

THE UNIVERSITY CENTER FOR
HUMAN VALUES SERIES

AMY GUTMANN, EDITOR

A Matter of Interpretation



FEDERAL COURTS AND THE LAW



AN ESSAY BY
ANTONIN/SCALIA

WITH COMMENTARY BY
AMY GUTMANN, EDITOR
GORDON S. WOOD
LAURENCE H. TRIBE
MARY ANN GLENDON
RONALD DWORKIN

PRINCETON UNIVERSITY PRESS
PRINCETON, NEW JERSEY

much weight an element of legislative history is entitled to, it can usually be either relied upon or dismissed with equal plausibility. If the willful judge does not like the committee report, he will not follow it; he will call the statute not ambiguous enough, the committee report too ambiguous, or the legislative history (this is a favorite phrase) “as a whole, inconclusive.” It is ordinarily very hard to demonstrate that this is false so convincingly as to produce embarrassment. To be sure, there are ambiguities involved, and hence opportunities for judicial willfulness, in other techniques of interpretation as well—the canons of construction, for example, which Dean Landis so thoroughly detested. But the manipulability of legislative history has not *replaced* the manipulabilities of these other techniques; it has *augmented* them. There are still the canons of construction to play with, *and in addition* legislative history. Legislative history provides, moreover, a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.

I think it is time to call an end to a brief and failed experiment, if not for reasons of principle then for reasons of practicality. I have not used legislative history to decide a case for, I believe, the past nine terms. Frankly, that has made very little difference (since legislative history is ordinarily so inconclusive). In the only case I recall in which, had I followed legislative history, I *would* have come out the other way, the rest of my colleagues (who *did* use legislative history) did not come out the other way either.⁴⁶ The most immediate and tangible change the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense. When I was head of the Office of Legal Counsel in the

Justice Department, I estimated that 60 percent of the time of the lawyers on my staff was expended finding, and poring over, the incunabula of legislative history. What a waste. We did not use to do it, and we should do it no more.

INTERPRETING CONSTITUTIONAL TEXTS

Without pretending to have exhausted the vast topic of textual interpretation, I wish to address a final subject: the distinctive problem of constitutional interpretation. The problem is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text. Chief Justice Marshall put the point as well as it can be put in *McCulloch v. Maryland*:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.⁴⁷

In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.

Take, for example, the provision of the First Amendment that forbids abridgment of “the freedom of speech, or of the press.” That phrase does not list the full range of communicative

⁴⁶ See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991); *id.*, at 616 (Scalia, J., concurring).

⁴⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored. In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole. That is not strict construction, but it is reasonable construction.

It is curious that most of those who insist that the drafter's intent gives meaning to a statute reject the drafter's intent as the criterion for interpretation of the Constitution. I reject it for both. I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in *The Federalist*, and to Jefferson's writings, even though neither of them was a Framers. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.

But the Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and "find" that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures. Recall the words I quoted earlier from the Fourth-of-July speech of the avid codifier Robert Rantoul:

"The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator."⁴⁸ Substitute the word "people" for "legislator," and it is a perfect description of what modern American courts have done with the Constitution.

If you go into a constitutional law class, or study a constitutional law casebook, or read a brief filed in a constitutional law case, you will rarely find the discussion addressed to the text of the constitutional provision that is at issue, or to the question of what was the originally understood or even the originally intended meaning of that text. The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean. Should there be—to take one of the less controversial examples—a constitutional right to die? If so, there is.⁴⁹ Should there be a constitutional right to reclaim a biological child put out for adoption by the other parent? Again, if so, there is.⁵⁰ If it is good, it is so. Never mind the text that we are supposedly construing; we will smuggle these new rights in, if all else fails, under the Due Process Clause (which, as I have described, is textually incapable of containing them). Moreover, what the Constitution meant

⁴⁸ Rantoul, *supra* note 7, at 318.

⁴⁹ See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

⁵⁰ See *In re Kirchner*, 649 N.E.2d 324, 333 (Ill.), *cert. denied*, 115 S. Ct. 2599 (1995).

yesterday it does not necessarily mean today. As our opinions say in the context of our Eighth Amendment jurisprudence (the Cruel and Unusual Punishments Clause), its meaning changes to reflect "the evolving standards of decency that mark the progress of a maturing society."⁵¹

This is preeminently a common-law way of making law, and not the way of construing a democratically adopted text. I mentioned earlier a famous English treatise on statutory construction called *Dwarris on Statutes*. The fourth of Dwarris's Maxims was as follows: "An act of Parliament cannot alter by reason of time; but the common law may, since *cessante ratione cessat lex*."⁵² This remains (however much it may sometimes be evaded) the formally enunciated rule for statutory construction: statutes do not change. Proposals for "dynamic statutory construction," such as those of Judge Calabresi and Professor Eskridge, are concededly avant-garde. The Constitution, however, even though a democratically adopted text, we formally treat like the common law. What, it is fair to ask, is the justification for doing so?

One would suppose that the rule that a text does not change would apply a fortiori to a constitution. If courts felt too much bound by the democratic process to tinker with statutes, when their tinkering could be adjusted by the legislature, how much more should they feel bound not to tinker with a constitution, when their tinkering is virtually irreparable. It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that "evolving standards of decency" always "mark progress," and that societies always "mature," as opposed to

⁵¹ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), quoting from *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁵² Fortunatus Dwarris, *A General Treatise on Statutes, with American Notes and Additions by Platt Potter* 122 (Albany, N.Y. 1871).

rot. Neither the text of such a document nor the intent of its framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.

