

Constitutional Interpretation and the American Tradition of Individual Rights

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One of the most distinctive features of American constitutionalism is the idea that the Constitution is law.¹ It is fairly clear that the founders viewed the Constitution as a rather ordinary species of written law, albeit the supreme law of the land.² In fact, when the Supreme Court set forth its claim to arbitrate the meaning of the Constitution in the famous case of *Marbury vs. Madison*, the Court's central premises were that the Constitution is the law and that the courts are competent to interpret the Constitution in a case presenting a constitutional issue.³ While the great Chief Justice John Marshall relied on some specific texts to support the jurisdiction of the Court, the heart of the matter was that the point of a written constitution was to bind the government, and judges were therefore bound to give effect to the Constitution over conflicting legislative or executive acts.

Early proponents of the Supreme Court's interpretive role believed that rules of legal construction and the doctrine of precedent defined and limited the Court's power. Alexander Hamilton wrote, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."⁴ Hamilton's reference to the "rules" or canons of construction used as guides in the interpretation of written law reflected a widely held faith in a sharp distinction between the lawmaking performed by legislators and the judicial role of "interpretation."⁵ Hamilton thus expressed confidence that in fulfilling their duty to "declare the sense of the law" courts must always exercise "Judgment" and never "Will," lest they substitute "their pleasure to that of the legislative body."⁶ As long as judges stayed within their prescribed role of exercising judgment, rather than mere will, their role would be justified because they were following the superior will of the sovereign people to the inferior will of their governmental agents.⁷ One of the central issues in modern constitutional

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thought concerns whether (and, if so, to what extent) Hamilton's interpretive model can aid us in defining and justifying the Court's role today. Stated most generally, the question has come down to whether there is any set of objective principles of interpretation that is capable of limiting the role of courts in our constitutional scheme to any significant extent.

The greatest number of modern theorists agree that Hamilton's model limiting the judicial role to interpretation, as sharply distinguished from lawmaking, does not accurately reflect the realities of making and interpreting law. Lawmakers not only state and define rules for courts to apply; they also, by design as well as by inadvertence, provide courts with the task of filling out the implications of a general design or of confronting questions that the lawmaker did not address (or did not address clearly). For some theorists, however, the skepticism runs deeper yet. They view the distinction between lawmaking and interpretation as completely illusory and see judges as political actors who are virtually always imposing their will.⁸

Even among those who find neither extreme view acceptable, there is considerable debate. On the one hand are those who contend for a significant role for evidence of "original intent"—or, perhaps more broadly, "original context"—in any proper approach to the interpretive process.⁹ This call for a return to a jurisprudence of original intent has, in turn, been met with a chorus of criticism from those who see it as a threat to the progress of the living constitution.¹⁰ Unfortunately, the debate has frequently been approached from an either/or perspective, as though the intent of the framers must either control all constitutional questions or be used as mere window dressing.¹¹ While some advocates of original intent may overstate the extent to which historical evidence can aid constitutional construction, a commitment to the principle that evidence extrinsic to the text *can* clarify meaning in ways that bind decision makers does not entail seeing historical evidence as a grand key that will remove all difficulties in constitutional interpretation or entirely resolve the riddle of determining the proper role for courts in a democratic society. It will hardly do to launch a broad-scale attack on the use of original context on the grounds that claims as to its potential have been inflated.

Some seeming opponents of original intent have been somewhat obscure as to whether they are opposed to seeing original intent as a panacea or are staking out the much stronger claim that, based on theoretical or practical objections, original intent can never raise binding obligations.¹² Some have argued that the search for original intent will not provide answers to the difficult issues of contemporary application of constitutional provisions, but have not clarified whether text read in context might resolve ambiguities or establish outside boundaries or, at least, some core applications of a particular provision.¹³ Those most

emphatic about the total poverty of original context seem in general to be committed either to the view that the search for binding intent is practically impossible or even theoretically incoherent, so that only the text (if anything) binds us, or to the view that the framers lacked authority to bind us.

In this essay, I will offer grounds for doubting the correctness of the first of these views. As to the second, it would require a separate article to fully defend the traditional assumptions that the Constitution binds us until it is amended and that we are bound by the ascertainable meaning of the document where it is clear from text and context.¹⁴ These were the premises of *Marbury vs. Madison*, and I consider them to be woven into the fabric of our law. At a more practical level, the view that we are not bound by the clear meaning of the text would not be sustained by the American public for a month if the Supreme Court were to announce it as the basis for a “constitutional” judgment. And advocates of such positions would have a difficult time persuading presidents and legislators that they should consider themselves bound by Supreme Court decisions if the Court viewed itself as empowered to amend clear text by ascribing a meaning of its own. If courts are bound by clear text, as most have supposed,¹⁵ it is difficult to see why they should not be equally bound by context fully capable of clarifying the meaning of text.

In the second part of the essay, I will suggest some of the limits of original context in determining the meaning of constitutional language, and try to identify the senses in which the metaphor of a living constitution accurately describes our constitutional order, as well as the ways in which it might be misleading or unhelpful. The key to the analysis, as we shall see, is the distinction between the search for meaning and the role courts inevitably play in applying constitutional language when the search for meaning has ended. When the court’s role shifts from discovering meaning to effectuating generally worded norms, the debate over the role of context becomes, in important ways, a discussion of institutional and constitutional philosophy.

Finally, I will take up a central debate in modern constitutional theory—the debate over whether, or to what extent, the protection of individual rights is properly limited to some number of rights enumerated in the text of the Constitution. Applying insights developed in earlier parts of the essay, I will examine the questions raised by the American tradition of discovering some rights as implicit in the concept of limited government embodied in the social contract we call the Constitution, and will explore the possibilities and problems for both sides of the debate over the judicial articulation of unenumerated individual rights. That debate, however, as we shall see, need not implicate the straightforward duty of courts to apply the Constitution when its meaning is ascertainable from text and context.

