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IV. CONSTITUTIONAL INTERPRETATION: DEFINING LIBERTY UNDER THE CONSTITUTION

A. T. KENNETH CRIBB,* MODERATOR

The topic for our panel this afternoon is constitutional interpretation. In each of the sessions that we have had thus far, we have seen how large the question of interpreting a written text looms in academic discussions of our fundamental law.

For example, in yesterday's commercial speech panel, Floyd Abrams pointed out that political speech receives a higher degree of protection, at least in part, because as an historical matter that is what the Framers of the first amendment intended. I found it interesting to hear Floyd Abrams make that argument. It says something about how this debate has evolved in the last four years or so. The special problems attendant upon interpreting a democratically ratified, written fundamental law did not previously receive the same level of attention in legal academic circles.

I managed to get through three constitutional law courses at the University of Virginia without any recourse to the text of the Constitution whatsoever. Until recently, a leading constitutional casebook did, in fact, contain the text of the Constitution, but it was relegated to Appendix B. Well, Attorney General Meese made this point in a speech he gave at a Federalist Society meeting. The author of the textbook responded by writing the Attorney General that, in the next edition, the Constitution would be moved up to Appendix A. We can take that upgrading of the Constitution to Appendix A as a tribute to Federalist Society sponsorship of a public discussion that has been called the "Great Debate on Constitutional Interpretation."

Before getting to the presentations of the panelists, it would be useful to set out two formulations of the main question, as stated by two worthy antagonists. Justice Brennan in a speech in 1985 put his position this way:

Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance. . . . For the genius of the

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Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with the current problems and current needs.\textsuperscript{1}

Also in 1985, Judge Bork expressed the issue this way:

Whenever I speak on the subject someone invariably asks, "But why should we be ruled by men long dead?" What the questioner is really driving at is why judges, not the public but judges, should be bound to protect only those freedoms actually specified by the Constitution. The objection underlying the question is not to the rule of dead men, but to the rule of living majorities. . . . A concept of original intent, one that focuses on each specific provision of the Constitution rather than upon generalized values, is essential to prevent courts from invading the proper domain of democratic government.\textsuperscript{2}

There are many side arguments and we will go into some of them today, but I think the positions of those two distinguished antagonists fairly put the main terms of the debate.

Once again, the Constitution is being discussed, at least in some quarters, as law with its legitimacy deriving from the consent of the governed rather than as a document providing an aspirational point of departure in a judge's quest for new rules to better accommodate evolving notions of human dignity.

\section{B. Raoul Berger*}

Let me depart for a moment from my written remarks. My difference with Justice Brennan is that, under the cloud of rhetoric, what he really is espousing is a right to revise the Constitution. I have an article forthcoming discussing Brennan's out-of-court re-

\begin{footnotes}
\item[2] Judge Robert H. Bork, speech to the University of San Diego Law School (Nov. 18, 1985), \textit{id.} at 47, 49.
\end{footnotes}

marks explaining his positions, which seeks to demonstrate that.¹ This is what the controversy is basically about: Can the Constitution be brought up to date by judges? Are they authorized to do so? Or must it be done exclusively by the amendment process?

I have never taken a blanket position that intent is clear at all points. At most points it is ambiguous and inconclusive; but I have always fought for one proposition that where it is unmistakably clear and the Court has acted in the teeth of it, rewritten it—that is abominable.

Let me give you an example from the history of the fourteenth amendment that underlies the one-man, one-vote rule. Roscoe Conkling, a member of the Joint Committee on Reconstruction which drafted the amendment, stated it would be futile to ask three-quarters of the states to do the very thing which most of the Committee had refused to do. Another member of that committee, Senator Jacob Howard, said that three-fourths of the states of this union could not be induced to vote to grant a right of suffrage. The Chairman of the Committee, Senator William Fessenden, said that there was not the slightest probability that it would be adopted by the states. A unanimous report of the Committee expressed doubt that the states would consent to surrender a power they already exercised. The report thought it best to leave the suffrage question with the people of each state.

It is mighty clear that the Framers intended to exclude suffrage from the fourteenth amendment. That is why I have little sympathy and waste little time on the philosophical wanderings of most of the academicians of today, whom judges do not understand and will never read anyway.

Discussion of constitutional interpretation should start with the question: What does “interpret” mean? In 1755, Dr. Johnson’s famous Dictionary defined “interpret” as “[t]o explain; to translate; to decipher . . . to expound.”² So it remains today; the Oxford Dictionary defines “interpret” as “[t]o expound the meaning of . . . to elucidate; to explain.”³ To explain is not to revise.

Invariably the Founders discussed the judicial role in terms of “expounding” the Constitution.⁴ Commenting on the exclusion of

². 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1755).
³. OXFORD UNIVERSAL DICTIONARY 1031 (3d ed. 1964).
⁴. For citations of Expounding the Law, see R. BERGER, CONGRESS V. THE SUPREME COURT 409 (1969).
the Supreme Court justices from a Council of Revision that would share the President’s veto, Edward Corwin correctly concluded that the Framers acted on the principle that “the power of making ought to be kept distinct from that of expounding the law.”

That principle was rooted in the common law and the courts recognized it again and again. Francis Bacon cautioned judges “to remember that their office is . . . to interpret law, and not to make law.”

James Wilson, a leading architect of the Constitution, instructed a judge to “remember that his duty . . . is, not to make the law, but to interpret and apply it.” In *Luther v. Bord-
den* Chief Justice Taney declared, “It is the province of a court to expound law, not to make it.”

This principle was at the heart of the separation of powers, as Chief Justice Marshall perceived: “The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law.”

Whatever may be one’s definition of “interpretation,” one thing it plainly does not mean is—making law. The “nonoriginalist” interpreter, wrote Walter Benn Michaels, “isn’t interpreting an old text, but either writing a new one or imagining that someone else has written it.”

“Interpretation” and “original intention” have long been closely allied. In the seventeenth century John Selden reduced the common law to an aphorism: “[A] Man’s writing has but one true Sense, which is that which the Author meant when he writ it.”