FLEXIBILITY AND LIBERALITY OF THE LIVING CONSTITUTION

The argument most frequently made in favor of The Living Constitution is a pragmatic one: Such an evolutionary approach is necessary in order to provide the "flexibility" that a changing society requires; the Constitution would have snapped if it had not been permitted to bend and grow. This might be a persuasive argument if most of the "growing" that the proponents of this approach have brought upon us in the past, and are determined to bring upon us in the future, were the *elimination* of restrictions upon democratic government. But just the opposite is true. Historically, and particularly in the past thirty-five years, the "evolving" Constitution has imposed a vast array of new constraints—new inflexibilities—upon administrative, judicial, and legislative action. To mention only a few things that formerly could be done or not done, as the society desired, but now cannot be done:

- admitting in a state criminal trial evidence of guilt that was obtained by an unlawful search;⁵³
- permitting invocation of God at public-school graduations;⁵⁴
- electing one of the two houses of a state legislature the way the United States Senate is elected, i.e., on a basis that does not give all voters numerically equal representation;⁵⁵
- terminating welfare payments as soon as evidence of fraud is

⁵³ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁴ See *Lee v. Weisman*, 505 U.S. 577 (1992).

⁵⁵ See *Reynolds v. Sims*, 377 U.S. 533 (1964).

received, subject to restoration after hearing if the evidence is satisfactorily refuted;⁵⁶

- imposing property requirements as a condition of voting;⁵⁷
- prohibiting anonymous campaign literature;⁵⁸
- prohibiting pornography.⁵⁹

And the future agenda of constitutional evolutionists is mostly more of the same—the creation of *new* restrictions upon democratic government, rather than the elimination of old ones. *Less* flexibility in government, not *more*. As things now stand, the state and federal governments may either apply capital punishment or abolish it, permit suicide or forbid it—all as the changing times and the changing sentiments of society may demand. But when capital punishment is held to violate the Eighth Amendment, and suicide is held to be protected by the Fourteenth Amendment, all flexibility with regard to those matters will be gone. No, the reality of the matter is that, generally speaking, devotees of The Living Constitution do not seek to facilitate social change but to prevent it.

There are, I must admit, a few exceptions to that—a few instances in which, historically, greater flexibility has been the result of the process. But those exceptions serve only to refute another argument of the proponents of an evolving Constitution, that evolution will always be in the direction of greater personal liberty. (They consider that a great advantage, for reasons that I do not entirely understand. All government represents a balance between individual freedom and social order, and it is not true that every alteration of that balance in the direction of greater individual freedom is necessarily good.) But in any case,

⁵⁶ See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁵⁷ See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

⁵⁸ See *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995).

⁵⁹ Under current doctrine, pornography may be banned only if it is “obscene,” see *Miller v. California*, 413 U.S. 15 (1973), a judicially crafted term of art that does not embrace material that excites “normal, healthy sexual desires,” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).

the record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights. The most obvious refutation is the modern Court's limitation of the constitutional protections afforded to property. The provision prohibiting impairment of the obligation of contracts, for example, has been gutted.⁶⁰ I am sure that We the People agree with that development; we value property rights less than the Founders did. So also, we value the right to bear arms less than did the Founders (who thought the right of self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgment of property rights and *like* the elimination of the right to bear arms; but let us not pretend that these are not *reductions of rights*.

Or if property rights are too cold to arouse enthusiasm, and the right to bear arms too dangerous, let me give another example: Several terms ago a case came before the Supreme Court involving a prosecution for sexual abuse of a young child. The trial court found that the child would be too frightened to testify in the presence of the (presumed) abuser, and so, pursuant to state law, she was permitted to testify with only the prosecutor and defense counsel present, with the defendant, the judge, and the jury watching over closed-circuit television. A reasonable enough procedure, and it was held to be constitutional by my Court.⁶¹ I dissented, because the Sixth Amendment provides that “[i]n *all* criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him” (emphasis added). There is no doubt what confrontation meant—or indeed means today. It means face-to-face, not watching from

⁶⁰ See *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

⁶¹ See *Maryland v. Craig*, 497 U.S. 836 (1990).

another room. And there is no doubt what one of the major purposes of that provision was: to induce *precisely* that pressure upon the witness which the little girl found it difficult to endure. It is difficult to accuse someone to his face, particularly when you are lying. Now no extrinsic factors have changed since that provision was adopted in 1791. Sexual abuse existed then, as it does now; little children were more easily upset than adults, then as now; a means of placing the defendant out of sight of the witness existed then as now (a screen could easily have been erected that would enable the defendant to see the witness, but not the witness the defendant). But the Sixth Amendment nonetheless gave *all* criminal defendants the right to *confront* the witnesses against them, because that was thought to be an important protection. The only significant things that *have* changed, I think, are the society's sensitivity to so-called psychic trauma (which is what we are told the child witness in such a situation suffers) and the society's assessment of where the proper balance ought to be struck between the two extremes of a procedure that assures convicting 100 percent of all child abusers, and a procedure that assures acquitting 100 percent of those falsely accused of child abuse. I have no doubt that the society is, as a whole, happy and pleased with what my Court decided. But we should not pretend that the decision did not *eliminate* a liberty that previously existed.