THE POSSIBILITY OF FINDING ORIGINAL INTENT

Perhaps the most common argument against the use of original intent is that it is simply impossible to find.¹⁶ Opponents present a host of theoretical difficulties, including problems involved in deciding whose intentions should count as well as in determining and counting the intentions of relevant collective bodies (congresses or state ratifying bodies).¹⁷ The objections are formidable as well as complex, and even Monaghan, perhaps the most articulate proponent of original intent, has acknowledged that the possibility of a stable theory of constitutional interpretation may depend on the ability of scholars with like views to confront the problems raised.¹⁸ Moreover, some objections are embraced not only by those opposed to the very notion that the meaning of the Constitution could or should ever be fixed, but also by some who defend the notion of a binding constitutional text.¹⁹

No detailed response to these various objections will be attempted in this essay. Instead, I will offer some general skepticism about the more extreme forms of interpretive skepticism, followed by two illustrative examples designed to provide confirmation of these general observations.

It seems apparent that the most powerful and cogent objections to discovering the original intent underlying constitutional provisions apply equally well to the attempt to discover the ordinary legislative intent underlying any statute. The common problems include the difficulty of ascribing intent to any individual, complexities associated with counting intentions and determining the intent of large numbers of people, and problems presented by the distorting effects of group decision making. The constitutional context does present the unique problem of determining *whose* intentions count, whether ratifiers or framers, and how the intentions of many ratifiers could reliably be determined.²⁰ Virtually all of the skeptical literature, however, treats the remaining problems associated with determining intent as being sufficient to justify a skeptical position. While there exists a parallel controversy in the world of statutory interpretation as to the role that extrinsic evidence of intent should play,²¹ it is noteworthy that the trend among modern courts has been in the direction of increased use of relevant context, including legislative history, to shed light on the meaning of statutes.²² Theoretical objections to our ability to discover the collective intent of large groups of individuals have given way to the practical experience of most judges that original context can shed light on statutory meaning.

Some skeptics, such as Justice William J. Brennan, are capable on the one hand of debunking the notion of discovering original intent

while on the other praising “the vision of the individual embodied in the Constitution” and “the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure.”²³ Perhaps this sort of appeal to a basic “vision” or “design” is simply a device for linking modern value choices to the most general formulation of the weight of our political tradition.²⁴ Perhaps—but it has a peculiar ring to it, suggesting that the speaker is claiming fidelity to what is most basic about our constitutional system itself, to the framers’ own commitment to freedom and dignity.

But why should we think we can discern what is central to the constitutional design if we cannot possibly divine what was intended by any particular provision? The most thoughtful commentators on statutory interpretation have observed that one of the ironies of the attack on the concept of legislative intent is the frequent substitution of talk about legislative “purposes,” “policies,” and “objectives” without any attempt to show “that arguments leading to the rejection of talk about legislative intent have no force against these new expressions.”²⁵ Such observations seem equally applicable to appeals to the purpose of the Constitution.

As with many forms of skepticism, when proponents of skeptical views about original intent complete their arguments, they frequently turn (in other writings or sections) to familiar discourse about the purposes and intentions of those responsible for the Constitution or one of its important amendments—as though it were possible to discover them and to find them relevant at least in interpreting constitutional provisions.²⁶ This points up that no matter what real difficulties may be presented by constitutional text and history for the discovery of a usable original intent, those difficulties frequently enough seem surmountable with respect to at least some issues.

Now for the illustrations.

In the *Slaughter-House Cases*,²⁷ the Supreme Court adopted a reading of the “privileges or immunities” clause of section 1 of the post-Civil War Fourteenth Amendment that ran against the grain of the purposes of the clause as revealed by the legislative history of Congress’s deliberations. There are overwhelming grounds for rejecting the reading adopted by Justice Miller, writing for the majority, even though the arguments for the opposing view are neither overwhelming nor even conclusive on textual grounds alone.

In the *Slaughter-House Cases*, New Orleans butchers challenged the constitutionality of a state legislative grant of a monopoly on butchering. They contended that the granting of a monopoly constituted an abridgment of their right to pursue a professional calling, which fell within the scope of the “privileges or immunities” protected by the clause. The butchers argued that the Fourteenth Amendment “privileges

or immunities” clause was essentially derived from the “privileges and immunities” clause of article 4, section 2, and was designed to give federal protection to the basic civil rights protected in the earlier provision.

Justice Miller, however, found that the article 4 clause was an antidiscrimination provision to protect nonresidents in the exercise of rights otherwise within the exclusive regulatory domain of the states.²⁸ He concluded that an “article 4” reading of the Fourteenth Amendment clause would entail a revolutionary enlargement of the powers of Congress and the federal courts over state-law rights that were traditionally within the exclusive domain of the states—enlargement beyond what he was willing to acknowledge animated the framers of the amendment.²⁹ As an alternative, Justice Miller relied on the explicit distinction in section 1 between state and national citizenship to buttress his conclusion that the “privileges or immunities of citizens of the United States” more fully secured rights already protected by the Constitution, explicitly or implicitly, which were bestowed upon individuals by virtue of their national citizenship.³⁰ He listed as rights dependent on national citizenship the right to travel to the seat of government, to assemble and petition, the writ of habeas corpus, and rights guaranteed by virtue of treaties and other national enactments.³¹

There is only one significant problem with Justice Miller’s reading of the privileges or immunities clause—it is clearly wrong. There is no question that article 4 was the antecedent provision that inspired the privileges or immunities clause of the Fourteenth Amendment. Congress enacted the Civil Rights Act of 1866 and sent forth the Fourteenth Amendment in response to the enactment of the so-called Black Codes by the slave states of the South.³² The Black Codes were designed to effectively undercut the Thirteenth Amendment prohibition on slavery by denying basic civil rights to the former slaves, rights such as the right to contract, to own property, to testify in court, and to sue and be sued.³³ In justifying the view that Congress should act to enforce these civil rights belonging to individuals because of their United States citizenship, congressional leaders invoked the privileges and immunities clause of article 4.³⁴

In defense of both the civil rights act and the proposed amendment, proponents relied on the case of *Corfield vs. Coryell*.³⁵ In that early decision construing the scope of the article 4 privileges and immunities clause, Justice Washington found that the rights protected by that provision included all the basic civil rights that individuals enjoy in true republics.³⁶ These rights included the same rights enumerated in the civil rights act, as was observed by its House and Senate sponsors.³⁷ While the *Corfield* case itself concerned the limits of state power to discriminate against nonresidents as to the relevant privileges and immunities,

proponents of post-Civil War provisions for civil rights used the broad language in *Corfield* to support the argument that all American citizens held such federally-protected civil rights even against their own state governments.

