

THE CONSTITUTION: NOT JUST A LAW A Dissent from Misspelled Original Intent* +

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Philadelphian Benjamin Rush had cause to worry early in 1787, and he shared his worries with his countrymen. Writing appropriately enough in a new journal entitled *The American Museum*, Rush speculated whether his country might become a relic before consummating the promise of its Revolution. The war ended long before the Revolution, for the Revolution had no end but “to establish and perfect our new forms of government, and to prepare the principles, morals, and manners of our citizens, for these forms of government...” [“An Address to the People of the United States,” *The American Museum*, January 1787.] When Rush emphasized at the end of his essay, “The Revolution is not over!,” he meant then that the specific intent or design of the revolution remained to be accomplished.

That perspective or attitude toward the Founding was not unique to Rush. It characterized the Founding, and many of the Founders, in general. Because of that original attitude, Americans since have confronted a special difficulty—namely, how to acquire or preserve a metric whereby to test fidelity to the purpose the Founders believed to have realized. That question poses a special difficulty because it entails a logical corollary—namely, whether the Constitution itself is adequate? Or, should a revolution begin?

The question of revolution—the contemporary prospect of a rebellion against the present forms and prospects of American life—is easily the most interesting and important question in the entire original intent debate. Without positing such a limit condition, that debate declines to sterile exercises in legal reasoning. Accordingly, I ask that we face squarely up to the question of revolution, as George Washington did in the midst of the Stamp Act crisis when he wrote, “law can never make just what is in its nature unjust.” This moral declaration of independence will always be the philosophical pre-condition of a political declaration of independence. [Cf., Plato, *Crito*; Corwin, *Higher Law Background of American Law* (Ithaca, N.Y.: Cornell Univ. Press).] The *possibility* of such a moral declaration undergirds the original intent debate. The original intent researcher poses less a question about the clarity with which the past speaks to the present than question about the acceptable grounds of obedience—of legitimate authority—in the present. To raise the question is to threaten to withdraw consent (or, submission, if the stolid persist), to de-legitimize established authority. From that step there remains only one progressive direction: revolution.

We cannot contemplate such a possibility in ignorance. We require to master both the objective conditions which counsel rebellion and the principles, which enable us to discern its necessity. In what follows I seek to develop these two qualifications of rebellion, starting from the terms of the present debate itself. I announced in the title of this essay that “original intent” has been pervasively misspelled. When we discern the correct spelling, then we can analyze its political and legal significance.

Lawyers are wont to express technical concepts in Latin. In the original intent debate, they have used the word, “original,” as though they derived it from *abinitio*, from the beginning. In that sense, “original intent” has no greater significance than attaches to what comes first in a series. As such it has neither dignity nor compulsive meaning. True, it is, the human praise of the venerable is one of the more charming virtues. It is, however, far from sufficient, inasmuch as the old commands our attention only for so long as it is allied to an argument for goodness. Naboth yielded his life in defense of ancestors he regarded as better than himself, not contemptible forebears. What comes first is older but not, for that reason, better. Thus, the *intentio abinitio* cannot command our respect, and no one with respect for our intelligence can offer it to us as doing so. That spelling of original intent is incorrect.

An alternative source for the meaning of “original” is *a principio*, a word which can mean not only from the beginning but more importantly from a principle. It stands thus as a claim, significant not because of its authors but because of its demands on us (*en arche ein ho logos*). Original intent thus emphasizes the intention or design as it applies to us and as we, in principle, are capable of understanding it. It possesses a dignity in proportion as it truly reflects that rational design which operates compulsively on minds unaffected by desire. When it is old its dignity is enhanced by virtue of its having survived challenges to its status as a superior claim. The only original intent worthy the name is such an one, become manifest in the form of responding fully to our most serious questions even after we have pursued counter hypotheses.

Investigating the debate with some care, we will see that the misspelled variety of original intent has characteristically been propounded. We will also readily perceive that that version poses little threat to the legal and political order as it subsists today, while the correct version would deliver us to the very threshold of revolution. More than a slight hint of this can be found in one of the most recent contributions to this debate, by Raoul Berger. The very title of his long essay conveys this ambiguous relationship: “Federalism: The Founder’s Design.” He used the word “design” rather than the word “intent,” as much a term of art as of moral purpose. Design may mean aim or intention, but it may also point to the inherent *logos* or principle in accord with which a work was executed. A given work may aim to do good without being adequately designed to hit the mark. If the Founders aimed at federalism, or liberty, or anything else, but did not adequately tailor their efforts to their purpose, it would require an argument passing bizarre to persuade men to adhere to such foredoomed efforts.