LACK OF A GUIDING PRINCIPLE FOR EVOLUTION

My pointing out that the American people may be satisfied with a reduction of their liberties should not be taken as a suggestion that the proponents of The Living Constitution *follow* the desires of the American people in determining how the Constitution should evolve. They follow nothing so precise; indeed, as a group they follow nothing at all. Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that

there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution. *Panta rei* is not a sufficiently informative principle of constitutional interpretation. What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle? As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy.

I do not suggest, mind you, that originalists always agree upon their answer. There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply. Sometimes (though not very often) there will be disagreement regarding the original meaning; and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena. How, for example, does the First Amendment guarantee of “the freedom of speech” apply to new technologies that did not exist when the guarantee was created—to sound trucks, or to government-licensed over-the-air television? In such new fields the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment.

But the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*; that the very

act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable. The originalist, if he does not have all the answers, has many of them. The Confrontation Clause, for example, requires confrontation. For the evolutionist, on the other hand, every question is an open question, every day a new day. No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional,⁶² *even though its use is explicitly contemplated in the Constitution*. The Due Process Clause of the Fifth and Fourteenth Amendments says that no person shall be deprived of life without due process of law; and the Grand Jury Clause of the Fifth Amendment says that no person shall be held to answer for a capital crime without grand jury indictment. No matter. Under The Living Constitution the death penalty may have *become* unconstitutional. And it is up to each Justice to decide for himself (under no standard I can discern) when that occurs.

In the last analysis, however, it probably does not matter what principle, among the innumerable possibilities, the evolutionist proposes to determine in what direction The Living Constitution will grow. Whatever he might propose, at the end of the day an evolving constitution will evolve the way the majority wishes. The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is (like the interpretation of a statute) essentially lawyers' work—requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth. But if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean, in light of the "evolving standards of decency that mark the progress of a maturing society"—well, then, they will look

for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it. More specifically, they will look for judges who agree with *them* as to what the evolving standards have evolved to; who agree with *them* as to what the Constitution *ought* to be.

It seems to me that that is where we are heading, or perhaps even where we have arrived. Seventy-five years ago, we believed firmly enough in a rock-solid, unchanging Constitution that we felt it necessary to adopt the Nineteenth Amendment to give women the vote. The battle was not fought in the courts, and few thought that it could be, despite the constitutional guarantee of Equal Protection of the Laws; that provision did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis not only of age but of property and of sex. Who can doubt that if the issue had been deferred until today, the Constitution would be (formally) unamended, and the courts would be the chosen instrumentality of change? The American people have been converted to belief in The Living Constitution, a "morphing" document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.

⁶² See *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); *Callins v. Collins*, 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of certiorari).

there are no citizens but only subjects. So softly that if a well-meaning foreigner should suggest, "Perhaps you could do something about your oppression," we might look up, puzzled, and ask, "What oppression?"

Comment



RONALD DWORKIN

1

JUSTICE SCALIA has managed to give two lectures about meaning with no reference to Derrida or Gadamer or even the hermeneutic circle, and he has set out with laudable clarity a sensible account of statutory interpretation. These are considerable achievements. But I believe he has seriously misunderstood the implications of his general account for constitutional law, and that his lectures therefore have a schizophrenic character. He begins with a general theory that entails a style of constitutional adjudication which he ends by denouncing.

His initial argument rests on a crucial distinction between law and intention. "Men may intend what they will," he says, "but it is only the laws that they enact which bind us,"¹ and he is scornful of decisions like *Holy Trinity*, in which the Supreme Court, conceding that the "letter" of a statute forbade what the church had done, speculated that Congress did not intend that result. Indeed, he is skeptical about the very idea of a corporate legislative "intention"; most members of Congress, he says, have never thought about the unforeseen issues of interpretation that courts must face. A careless reader might object, however, that any coherent account of statutory interpretation *must* be based on assumptions about someone's (or some body's) intention, and that Scalia's own account accepts this at several points. Scalia admits that courts should remedy "scrivener's error."² He rejects "strict constructionism"—he thinks the

¹ Scalia, "Common-Law Courts in a Civil-Law System," p. 17.

² *Id.* p. 20.

Supreme Court's "literalist" decision in the "firearm" case, *Smith v. United States*, was silly.³ He credits at least some of the "canons" of interpretation as being an "indication" of meaning.⁴ And he says that it would be absurd to read the First Amendment's protection of speech and press as not applying to handwritten notes, which are, technically, neither.⁵

Each of these clarifications allows respect for intention to trump literal text, and the careless objection I am imagining therefore claims an inconsistency. Scalia's defenders might say, in reply to the objection, that he is not an *extreme* textualist, and that these adjustments are only concessions to common sense and practicality. But that misunderstands the objection, which is that the concessions undermine Scalia's position altogether, because they recognize not only the intelligibility but the priority of legislative intention, both of which he begins by denying. If judges can appeal to a presumed legislative intent to add to the plain meaning of "speech" and "press," or to subtract from the plain meaning of "uses a firearm," why can they not appeal to the same legislative intent to allow a priest to enter the country? Scalia's answer to this objection must not rely on any self-destructive "practicality" claim. It must rely instead on a distinction between *kinds* of intention, a distinction he does not make explicitly, but that must lie at the heart of his theory if the theory is defensible at all.