There is room for significant doubt as to whether congressional leaders correctly interpreted *Corfield* and article 4.³⁸ There is no doubt, however, that Congressman John Bingham, the principal draftsman of section 1 of the Fourteenth Amendment, interpreted article 4 broadly and drafted the Fourteenth Amendment clause to ensure the rights listed in *Corfield*.³⁹ By contrast, Justice Miller's interpretation of the provision not only finds no support in the legislative history of section 1, but is actually undercut by that history.

It is tempting to believe that the text alone is sufficient to prove that *Slaughter-House* misconstrued the provision. The phrase "privileges or immunities" in section 1 certainly suggests a possible connection to the antecedent article 4 provision. But the language as easily points in Justice Miller's direction. The language in section 1 refers to the "privileges or immunities of citizens of the United States" as opposed to article 4's "privileges and immunities of Citizens in the several States." Considering that the first sentence of section 1 specifically distinguishes state and national citizenship, it is quite plausible to construe the clause as recognizing a second, distinguishable set of rights.

It has been further argued that Justice Miller's construction renders the clause superfluous or trivial.⁴⁰ It is thought to be superfluous because, by Miller's own formulation, it is referring to rights that already receive protection under the Constitution, either implicitly or explicitly. But there are other constitutional provisions that are merely "declaratory" of what many thought was already understood. For example, the Tenth Amendment states the principle, already implicit in the Constitution, that powers not delegated to the national government are reserved to the states or to the people. Moreover, providing greater security for several of the rights listed by Justice Miller, by giving them textual recognition and empowering Congress to enforce them, looks trivial to us only because we know from extrinsic evidence that the Fourteenth Amendment was really enacted to protect the freeman against hostile state action.⁴¹

One might question how significant these conclusions are, particularly since there remains controversy over the intended breadth of the privileges or immunities clause.⁴² The practical implication of modern skepticism about the search for intended meaning is that many provisions in the Constitution will be reduced to a debate about "constitutional policy." Should we construe the clause broadly so as to maximize the protection given to individuals against the state? Or are we more properly concerned about the potential impact on our federal system, or on the

exercise of judicial power, of the broader reading of the clause? The most absolute skeptics about intent frequently seem to believe that they have the best answers to these sorts of questions, better than any the framers intended to embody in the text.⁴³

As for myself, I am much more certain that Justice Miller acted illegitimately in construing the clause contrary to the overwhelming evidence of its intended meaning than I ever could be that his concerns about the erosion of state power and the enlargement of judicial power were illegitimate or lacking in judicial statesmanship. However, for those interested in preserving individual rights, the battle against original understanding could in the long run work to undercut our commitment to abiding by the rights recognized in the text, properly read. The privileges or immunities example points up that such questions are not all of the same order of magnitude. Particularly where basic questions as to the essential thrust of a provision are presented by an ambiguous text, the possibilities for discovering a determinative intent are quite genuine. One additional example must suffice.

The historical evidence is overwhelming that article 1's grant to Congress of the power "to declare war" means, when read in context, that Congress holds the exclusive power to change the status of the nation from peace to war to advance foreign policy objectives (as opposed to defending against sudden attack).⁴⁴ When contemporaneous evidence extrinsic to the text is combined with the understanding reflected in the nation's experiences, it is clear that the President may wage war only when it is thrust upon the nation by an enemy.⁴⁵ Some commentators have raised legitimate issues as to the modern reach of the President's emergency power in a world in which we are committed as a nation to the idea that an attack on Western Europe, for example, is an attack on the United States.⁴⁶ But such questions, reflecting the vagueness of the framers' concept of a "sudden attack" that warrants executive dispatch, cannot obscure completely the distinction between a policy decision to wage war and war that is thrust upon us. As Wormuth and Firmage point out, the framers "did not give [the President] the right to choose between war and peace, or the right to make a judgment concerning the security of the United States"; instead, they "provided for the President to act in the defense of the country."⁴⁷ The commitment of half a million troops to Vietnam or the mining of harbors in Nicaragua can hardly be justified by any notion of emergency power unless we simply ignore the mandate of the Constitution itself. Once again, however, it is much easier to say what the text requires, in the light of original context and confirming history, than what modern conditions require of constitutional "statesmen."⁴⁸

REFLECTIONS ON THE IDEA OF A LIVING CONSTITUTION

There is a conventional wisdom that the Constitution is *sui generis* and requires an entirely different interpretive method than a statute. This view is frequently expressed with the metaphor of a “living constitution” or by reference to Justice Marshall’s famous reminder “that it is *a Constitution* we are expounding.”⁴⁹ It is not easy to separate the senses in which these ways of speaking tell us something accurate and important from the ways in which they can become dangerously misleading. For one thing, while the Constitution is obviously not a code, it unquestionably contains provisions that are as specific and unambiguous as those found in any statute.⁵⁰ If the notion of a living constitution is to be applied to these provisions, then we truly have no written constitution, for we have turned it into a blank check. Moreover, as we have seen, some questions presented by ambiguous or vague texts can also be resolved with the aid of original context. To ignore what that context tells us is quite simply to amend the Constitution by construction, something that Justice Marshall would not have countenanced.