Within the essay Berger recurs far less to the term “design” than to “original intent,” doubtless because that it is how the debate has already been cast. Which original intent is prominent, the *abinitio* or the *a principio*? The virtue of Berger’s analysis is that he demonstrates that the concept of “original intent” is not a term of art. It has characterized American jurisprudence from the beginning and before; indeed, Berger shows the term to be a staple of legislative interpretation in the Anglo-American universe from as much as 500 years before the Founding. When we canvas Berger’s sources, we are of two minds about the spelling question, some sources alighting on one side and others on the other side of the question.

The confusion derives from the fact that the concept of original intent has been promiscuously applied to statutes and constitutions as though it made little difference to which one referred. Thus, “such construction ought to be put upon a statute, as may best answer the intention

which the makers of it had in view.” [Matthew Bacon, *A New Abridgement of the Laws of England*, Statute I (5) (3d ed., 1768), cited in Berger, p.16, no. 52.] Berger cited this formulation as the proper gloss on his own statement to the effect that, correctly to understand what is “nowhere mentioned in the Constitution, we must look to the explanations of the Founders, what is characterized as the ‘original intention’.” Berger also cited James Madison’s famous gloss, “the *sense* in which the Constitution was accepted and ratified” must guide every expounding. Madison’s expanded version of his argument, however, permits us to question whether his view says no more than that “the intention of the lawmaker is the law’ rising even above the text.” [15-16]. Madison located

... a key *sense* of the Constitution, where alone the true one can be found; in the proceedings of the Convention, the contemporary expositions, and above all in the ratifying Conventions of the States. If the *instrument* be interpreted by criticisms which lose sight of the *intentions of the parties to it*, in the fascinating pursuit of objects of public advantage or conveniency, the purest motives can be no security against innovations materially changing the features of the Government.

The law, as the command of a sovereign, stands in relation to an individual differently than an *instrument* of social compact, an agreement, to which one may be party. For even where the agreement exists as historical antecedent to a contemporary claim of sovereignty, the “intentions of the parties to it” cannot reveal a *sense* in the same way that a sovereign command can reveal an intention or mind. A sovereign mind, individual or corporate, may be seized by the purpose it aims at—the sovereign mind by definition singular of purpose. An agreement, however, offers plural minds by definition, and the very idea of agreement constrains the identification of the intention to what each of several will specifically ratify—always somewhat less than what each would himself declare. In agreement, then, it is far less the several reasons for agreeing than the agreement itself which expresses intent; while, in the case of law, it is the purpose even more than the literal text (“rising above the text,” Berger said) which expresses intent. This difference is of the greatest consequence.

Now let us contrast Berger’s authority with that of Cooley. The model for Berger:

Thus, light was first to be sought from the makers’ ‘declaration of their myndes,’ and in the absence of such a declaration, from those that, ‘were moste nearest the statute.’ [p.194]

A rule in literary exegesis is to discover authorial intent. A like rule can apply to statutes, for a legislature acts on authority, whether assumed or derived, which permits the authorial stance. The “informal propositions” of a constitutional convention are surely authored but possess no authority. Thus, Cooley commented:

Every member of [a constitutional] convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause... And even if it were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words

would most naturally and obviously convey. For as the Constitution does not derive its force from the Convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding... These proceedings therefore are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives. [T. Cooley, *A Treatise on Constitutional Limitations*, 66-67 (2d ed. 1871), quoted in John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), pp. 18-19.]

There is, then, a tension between legislative original intent and constitutional original intent, to which Berger pays only implicit attention in his book. In pointing this out and, ultimately, dissenting from Berger's view, I intend rather to narrow or tighten than to overthrow his conception. To do justice to his argument, however, I need first to draw it out in a length appropriate to the effort he expended on it.

The object of Berger's vigorous opposition is that view of constitutionalism which liberates the present from all historical strictures, a view variously known as non-interpretivism, the unwritten Constitution, the evolutionary constitution, and other familiar terms of art. In one such instance he reasons as follows:

Does long-standing adherence of the Courts to an unconstitutional course, allegedly 'acquiesced' in by Congress and the people, sanction it? Gerald Lynch would extenuate departures from the text as well as from the original understanding on grounds of adherence to long-standing constitutional doctrines,' and he asserts that the people have implicitly ratified the role the Court has assumed over the last century.

It would only be fair to point out that Lynch would not apply Berger's term, "unconstitutional," to this process. He would rather describe it as the specific form of constitutional existence. Nevertheless, Berger's point is clear—tacit acceptance of non-consecrated doctrines does not qualify as a principle of legitimation [or, a rational justification of submission to authority or power]. In accord with that argument, the litmus of legitimacy must be an explicit original text or understanding. A different response than Berger's might have invoked the language of the Declaration of Independence and judged Lynch's longstanding departures as a "long train of abuses" patiently suffered while sufferable on the prudential ground that native reaction should not proceed from "light and transient" reasons. That approach would have led Berger toward a different view of original intent than that he envisions. Instead, he settled for the version contained in Leonard Levy's response,

The simple fact is that at no time in our history have the American people passed judgment, pro or con, on the merits of judicial review over Congress. Consent freely given, by referendum, by legislation, or amendment, is simply not the same as failure to abolish or impair.