This did not envisage a psychological search of the author’s mind but rather contemporary proof of what he intended to accomplish. That is the counsel of common sense. The essence of communication is that a writer should be permitted to explain what his words mean; the reader may not insist that he knows better than the writer what the writer means. To maintain the contrary, as Judge Frank Easterbrook observed, is to assume

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8. 48 U.S. (7 How.) 1, 41 (1849).
9. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) (emphasis added). In Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874), Chief Justice Waite reiterated that the Court’s “province is to decide what the law is, not to declare what it should be.”
when determining meaning that "it is the readers rather than the writers that matter."\textsuperscript{112}

As long ago as the end of the thirteenth century, recounted Chief Justice Frowycke, a fifteenth century sage, the judges asked the "statute makers whether a warrantie with assettz shulde be a barre [in the statute of Westminster] & they answered that it shulde." "And so," Frowycke continued, "in our own dayes, have those that were the pennisers & devisors of statutes bene the grettest lighte for exposicion of statutes."\textsuperscript{113} Elsewhere I have shown that such was the invariable practice across the centuries.\textsuperscript{114} Small wonder that Chief Justice Marshall stated that he could cite from the common law "the most complete evidence that the intention is the most sacred rule of interpretation."\textsuperscript{115} Writing in 1939, Jacobus tenBroek said that the Court "has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument."\textsuperscript{116}

Did the Framers intend us to be guided by their intent? They did. First, they labored against the background of common law practices. As the Court stated, they "were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary."\textsuperscript{117} For instance, they consulted Blackstone as to the scope of \textit{ex post facto}.\textsuperscript{118} It is the nonoriginalists who have the burden of proving that the Founders gave them the privilege of jettisoning "the most sacred rule of interpretation."\textsuperscript{119} As Justice Story put it, "[A]re the rules of the common law to furnish the proper guide, or is every court and department to give any interpretation according to its own arbitrary will?"\textsuperscript{120} Justice Story em-

\begin{thebibliography}{99}
\item 18. 2 \textit{Records of the Constitutional Convention of 1787} 448 (M. Farrand ed. 1911).
\item 19. \textit{See supra} text accompanying note 15.
\item 20. 1 \textit{J. Story, Commentaries on the Constitution of the United States} § 166 n.2
\end{thebibliography}
phasized that rules of construction provide a "fixed standard . . . by which to measure [the Constitution's] powers." 21 Second, the Framers resorted to a written Constitution in order to limit the power they delegated, and as Philip Kurland observed, "such a Constitution could have only a fixed and unchanging meaning, if it were to fulfill its function." 22 So, given that suffrage plainly was excluded from the fourteenth amendment, it does violence to the presupposition of a "fixed" Constitution to assume that the Framers did not intend us to be bound by their intention. Third, James Wilson urged that the Journals of the Convention be preserved because "as false suggestions may be propagated it should not be made impossible to contradict them." 23 In other words, "false" interpretations could be rebutted by resort to the Founders' intention. Washington, President of the Convention, cited to the Journals in 1796. 24 So too, Abraham Baldwin, Caleb Strong, Charles Pinckney and Pierce Butler, Framers all, referred to discussions in the Convention. 25 In the ratification conventions, those who had been delegates to the Federal Convention were frequently called upon to explain provisions of the Constitution. All of which indicates that the Founders themselves looked for guidance to the intentions of the Framers. How can we conclude that they absolved us from respect for that intention?

In light of the foregoing, we should define "liberty" as it was understood by the Founders. Blackstone, whom they regarded as the oracle of the common law, stated that the "personal liberty [of individuals] consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 26 Charles Warren's study led him to conclude that under the common law, liberty meant simply "the right to have one's person free from physical restraint." 27 During

(5th ed. 1905).

21. Id. at § 399, p.305.
23. 2 M. FARRAND, supra note 18, at 648.
24. 5 ANNALS OF CONGRESS 760-61 (1796).
25. Baldwin, 3 M. FARRAND, supra note 18, at 369-70; Strong, id. at 247; Pinckney, id. at 248-50; Butler, id. at 250.
26. 1 W. BLACKSTONE, COMMENTARIES *134.
the 1866 debates on the Civil Rights Act, James Wilson, chairman of the House Judiciary Committee, read the Blackstone excerpt to the House.\textsuperscript{28} Senator Henry Wilson of Massachusetts urged the House to ensure that the freedman “can go where he pleases.”\textsuperscript{29} This was a response to the Black Codes which sought to chain the freedman to his hovel. In Dean James Bond’s study of the campaign for ratification of the fourteenth amendment, he found that stump speakers were apt to explain that “liberty” means “the right to sue and be sued, to be protected in their person and property, the right of locomotion—the right to go where they please and live where they please and own property where they please.”\textsuperscript{30} This was part of the “limited category of rights,” to borrow from \textit{Georgia v. Rachel}, that the Framers “intended to protect.”\textsuperscript{31} Modern notions of “liberty” cannot be rooted in constitutional history but are constructs fashioned by the modern Court, a cornucopia overflowing with rights undreamed of either by the Framers of 1787 or of 1866.

Finally, the Court itself has “abandoned” employment of the due process clause “to nullify laws which a majority of the Court believed to be economically unwise.”\textsuperscript{32} Justice Black regarded resort to substantive due process as “no less dangerous when used to enforce this Court’s views about personal rights than those about economic rights.”\textsuperscript{33} As Justice Frankfurter declared, the “Constitution does not give us greater veto power when dealing with one phase of ‘liberty’ than with another.”\textsuperscript{34} The logic that bars the one equally bars the other. Indeed, for the Founders, property “was the basic liberty, because until a man was secure in his property, until it was protected from arbitrary seizure, life and liberty could mean little.”\textsuperscript{35} Let us not substitute glittering

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\bibitem{28} A. Avins, \textit{The Reconstruction Amendments Debates} 164 (1967).
\bibitem{29} Id. at 98.
\bibitem{31} 384 U.S. 780, 791 (1966).
\bibitem{34} Board of Educ. v. Barnette, 319 U.S. 624, 648 (1943) (Frankfurter, J., dissenting). Justice Holmes stated, “I cannot believe that the Amendment was intended to give us carte blanche to’embody our economic or moral beliefs in its prohibitions.” Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).
\bibitem{35} 1 P. Smith, \textit{John Adams} 272 (1962). “For most men, to be deprived of . . . private property would be a far greater and more deeply felt loss of liberty than to be deprived of

C. ROBERT W. BENNETT*

I want to discuss problems in interpreting the Constitution, particularly the open-ended provisions that give rise to so much contemporary litigation, by drawing on two models or styles of judging that have been discussed in the literature on the judicial process. These are an individualistic model and an institutional model. In the individualistic model, the judge searches for his or her own best answer to the question of interpretation, quite apart from the interpretations that present colleagues or past courts may have provided on related matters—save as those other interpretations might prove persuasive to the judge as his individual quest proceeds. The institutional judge, on the other hand, struggles with questions of interpretation on his own terms, to be sure, but recognizes an additional obligation to accommodate his individual views to an institutional mission. In the individualistic model, one would usually expect nine different opinions on a nine person court and no particular respect for precedent; in the institutional model, a single opinion with no dissents and infrequent overruling of prior opinions.