Occasionally, even thoughtful scholars have suggested that the Constitution must change in meaning to confront technological changes that the framers could not foresee, such as home invasions through electronic eavesdropping.⁵¹ While our changing world can create difficult choices for constitutional interpreters, many such examples (including new methods of invading privacy) can readily be seen as falling within the original meaning and intent of relevant provisions.⁵² No one has doubted that Congress’s power to regulate commerce includes—and was intended to include—not only commercial shipping but railroads and air transportation as well, though neither existed in 1787. Lon Fuller long ago pointed out the conceptual confusion involved in the assumption that we think in particulars rather than in general concepts—a view that he called “the pointer theory of meaning.”⁵³ To insist that electronically stored data receives no protection under the Fourth Amendment because the framers did not know of it would make as little sense as contending that a 1920 statute dealing with “motor cars” could not be read as covering Volkswagens.⁵⁴

It does not require a special theory of constitutional interpretation to acknowledge that the meaning of constitutional provisions is not necessarily circumscribed by the immediate purposes of the framers. Experts on language and statutory interpretation have long recognized that meaning can outstrip intent, for “an author inevitably encompasses in what he says more than he has specifically in mind and often encompasses even more than he has generally in mind.”⁵⁵ Furthermore, there may be constitutional provisions that are sufficiently vague and general as to require supplementation and whose meanings can hardly be

equated with the expectations held for them.⁵⁶ This problem, too, is not unique to constitutional construction, as modern antitrust legislation provides a classic example.⁵⁷ These clauses will require constitutional decision makers (and in particular courts) to develop the provision's contours. This is not to say that such provisions are meaningless but only that the language alone—even when read in relevant context—will not resolve a large number of contemporary issues.⁵⁸ The result is that we inevitably will have a living constitution to some extent. Yet even with vague, open-textured provisions, there remains the issue of the meaning to be ascribed to them. Simply because the constitutional language read in context is not dispositive, it does not follow that the Supreme Court is free to go directly to moral theory or societal consensus to supplement the provision's meaning.⁵⁹

In the analogous field of statutory interpretation, it is usually thought that the court should create a rule that is at least not inconsistent with what extrinsic evidence shows were the purposes and intentions of the legislature. Lacking any such clear evidence, courts are expected to make their decisions cohere with what is already settled by the legal order.⁶⁰ Even if these basic assumptions were transferred to the constitutional arena, courts would be required to make some basic value choices because the history is frequently quite unclear and the vague text invites consideration of whether contemporary problems are sufficiently like those confronting the framers to warrant inclusion within the scope of the provision.

The larger issue is whether courts *ought* to seek authoritative guidance from the reasonably knowable intentions and purposes of the framers in these circumstances. Many contend that changing conditions and moral conceptions make it inevitable that modern courts will basically go it alone in filling out the meaning of the Constitution's open-textured provisions, with due regard for the outside limits suggested by a text, continuity, and the lessons of history.⁶¹ There is certainly reason to doubt whether modern decision makers ought to feel compelled by the "original understanding" of broadly worded provisions where it appears that the framers themselves were essentially involved in the same process we are—engaging in a contest of opinion over the appropriate implications of the principle being invoked.⁶²

Finally, even if we agree that many constitutional issues are left unresolved by text and history, it does not necessarily follow that this indeterminacy should lead to a continually expanding judicial role.⁶³ As Neil Komesar has recently observed, these coexist with a constitutional system that assumes, on almost any current reading, that the lion's share of society's decision-making load will be carried by the political branches. No matter how vague and general the text, advocates of an activist judicial role must explain why, in a world of imperfect

decision-makers, a given set of questions are best resolved by the institution we know as courts.⁶⁴ One prominent commentator, Terence Sandalow, has observed that although an independent judiciary may be better suited than other government actors to dispassionately apply governing principles despite competing pressures, it is more debatable whether the judiciary is especially suited to discern or generate society's fundamental values.⁶⁵

The most important contemporary challenge to this traditional caution about the role of courts comes from individual rights theorists who contend that the Supreme Court needs a broader, rather than a narrower, vision of its role. For them the key to the open-textured provisions of the Constitution is to be sought in the natural rights heritage that served as a backdrop to the Constitution's recognition of individual rights. It is to the question of the relevance of our natural rights heritage to the contemporary debate over individual rights that we now turn.

THE UNWRITTEN CONSTITUTION

The debate over the interpretation of the written constitution is complicated in the area of individual rights by the existence of a tradition that sees the text as suggestive, rather than exhaustive, of the rights protected by the Constitution. The idea of an "unwritten constitution" has its roots in the natural law tradition that influenced the founding period through the writings of John Locke and others.⁶⁶ Resting on the social contract political theory, the premise was that men bring rights with them to civil society and that government's role and justification is to protect those natural rights. From the viewpoint of this tradition, the written constitution embodies this underlying moral and political model but is not a substitute for it.

Early in the nation's history, Justice Chase reached beyond the specific textual issues presented in *Cedar vs. Bull* to clarify his view that state power is not "without controul" even though "its authority should not be expressly restrained by the Constitution, or fundamental law, of the State."⁶⁷ According to Chase, "The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it." Chase was not alone in this view. The leading judges of the nation prior to 1830, including Justices Marshall and Story, rested decisions in whole or in part on a natural law ground in protecting contract and property rights against retroactive or otherwise arbitrary legislative acts.⁶⁸

Even so, the tension between this strain of thought and the justification of judicial review in *Marbury vs. Madison* is apparent.⁶⁹ *Marbury's* rationale is that there is a judicial duty to fulfill the purpose

of a written constitution by giving effect to the “supreme law of the land.”⁷⁰ Justice Marshall relied on the Constitution’s explicit grant to the Supreme Court of jurisdiction over cases “arising under *this* Constitution.”⁷¹ It is not obvious how the Constitution empowers the Court to strike down laws because they run afoul of proscriptions of natural law that are not expressed in the constitutional text. It is not surprising, then, that Justice Chase’s natural rights theory in *Calder* was strenuously opposed in a separate opinion by Justice Iredell.

