jurisprudence of natural law.⁴⁹ Under this jurisprudence, neither the Constitution nor the federal government

⁴² Brest, *supra* note 10, at 219 n.55.

⁴³ Webster's *infra* note 65, at 1592.

⁴⁴ AMERICAN HERITAGE DICTIONARY 668 (1981).

⁴⁵ See Powell, *supra* note 15, at 892.

⁴⁶ 6 ENCYCLOPEDIA BRITANNICA *Enlightenment* 893 (15th ed. 1978).

⁴⁷ *Id.* at 894.

⁴⁸ Or, as the term was most often used then, liberals. See *American Heritage Dictionary*, *supra* note 44, at 1045 (defining progressive as "3. Promoting or favoring political reform; liberal.") By the time the Constitution was drafted, many of the Tories (conservatives) had removed themselves to New Brunswick following the Treaty of Paris signed on September 3, 1783.

⁴⁹ See Tenker, *supra* note 38, at 29.

granted citizens rights. Rather, these rights were “possessed by all men equally by nature . . . [but] require a well governed civil society for their security.”⁵⁰ As Pennsylvanian John Dickenson said of these rights,

They are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short, they are founded on the immutable maxims of reason and justice.⁵¹

As is reflected in the quote immediately above, there was a developing pattern of combining political thought and the beliefs of the Reformation.⁵² Many writers of the Enlightenment, however, struggled to garb theological standards in secular clothing. The Constitution was the preeminent legal document to emerge from the Enlightenment. The Attorney General, with his “non-ideological” argument for original intent, tries to disguise the Enlightenment/natural law philosophy of the framers under positivist garb, denying to Americans those rights not explicitly detailed in the Constitution.⁵³ The law is infected throughout with discussions of intent, but when we apply the concept of intent to our constitutional forefather’s anticipatory state of mind as to how future generations would read their work product, reason would lead us to believe that they would have us liberally interpret any recognition of individual rights contained therein.⁵⁴

Rather than decry the so-called corruption through expansion of individual rights undertaken by the nation’s high court in the past fifty years, it would probably be more appropriate to celebrate the fact that our judicial system has finally arrived at the stage anticipated by its drafters two centuries ago. The founding fathers did not anticipate a judiciary without discretionary powers or the ability to weigh policy considerations.⁵⁵ The early Constitutional amend-

⁵⁰ 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1301, 1302 (1986).

⁵¹ Tepker, *supra* note 38, at 29.

⁵² BRITANNICA, *supra* note 46, at 892.

⁵³ This in spite of the specific language of the ninth amendment that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

⁵⁴ See ANTIEAU, *supra* note 24, at 34; BLACK, *supra* note 18, at 13.

⁵⁵ Posner, *What Am I? A Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 23.

ments recognized both the necessity of construing the language of the Constitution and the necessity of perpetuating the vitality of the common law.⁵⁶ Thus, the courts of this nation, from its inception, have legitimately drawn on rich traditions of natural rights and of the common law, both substantive and procedural. If those who claim to value the concepts of original intent truly wish to follow the thinking of the drafters of the Constitution, they would be wise to remember that the Constitution, like the Bible, bears reading again and again.

IV. THE IMPORTANCE OF LANGUAGE

“Interpretation, as applied to written law, is the art or process of discovering and expounding the signification of the language used, that is, the meaning which the authors of the law designed it to convey to others.”⁵⁷ Not only must courts define words which are ambiguous or unclear, but they must also rely on interpretation of the text to determine if a law may properly be applied to a given state of facts.⁵⁸ Immediately following the adoption of our Constitution, the courts made it clear that the basis of interpretation should be textual, with the intent of the adopters most obvious in the words used.⁵⁹ The delegates in Philadelphia often struggled to choose the precise words with which to clearly convey the convention’s meaning, for it was their expectation that the document would be interpreted by reference to its express language.⁶⁰ Words are the tools of thought. In the legal realm, they must be chosen precisely when precise meaning is to be conveyed.