No judge pursues either style in the extreme, but by degrees all judges display both an individualistic and an institutional approach. The contrast between the two gave rise to an interesting clash between Judges Easterbrook and Posner. Before becoming a judge, Frank Easterbrook insisted on an extreme individualistic model. In his article on ways of criticizing the Supreme Court, Easterbrook concluded that inconsistency on the Court was not a justifiable basis for criticism, because no justice could be expected to accommodate his own individual views to the different views of others.1 Of precedent in particular, Easterbrook said, "The order of decisions has nothing to do with the intent of the Framers or any of the other things that might inform constitutional interpre-

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the right to speak freely." M. Oakeshott, Rationalism in Politics 44 (1962).
In a rejoinder in his book on federal courts, Judge Posner urged that a more institutional conception of the judge's role is essential in achieving coherence and consistency in the law.

I want to use these two models to discuss some difficulties with an originalist approach to constitutional interpretation. Much of what I have written on constitutional interpretation has been critical of what is called originalism, the attempt to refer constitutional questions to the intentions, not the language but the intentions—mental states—of those responsible for the provisions in question. The thrust of my criticism has been to insist on the importance of the judge's institutional role, along with what might be called its vertical dimension—respect for precedent.

Although originalists seem to me to be animated by a commendable desire to achieve a large degree of consistency and stability in constitutional law, I believe they are misguided in part because they ignore the role that precedent would play in a coherent originalism. For if originalism strives for the answers to constitutional questions that the original intenders would have given if they were present and had lived through everything that had happened in the meantime—indeed if they had decided all the intervening cases—then it would necessarily assign a large role to precedent. That, I assert, is simply a fact of human psychology. If the original intenders actually had to engage in this hypothetical exercise, they would have put great stake in their prior decisions as the process proceeded.

There is the rub. In a system with quite general governing language and reliance on precedent, a significant degree of malleability and hence uncertainty will prove inevitable. For a variety of reasons the questions that arise will often and easily be distinguishable from prior decisions, so that the inevitable use of precedent is bound to make decision a matter of judgment and of choice.

To take a prominent example, the fact that the fourteenth amendment intenders thought that nothing they did would jeopardize the legitimacy of legally required racial segregation in public schools, does not tell us how they would deal with the contemporary problem of racially segregated public schools, were they here now and charged with deciding. Just as our answer now is

2. Id. at 820.
that racial segregation is abhorrent, so might theirs be if they knew what we know. Whether we say this is so because they may well have changed their minds, or because the problem is not the same today, does not matter for present purposes, as long as we can agree that it is so.

It can perhaps now be seen that I am actually something of an originalist, if one loosens the notion from the unrealistic aspirations for it of its proponents. If one conceives of the judiciary as the contemporary institutional embodiment of the constitutional decision-making enterprise that the original intenders began, then original intentions have an ongoing role to play, but it is just not the dispositive one upon which originalists insist. Precedent functions in the project as the vehicle by which institutional continuity is maintained. If, as I assert, the original intenders would be influenced by what they themselves decided in earlier cases, even where that might be at odds with some characterizations of what they "originally intended," then the distinction between a regime of original intention and a regime of reliance on precedent begins to dissolve.

My own view of the proper determinants of judicial decisions is highly pluralistic, with heavy emphasis on judicial deference to original intentions, to precedent and to the judgments of the political branches. But I also do not think there is any escape from judicial value judgments as one important determinant of constitutional decisions. This is especially so where the governing language is as open-ended as that in our most litigated constitutional provisions. In this respect, I believe that the familiar dichotomy recited anew in the brochure advertising this conference between the judiciary saying what the law is and what it should be, is a false one.

There is a second dimension—the horizontal dimension—to the judge’s institutional role. This dimension is the judge’s relationship to his immediate colleagues. Not nearly as much has been written about this subject as about precedent, but we certainly observe very different styles of judging along this dimension as well. The tone of Judge Easterbrook’s article suggests that no accommodation is appropriate along this dimension either, and some quite prominent justices have insisted on searching for their own best answers without regard to the differing opinions of their colleagues. In recent times Justices Black and Douglas come to mind as individualistic judges along the horizontal as well as the
vertical dimension.

The institutional style, however, has long roots in American constitutional jurisprudence. In Chief Justice Marshall's day dissent was very unusual. Even in more recent times, when dissent has become commonplace, Justices Harlan, Stewart and Powell each adopted an institutional stance—albeit each in his individual way—along both the horizontal and vertical dimensions. There has been a good deal of comment lately about the change in Justice Rehnquist's style of judging since becoming Chief Justice. The change might well be described as movement from an individualistic to an institutional style, particularly along the horizontal dimension. That should not be a surprising development for one who has by dint of office taken on an even larger identification with the institution he serves.

The horizontal dimension of the judge's institutional role actually may hold more promise for bringing coherence and consistency to the law than the vertical dimension. Precisely because the problems courts confront are always changing, precedent will never constrain very rigidly. This will be particularly so for a judge trying to follow an earlier decision in which he did not join. He will then not have had the earlier occasion to puzzle through later implications. Accommodation with one's immediate colleagues, on the other hand, will mean more unanimous decisions, and more opinions commanding at least a majority of the Court. Even unanimous opinions are open to varying later interpretations, of course, but initial agreement on both language and result could serve substantially to contain and channel later differences. Institutional behavior along the horizontal dimension should thus tend to reinforce institutional behavior along the vertical dimension, at least as long as the personnel on the Court do not change too rapidly.