Now, Levy's view is such that the expression or absence of expression of consent operates not so much as a principle than as a positive enactment. And positive enactment, with understanding behind it, is what Berger seeks in original intent. The intention is rather the *product* (including the understanding) than the *moral purpose* of such a singular, historical event. For that reason Berger reaffirmed the frequently stated Court position, and one defended by James Madison, that "a contemporaneous legislative exposition of the Constitution when the Founders... were actively participating in public affairs, long acquiesced in, fixes the construction..." This is some distance removed from Justice Harry Blackmun's preferred view, that "the text of the constitution provides the beginning rather than the final answer to every inquiry into questions of federalism." [*Garcia v. San Antonio Mass Transit Authority*, 469 U. S. 528 (1985).]

One sees in this formulation the difference between Lynch's "long-standing adherence" and the "long acquiescence" of *Hampton & Co. v. United States* [276 U. S. 394 (1928)]. Reliance on authority derived purely from positive tradition characterizes each view, and they are distinguished only by differing notions of the source of the tradition. The Lynch view will settle upon the first available historical source, counting backwards (thus, too, Mr. Justice Brennan), while Berger and the Court have insisted upon a single, unique tradition. No compelling moral argument is made for either, doubtless because each approach confuses a rule of prudence (tradition is a powerful aid to memory and judgment) with a rule of interpretation (to follow tradition exclusively depends upon its being superior to every other possible recourse).

Berger's purpose is praiseworthy. He sought a rule whereby to safeguard society from what Madison called, "a will independent of society." Seeking to check the power of the Court, he naturally looked to the Founding, and there he sought a constraint which would not depend on the will of the party to be constrained. As he put it, "those who enjoy the exercise of uncurbed power are unlikely to surrender it merely because it has been usurped." Justice White similarly, in the 1986 sodomy case, pointed out that "the Court... comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." [*Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).] The problem for White and Berger alike, however, is that they have fashioned a device to limit judicial usurpation, misspelled original intent, which calls upon the justices themselves for its execution. Original intent is neither self-executing nor falls to any of the other branches of government to execute. The power of the Court, reposing as it does on Justice John Jay's 1793 ruling on advisory opinions, which insisted that the Court must have the last word, cannot be directly constrained by any ordinary institutional considerations. This seems to have been the import of the argument in Marshall's original elaboration of the notion of judicial review, in which most commentators usually neglect that the Chief Justice also laid out the limits of the power.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character... The subjects are political. They respect the nation's, not individual rights, and... the decision of the executive is conclusive... where the heads of departments are the political or confidential agents of the executive ... to act in cases in which the executive possesses a constitutional or legal dis-

cretion, nothing can be more clear than that their acts are only politically examinable, [*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803).]

Marshall's account of judicial review describes it as law bound, subject to the Constitution and not as a *carte blanche* constitutional oversight. The reason is that the Constitution provides not only for legislative but for political judgment. In that context, he held, the "province of the Court is, solely, to decide on the rights of individuals," which is not to say "minorities." Thus, when it came to the question of original intent Marshall could affirm rather a different view than prevails today:

That the people have an original right to establish for their future government, such principles as in their opinion, shall most conduce to their happiness, is the basis on which the whole American fabric has been erected... as the authority from which [the principles] proceed is supreme, and can seldom act, they are designed to be permanent. (Ibid.)

Original "original intent," in other words, focused not on the absence of referenda but on the presence of the original authoritative act. Thus, Justice Joseph Story could maintain that the Court could construe only the powers of the Constitution and not "the policy or principles which induced the grant of them," precisely because the "Constitution has proceeded upon a theory of its own." [*Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).] Contemporary jurists have been known to echo similar sentiments, though seldom to stick by them. Justice Powell, for example, and whom we shall see explicitly rejecting the restraint on the judicial creation of rights, nevertheless held in 1973 that "it is not the province of this Court to create substantive constitutional rights." [*San Antonio Ind. School Dist. v. Rodriguez*, 411 U. S. 193 (1973).] The last Justice Harlan, on the other hand, sounded much like his original namesake in 1970:

...when the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process,... and it has violated the constitutional structure which it is its highest duty to protect. [*Oregon v. Mitchell*, 400 U. S. 112 (1970).]