This is the crucial distinction between what some officials intended to *say* in enacting the language they used, and what they intended—or expected or hoped—would be the *consequence* of their saying it. Suppose a boss tells his manager (without winking) to hire the most qualified applicant for a new job. The boss might think it obvious that his own son, who is an applicant, is the most qualified; indeed he might not have given the instruction unless he was confident that the manager would think so too. Nevertheless, what the boss *said*, and *intended* to say, was that the most qualified applicant should be hired, and if the

³ *Id.* pp. 23–24.

⁴ *Id.* p. 27.

⁵ *Id.* pp. 37–38.

manager thought some other applicant better qualified, but hired the boss's son to save his own job, he would not be following the standard the boss had intended to lay down.

So what I called the careless objection is wrong. The supposed lapses from Scalia's textualism it cites are not lapses at all, because textualism insists on deference to one kind of intention—semantic intention—and in all his remarks so far cited Scalia is deferring to that. Any reader of anything must attend to semantic intention, because the same sounds or even words can be used with the intention of saying different things. If I tell you (to use Scalia's own example) that I admire bays, you would have to decide whether I intended to say that I admire certain horses or certain bodies of water. Until you had, you would have no idea what I had actually said even though you would know what sounds I had uttered. The phrase "using a firearm" might naturally be used, in some contexts, with the intention of describing only situations in which a gun is used as a threat; the same phrase might be used, in other contexts, to mean using a gun for any purpose including barter. We do not know what Congress actually said, in using a similar phrase, until we have answered the question of what it is reasonable to suppose, in all the circumstances including the rest of the statute, it intended to say in speaking as it did.

When we are trying to decide what someone meant to say, in circumstances like these, we are deciding which clarifying *translation* of his inscriptions is the best. It is a matter of complex and subtle philosophical argument what such translations consist in, and how they are possible—how, for example, we weave assumptions about what the speaker believes and wants, and about what it would be rational for him to believe and want, into decisions about what he meant to say.⁶ The difficulties are greatly increased when we are translating not the utterances of a real person but those of an institution like a legislature. We rely on personification—we suppose that the institution has

⁶ Reference to work of Quine, Grice, and Davidson.

semantic intentions of its own—and it is difficult to understand what sense that makes, or what special standards we should use to discover or construct such intentions. Scalia would not agree with my own opinions about these matters.⁷ But we do agree on the importance of the distinction I am emphasizing: between the question of what a legislature intended to say in the laws it enacted, which judges applying those laws must answer, and the question of what the various legislators as individuals expected or hoped the consequences of those laws would be, which is a very different matter.

Holy Trinity illustrates the difference and its importance. There can be no serious doubt that Congress meant to say what the words it used would naturally be understood to say. It is conceivable—perhaps even likely—that most members would have voted for an exception for English priests had the issue been raised. But that is a matter of (counterfactual) expectations, not of semantic intention. The law, as Scalia emphasizes, is what Congress has said, which is fixed by the best interpretation of the language it used, not by what some proportion of its members wanted or expected or assumed would happen, or would have wanted or expected or assumed if they had thought of the case.⁸ Not everyone agrees with that judgment. Some lawyers think that it accords better with democracy if judges defer to reasonable assumptions about what most legislators wanted or would have wanted, even when the language they used does not embody those actual or hypothetical wishes. After all, these lawyers argue, legislation should reflect what those who have been elected by the people actually think best for the country. Scalia disagrees with that judgment: he thinks it more democratic to give semantic intention priority over expectation intention when the two conflict, as they putatively did in *Holy Trinity*.

⁷ See chapter 9 of my *Law's Empire* (Harvard University Press, 1986).

⁸ I am prescinding, as Scalia does, from the question Professor Tribe raises about the constitutionality of the statute considered in *Holy Trinity* if it is read to say what it was plainly intended to say.

Now consider the implications of textualism so understood for the most important part of Scalia's judicial duties: interpreting the exceedingly abstract clauses of the Bill of Rights and later rights-bearing amendments. Scalia describes himself as a constitutional "originalist." But the distinction we made allows us a further distinction between two forms of originalism: "semantic" originalism, which insists that the rights-granting clauses be read to say what those who made them intended to say, and "expectation" originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have. Consider, to see the difference, the *Brown* question: does the Fourteenth Amendment guarantee of "equal protection of the laws" forbid racial segregation in public schools? We know that the majority of the members of Congress who voted for that amendment did not expect or intend it to have that consequence: they themselves sustained racial segregation in the schools of the District of Columbia.⁹ So an expectation-originalist would interpret the Fourteenth Amendment to permit segregation and would declare the Court's decision wrong. But there is no plausible interpretation of what these statesmen meant to *say*, in laying down the language "equal protection of the laws," that entitles us to conclude that they *declared* segregation constitutional. On the contrary, as the Supreme Court held, the best understanding of their semantic intentions supposes that they meant to, and did, lay down a general principle of political morality which (it had become clear by 1954) condemns racial segregation. So, on that ground, a semantic-originalist would concur in the Court's decision.

⁹ For a recent account of the literature, see Michael J. Klarman, Brown, *Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 Virginia Law Review, 1881 (1995).