As I have explained, in elaborating open-ended constitutional language, a genuine originalism that brings the certainty that originalists crave is not available. Any originalism that will bring a high degree of certainty to the interpretation of these provisions must ignore something that would undoubtedly have animated the original intenders, had they been charged with the burden of decision over time. What determinants of decision in the mental makeup of the Framers should be counted and what should be ignored is a question that has provoked wide divergence of opinion among originalists. Self-styled originalists prefer not to dis-
cuss the question in terms of what to ignore; but in attempting to answer their critics they show that there is no obvious—no originalist if you will—answer to this question.

Henry Monaghan, for instance, insists that “[t]he relevant inquiry must focus on the public understanding of the language when the Constitution was developed”—an “objective” approach to originalism, in contrast to the more subjective understanding that the phrase “original intention” suggests. But even among those who grope for a satisfactory subjective conception of original intention, there is no agreement about what originalism really entails.

My colleague at Northwestern, Michael Perry, while trying to resolve the problem, exposes some of its difficulties. Perry quotes with approval Ronald Dworkin’s statement of a familiar difficulty in sorting out the relevant beliefs. Dworkin says:

[Peop]eople’s convictions do not divide themselves neatly into general principles and concrete applications. Rather they take the form of a more complex structure of layers of generality, so that people regard most of their convictions as applications of further principles or values more general still. That means that a judge will have a choice among more or less abstract descriptions of the principle that he regards the framers as having entrusted to his safekeeping . . .

This passage from Dworkin poses one problem in resolving the question of which aspects to ignore. Perry offers the following solution to Dworkin’s difficulty:

The originalist, on the basis of available historical materials, must engage in a hypothetical conversation with . . . ‘the group . . . mainly responsible for’ the relevant . . . provision in an effort to discern which principle they . . . would have chosen . . . as being the one that best captured the purpose or . . . meaning of what they did.

The obvious difficulty is that answers in this hypothetical conversation can, and in all likelihood will, vary from one originalist judge to the next. Such a conversation would, for instance, leave ample room for the possibilities that racially segregated public

schools were permissible or were forbidden.

This brings me to an additional problem with the originalist enterprise. The appeal of originalism is in the certainty that it promises—but cannot deliver. The promise, however, encourages originalists in their individualistic conceptions of the judicial role. (Actually Henry Monaghan, in his embrace of stare decisis, is an exception to the individualistic inclination that typifies most originalists.) Because there are so many variants of originalism, and room for maneuvering within variants, the need for institutionally minded judges would likely be as great on an originalist court as on a more pluralistic one. Without institutional glue, the law of an originalist court would fall victim to destructive centrifugal forces—yielding precisely the opposite of the certainty the originalist seeks. On an originalist court, in other words, the institutional judge would be badly needed but hard to find.

The erosion of institutional behavior on the Supreme Court is already alarming. It is most evident in the runaway inclination to dissent, exemplified by the gyrations on the Usery-Garcia issue that may not yet be spent. Dissents do serve important purposes. They provide, in Charles Evans Hughes’ phrase, “an appeal to the intelligence of a future day.” Dissents can also serve a more immediate institutional purpose by laying bare weaknesses in the majority’s reasoning, providing a prod to greater craftsmanship and finer substance. To be sure, the same purpose could be served by pre-publication give and take, but the fact that the light of day will eventually shine on the exchange probably makes the dialogue even more salutary. And dissent must always be available to a judge who thinks that a decision is beyond the pale. Neither singly nor in combination, however, do these purposes of dissent justify the Usery-Garcia spectacle or the extent of dissent on the Court today.

Accommodation with one’s colleagues is becoming a lost art on the Supreme Court, but if cultivated anew it could provide a powerful institutional constraint alongside those traditionally cited.


8. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In one of three dissenting opinions, Justice Rehnquist predicted that the Usery principle “will, I am confident, in time again command the support of a majority of this Court.” Id. at 580.

9. C. Hughes, The Supreme Court of the United States 68 (1928).
In this endeavor, however, I fear that clinging to the hope of an inevitably elusive originalism serves only to postpone the time when the real purposes animating the originalist enterprise can be realized.

D. John Harrison*

The problem I am going to talk about, and that Dean Bennett was just talking about, is the problem of earlier decisions and change over time.

Earlier today, Professor Miller said that, sometimes, the Supreme Court seems like a drunken sailor, reeling from one side of the deck of the ship to the other. I think that, sometimes, the Supreme Court is more like the man who got drunk and lost his watch, and has to get drunk again to find it. The Court has to consult its own precedents in order to discover where it put the Constitution.

I put the point that dramatically because the courts' practices of adhering to their precedents, whether or not they were correct, means that before we consider the question of how to interpret the Constitution, we must consider the logically prior question of whether to interpret the Constitution—the Constitution, that is, as opposed to the precedents.

This question is practically significant because the precedents that we have include some made-up doctrines—rules that bear no relation to the text of the Constitution and its amendments—either as that text was understood when adopted or as we understand it today.

An example of this is the doctrine of fifth amendment substantive due process. You cannot come up with it just by interpreting the Constitution. It is not in the language, and it is not in the history. If we had written those words yesterday, no one, unless he had been corrupted by the last 200 years of constitutional experience, would think that the Due Process Clause means that Congress can pass only reasonable laws. Nevertheless, substantive

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due process figures prominently in cases like Dred Scott,¹ Kore-matsu v. United States,² and some other favorites. So, there are made-up doctrines.

Given our standard justification for judicial review, however, made-up doctrines are profoundly problematic. When the Supreme Court tells you that you have to follow the Supreme Court instead of following what the act of Congress tells you to do, it is implicitly relying on Marbury v. Madison.³ As Judge Frank Eas-terbrook has pointed out forcefully, Marbury v. Madison justifies only interpretation.⁴ Nowhere does it justify making things up, and nowhere does it justify doing something that is made-up because you made it up five years ago.

Under the official theory of judicial review and judicial action, there is no room in the Constitution for made-up doctrines—at least no obvious room. There are two possible responses to this challenge.

First, if you ask the Supreme Court, they will tell you, of course, that we have the doctrine of stare decisis, which is an accepted part of legal method. But it is a funny part of legal method because, unlike, for example, the doctrine of expressio unius est exclusio alterius, the doctrine of stare decisis, which means following what you did ten years ago or in 1854, is not a means of interpretation at all. It may be an institutional constraint, as Dean Bennett described, but is not a means of figuring out what a text says. Therefore you cannot use the Marbury v. Madison justification for it in any obvious sense. You cannot determine what the Constitution means by looking at the prece-dents, unless the precedents are about the Constitution and not about something made-up.