Contrasting with Harlan, however, is the dissenting opinion of Justice Brennan, which more nearly approximates the professional consensus on the question of original intent in the contemporary world:

[The] historical record left by the framers of the 14th Amendment, because it is a product of differing and conflicting political pressures and conceptions of federalism, is thus too vague and imprecise to provide us with sure guidance in deciding... We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. [Ibid.]

On such terms as these, original intent would refer to the structures of government and the original authority of the people last of all!

To repeat: misspelled original intent does not constrain the Court beyond the willingness of justices to operate within what is essentially the framework of a hypothetical construct. To

realize the goal of Berger's crusade, Americans would have to re-discover a means to limit the Court not dependent on the opinions of the justices. Before we assess the prospects of accomplishing this, let me restate the cause of the central error in the prevailing reading of original intent.

Original intent has been confused with the doctrine of legislative intention. Brennan errs thus in the citation from *Oregon v. Mitchell* above, but both sides are guilty of this. Even the reference to Justice Taney's discussion in the Dred Scott case as the *locus classicus* for the meaning of original intent results from confusion [Cf., Harry V. Jaffa, "What Were the 'Original Intentions' of the Framers of the Constitution of the United States?", 10.3 *University of Puget Sound Law Review*, 352-54 (1987)]. Taney employed the model of legislative intention to build his argument of the "intent of the framers" regarding black people. He searched the referents and practices common to the Framers as a means to discern their intention in the substantive provisions of their enactments. The process mirrors the rummaging of the "legislative record" which characterizes contemporary Court proceedings. We saw an example of this last spring, when the Supreme Court decided that Jews and Arabs qualify as ethnic minorities on the strength of remarks made during the deliberations of the Reconstruction Congress. [*Saint Francis College v. Al-Khazraji*, 482 U.S.____(1987) and *ShaareTefila Congregation v. Cobb*, 482 U.S.____(1987).]

By contrast, the correct understanding of original intent would not pretend to lift substantive decisions on particular facts whole from some founding record. Unlike legislative intention, which may guide the Court, original intent operates to constrain the entire American political system with respect to processes and ends. The substance of the principle is republicanism—self-government.

The consequence of taking this distinction seriously will be to undermine the prevailing understanding of this particular question, one that has been much on the minds of many people in recent years and part of an academic debate in the legal community stretching back at least thirty years. In discussing the interpretation of the Constitution, we are forced to choose whether we wish to discuss the specific and limited role assigned to the Court or the broader question of the structure and operation of the American political system. A palpable example of the effect such a distinction would have on the Court was offered in the majority opinion in *INS v. Chadha* [33 *Daily Journal D. A. R.* 1657 (1983).] By insisting on a rigorous interpretation of the separation of powers, focusing on the presentment clauses, the Court found itself unable to reach the policy question (despite the vigorous objection of Justice White). More importantly, however, in a rare twentieth century instance the Court acknowledged dimensions of governmental power beyond its reach. In *Chadha*, form outweighed substance, meaning therefore that substantive decisions remained to be made in forums and in a manner beyond the power of the Court to impose. Not utility, but constitutional design decided the question, and in constitutional matters original intent can mean nothing less. To maintain his point, the Chief Justice summoned James Madison to his defense, but not Madison's most explicit statement on the question:

I am not unaware that my belief, not to say knowledge, of the views of those who proposed the Constitution, and what is of more importance, my deep impression as to the views of those who bestowed on it the stamp of authority, may influence my interpreta-

tion of the Instrument. On the other hand, it is not impossible that those who consult the instrument without a danger of that bias, may be exposed to an equal one in their anxiety to find in its text an authority for a particular measure of great apparent utility. [3 *Works*, 53-54, Letter to Henry St. George Tucker, December 23, 1817.]

Serious danger seems to be threatened to the genuine sense of the Constitution, not only by an unwarrantable latitude of construction, but by the use made of precedents which cannot be supposed to have had in the view of their Authors the bearing contended for, and even where they may have crept through inadvertence into acts of Congress, and been signed by the Executive at a midnight hour, in the midst of a group scarcely admitting perusal, and under a wariness of mind as little admitting a vigilant attention.

Another, and perhaps a greater danger, is to be apprehended from the influence which the usefulness and popularity of measures may have on questions of their constitutionality. [3 *Works* 54-57, Letter to President Monroe, December 27, 1817.]

In Madison's view, as in the *Chadha* opinion, then, the key to constitutional jurisprudence is a careful segregation of legislative intent and constitutional intent, the former bowing to the latter even where utility pleads its case.

The Court is able to apply this rule only in the circumstance where it preserves its own power in a properly subordinated role. In that sense, the defenders of misspelled original intent have inverted the argument, for they behold a Court which is able to hold the government's feet to the fire of constitutional structure not by virtue of its own subordinate role but rather by virtue of its superordinate judgment.