Although the National Law Journal recently expressed surprise at the United States Supreme Court’s reliance on several editions

⁵⁶ U.S. CONST. amend. VII & amend. XI.

⁵⁷ BLACK, *supra* note 18, at 1. Construction of written law, by contrast, is the art or process of discovering and expounding the meaning and intention of the author of the law with respect to its application to a given case, where that intention is rendered doubtful either by reason of apparently conflicting provisions or directions, or by reason of the fact that the given case is not explicitly provided for in the law.

Id.

⁵⁸ *Id.* at 2.

⁵⁹ Powell, *supra* note 15, at 900-01; Brest, *supra* note 10, at 215-16.

⁶⁰ Powell, *supra* note 15, at 903-04.

of Webster's dictionaries to determine the intent of Congress in enacting the 1866 Civil Rights Act,⁶¹ there should be nothing unusual about a court's reliance on dictionary definitions to determine the proper meaning of a constitutional or statutory term. The language of the law, after all, is English. The meaning of that language may be found by consulting the dictionary. Among textualists, however, there is often debate about as to which dictionaries should be relied upon: those of the time the provision was first adopted or those of the modern era. This debate seems of little importance, however, because many of the important constitutional terms are not defined in the older legal dictionaries. A scholar would search in vain for a definition of "cruel and unusual punishment" or "equal protection" in the law dictionaries of the framers' time.⁶² Even when attempts were first made to define constitutional terms, the definitions consisted of quotations from judicial opinions.⁶³ Definitions for the words which make up these phrases, however, may be found in the standard English dictionaries of the early constitutional era.

The terms used in our Constitution were carefully considered conceptual expressions chosen by the drafters to guarantee to the citizens of the infant nation new ideals of ordered liberty. The words were chosen with thought and skill to capture ideas and create an ambiance of freedom. The Constitution was written in the vulgate, and in conducting Constitutional explication,

[t]he intent to be arrived at is that of the people, and it is not to be supposed that they looked for any obtruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.⁶⁴

Courts must constantly resist the urging of technocrats, who advocate interpretation of the law in a technical sense and attempt to

⁶¹ *The Court Turns to a Dictionary*, THE NAT'L L.J., June 1, 1987, at 37, col. 1.

⁶² See, e.g., JACOB, A NEW LAW DICTIONARY (10th ed. 1773). Madison once wrote that the United States government was such a novelty that words in the Constitution "were sometimes used in a new sense and thus must be interpreted by their context or our knowledge of the intentions of those who created the Constitution." Dewey, *James Madison Helps Clio Interpret the Constitution*, XV AM. J. OF LEGAL HIST., 38 n.1 (1971).

⁶³ See, e.g., ABBOTT'S LAW DICTIONARY (1879).

⁶⁴ *May v. Topping*, 65 W. Va. 656, 660, 64 S.E. 848, 850 (1909).

produce from statutes and constitutions memorials to themselves in the form of terms of art.⁶⁵ "Narrow and technical reasoning . . . is misplaced when it is brought to bear upon an instrument framed by the people themselves . . . , and designed as a chart upon which every man, learned or unlearned, may be able to trace the leading principles of government."⁶⁶

Alexis de Tocqueville clearly understood the strength of a law of popular origin. In America, political democratization led to democratization of the language of the law. The individual's vote gives him an indirect share in lawmaking.⁶⁷ The individual's representatives adopt the laws, and the individual himself, as a jury member, serves to ultimately apply the language of the law. As de Tocqueville said, "There is a prodigious force in the expression of the wills of a whole people. When it stands out in broad daylight, even the imagination of those who would like to contest it is somehow smothered."⁶⁸

From the beginning of our nation's history, the courts have been the primary interpreters of our Constitution. The written Constitution, subject to judicial review, was an innovation of the revolutionary period in America.⁶⁹ Judicial review, like all powers of the federal government, is founded in the rule of law as structured by the Constitution.⁷⁰ The basis for judicial review is not any supposed superiority of judges over members of the legislature or the executive. Rather, it is superiority of the Constitution, which declares that the judicial power extends to all cases arising under that document.⁷¹

⁶⁵ It is no accident that the words "statute" and "statue" are similar. They are both related to the Latin word "stature," meaning to set or stand up. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2230 (1970). Thus, one is a representation artistically rendered and the other is a representation artfully rendered.