Perhaps there is a better theory about where we get stare deci-sis than the claim "that’s just the way you read things.” But here I want you to join me in a moment of vertigo: nobody knows what it is. The Supreme Court does not have, and the legal culture does not have, an official explanation that gets you from the Constitution to the notion that you follow the precedents instead of the Constitution. The Marbury for stare decisis—the case that

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². 323 U.S. 214 (1944).
³. 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.).
deduces the rule of precedent from the written Constitution—is not to be found in the United States Reports.

You can try to sketch a theory that precedent is implicit in the concept of judicial power. Maybe stare decisis is the way courts do things. But is the basis of stare decisis, as it came down to us historically, to be found in the notion of judicial power or is it to be found in the fact that most of the law at the time the Constitution was written was common law; that is, is stare decisis methodology or is it about the content of the law?

Another possible explanation, which is related to what Dean Bennett was talking about, is that the rule of precedent is implicit, not in the idea of the judicial power, but in the idea of a court. A court is an institution and a judge is just part of a court. When the institution speaks, it is indeed the institution that speaks. It is the court and not the judge.

Perhaps the judge has to keep in mind what the court has done and think of himself as part of a super-person who is, in some sense, continuous over time. Such a person might reason, “I did this 150 years ago in Dred Scott; if I am going to be the same person who decided Dred Scott, maybe in the case at bar I have to act consistently even though if I were to step back from this fictional super-person and just read the fifth amendment, I would never imagine such a result.”

That is a candidate theory of stare decisis, but, as you can see, it is filled with all sorts of difficulties, and it is certainly not a generally accepted part of our legal culture. If you look down from the tower of stare decisis that we are standing on, you will find that there is nothing holding us up. Like me, you may then get a little dizzy and have that moment of vertigo.

It is a strange experience to realize that there is something deeply wrong with the legal culture. I do not want to suggest that the whole problem of stare decisis is some evil plot by the courts. It is not just the courts saying, “shut up, he explained,” like Ring Lardner’s immortal response to a difficult question. This is a scandal for the whole legal culture. Robert Bork, for example, thinks there has to be a doctrine of stare decisis but he does not know exactly what it is or where it comes from.

There is another possible response to the claim that made-up doctrines are inconsistent with the theory on which the Court’s power claims to rest, the theory of Marbury. We might call this meta-stare decisis, because it operates at a higher level than an
ordinary rule of law: meta-stare decisis is a way of telling which rules to follow, not how to interpret them. This meta-principle boldly asserts that when the written Constitution conflicts with the precedents, the precedents win—that the precedents, not the text, are in fact the law.

Paul Brest has written about this in his well-known article, The Misconceived Quest for the Original Understanding, and I think his is the most powerful and clearest discussion of the problem not only of stare decisis but of all sorts of extra-textual additions to the Constitution. What Brest says, essentially, is that the authority of the written Constitution is not absolute in our legal culture, and that, as a matter of fact, courts do not derive their authority from a Marbury v. Madison rationale, which looks to the Constitution as the source of the judiciary’s authority. Brest asks:

What authority does the written Constitution have in our system of constitutional government? This is not an empty question. The English experience demonstrates that a constitutional democracy—a government of limited powers ultimately responsible to its citizens—need not be premised on a written document. And although Article VI declares that the Constitution is the “supreme Law of the Land,” a document cannot achieve the status of law, let alone supreme law, merely by its own assertion.

Brest says there has to be a social practice to make a rule the law. To that extent there is what you might call an unwritten constitution—a warrant for doing whatever it is we do that is supposed to give the right answer.

Brest then argues that the unwritten constitution that we actually accept validates the practice of judicial review and the doctrines that the Supreme Court has developed, including the doctrines that do not come from the written constitution. Brest says, “[T]he practice of supplementing and derogating from the text and original understanding is itself part of our constitutional tradition.” That is, it is simply accepted that the Supreme Court sometimes invalidates laws on the basis of made-up theories, as it did in Dred Scott, and that it sometimes upholds laws in the face of constitutional provisions that clearly forbid them, as it did in

6. Id. at 225.
7. Id.
Home Building & Loan v. Blaisdell.\(^8\)

So, Dean Brest and today Dean Bennett have posed the ultimate question: should we look for guidance to considerations of stability and continuity, and should we perhaps consult some thick moral principles as well, like the ones that give substantive due process? Are those considerations part of the unwritten constitution? Or, instead, do we have a very thin unwritten constitution, a very thin justification for the way we do things—maybe the thinnest one possible?

As you might guess, I do not agree with Dean Brest. I think that the notion of a "thick" unwritten constitution is inconsistent with our actual practices and with our fundamental principles. As to practice, all officers of government take an oath to the Constitution, and they do not put quotation marks around the word. Partly for that reason, the claim that courts do not appeal for their authority to Marbury—and thus to the written Constitution—is empirically false. What do you suppose would happen if the judges one day announced that this Marbury stuff was just eyewash, and they were going to decide cases the way they liked; would that produce any public outrage? If so, then perhaps the unwritten constitution consists solely of the command, "Follow the written Constitution."

The argument from fundamental principles is harder to make, of course, so I will conclude by using a slogan instead of an argument. Professor Aman said this morning that every age seeks a new order for a new world. I do not know whether it was accidental, but he was paraphrasing one of the phrases located on the back of a dollar bill, on the obverse of the Great Seal of the United States: Novus Ordo Seclorum. That means "a new order for the ages." I want to conclude by suggesting that one of the things that makes the American nation the new order for the ages is precisely the idea of a written Constitution, written down so that it does not have to be approached through the methods of the common law and by the priests of the common law, but written down in black and white so that any fool can read it.

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\(^8\) 290 U.S. 398 (1934). If you wonder whether that is what the Court did in Blaisdell, read the case.
E. David Friedman*

I should start by saying that I know less about constitutional interpretation than many people in this room and, therefore, will not talk about it. What I will be talking about is not what the Constitution means but rather why one has constitutions and what they ought to be like. I will approach that as an economist, an economist interested in trying to use economics to understand political institutions. I hope, given limits of time, to get back to original intent, rigid constitutions and a case both for and against *Lochner v. New York.*

I want to start with an economic idea, a very simple and interesting economic idea originated, as far as I know, by Gordon Tullock and popularized in an article by Ann Krueger on the subject of “rent-seeking.” We begin with the following story.