A constitutional founder, Iredell contended that the purpose of the written constitution was “to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries.” While any legislative act that violates those constitutional prohibitions would thus be void, courts may not pronounce as void legislation “within the general scope of [the legislature’s] constitutional power” merely because it is deemed “contrary to the principles of natural justice.” Iredell saw not only a conflict with the concept of a written constitution, but also a danger to republican government. Since “ideas of natural justice are regulated by no fixed standard” and are the subject of disagreement by reasonable men, Iredell could see no basis for courts to use their own views of the proper application of “abstract principles of natural justice” to nullify the acts of the people speaking through their elected representatives.⁷²

In the long run, the perceived tension between the natural rights tradition and the written constitution drove the natural rights doctrine underground, where it found a home in the due process clauses of state constitutions and in the federal Bill of Rights and the Fourteenth Amendment.⁷³ Such provisions generally provided that no person could “be deprived of life, liberty, or property, without due process of law.”⁷⁴ The agreed-upon core meaning of these clauses was that individuals must have notice and an opportunity for a hearing to contest the legal justification of the state for any of the enumerated deprivations.⁷⁵ Courts reasoned further that this right to adjudication belonged in the courts and that laws that applied new standards retroactively or that effectively adjudicated particular cases, rather than establishing general rules to govern future conduct, equally denied individuals the opportunity to show that the deprivation of their interests was not justified by preexisting legal standards.⁷⁶

The doctrine that legislatures must proceed by “general” rules became the wedge that opened the door to broader arguments that validly enacted laws might partake of the “form” of law only, without being substantially valid “law” sufficient to justify a deprivation of liberty and property.⁷⁷ Courts thus saw themselves as empowered to determine that legislatures had acted arbitrarily and had therefore denied due process of law. The transplanted natural rights tradition thrived, and due process

became the container into which the Supreme Court poured its own vision of implied limits on government. During the first third of this century, the Court poured into that container a laissez-faire vision rooted in nineteenth-century liberal political theory as it struck down social reform legislation that it perceived as being in conflict with the nation's heritage of private rights.⁷⁸

With the paradigm shift that was called the New Deal, the Supreme Court repudiated a good deal of its interventionist, laissez-faire case law.⁷⁹ But the concept of implied rights was never entirely rejected, and more recently the Court has harked back to the laissez-faire era in protecting rights of access to contraception and abortion while elaborating the newly-fashioned right of privacy—a fundamental right of gradually unfolding but still largely uncertain dimension.⁸⁰

As with Justice Chase's pure natural law theory, of course, the due process–natural rights tradition has always had its critics. Scholars have contended that the implied rights reading of the due process clause is an unwarranted gloss that lacks adequate textual and historical roots.⁸¹ The research to date seems at least to bear out Corwin's historical thesis that the doctrine owes more to the natural rights premise that there are implicit limits on government power than to any attempt to explicate the historical meaning of "due process of law."⁸² While some judges and scholars would thus reject the doctrine entirely, others have been satisfied to caution judges to exercise restraint as they consider the practical implications of a nonmajoritarian institution imposing a natural rights agenda on a pluralistic society.⁸³

Since the 1950s, the natural rights debate has been rekindled by the rediscovery of a text that seems more naturally suited to accommodate such a reading of our constitutional system: the Ninth Amendment, which reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." A number of scholars have found in this textual reference to unenumerated rights a reflection of the social contract and natural rights framework out of which our constitutional system developed.⁸⁴ It is possible that this is the text that undergirds Justice Chase's thesis that some enforceable constitutional rights are implicit in the nature and purpose of government, whether or not they are spelled out in any text.⁸⁵

This Ninth Amendment argument found its way to the Supreme Court for the first time in 1965, when the Court decided *Griswold vs. Connecticut*. In a concurring opinion, Justice Goldberg relied on the Ninth Amendment to undergird the Court's decision establishing a constitutional right to privacy and striking down a Connecticut statute that prohibited the use of artificial birth control by married couples.⁸⁶ Since the *Griswold* decision, the Supreme Court has relied on the Ninth Amendment only sparingly, but an increasing number of lower federal

court decisions have cited the Ninth Amendment in support of broad holdings in favor of individual rights.⁸⁷

As one might expect, however, there is no consensus that the Ninth Amendment is properly read as empowering courts to enforce unenumerated rights. The Ninth Amendment emerged from the debate at the state ratifying conventions as to the necessity and risks of including a bill of rights in the Constitution.⁸⁸ While many ratifiers objected to the framers' failure to include a bill of rights in the Constitution, fearing that a powerful central government would pose a threat to liberty, opponents of a bill of rights contended that the rights of the people were not at risk because the national government had been granted only limited, and enumerated, powers.⁸⁹ The underlying premise of this argument was that under the Constitution's scheme of limited government the sovereign people retained as rights all the powers not specifically delegated to the national government.⁹⁰

Even while constructing the case for the necessity of a bill of rights, James Madison acknowledged the force of the argument that "the Constitution is a bill of powers, the great residuum being the rights of the people." Madison went on, however, to observe that the national government "has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent."⁹¹ A bill of rights was therefore needed.

More fundamentally, opponents of a bill of rights objected that the listing of specific rights might actually undercut the original design for protecting rights by raising the inference that the national government was empowered to invade those spheres of private rights not included. James Wilson set forth this argument in its plainest terms before the Pennsylvania ratifying convention:

A bill of rights annexed to a constitution is *an enumeration of the powers reserved*. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.⁹²

Madison, who had once opposed inclusion of a bill of rights, wrote to Jefferson in 1788 that he would support a bill of rights "provided it be so formed as not to imply powers not to be included in the enumeration."⁹³ The Ninth Amendment's "rights retained by the people," then, might be simply the "great residuum" of rights and powers that Madison alluded to even while defending the necessity of a bill of rights. On this reading, the Ninth Amendment is a rule of construction that prohibits the inference of new or enlarged governmental power from the enumeration of specific rights. This "residual rights" reading is the one adopted by the two dissenting opinions in *Griswold vs. Connecticut*.⁹⁴

The legislative history of the Ninth Amendment lends support to this “residual rights” reading. Prior to the work of the first Congress, New York and Virginia addressed the “implied powers” concern in their proposed amendments to the new constitution, both of which stated that the clauses which limited Congress’s powers should not be construed to imply that Congress may exercise any powers not given in the Constitution. Indeed, both also provided that the rights provisions should be construed either as “exceptions to the specified powers” or “as inserted merely for greater caution,” thereby acknowledging the continuing significance of the framers’ structural protection of the residuum of rights.⁹⁵

It is obvious that Madison drafted the resolution that became the Ninth Amendment from these state proposals. He included additional language, however, as shown by the italics in the text of his resolution reprinted below:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed *as to diminish the just importance of other rights retained by the people*, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁹⁶

The basic question is whether the italicized language was intended only to emphasize the protection of “residual” (or “retained”) rights of the people, or whether it was intended instead—or also—to refer decision makers to legally enforceable unenumerated rights that might limit the power of Congress acting generally within its enumerated powers.