⁶⁶ BLACK, *supra* note 18, at 13 (quoting Cooley, J.).

⁶⁷ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 222 (G. Lawrence trans. 1966).

⁶⁸ *Id.*

⁶⁹ Powell, *supra* note 15, at 887.

⁷⁰ Easterbrook, *An Immutable Vision*, Wash. Post Mag., June 28, 1987, at 54.

⁷¹ U.S. CONST. art. III, § 2; see WOLFE, *supra* note 27, at 83-84 (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

There is hardly a question arising in a democracy which does not become a legal question.⁷² While legal questions must be resolved consistently with the Constitution, "the Constitution is what the judges say it is."⁷³ This imposes a tremendous responsibility on the judiciary to act as the guardians of liberty.⁷⁴ The Constitution itself recognizes this role, requiring that all judicial officers be bound by oath or affirmation to support the Constitution.⁷⁵ Courts must honor their oath and shun the temptation to exert naked power; rather, every judicial decision should be a principled one, resting on the foundation established two hundred years ago.⁷⁶

Federal Judge J. Skelly Wright aptly captured the nature of a judge's role in constitutional adjudication. "Constitutional choices are in fact different from ordinary decisions. The reason is simple: the most important value choices have already been made by the framers of the Constitution."⁷⁷ The West Virginia Supreme Court of Appeals has long recognized its duty in constitutional cases. "The [Supreme] Court [of Appeals] is empowered to construe, interpret and apply provisions of the Constitution, but may not add to, distort or ignore the plain mandates thereof."⁷⁸ Where the words of the Constitution are plain to the "ordinary and reasonable mind," there is no occasion for judicial construction, and the Constitutional provision will simply be applied.⁷⁹ Further, it is not necessary for a

⁷² See DE TOCQUEVILLE, *supra* note 67, at 248.

⁷³ Speech by Chief Justice Charles Evans Hughes at Elmira, New York (May 3, 1907), *quoted in* J. BARTLETT, *FAMILIAR QUOTATIONS* 700 (15th ed. 1980). This statement is reminiscent of the following conversation between Alice and Humpty Dumpty:

"When I use a word," Humpty Dumpty said, in a rather 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."

L. CARROLL, *THROUGH THE LOOKING GLASS* (1872), *quoted in* J. BARTLETT, *FAMILIAR QUOTATIONS* 613 (15th ed. 1980) (emphasis in original).

⁷⁴ Hughes, *supra* note 73.

⁷⁵ U.S. CONST. art. VI; *see* *Marbury v. Madison* 5 U.S. at 173-79.

⁷⁶ H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 27, 103 (1961).

⁷⁷ Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 784 (1971).

⁷⁸ *State ex rel. Bagley v. Blankenship*, 161 W. Va. 630, 643, 246 S.E.2d 99, 107 (1978).

⁷⁹ *State ex rel. Dunbar v. Stone*, 159 W. Va. 331, 221 S.E.2d 791 (1976); *see State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed*, *Moore v. McCartney*, 425 U.S. 946 (1976).

court to engage in oblique hermenutical pursuits in applying the Constitution, for it “should be applied . . . according to common understanding and everyday requirements of life”⁸⁰ Thus, regardless of the jurisprudential school with which a judge may be aligned, the conclusions should not vary, so long as the words of the Constitution light the court’s path.

⁸⁰ *Maloney*, 159 W. Va. at 523, 223 S.E.2d at 614; *Charleston Transit Co. v. Condry*, 140 W. Va. 651, 659, 86 S.E.2d 391, 396 (1955).
<https://researchrepository.wvu.edu/wvlr/vol90/iss1/5>