The government of India is giving away $10 million worth of valuable import permits. That government chooses to set an official exchange rate for its currency very much more favorable than the market exchange rate. If you are an Indian you will try to persuade the government of India that you are a good guy and should be given a piece of paper saying that this person can trade rupees for dollars at the favorable official rate and import goods. These pieces of paper are very valuable.

The point that Ann Krueger made was, if you are giving away valuable things, people will spend resources making sure that they, rather than others, get them. So that if the government of India is giving away $10 million worth of import permits, there will be a surplus of people who want them, and it will occur to someone that by running ads about what a public-spirited firm he has and how important it is for the welfare of India that his firm be able to import medical equipment, he will increase the chance that he will get a permit.

If the permits are worth $100,000 each, the applicant starts out with a modest $5,000 ad campaign. But other firms also want the permits and so they run $10,000 ad campaigns. He responds with a $15,000 ad campaign, and if you think through the logic of the

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1. 198 U.S. 45 (1905).
situation, you see that one will spend on the average $100,000 trying to influence whoever gives out the permits, with the result that the people of India are $10 million worse off and the people who get the permits are zero better off. That is to say, the full value of what the government is giving out is dissipated in the competition to obtain it.

I am rather fond of this idea because I invented it. I invented it after Gordon Tullock, alas, but before Ann Krueger, as it happens, in *The Machinery of Freedom*. In the chapter entitled, "Thieves Market, or The Nonexistence of the Ruling Class," I pointed out that even if the government makes many of us worse off, it does not follow that there is someone else receiving the benefit. Much of the benefit may, in fact, be competed away in the political contest to acquire it.

In this example, it looks as though the full benefit will, through competition, be dissipated. I would now like to give an example that seems very different, in which the economics is exactly the same and yet the result quite different.

The United States government decides to grant $10,000 a year to everyone in the United States who is totally blind. On the margin, you still have rent-seeking. Somewhere in the United States there is someone with very bad eyesight who is rather lazy and decides to pretend that he is totally blind, and to give up a $10,000 job in order to get a $10,000 subsidy. Just as for all those Indian firms, he has spent the full value of the subsidy on acquiring it.

But in this case, he is not the average. Almost all the people who receive the benefit can get it at no cost at all, because they are already totally blind. So, at one extreme, a government program to give something away wipes out the full value of what is being given away. At the other extreme, you have a program in which a tiny bit of the benefit is wiped out, but almost all of it is transferred. Speaking as an economist, the fundamental difference between the two situations is the elasticity of supply. In the blindness case, you have a supply curve representing lots of people who can supply being blind at no cost at all because they are blind, and a few people on the edge who can supply a little more being blind if you pay them enough. In the case of the import permits, on the other hand, the supply curve is more or less a

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straight horizontal line, and anybody can spend another $1,000 on advertising. It is an interesting distinction between the two cases.

Let me now give you a third case and one that has been argued to be possibly the most stupid thing the United States government has ever done. That is quite a distinction, and it is also one of the most popular things the government has ever done. I am referring to the homesteading program, the arrangement under which a large part of the property of the United States became private property. This argument was first made by Terry Anderson and is roughly as follows: Under homesteading, you get possession of land by farming it for a certain number of years. In 1840, if you farm a parcel of land beyond the frontier, you will earn a large negative income because it is too far away to farm at a profit. As time passes and the frontier moves west, around 1880, it just barely becomes worth farming. But from then on the income goes steadily up, so that by 1950, this land is worth $1 million.

Under homesteading, when is the land settled? Well, obviously the time to arrive is when it just becomes worth settling. But there are lots of people who would like things for free. If you arrive at the land when it is just worth settling, you are getting that whole future stream of income, the ownership of the land, at no cost because you are breaking even on your farming. So you arrive and discover someone is already there. It is just like the advertising case. Push it back and back and back. As a result the land is settled too early and, in fact, it is settled so prematurely that the settlers dissipate the entire value of the land. We are talking about three-quarters of the area of the United States. The entire value of the land is dissipated in the cost of people coming too early, starving or nearly starving, and burning up the returns in homesteading.

But the relevant question is the elasticity of supply of homesteaders. If, in a world with 10,000 people who are very good at homesteading, and who do not mind being far away from neighbors, and another 10,000 who are pretty bad at it, you give out 15,000 homesteads, then the first 10,000 can settle just before the second 10,000 arrive and there is still a large benefit. In this model it is only the marginal person who dissipates the rent, not the average person. Therefore, just how bad homesteading was depends on what you believe were the attributes of the supply group of homesteaders.
It has been suggested, most recently, in an article in *Public Choice* by Stroup,⁴ that the solution is to auction off the land instead of homesteading it. This raises a little bit of a problem. I am working on an essay entitled *Homesteading the Treasury*, premised on the idea of an auction of $100 million worth of land. That money is now in the treasury and we, as individual members of the political organism, start engaging in rent-seeking activities to procure these funds for ourselves. It is not immediately obvious that we solve the problem by auctioning off the land. We must analyze the rent-seeking behavior of the general political system of interest groups trying to get special favors. Maybe the equilibrium is that taxes drop by $100 million, or maybe we compete the $100 million away trying to get it.

Another suggestion that Stroup makes is that we should have simply held a lottery in 1860. With a million parcels of land and three million people, everyone has one chance in three of getting a parcel, and they can then resell it. But you still get rent-seeking. The rent-seeking now is inefficient migration. People who otherwise would have come to the United States in 1870 now want to come in 1860 so as to participate in the land lottery. It is like the blindness case. There are lots of people to whom it costs nothing to be in America by 1860, namely, the ones who already are here. Thus, most of the value is transferred, but still some of it is dissipated.

Let me talk about what this line of arguments suggests about constitutions and what constitutions ought to be like. First, you would like constitutions to establish inflexible property rights; that is, you want a system where it is difficult to acquire things by spending resources trying to change the rules. Imagine a world where, by spending $1,000 on a lawyer, I have a ten-percent chance of persuading someone that your house is mine. By spending $2,000, I have a twenty-percent chance, and with $3,000, a thirty-percent chance. In such a world the resources of the society will be eaten up in the fight over claims to property.