The clearest example of this inversion appears in the writings of Judge Robert Bork, who reasons that it is sufficient for jurists to begin with a "premise" rooted in the Constitution in order to fulfill the function of preserving constitutional intention. Judge Bork sets forth the peculiar problem which confronts the Court in unmistakable terms, terms which convey far more than the limited, subordinate role envisioned in this essay. I quote at length:

The problem for constitutional law always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second tyranny by the minority.

Over time it came to be thought that the resolution of the Madisonian problem—the definition of majority power and minority freedom—was primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals but they

must also be scrupulous not to deny the majority's legitimate right to govern. How can that be done? ["The Great Debate: Interpreting Our Written Constitution," speech reprinted by The Federalist Society, 1986, p. 44.]

Before entertaining Judge Bork's response to this most important question, we must note how far his account of the Madisonian problem and system depart from what was in fact the case.

Judge Bork attributes to the United States Constitution attributes which Madison specifically attributed only to systems not vested with the safeguards of the Constitution. *Federalist* number ten spells out at great length the difference between mere majority rule (simple democracy) and the extended republic (representative democracy). Majority ties not only are not allowed to rule in the latter "simply because they are majorities," but only just majorities are allowed to rule (*Federalist* 51). Further, not only can the just majority be trusted to "define the proper spheres of democratic authority," but they *alone* may be trusted to do so. Any other arrangement would vest power and authority in a "will independent of the society." [Cf., Allen, "Justice and the General Good: *Federalist* 51," in C. Kesler, *Saving the Revolution* (New York: The Free Press, 1987), 131-149.] Thus, the arrangement which Madison defended as avoiding both tyranny and anarchy, Judge Bork regards as courting tyranny whether by the majority or the minority. This is the context in which it is then alleged that evolved circumstances have produced a solution to the Madisonian problem—namely, the exclusive power of the judiciary to determine questions of rights and power in the United States. At bottom, therefore, the argument means that the original Constitution failed, and the recourse to the Supreme Court has been a second line of defense, the very argument which Justice Thurgood Marshall offered in Hawaii in May of 1987:

... the government they [the Framers] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government...

This essay does not maintain that Justice Marshall and Judge Bork would entertain the same results as fulfilling their shared vision of constitutional government. Further, Justice Marshall has never uttered a word of the principle which Judge Bork went on to affirm, that "any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges." I do suggest, however, that the control Judge Bork finally settled on is precisely no control at all. "The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments." I submit that what this means is that there is no constraint whatever, for the "only way" is a way which leaves original intent jurisprudence no less open to the subjective opinion of the judge than is the jurisprudence of evolutionary utility. When Judge Bork goes on to describe the process by which this constraint is to be accomplished, this conclusion becomes still more manifest. He maintains that Dean Ely's "discoverable premise" is the foundation. The jurist then adds a minor premise designed to fit the original premise to contemporary circumstances, and, *voila*, we proceed to a conclusion the "framers could not foresee." Giving every due allowance to this procedure and its announced intent to depart from the Constitution, it nevertheless remains true that the process of discovering a premise is a step in ratiocination. It must accordingly follow that this procedure aims to limit only the

reason, not the power of the Court. Constitutional government, by contrast, must be based on actual limitations on the power of the Court, for, among other reasons, the fact that we all know only too well the fallibilities of human reason.

Original intent spelled correctly would limit the power of the Court, and that is the missing element in the contemporary original intent debate. We grew up to believe that our judges, above all Supreme Court Justices, were clothed in the robes of the Constitution. Whether they wore anything beneath was of no importance. What counted was that they accept, as we believed, that our Constitution formed a government limited in *all* its branches and powers and that interpretation of that document would always start from the conceptions of its architects. When our judges cast off “a world that is dead and gone,” in Justice Brennan’s words, they cast off their constitutional robes and stand nakedly before us, asserting their own authority, independent of any limitations, to shape society as they will.

We have known for some time that *some* judges thought their power unlimited. Indeed, Justice Powell made it explicit enough in a 1979 interview [with Professor Harry Clor, printed in the *Kenyon College Alumni Bulletin*, Summer, 1979, p. 14]. And Justice Marshall made the point clear in his 1976 *Bakke* opinion [*Regents of the University of California v. Bakke*, 438 U. S. 265 (1978)]. Nevertheless, Marshall was content to speak from the bench, and Powell’s interview appeared only in an obscure college alumni bulletin, known generally only to a few scholars and lawyers. They did not enter the political thicket to make their nakedness a principle of right. What has been revealed, however, both gives pause and suggests a response. Discussing the earth shaking 1973 abortion decision [*Roe v. Wade*, 410 U.S. 113 (1973)], Powell declared, “there’s nothing in the Constitution about privacy.” Nevertheless, the Court invented a right of privacy to make their decision because, as Powell expressed it, “the liberty to make certain highly personal decisions [is] terribly important to people.” Similarly, the Court says what the Constitution means, according to Powell, without relying on the intent of either Congress or the Founding Fathers. This they did, he held, when they invented the eighteen year old right to vote although “nothing in the Constitution... could have suggested that result.” Simply put, “the Court decided that when young people were being drafted and asked to go to war..., the time had come to extend to them the right to participate as citizens in the decisions that affected them so seriously.” A review of how the twenty-sixth amendment came to be passed would say far more than any commentary here could about the significance of this remark.