Madison explained the resolution in these terms:

It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure.⁹⁷

Given the entire context, a surprising number of commentators have taken this statement as a straightforward articulation of the “enforceable rights” construction of Madison’s resolution.⁹⁸ But the “enforceable rights” construction is anything but straightforward.

For one thing, the language of the statement easily lends itself to the more restrictive “residual rights” reading. Madison says that the disparagement of retained rights that stems from “enumerating particular exceptions to the grant of power” occurs when it is inferred that the rights are “assigned into the hands of the General Government.” Madison’s fear seems to be that “particular exceptions” to power will be read to infer enlarged powers that disparage the rights that otherwise would have been

“retained” by the device of enumerated governmental powers. Rather than being retained by the people, they will be “assigned into the hands of the General Government.” Additional considerations lend plausibility to this equally straightforward reading. Since Madison’s resolution clearly speaks to the feared enlargement of powers construction that had prompted the New York and Virginia proposals he drew upon, it would have been odd for him to introduce so casually a quite separate approach to providing greater security to the people’s rights.

It is true that the final text of the Ninth Amendment omits the language referring to a feared enlargement of powers construction and refers only to the concern that retained rights not be denied or disparaged. While the drafting history is unavailable, it seems plausible to think that language forbidding a construction that disparaged rights and implied enlarged powers was considered redundant and that the language of the amendment was therefore purified toward an emphasis on the goal of preserving residual rights. The alternative is that the drafters at some point decided to pursue exclusively the separate strategy of referring to unenumerated, enforceable rights as the most effective means of maximizing the protection of rights, in the place of seeking to avoid the inference of expanded governmental powers.⁹⁹

The historical evidence suggests that Madison did not see the refined version as operationally different from his original proposal. During the ratification debate in Virginia, Edmund Randolph objected to the language employed, contending that the provision “should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.”¹⁰⁰ But Madison, in a letter to President Washington, called Randolph’s argument “fanciful,” contending, “If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.”¹⁰¹ Madison appears to have expressly adopted the “residual rights” construction of the amendment and to have rejected Randolph’s suggestion that the proposed language declared an alternative strategy.¹⁰²

It may be another matter, of course, to say that the history forecloses reliance on the Ninth Amendment in support of an implied rights approach to the Constitution.¹⁰³ Considering that Madison accepted the need for a bill of rights, despite the Constitution’s implicit recognition of residual rights, it is conceivable that he or others came to prefer the strategy of referring to additional, unenumerated limitations to one of merely avoiding a construction of enlarged powers. Moreover, there is no conclusive evidence that members of Congress, or the legislatures that ratified the Bill of Rights, understood this language as in effect precluding only implied grants of power to Congress.¹⁰⁴ Whether its

adopters intended it or not, early in the nineteenth century state constitutions adopted essentially identical language, even though, given the absence of the device of enumerated powers, the only purpose of such language would be to refer to additional limitations.¹⁰⁵

At the least, however, the historical evidence belies the modern assertion that the Ninth Amendment is the key to construing the individual rights provisions of the Constitution.¹⁰⁶ Rather, it is a symbol of the debate over the search for rights going beyond the text. Most constitutional law scholars agree, for example, that the Ninth Amendment, like the Bill of Rights generally, initially served only to limit the national government.¹⁰⁷

The Fourteenth Amendment, enacted after the Civil War, is the Constitution's primary source of limitation on state power. But our most pressing individual rights controversies arise most frequently in challenges to state law. While one historical claim is that the Fourteenth Amendment was intended to incorporate all of the Bill of Rights (which would presumably include the Ninth Amendment), that claim remains controversial and has never been embraced by a majority of the Supreme Court.¹⁰⁸ Modern invocation of the Ninth Amendment is best seen as a way of appealing to the natural rights tradition as a source for informing our judgment in giving effect to the generally worded provisions of the Fourteenth Amendment.

A growing number of contemporary theorists see the task of constitutional decision makers as that of drawing out the modern implications of the social contract and natural rights tradition that characterizes our constitutional origins and development. At least one set of such commentators perceive in these traditions a commitment to human rights and individual dignity. The key to giving effect to the Constitution's generally worded provisions, in their view, is the explication of our moral commitment to the dignity and autonomy of individuals, and the interpretation of individual rights becomes essentially an attempt to explicate the principles of liberal moral and political philosophy.¹⁰⁹ Indeed, in one prominent formulation, the Supreme Court is seen as a kind of moral prophet that speaks on behalf of the essentially religious commitment of Americans to the possibility of moral decision making and moral progress.¹¹⁰ Whatever the formulation, the role of courts in human rights cases is conceived as discerning moral truths rather than pursuing some legal norm rooted in text, history, tradition, or consensus.

Many would agree that the existence of the implied rights tradition, the interpretive freedom provided by the generality and vagueness of central texts, or simply the long-standing nature of some governing precedent, make it unthinkable that we will cease to find some individual rights to be implicit in the text or design of the Constitution. Many,

however, question whether this leads to the ideal of the courts as ultimate arbiters of human rights in general. It is important to realize that there are other ways of understanding our origins and traditions, other voices to be heard beyond the modern theorists who think they have discovered the origins of liberal theory and the tradition of natural rights.

In the first place, even though the natural rights tradition has roots in currents of thought during the founding period, it is by no means clear that the founding generation as a whole equated natural and constitutional rights.¹¹¹ If social contract thinking leads naturally to a written constitution, it does not follow that the founding generation embraced the political philosophy of John Locke, let alone that Lockean political philosophy is especially congenial with modern versions of Contractarian moral and political theory.¹¹² Indeed, a leading scholar on the “unwritten constitution” acknowledges that the notion of an enforceable fundamental law underlying the written norms was identified during the founding period with conservative political forces that were concerned with ensuring common law rights that they identified with British traditions and the art of legal reasoning.¹¹³ Modern moral theories of human rights have come a long distance from the thinking of the founding generation.