Alternatively, imagine a world where only infrequently will spending money on lawyers help persuade a court that the house is mine instead of yours. That infrequent case corresponds to the guy who decides to pretend he is blind. But where ninety-nine

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point nine percent of the time, no matter how much I spend, up to the value of the house, I cannot get your property transferred to me, then we have a world where not very many resources are dissipated by rent-seeking.

When somebody tells me, as Mr. Baker did, that there are eight different criteria for deciding on property and we must properly balance them, or when someone tells me, as I gather the City of San Jose told people, that there are seven different criteria for deciding how much of your apartment you really own, which is ultimately what rent price-fixing is about, my response is that I better keep one hand on my wallet and use the other to dial my lawyer. But it is hard to produce much while keeping one hand on your wallet and using the other to dial your lawyer.

The bottom line is that in a world where deciding ownership is difficult, ambiguous and expensive, people will all be poor. While it is true that some differences in definitions of property rights merely mean efficient ways of reaching different societies, there are many definitions of property rights which entail very inefficient ways of achieving any society worth having; namely, those definitions that result in extensive resources being spent on the enterprise of transferring, retransferring, and defending against the transferring of property.

Similarly, an almost unlimited amount of money could be spent on trying to prove what men who died 180 years ago would have believed had they lived for another 180 years. It is a rather unattractive basis for constitutional interpretation to say that if I can do a more plausible job than you of constructing a fantasy about which no proof really exists, then I win. The outcome of such a system is large amounts of rent-seeking in the form of efforts to get the right people onto the Supreme Court, which is done by getting the right people into the White House and the right people into the Senate.

Again, it seems that does not tell us what the right rule is, but it does suggest that you want some rule which is rigid. So, I am now responding to my first point, which pertains to what the Constitution should be like, and my answer is it should set very rigid, easily interpreted definitions of property rights in the broad sense in which economists understand property rights. The second point is that the Constitution itself should be clear, dogmatic and inflexible, because if the Constitution itself can be readily bent, resources will be spent on bending it.
No doubt flexibility commonly sounds like a wonderful thing and, with the additional information of 200 years, there are probably some ways in which one could better adapt the rules to present society. But you must balance against that advantage the fact that if rules can be changed, people will spend resources changing them.

This is an argument also for *stare decisis*; that is, once the thing is settled, people should not be able to change it. That is one way of gaining inflexibility. It is also an argument for literal interpretation, if you believe that it is more practical to find out what the writers actually meant than it is to find out what they ought to have meant, and that is essentially some version of the alternative. In one sense, I am agreeing with Raoul Berger. I am arguing for a system where you find something out rather than choose something. At the same time, I am an economist. Economists are experts on the logic of choice but not on technology. What we are talking about is the technology of adjudicating disputes and producing decisions. The question of whether it is possible to get unambiguous answers to most disputes by asking what the Founders would have said back then if we gave them the dispute, is extremely problematic. Asking how the Founders would have changed their minds in 180 years is going to be even worse.

The general point really is not a conclusion about whether you should or should not seek original intent. I do not know enough. The point is to introduce a set of arguments which address a fundamental reason why we have constitutions, written or unwritten, namely, the attempt to set up a construct of rules in which as little as possible is dissipated on trying at the lower level to transfer property back and forth or at the higher level to change the rules that define who owns what.

F. Questions and Answers

SPEAKER: Professor Berger, whenever you allow a court to look at the legislative history, are you not, in fact, inviting abuse in that it can deliberately, no matter how plain the statute is, just misread the legislative history to arrive at whatever social conclu-
sion? And when a statute is plainly clear, as in the Bakke case, or perhaps capital punishment where the fifth amendment expressly allows it, should the court be allowed to look behind the plain meaning of the language and look at legislative intent?

PROFESSOR BERGER: Instead of looking at desegregation, let's talk about suffrage which poses the same problem. I read some extracts that showed unmistakably that the Framers intended to exclude suffrage from the fourteenth amendment. In the teeth of that exclusion, the Court said that human dignity requires that one man should have one vote. That was just a judicial construct, a rewriting of the Constitution, which can only be changed by amendment, according to Article Five. That is a flagrant abuse of power.

I would always look for the explanation of the Framers, what did they mean. Let me give you an example. Take what Dean Bennett calls the grand open-ended clauses like equal protection. Wallace Mendleson says that equal protection is so broad as to be almost meaningless; John Ely regards the words as inscrutable; J.R. Pole wrote that the pursuit of equality was the pursuit of an illusion. And another activist said that different justices have very different beliefs and are likely to have very different opinions as to what is allowed under equal protection. So here are these grand open-ended words.

It is plain that at the ratification stage equal protection did not contemplate that every man would have the vote. Because whatever else equal protection meant, it did not mean suffrage for blacks. That, Justice Harlan said, is irrefutable and unanswerable and he was right.

Bear in mind that I have not spun broad theories, but I said there are six or seven flagrant cases. Segregation was one of them and I could make the same proof about segregation that I made about suffrage, maybe not quite as airtight but still very powerful. I would invite Dean Bennett to deal with that. Let's not deal with hypothetical cases. Let's not have table tapping to bring the ghost of a Framer here, and, by the way, let me give you an example of some results of that kind of table tapping.

Dworkin, who is one of the gurus of the activist movement, had an imaginary dialogue with a fourteenth amendment Framer, just

like Dean Bennett described. He brought him here and asked him, "What would you do about segregation?" The Framer replied, "Well, as it happens, I have no particular preferences myself, either way, about segregated schools. I haven't thought much about it." If he had not, it was because desegregation was unthinkable in an atmosphere rampant with racism. Here is the clincher: James Wilson, chairman of the House Judiciary Committee, was constrained to assure the Framers that the Civil Rights Act of 1866 did not mean that children should attend the same schools. Nevertheless, we have this reverie by Dworkin where our Framer tells him he did not even think about it. Well, if he did not think about it, he was asleep at the switch.

I want to hammer home a couple of propositions. I am not interested in states of mind; instead we ought to be governed by what a man utters. If he says "I mean the moon that is made of green cheese," we may think he is crazy, but he is entitled to tell us that, and you have got to start from there.

MR. CRIBB: Professor Berger invited Dean Bennett to comment on suffrage so let's afford him that opportunity.