What this means is that our judges now stand in relation to the people of the United States where the judges of Abraham Lincoln’s day stood in relation to the people of that era. When Lincoln challenged the people to consider whether they would accept a Supreme Court decision declaring slavery lawful throughout the United States, he meant for them to remember that that was their decision and not the decision of their judges. So, too, is today’s American challenged by the tendency of contemporary Court opinions to make a decision how far they are willing to permit the Court to go. In the *Jaffree* decision on school prayer in Alabama [*Wallace v. Jaffree*, 472 U. S. 38 (1985)], the Court went so far as to mandate governmental neutrality between religion and irreligion. It is irrelevant whether it were dicta or law, in these premises, for in doing so they did more than merely to depart from the understanding of the founding generation. They forced people to wonder, what if they take the next step; what if the Court insists that Americans cannot teach religion to their young, whether in public or in private, because that has

the effect of restricting what must be regarded as a highly personal decision which young people have a right to make for themselves? Would Americans abide a decision which would put their churches out of business and their faiths out of society?

Justice Brennan assumed just such a power in his speech of the fall of 1985 [“Address,” to the Text and Teaching Symposium, Georgetown University, October 12, 1985]. That is at least a natural conclusion from his reason that there is no way for us to know what the Founders intended two hundred years ago. The more serious question, however, is what the American citizens of the founding era intended, just as it is important to ask what Americans intend today. Brennan cited James Madison’s changed opinion about the constitutionality of a national bank in order to persuade that the Constitution has no fixed meaning. Brennan erred in reading Madison. Madison explained his changed opinion about the constitutionality of a national bank by pointing out that the decision to make such a bank was achieved by the very people who determined the Constitution itself. Therefore, their action constituted a legitimate interpretation of the *intention* of the founding in Madison’s eyes. This pre-eminent Founder, in other words, considered the people far more the true founders than himself.

The Constitution does not need to change in order “to cope with current problems and needs” [Brennan, *ibid.*]. As all the Founders so frequently said, the Constitution was intended as it stood to accommodate the needs of changing circumstances. By changing the Constitution we only make ourselves more vulnerable to changing circumstances. As drafted the Constitution was intended to convey power sufficient to cope with transient problems without changing constitutional fundamentals. The theory was that thus Americans would remain free; whereas in other states people change their constitutions as they change their undergarments. By Brennan’s view, Americans should always regard the Constitution of the past generation as just so much dirty underwear.

Like Powell, Brennan defended the Court’s decision to stand as a protector of the few against the many. In order to serve this role, the Court had to assume an independent power in the society, a position which Brennan conceded “requires a much modified view of the proper relationship of individual and state.” In particular, the so-called “majoritarian process cannot be expected to rectify claims of minority rights that arise as a response to the outcomes of that very majoritarian process.” Brennan, like Judge Bork, believes that the Founders intended to create a simply majoritarian political order. Judging such an order unwise, he assumes the power and authority to change it.

It is characteristic in Brennan’s argument that, when he makes his most radical claims, he reaches for the authority of the past to protect himself. Here, again, he appealed to Madison. Here, again, he abused Madison. Drawing from Madison’s contribution to the debate on the Bill of Rights in 1789, he quoted that “the prescriptions in favor of liberty ought to be leveled against ... the highest prerogative of power... the body of the people, operating by the majority against the minority.” Thus, Brennan used Madison to design a Constitution against the people.

The passage Brennan cited, however, follows a discussion in which Madison insisted that, in a government constructed such as ours, these declarations of rights [the Bill of Rights] do not “prevent the exercise of undue power” inasmuch as effective controls have been instituted in

government itself. It is the community itself, not the “legislative body,” which may profit from additional restraint, a restraint which derives from the “salutary tendency” of such declarations in regard to public opinion. Thus, where Brennan found the idea of a Constitution against the people, we see in fact a description of those areas in which public opinion operates outside the so-called majoritarian processes. Madison remained consistent with what he had already said in defending the Constitution earlier, that “the rights of individuals, or of the minority, will be in little danger from” the government itself.