Moreover, the founding period was characterized by a preoccupation with public virtue as a prerequisite to republican forms of government.¹¹⁴ While these republican thinkers did not necessarily conceive of government as charged with inculcating the qualities of virtue, their political thought presumed the existence of public values (a “civil religion”) embodying the basic principles of the Christian life.¹¹⁵ Modern commentators have observed that the republican political theory of the founding period did not rest on liberal foundations, and legal historians increasingly see liberalism as rising to dominance in American thought only at a later period.¹¹⁶ While the Constitution has been seen as embodying more skeptical attitudes about human nature than the more optimistic versions of republicanism, the founding generation was in general more republican than liberal. If the republican ideal of community and its commitment to the search for the common good provide a historical link to the modern positive state’s rejection of some of the individualistic postulates of nineteenth-century liberal theory, it is equally in tension with modern liberalism’s preoccupation with individual autonomy.¹¹⁷

Judged by their characteristic thinking, the delegates to the Great Convention seem an unlikely group to have founded a government based on overarching liberal principle with the Supreme Court as moral prophet. For one thing, despite the support for judicial power to interpret the Constitution, there was a good deal of skepticism about judicial power generally during the founding period.¹¹⁸ More broadly, the most

important roles at the convention, as well as in the new government, were played by men of affairs who relied upon experience and history and were skeptical of high theory in political matters.¹¹⁹ As M. E. Bradford points out elsewhere in this issue of *BYU Studies*, the framers as a group were more impressed with the traditions embodied in the British constitution than with any abstract political theory.

Modern theorists have contended that liberal political theory nevertheless does the best service to the framers' general intentions because it most adequately explicates the rights they recognized in the light of the background principles they relied upon.¹²⁰ To the extent that these contentions involve any sort of historical claim, Terrance Sandalow has provided an effective critique:

By wrenching the framers' "larger purposes" from the particular judgments that revealed them, we incur a loss of perspective, a perspective that might better enable us to see that the particular judgments they made were not imperfect expressions of a larger purpose but a particular accommodation of competing purposes. In freeing ourselves from those judgments we are not serving larger ends determined by the framers but making room for the introduction of contemporary values.¹²¹

The argument from the framers' "general intentions" is probably more accurately viewed as a normative theory aimed at making sense of the framers' choices as we attempt to build a just and coherent body of constitutional law. But even when viewed in this light, it remains passing strange that the "best" interpretation of the framers' choices, and of our individual rights tradition, would call on courts to engage in a systematic explication of a complete moral theory of rights contrary to the role courts have played in our constitutional system from the earliest days of the republic. Even with the implied rights theory taken into account, American courts have never seen themselves as charged with the duty of explicating and enforcing a general theory of human dignity and autonomy.¹²²

As for our constitutional development, the judicial recognition of implied limitations on government grew up in tension with a growing judicial recognition of the power of the state to regulate—what courts called the "police power."¹²³ In traditional formulations, the police power enabled the state to legislate to promote the public health, safety, welfare, and morals.¹²⁴ In general, courts historically presumed that, except for the violation of specific constitutional prohibitions, states were limited only by the duty to legislate in the public interest—a standard that of itself suggests rather limited constraints on government power, precluding only legislation that irrationally confers benefits or imposes costs on a group (or groups) of citizens. While various liberal premises can be (and on occasion have been) worked into the requirement of pursuing the general or public interest,¹²⁵ there is little question

that the traditional understanding of the nature and scope of the police power cuts against the imposition of a general liberal theory.¹²⁶ To use a single example, the modern liberal critique of morals legislation involving so-called victimless crimes conflicts with the competing police power tradition.

At a somewhat more philosophical level, an important strand of the American judicial tradition—embodied by Justices Holmes, Frankfurter, Harlan, and others—has given voice to the concerns about the prospects for objectivity in moral and judicial decision making first expressed by Justice Iredell in *Calder vs. Bull*. This tradition sees the Constitution, including its potentially open-ended provisions, as providing room for a wide variety of views about the proper ends of government. To the extent that constitutional text and context provide no clear answers, these judges have sought fundamental rights only as revealed in long-standing traditions and have advocated judicial self-restraint as the guiding virtue for judges.¹²⁷

Perhaps not surprisingly, in light of these competing elements of our heritage, although the modern Supreme Court has resurrected the implied rights tradition, its decisions appear based more nearly on its own perception of tradition, consensus, and policy than on any overarching moral theory of individual rights.¹²⁸ While this may partially reflect the difficulties of institutional decision making, it also reflects a basic dichotomy in thinking about individual rights that has its roots in the founding period. As described by the great legal theorist Alexander Bickel, the “Contractarian” tradition sees individual rights as a set of preexisting moral standards by which political society is judged. This is the tradition of natural rights or God-given rights—rights that predate the written Constitution and are embodied in it. The other tradition, which Bickel calls the “Whig” model, sees rights as rooted in, and limited by, an unfolding human culture and the values of a particular society. As a political or constitutional theory, the Whig view does not completely eschew value choices in an evolving world, but it is inclined to be “flexible, pragmatic, slow-moving, highly political” as well as “relativistic.”¹²⁹ Applied to judicial decision making, the Whig model evokes the image of the traditional common law role of courts as the discerners of gradually evolving societal values rather than the image of reformer or platonic guardian.

The significance of these two models can, of course, be overdrawn, for we are dealing with a spectrum of views rather than a mere dichotomy. Many modern thinkers, for example, embrace neither the optimism of some modern Contractarians nor the degree of “mature skepticism”¹³⁰ exhibited by Bickel and the judicial tradition beginning with Holmes. Some of these theorists see a fairly broad scope for a constructive judicial role in an imperfectly democratic society, but

nevertheless contend for the need to distinguish moral and legal issues and for the importance of questions of relative institutional competence in assessing the nature and extent of the judicial role.¹³¹ In general terms, however, these theorists share the Whig assumption that individual rights arise from a society and its values and that the implied rights tradition does not of itself charge judges with the task of searching for the holy grail of moral and natural rights.