DEAN BENNETT: Well, that topic is your choice, not mine. I think the suffrage decisions are questionable but I would reach that conclusion for different reasons than you do.

Two people have suggested that I was advocating that a justice, that the Supreme Court today, should try to figure out what the Framers' or intenders' answers to contemporary questions would be had they lived through everything that had happened in the meantime. That is not what I was suggesting. What I was suggesting was that if the Framers had decided all cases up until today and were charged with the task of deciding today, precedent would play a substantial role in the answers they would give. That observation is based on my reading of ordinary human psychology.

So that given that fact of human psychology, one cannot simply say, "I know the answer that they would have given to the question that is now posed because I read the history." You have to take, they would have to take, anyone trying to answer that question would have to take a lot of other things into account—very much including precedent.

Reliance on precedent is thus part of any coherent and mean-
ingful originalist approach. There is no “table tapping” called for.

SPEAKER: In Mr. Harrison’s talk, he focused on the question of how precedent and the original text work together or, in fact, do not work together, and how we have not even the beginnings of a theory to account for this. What he seemed to be implying is that from a strict formalist rule of law perspective the rot or the shakiness in constitutional adjudication goes back a lot further than the Warren Court or the Lochner Court. It was there in the beginning of the Taney Court when the commerce clause started to get really funny looking. What I would like to ask is if the rot goes back that far, if the system has been essentially illegitimate for three-fourths of its existence, at which point does a formalist insistence on that sort of legitimacy become vain and anti-Burkian from a conservative point of view? For example, there is this George III guy but I am very sure there is a steward in Italy who is really the king. It seems to me that if a wrong turn in constitutional jurisprudence was taken that far back, that after a certain point one who is excessively legitimate and excessively formalist becomes like a Jacobite and becomes caught in his own abstractions.

MR. HARRISON: This is a very good question. Before I answer it, let me say that as to what Dean Bennett said a moment ago, the process that he described but did not claim as his own is a species of originalism. It is not the only species of originalism and it is a fairly nonformalistic type, but it is originalism. Let me turn now to the question: how can legitimation be tied strictly to the written text when we have had substantive departures for such a long time and when we have had the proclaimed doctrine of *stare decisis*, a methodological departure, for even longer? The first references to *stare decisis* started coming up, I think, in the 1820’s. They are very old.

One response to the question is to say that the generally accepted system is not in what Rawls would call “reflective equilibrium.” That is, it still has some inconsistencies. If you ask on Tuesday, “Do you believe in the written text?” everybody will say “yes.” If you ask on Thursday, “Do you believe in doing things every day the way we do them today?” everyone will say “yes.” But those answers are not consistent.

What we may have to do, either practically, if the debate actu-
ally begins to call into question the content of the consensus, or theoretically, if we want to work out what the consensus should be since the one that is there is very hard to follow, is ask, which would we jettison? If we decided to jettison the attachment to text, where would we be, and is that a position that people would accept if it were put to them?

These are not questions as to the content of the legal system so much as they are questions of what legal system are you going to choose to be under.

PROFESSOR BERGER: I would like to make a comment on the gentleman's remark.

I take it that you say if practices have endured for 100 or 150 years, that they have become a tradition. I cannot buy that. The fact that larceny was repeated 100 times does not make it less larcenous; nor can you change the Constitution by lethargy, particularly in view of the fact that the Court has never told the people that it is changing the Constitution. The Court always professes to speak in terms of the articles of the Constitution.

MR. HARRISON: I agree with Professor Berger. And I think that what is really bedrock on this issue are two powerful considerations. First is the fact that except on rare occasions, like Home Building & Loan v. Blaisdell, the Court will never say they are just making it up; and second, the judges, the President, all the officers of the executive branch, all of Congress, and all the officers of the state governments take an oath to the Constitution, and there are no quotes around the word Constitution when they take the oath.

SPEAKER: Professor Friedman, one might expect that certain types of economic regulation ought to be drafted and interpreted and valued based on their economic efficacy, but I wonder what is the basis for a presumption that the Constitution ought to be economically effective. After all, if you steal five dollars from me, it would be economically inefficient to prosecute both criminally and civilly but it is something that the Constitution goes out of its way to protect nonetheless.

PROFESSOR FRIEDMAN: There are really two different

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questions there. The second has to do with the economics of crime and my answer would be that a policy of prosecuting people for stealing is an economically efficient rule; it is a mistake to think of stealing as a transfer with zero cost. On the contrary, if you run through the argument that I was making in my talk, the existence of opportunities to steal diverts resources into theft until, on the margin, the thief is giving up a $10,000 job in order to steal $10,000 and one cent. So it is economically efficient to prevent theft.

The other question is: Is that the only thing in the world? And I guess my answer is no, economic efficiency is not the only thing in the world, although it is a much broader thing than most non-economists realize. Economic efficiency in a very rough sense is the equivalent of maximized total human happiness. I could qualify it a lot, but I am not going to now. But even if it were the exact equivalent, I do not believe that total human happiness is the only thing in the world that matters. I could imagine cases where the utilitarian answer was A and my answer would be B. So, I am really not saying I can rigorously prove what the Constitution should be. What I am saying is that economic efficiency or human happiness are very widely shared and very important values. Therefore, they ought to have very great weight in what kind of constitution you design.

PROFESSOR BERGER: I will take the privilege of making a kind of a circuitous response that Dean Bennett made to me.

DEAN BENNETT: Citing precedent, of course.

PROFESSOR BERGER: A distinguished French publicist, Raymond Aron, said that it is proof of a proposition that opposing proofs are so false.

In a 705-page symposium with maybe fifty theories of interpretation, all written by those who want to see the Court have the power to revise the Constitution, a Canadian law professor wrote that American scholars struggle to offer some theoretically valid account of the jurisprudential enterprise.\(^3\) That they are energized by a growing sense of desperation. I could quote you a half dozen others, including Brest and Perry, and other activists, try-

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ing to come up with a valid theory that justifies what you claim judges can do. They have not been able to do it.

The theory I am talking about did not spring full-grown from my brow, not at all. Thomas Grey of Stanford said it is deeply rooted in constitutional history, in the Constitution and in decisions of the Supreme Court. It is only really in the last forty or fifty years that the do-gooders, as Holmes called them, have fashioned what they call a new mainstream. And it was this new mainstream that they were trying to douse Bork in.