The beauty of this design was precisely that it made a government which did not have to create special categories of citizenship, dividing the society into legally created factions one against another, as our Court has done with whites and blacks, men and women, and other like divisions. The founders *intended* a color-blind, class-blind Constitution. Our Court today intends the opposite. To restore the vision of the Founding, Americans would be forced to make the Court do again what Madison originally depended on it to do, “to declare all acts contrary to the *manifest* tenor of the Constitution void.” If the word manifest means anything at all, Madison must have understood that it is *not* the task of the Court to declare void legislation with which it merely happens to disagree.

Laying out the problem thus prepares us at last for the necessary conclusion. A knowledge of the Constitution sufficient to assure familiarity with its “manifest tenor” would exceed by far a literal rendering of its terms; it would reach to its principles as they were adopted and including the principles of the Declaration of Independence. Coupled with the demonstration that present-day jurists frequently miscomprehend the Constitution both in its terms and its principles, the likelihood emerges that the prospects for correctly spelled original intent depend on a complete renewal of the Court or something more still. This statement is not entertained lightly. We are tutored by present justices and judges themselves. Justice Brennan’s abilities are clear in this regard. Similarly, Justice Marshall’s disparagement of the Constitution bespeaks an unfriendliness to the understanding of republicanism articulated at the Founding. One might add that it also bespeaks an unfamiliarity with the Founding, for it is based on an erroneous reading of the attitudes toward slavery and blacks at the Founding. The general problem all of this raises is this: how far can we rely on the judgments of jurists who are neither well-affected toward nor particularly knowledgeable about the Constitution. If the principle constraint on the Court, subordination to the mechanisms and purposes of republicanism, are unknown to the justices, they cannot be expected to perform a function compatible with the political order. That is the real subject at the heart of the original intent debate.

It would be a mistake to rely on our Courts to fulfill the promise of original intent, since to do so would confirm in them a power far beyond anything originally intended. If such power in fact exists today, the American people would find themselves faced with no alternatives (to reclaim their due authority) but a constitutional limitation on the judiciary, on the one hand, or, failing which, a revolution in their government. But it would be difficult indeed to imagine a constitutional limitation on the Courts, other than that in the original constitution, which would be compatible with a government of laws. Could we recover a firm sense of the constitutional order, in which the separate authorities were regarded as properly independent where they were designed to be so, without having to appeal to a specific ruling of the Court for the purpose, that could perhaps restore the health of our polity. Fifty years of legislative complicity in judicial

usurpation does not foster confidence in that possibility, however. Thus, for all practical purposes it would seem that an appropriate judicial deference, on the one hand, or a righteous legislative and/or executive defiance of the Court, on the other hand, are well beyond our reach.

What we can be most certain of is that this restoration cannot proceed from the Court itself. Justice Harlan's warning in *Oregon v. Mitchell* has gone all but unheeded not only by the Court but the legal system entire:

Judicial deference is based, not on relative fact finding competence, but on due regard for the decision of the body constitutionally appointed to decide.

Accordingly, Justice Frankfurter's insight, "there is not under our Constitution a judicial remedy for every (political mischief)" [*Baker v. Carr*, 369 U. S. 186 (1962)], counsels us to pursue other means. This consideration brings us nearer to the relevance of the idea of self-government in this discussion. Justice Brennan repeats no other phrase with such frequency as he repeats, without apparently understanding, "self-government." Since the original intent of the Constitution was to preserve self-government, however, it is most likely that the recovery of that heritage must involve the assertion of its claims over and against the institutions of the government, including the Court. That, in turn, would call upon a frankly political as opposed to a legal speech. This more than anything else could convey to us the impossible irony of seeking salvation in the Courts. For what would the judge be, who could speak with the accents the American people stand most in need of today?

Can we conceive some judge, attempting to refocus our constitutional deliberations, reminding the people that we don't need sniveling investigators and their pimps to tell us what our Constitution means? But such is the raw language of politics. He would continue: The people of this country are entirely capable themselves of insisting upon the due order of their Constitution. What we need are presidential candidates, for example, who can carry directly to the people the question of our Constitution—even to pose anew the question of their vote for the Constitution, whether the Constitution of Thurgood Marshall and Joe Biden or the Constitution of George Washington and James Madison. We need an executive who will not imagine that the way to defend the constitutional order is by cutting the budget of appropriately established governmental agencies and fighting over small bits of turf with an arrogant Congress. We need rather an executive who will lay down the general rule, that Congress can carry out its appropriate authority to create policies, but the President will carry out his authority to enforce its legislation—that the oversight responsibility of Congress is not only appropriate but encouraged, but that it does not consist in the right or authority of any Congressman to sign checks. The executive himself will report to the Congress, and Congress—individual congressmen and congressional staff—will not be afforded the opportunity to give immediate directions to the executive agencies of the government. We need an executive who will remind Congress that no individual Congressman has a constitutional existence in this country—that congressmen come to light only as part of a constitutional majority, and that means a majority in the sense prescribed by the processes outlined in the Constitution. When they are deliberating and passing legislation, then they are invested with the full dignity of our republican system. As mere individuals expressing their likes and dislikes they are just other Americans. It would take more than ordinary imagination to conceive of the Supreme Court opinion that would speak thus. Yet, the restoration of the original intent hinges