If Scalia were faithful to his textualism, he would be a semantic-originalist. But is he? Notice his brief discussion of whether capital punishment offends the Eighth Amendment's prohibition against "cruel and unusual" punishments. An expectation-originalist would certainly hold that it does not, for the reasons Scalia cites. The "framers" would hardly have bothered to stipulate that "life" may be taken only after due process if they thought that the Eighth Amendment made capital punishment unconstitutional anyway. But the question is far more complicated for a semantic-originalist. For he must choose between two clarifying translations—two different accounts of what the framers intended to *say* in the Eighth Amendment. The first reading supposes that the framers intended to say, by using the words "cruel and unusual," that punishments generally thought cruel at the time they spoke were to be prohibited—that is, that they would have expressed themselves more clearly if they had used the phrase "punishments widely regarded as cruel and unusual at the date of this enactment" in place of the misleading language they actually used. The second reading supposes that they intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual. Of course, if the correct translation is the first version, then capital punishment does not violate the Eighth Amendment. But if the second, principled, translation is a more accurate account of what they intended to say, the question remains open. Just as the manager in my story could only follow his boss's principled instruction by using his own judgment, so judges could then only apply the Eighth Amendment by deciding whether capital punishment is in fact cruel and has now become (as in fact it has become, at least among democracies) unusual.

The textual evidence Scalia cites would be irrelevant for a semantic-originalist who translated the Eighth Amendment in a principled rather than a concrete and dated way. There is no contradiction in the following set of claims. The framers of the Eighth Amendment laid down a principle forbidding whatever punishments are cruel and unusual. They did not themselves

expect or intend that that principle would abolish the death penalty, so they provided that death could be inflicted only after due process. But it does not follow that the abstract principle they stated does not, contrary to their own expectation, forbid capital punishment. Suppose some legislature enacts a law forbidding the hunting of animals that are members of "endangered species" and then, later in its term, imposes special license requirements for hunting, among other animals, minks. We would assume that the members who voted for both provisions did not think that minks were endangered. But we would not be justified in concluding from that fact that, as a matter of law, minks were excluded from the ban even if they plainly *were* endangered. The latter inference would be an example of *Holy Trinity* thinking.

You will now understand my concern about Scalia's consistency. For he cites the view that capital punishment is unconstitutional as so obviously preposterous that it is cause for wonder that three justices who served with him actually held such an opinion.¹⁰ If he were an expectation-originalist, we would not be surprised at that view, or at the evidence he offers to support it. But for a semantic-originalist the question just *cannot* be foreclosed by references to the death penalty in the rest of the Constitution. A semantic-originalist would also have to think that the best interpretation of the Eighth Amendment was the dated rather than the principled translation, and even someone who might be drawn to that dated interpretation could not think the principled one *preposterous*.

On the contrary, it is the dated translation that seems bizarre. It is near inconceivable that sophisticated eighteenth-century statesmen, who were familiar with the transparency of ordinary moral language, would have used "cruel" as shorthand for "what we now think cruel." They knew how to be concrete when they intended to be: the various provisions for criminal and civil process in the Fourth, Fifth, Sixth, and Seventh

¹⁰ Scalia, "Common-Law Courts in a Civil-Law System," p. 46.

Amendments do not speak of “fair” or “due” or “usual” procedures but lay down very concrete provisions. If they had intended a dated provision, they could and would have written an explicit one. Of course, we cannot imagine Madison or any of his contemporaries doing that: they wouldn’t think it appropriate to protect what they took to be a fundamental right in such terms. But that surely means that the dated translation would be a plain mistranslation.

So Scalia’s impatience with what seems the most natural statement of what the authors of the Eighth Amendment intended to say is puzzling. Part of the explanation may lie in his fear of what he calls a “morphing” theory of the Constitution—that the rights-bearing clauses are chameleons which change their meaning to conform to the needs and spirit of new times. He calls this chameleon theory “dominant,” but it is hardly even intelligible, and I know of no prominent contemporary judge or scholar who holds anything like it. True, a metaphorical description of the Constitution as “living” has figured in constitutional rhetoric of the past, but this metaphor is much better understood as endorsing, not the chameleon theory, but the view I just described as the one that Scalia, if he were a semantic-originalist, might be expected to hold himself—that key constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules. If so, then the application of these abstract principles to particular cases, which takes fresh judgment, must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says.

I have defended that view in a series of books over the last decade,¹¹ and some of what I have written might strike Scalia as saying that the Constitution itself changes, though I meant the opposite. I said, for example, that, subject to the constraints of

¹¹ See chapter 10 of *Law’s Empire*, *supra* note 7, chapter 5 of *Life’s Dominion* (Alfred Knopf, 1993), and *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996).

integrity which require judges to keep faith with past decisions, “The Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command.”¹²

It is that moral and principled reading of the Constitution, not the mythic chameleon claims he describes, that Scalia must produce reasons for rejecting. In his contribution to this volume, Professor Tribe endorses the abstract moral reading of many clauses as well; he proposes that the First Amendment, for example, be read as abstract.¹³ So we may gauge Scalia’s arguments against the principled reading by studying his response to Tribe’s suggestion. Scalia argues that the First Amendment should be read not as abstract but as dated—that it should be read, that is, as guaranteeing only the rights it would have been generally understood to protect when it was enacted. He makes three points: first, that since many parts of the Bill of Rights are plainly concrete—the Third Amendment’s prohibition against quartering troops during peacetime, for example—the “framers” probably intended to make them all so; second, that the “framers” would presumably be anxious to insure that their own views about free speech were respected even if later generations no longer agreed; and, third, that in any case the

¹² *Life’s Dominion*, *supra* note 11, 145.