far more on such language than on the arcane disputes about the legislative records of the Founding era. Further, it is clear that the inadequacy of the Court is very closely connected with the malfunctioning of the entire federal government. What is genuinely cause for pessimism, however, is that it is almost as difficult to imagine such a political dialogue taking place off the Court as on it. In that event, Americans must face the cold reality that their options have been painfully narrowed to one only. Correctly spelled original intent may well demand original exertions.

The more serious we become about the ambition to secure a permanent constitution, the more will such recourse be demanded of Americans, just as Lycurgus demanded it of Spartans initially. Lycurgus assembled all the people, congratulated them on the felicity of their institutions and practices, but also indicated that only one thing was wanted (and that the most important) to perfect the happiness of the design. He dared not relate it, however, without first consulting the oracle. Nevertheless, he counseled, Spartans could enjoy their present felicity, if they would simply pledge to “observe the laws without any the least alteration until his return.” Having obtained so secure a pledge, and the oracle’s blessing, Lycurgus chose never to return, thus to secure a permanent constitution to his city. In other words, Lycurgus made it more important that Spartans obey their common laws than that they seek *his* explanations for them. There are no longer any oracles.

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Before I undertake the task of conducting a spelling bee on constitutional interpretation, I remind the reader of a familiar story which is inversely apposite to our present case. Geoffrey Chaucer’s “Pardoners” tale relates the story of a small band of robbers who needed to cooperate among themselves in order to pursue their enterprise. They had to form a charter among themselves, agreeing that, though they would set forth on missions to stop wayfarers along the highway and rob them, they nevertheless would not rob one another. They would respect each the others’ property rights once the booty had been distributed among them.

All who know the tale will recall that the robber band breaks up. It does so because, leagued as they are in the purpose to commit injustices, they had hearts which could not with respect to one another make the switch to acting justly. With poetic license, however, we may assume that the break-up did not come so quickly. Maybe it took six or eight generations before the fruits of injustice worked themselves out in their own souls.

Now we can witness an interesting problem: the problem of how to transmit the robbers’ charter from one generation to the next. In the second generation, for example, one conceives that there would be in this robber band offspring of the first generation, carrying on their fathers’ work, perhaps in much the same manner as their fathers had done. They would choose, as their fathers did, a boss to make decisions about

targets of opportunity and lead them on successful forays. Of course, his henchmen would fall in line and carry out their part of the missions.

This would continue perhaps into the third generation, but eventually a creative boss would emerge. He might conceive that holding up travelers was a bit *déclassé*. He would rather concentrate on bank robbing as more elegant, and perhaps even the profits would be more interesting. On his own authority he would decide that thenceforward they would only rob banks. There one has a community of sorts, and it has something of a constitution which designates someone to make decisions, to rule. He further decides what kind of activities they will participate in as a community. Bank robbing, however, is not so far removed from highway robbery.

The boss would perhaps manage without a challenge to his authority for making that decision. Time passes, however, and now, not in the time of the great-grandson but perhaps in that of the great-great-great-grandson, views might change still more. A boss might decide that robbing altogether is something of a bore and not very challenging. He might prefer to build the community inheritance by investing, managing portfolios, arbitraging.

At a remove of six or eight generations, a latter-day henchman might begin to ask questions. He might well say that his daddy was a robber, and his daddy's daddy in turn before him. He belongs to the community because he wishes to rob, not to invest. Hear him ask the boss, "Where do you get the right to tell me I'm going to invest?" The latter-day boss would probably respond by appealing to his authority (as well as general ideas about what's good for the latter-day henchman). He could say, "I inherited the right to decide from my daddy, who got it in turn from his daddy. The bosses have always decided, and what the boss decides the henchman must do."

Stretch this out in time and one sees a crisis emerging. It would be very unclear why anyone should listen to the boss, for the original intent of the robber band has become confused with the authority of the person making the decision. The original intent to rob has been lost sight of, as the boss appeals to his authority to decide (based on the needs of the day, to be sure) what it is that would be good for the community to pursue.

This story illustrates in the small the problem of constitutional interpretation. Reflection on how it is the robbers might come to understand or discuss authority, and how they might or might not settle this conflict, may well expand the scope of the discussion of original intent as it occurs among us today.