¹³ I assume that Tribe agrees that some constitutional clauses are semantically principled, though in his lecture he called such clauses “aspirational,” a term that is often used to describe ambitions that government should strive to realize as distinct from law it is bound to obey. Many contemporary constitutions, for example, set out “aspirational” declarations of economic and social rights meant to have that function. Scalia may have understood Tribe in that sense in describing Tribe’s view of the First Amendment as a “*beau idéal*.” Based on Justice Scalia’s verbal reply to his respondents on the occasion of the Tanner Lectures, March 1995. Hereafter referred to as Tanner reply. The abstract principles of the Constitution’s text are as much law—as much mandatory and as little aspirational or idealized—as any other clauses. See *Freedom’s Law*, *supra* note 11.

"framers" would not have wanted to leave the development of a constitutionalized moral principle to judges.¹⁴

These are all arguments for ignoring the natural semantic meaning of a text in favor of speculations about the expectations of its authors, and the Scalia of the preconstitutional part of these lectures would have ridiculed those arguments. First, why shouldn't the "framers" have thought that a combination of concrete and abstract rights would best secure the (evidently abstract) goals they set out in the preamble? No other national constitution is written at only one level of abstraction, and there is no reason to suppose the authors of the Bill of Rights would have been tempted by that kind of stylistic homogeneity. Second, as I said, Enlightenment statesmen were very unlikely to think that their own views represented the last word in moral progress. If they really were worried that future generations would protect rights less vigorously than they themselves did, they would have made plain that they intended to create a dated provision. Third, we must distinguish the question of what the Constitution means from the question of which institution has final authority to decide what it means. If, as many commentators think, the "framers" expected judges to have that authority, and if they feared the consequences for abstract rights, they would have taken *special* care to write concrete, dated clauses. If, on the contrary, they did not expect judicial review, then Scalia's third argument fails for that reason. The First Amendment turns out to be his *Holy Trinity*.

He ignores, moreover, an apparently decisive argument against a translation of the First Amendment as dated. There *was* no generally accepted understanding of the right of free speech on which the framers could have based a dated clause even if they had wanted to write one. On the contrary, the disagreement about what that right comprises was much more profound when the amendment was enacted than it is now. When the dominant Federalist party enacted the Sedition Act in 1798,

its members argued, relying on Blackstone, that "the freedom of speech" meant only freedom from "prior restraint"—in effect, freedom from an advance prohibition—and did not include any protection at all from punishment *after* publication.¹⁵ The opposing Republicans argued for a dramatically different view of the amendment: as Albert Gallatin (Jefferson's future secretary of the treasury) pointed out, it is "preposterous to say, that to punish a certain act was not an abridgment of the liberty of doing that act." All parties to the debate *assumed* that the First Amendment set out an abstract principle and that fresh judgment would be needed to interpret it. The Federalists relied, not on contemporary practice, which hardly supported their reading,¹⁶ but on the moral authority of Blackstone. The Republicans relied, not on contemporary practice either, but on the logic of freedom. No one supposed that the First Amendment codified some current and settled understanding, and the deep division among them showed that there was no settled understanding to codify.

So Scalia's discussion of the First Amendment is as puzzling as his briefer remarks about the Eighth Amendment. Now consider what he says about the Fourteenth Amendment's guarantee of "equal protection of the laws." He says that that clause "did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis not only of age but of property and sex."¹⁷ Why is he so sure that the Equal Protection Clause did not always forbid discrimination on grounds of age, property, or sex (or, for that matter, sexual orientation)? Certainly when the amendment was adopted, few people *thought* that the clause had that consequence, any more than they thought that it had the consequence

¹⁵ For a recent description of the arguments over the Sedition Act, see Anthony Lewis, *Make No Law* (Random House, 1991), chapter 7.

¹⁶ See the exchange of views between Professors Leonard Levy and David Anderson, summarized in the former's 1985 edition of his book, *Legacy of Suppression*.

¹⁷ Scalia, "Common-Law Courts in a Civil-Law System," p. 47.

¹⁴ Tanner reply.

of making school segregation illegal. But the semantic-originalist would dismiss this as just what the framers and later generations of lawyers expected, not a matter of what the framers actually *said*. If we look at the text they wrote, we see no distinction between racial discrimination and any other form of discrimination: the language is perfectly general, abstract, and principled. Scalia now reads into that language limitations that the language not only does not suggest but cannot bear, and he tries to justify this mistranslation by attributing understandings and expectations to statesmen that they may well have had, but that left no mark on the text they wrote. The Equal Protection Clause, we might say, is Scalia's *Holy Trinity* cubed.

What has happened? Why does the resolute text-reader, dictionary-minder, expectation-scorner of the beginning of these lectures change his mind when he comes to the most fundamental American statute of them all? He offers, in his final pages, an intriguing answer. He sees, correctly, that if we read the abstract clauses of the Bill of Rights as they were written—if we read them to say what their authors intended them to say rather than to deliver the consequences they expected them to have—then judges must treat these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they *really* require. That does not mean ignoring precedent or textual or historical integrity or morphing the Constitution. It means, on the contrary, enforcing it in accordance with its text, in the only way that this can be done. Many conservative judges therefore reject semantic originalism as undemocratic; elected judges, they say, should not have that responsibility. Scalia gives nearly the opposite reason: he says the moral reading gives the people not too little but too much power, because it politicizes the appointment of Supreme Court justices and makes it more likely that justices will be appointed who reflect the changing moods of the majority. He fears that the constitutional rights of individuals will suffer.

History disagrees. Justices whose methods seem closest to the moral reading of the Constitution have been champions, not en-

emies, of individual rights, and, as the political defeat of Robert Bork's nomination taught us, the people seem content not only with the moral reading but with its individualist implications. Scalia is worried about the decline of what he believes to be property rights embedded in the Constitution but ignored in recent decades. He reminds liberals that rights of criminal defendants may also be at risk. But even if we were persuaded that the Court has gone too far in neglecting property rights, and also that *Maryland v. Craig* compromised a valid constitutional right, these assumed mistakes would hardly outweigh the advantages to individual freedom that have flowed from judges' treatment of the great clauses as abstract.

It is, however, revealing that this is the scale on which Scalia finally wants his arguments to be weighed, and it may provide a final explanation, if not justification, for the inconsistency of his lectures as a whole. His most basic argument for textualism is drawn from majoritarian theory: he says that it is undemocratic when a statute is interpreted other than in accordance with the public text that was before legislators when they voted and is available to everyone in the community afterwards. His most basic argument for rejecting textualism in constitutional interpretation, on the other hand, reflects his *reservations* about majority rule. As with most of us, Scalia's attitudes about democracy are complex and ambivalent. I disagree with his judgment about which individual rights are genuine and important, and about whether the moral reading is a threat or an encouragement to freedom. But I agree with him that in the end the magnet of political morality is the strongest force in jurisprudence. The power of that magnet is nowhere more evident than in the rise and fall of his own love affair with textual fidelity.

the more crucial is the judicial function of making sense out of the whole, which can be achieved in principled fashion only through the application of legitimate interpretive techniques.

I will not quarrel with Professor Glendon over whether tyranny by the majority or tyranny by the powerful few is the more likely outcome of the theories of constitutional interpretation that now prevail. She thinks the latter. I think the latter in the short term (we are there now); but ultimately the former. Perhaps I overestimate the democratic vigor of our institutions. Or perhaps, because I am usually addressing my remarks to the powerful few themselves (those who belong to, or are in training for, the legal elite), I am biased in favor of majority control as the likely outcome, because that is the only thing that will strike fear into their hearts. In any event, neither outcome is a desirable one.

PROFESSOR DWORKIN

I agree with the distinction that Professor Dworkin draws in part 1 of his Comment, between what he calls "semantic intention" and the concrete expectations of lawgivers. It is indeed the former rather than the latter that I follow. I would prefer the term "import" to "semantic intention"—because that puts the focus where I believe it should be, upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean. Ultimately, of course, those two concepts chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance. But so far Professor Dworkin and I are in accord: we both follow "semantic intention."

Professor Dworkin goes on to say, however, that I am not true to this calling, as is demonstrated, he believes, by my conviction that the Eighth Amendment does not forbid capital punishment. I am wrong in this, he says, because "the semantic-originalist . . .

must choose between two clarifying translations," the first of which "supposes that the framers intended to say, by using the words 'cruel and unusual,' that punishments generally thought cruel at the time they spoke were to be prohibited—that is, that they would have expressed themselves more clearly if they had used the phrase 'punishments widely regarded as cruel and unusual at the date of this enactment' in place of the misleading language they actually used," and the second of which "supposes that they intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual." This seems to me a false dichotomy, the first part of which caricatures my sort of originalism, much as Professor Tribe did—as a narrow and hidebound methodology that ascribes to the Constitution a listing of rights "in highly particularistic, rule-like terms." In fact, however, I, no less than Professor Dworkin, believe that the Eighth Amendment is no mere "concrete and dated rule" but rather an abstract principle. If I did not hold this belief, I would not be able to apply the Eighth Amendment (as I assuredly do) to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted. What it abstracts, however, is not a moral principle of "cruelty" that philosophers can play with in the future, but rather the existing society's assessment of what is cruel. It means not (as Professor Dworkin would have it) "whatever may be considered cruel from one generation to the next," but "what we consider cruel today"; otherwise, it would be no protection against the moral perceptions of a future, more brutal, generation. It is, in other words, rooted in the moral perceptions of *the time*.

On this analysis, it is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment. Professor Dworkin is therefore close to correct in saying that the *textual* evidence I cite for the constitutionality of capital punishment (namely, the specific mention of it in several portions of the Bill of Rights) ought to be "irrelevant" to me. To be entirely correct, he should have said "superfluous." Surely the same point *can* be proved by

textual evidence, even though (as far as my philosophy is concerned) it need not be. I adduced the textual evidence only to demonstrate that thoroughgoing constitutional evolutionists will be no more deterred by text than by theory.

Professor Dworkin nonetheless takes on my textual point and seeks to prove it wrong. He asserts that making provision for the death penalty in the Constitution does not establish that it was not regarded as "cruel" under the Eighth Amendment, just as making provision for mink-hunting licenses in a statute which forbids the hunting of "endangered species" does not establish that minks can never acquire the protected status of an "endangered species." To begin with, I am not as clear as he is that such a fanciful statute—which simply forbids the hunting of "endangered species" without conferring authority upon some agency to define what species are endangered from time to time—would be interpreted to have a changing content; or, if it were so interpreted, that minks, for which hunting licenses are authorized, can come within that changing content. But if the example does suggest those consequences, it is only because the term "endangered species," unlike the term "cruel punishments," clearly connotes a category that changes from decade to decade. Animal populations, we will all agree, ebb and flow, and hence it is plausible to believe that minks, even though "un-endangered" and marked for hunting when the statute was passed, might come under "endangered species" protection in the future. Unlike animal populations, however, "moral principles," most of us think, are permanent. The Americans of 1791 surely thought that what was cruel was cruel, regardless of what a more brutal future generation might think about it. They were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to nought. Thus, provision for the death penalty in a Constitution that sets forth the moral principle of "no cruel punishments" is conclusive evidence that the death penalty is not (in the moral view of the Constitution) cruel.

Professor Dworkin asserts that the three arguments I have made against an evolutionary meaning of the Bill of Rights do not comport with my methodology of "semantic intent." I disagree. The first of them, argument from the unquestionably "time-dated" character of the concrete provisions to the conclusion that the more abstract provisions are time-dated as well, is not, as Professor Dworkin asserts, a "speculation[] about the expectations of [their] authors," but is rather a quite routine attempt to divine import ("semantic intent") from *context*. In fact, it is nothing more than an application of the canon of construction *noscitur ex sociis*, which I discussed in my main essay. The second argument also rests upon context—a context which shows that the purpose of the document in question is to guarantee certain rights, which in turn leads to the conclusion that the passage of time cannot reasonably be thought to alter the content of those rights. And the third, the argument that the repository of ultimate responsibility for determining the content of the rights (the judiciary) is a most unlikely barometer of evolving national morality but a traditional interpreter of "time-dated" laws, rests upon context as well—assuming (as a given) that judicial review is implicit in the structure of the Constitution. Of course if, as both Professor Dworkin and Professor Tribe seem to suggest, it is not a given that the Bill of Rights is to be enforced against the legislature by the courts, then my argument ceases to have force as a justification for my mode of interpretation but becomes an argument directed to the overall inconsistency of the evolutionists: Why, given what they believe the Bill of Rights is, would they want judges to be its ultimate interpreters?

As for Professor Dworkin's point that the First Amendment cannot possibly be "time-dated" because "[t]here *was* no generally accepted understanding of the right of free speech": On the main points, I think, there was. But even if not, it is infinitely more reasonable to interpret a document as leaving some of the uncertainties of the current state of the law to be worked out in

practice and in litigation (statutes do this all the time) than to interpret it as enacting, and making judicially enforceable, an indeterminate moral concept of "freedom of speech." It makes a lot of sense to guarantee to a society that "the freedom of speech you now enjoy (*whatever* that consists of) will never be diminished by the federal government"; it makes very little sense to guarantee that "the federal government will respect the moral principle of freedom of speech, which may entitle you to more, or less, freedom of speech than you now legally enjoy."

Professor Dworkin also criticizes my discussion of the Fourteenth Amendment—in the course of which he confuses, I think, two issues. First, he quotes my statement that the Equal Protection Clause "did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis not only of age but of property and sex." He then asks, "Why is he so sure that the Equal Protection Clause did not always forbid discrimination on grounds of age, property, or sex (or, for that matter, sexual orientation)? . . . If we look at the text . . . , we see no distinction" In fact, however, as far as access to the ballot goes (which was the subject of my quoted remark), the text of the Fourteenth Amendment is very clear that equal protection does not mean equal access on the basis of (at least) age and sex. Section 2 of the amendment provides for reduction of representation in Congress if a state excludes from the ballot "any of the male inhabitants of such State, being twenty-one years of age." But as for the application of the Equal Protection Clause *generally* (which is what Professor Dworkin proceeds to address), he quite entirely mistakes my position. I certainly do not assert that it permits discrimination on the basis of age, property, sex, "sexual orientation," or for that matter even blue eyes and nose rings. Denial of equal protection on *all* of these grounds is prohibited—but that still leaves open the question of what *constitutes* a denial of equal protection. Is it a denial of equal protection on the basis of sex to have segregated toilets in public buildings, or to exclude women from combat? I have no idea how Professor Dworkin goes about

answering such a question. I answer it on the basis of the "time-dated" meaning of equal protection in 1868. Unisex toilets and women assault troops may be ideas whose time has come, and the people are certainly free to require them by legislation; but refusing to do so does not violate the Fourteenth Amendment, because that is not what "equal protection of the laws" ever meant.

Finally, Professor Dworkin dismisses my fears that, in the long run, the "moral reading" of the Constitution will lead to a reduction of the rights of individuals. "History disagrees," he says, since "the people seem content not only with the moral reading but with its individualist implications." Well, there is not really much history to go on. As I have observed, evolutionary constitutional jurisprudence has held sway in the courts for only forty years or so, and recognition by the people that the Constitution means whatever it ought to mean is even more recent. To be sure, there are still notable victories in the Supreme Court for "individual rights," but has Professor Dworkin not observed that, increasingly, the "individual rights" favored by the courts tend to be the same "individual rights" favored by popular majoritarian legislation? Women's rights, for example; racial minority rights; homosexual rights; abortion rights; rights against political favoritism? The glorious days of the Warren Court, when the *judges* knew that the Constitution means whatever it ought to, but the *people* had not yet caught on to the new game (and selected their judges accordingly), are gone forever. Those were the days in which genuinely *unpopular* new minority rights could be created—notably, rights of criminal defendants and prisoners. That era of public naiveté is past, and for individual rights disfavored by the majority I think there are hard times ahead.