It may not be possible, or even fruitful, to resolve the question as to which vision of our constitutional order best comports with our constitutional origins and tradition. For one thing, the general tension has been with us from the beginning. Moreover, it can equally be contended that (at least some) modern exponents of Bickel's Whig model reflect twentieth-century skepticism and pluralism that fail to do justice to the "higher law" background of the Constitution, or that modern Contractarians pursue a substantive agenda foreign to the founders' thinking while advocating a judicial role that would have been unthinkable in eighteenth-century America. There are elements of truth in both of these critiques, but each misses the point that if the framers did not enumerate all the rights that might be recognized, they also did not define an underlying theory of rights or prescribe a particular judicial role in giving them effect.

For the thoughtful Latter-day Saint, this continuing debate is bound to prompt careful reflection. On the one hand, we have been assured that the freedoms guaranteed by the Constitution are divinely inspired to promote human agency.¹³² President Ezra Taft Benson recently stated his conviction that one of the Constitution's "eternal principles" is the idea that our rights are "God-given as part of the divine plan" rather than "granted by government as part of the political plan."¹³³ Latter-day Saints therefore have reasons for preferring a Contractarian model of preexisting rights that earthly government is bound to respect. Arguably, the corollary is that we are obligated to fill out, to the best of our ability, a complete theory of our God-given liberty rather than relying to any degree on the relativistic assumptions of the Whig model. As Edwin B. Firmage's article in this issue of *BYU Studies* illustrates, the relativistic thinking suggested by the Whig model can lend itself to decision making undergirded by little more than society's conventional morality—which in one well-known historical instance, at least, led to oppression of Mormon religious thought and practice.

For Latter-day Saints, the natural rights tradition might also seem to warrant (to use prominent examples) modern Supreme Court decisions recognizing the right of parents to send their children to private schools and suggesting that legal restrictions on parental decision making as to the size of their families could be constitutionally justified only by a compelling government interest.¹³⁴ It might therefore be

doubted whether any nonliberal constitutional theory will be sufficiently robust to ensure the degree of personal liberty that our religious commitment to freedom requires. This is essentially the position taken by R. Collin Mangrum in his article in this issue of *BYU Studies*.

On the other hand, the founding era's republican themes underscoring the connection between virtue and democratic government are also likely to strike responsive chords within Latter-day Saints.¹³⁵ For example, many thoughtful people continue to see the potential of law as a teacher of moral standards that, if lived by, arguably enhance personal autonomy and capacity.¹³⁶ Within liberal theory, the debate over the legitimacy of laws prohibiting suicide and access to obscene materials, drugs, and prostitution, to use representative examples, would turn on the question of whether the conduct threatens direct and immediate harm to others. By contrast, nonliberal theory would justify the prohibition of such conduct because of its impact on the individuals participating as well as on the moral climate of society.

It is doubtful whether the Mormon concept of the inspired Constitution—and the inspired nature of its relationship to human freedom—is a sufficient basis for preferring liberal to nonliberal conceptions of the proper scope of political liberty. That the freedom of religion and conscience were inspired elements of the Constitution does not tell us whether to embrace social contract moral theory or any other particular conception of those rights. That God is the source of the protection of liberty does not necessarily imply that political freedom is the ultimate priority or that there is not a broader balance to be struck between liberty and competing values than the one embodied in liberal theory. Freedom of religion and conscience, defined in some fairly robust way, are required so that individuals might meaningfully choose among competing claims of ultimate truth and then act upon those choices. Obviously, for example, the creation of an official state church, particularly if backed by legal restrictions on religious liberty, could significantly impede the ability of individuals to exercise their agency as to life's central questions. But while it can be plausibly argued that an underlying principle of respect for individual moral autonomy requires protection of a much broader range of life-style choices than the courts have protected historically, we have no more definitive grounds for determining the scope of the inspired principle than we do for concluding that the framers intended the concept of constitutional rights to be so extended.¹³⁷

It seems clear, in any event, that morals laws do not pose the kind of irreconcilable conflict with a meaningful ideal of human freedom presented by the actions of totalitarian regimes around the world.¹³⁸ Indeed, such laws frequently involve close trade-offs between competing values that relate to freedom. For example, although drug

laws restrict freedom of choice, the problems of tolerance and physical and psychological dependence on drugs raise a serious question whether we act to prevent individuals from in effect alienating their freedom—a choice we do not authorize in the case of slavery because we consider personal freedom to be an inalienable right.¹³⁹

Moreover, in a society in which the pressures to use drugs are frequently intense, legal prohibitions may be needed simply to keep in equilibrium the forces impacting on individual choice. While the notion of “authentic” choice as a principle for limiting freedom may carry seeds of abuse, I remain skeptical of a “tolerance” for competing conceptions of the good life that would require government to stand by while thousands of young people (some of them legally adults) stumble into heroin and cocaine habits that will cost them dearly, body and soul.

Many would therefore question whether Contractarian models, based on the inspired Constitution or not, ought to govern our resolution of particular questions about the reach of liberty. It might be contended, for example, that the proper decisions with respect to regulating morals ought to come from democratic debate and a delicate legislative balancing of the benefits and harms that flow from such laws as well as from their repeal. Some would contend that in a world in which laws have served a standard-setting function, the repeal of morals legislation might be taken as a moral sanction of the previously prohibited conduct. To the extent that we may doubt whether the Constitution should be read as preempting this political debate, particularly in view of the long-standing nature of many such laws, it is perhaps the Whig view that is speaking.

Skeptics of the Contractarian approach might also hold the view that commitment to the existence of moral rights does not in itself resolve the institutional question as to who ought to put them into effect. The Constitution expressly provides for freedom of religion and speech and implicitly recognizes the power of courts to scrutinize laws for their constitutionality. But, as we have seen, it is far less clear that the Constitution embodies liberal theory or contemplates judicial enforcement of far-ranging rights. The Supreme Court’s *laissez-faire* era demonstrated that the preservation of rights of some can come at the cost of the legitimate rights and interests of others. Many contend that the Supreme Court’s decision legalizing abortion similarly rejects the claims offered on behalf of unborn life in favor of other claimed rights.¹⁴⁰ As a society, in any event, we have concluded that the judicial impositions of the *laissez-faire* era did more harm than good.

The notion of an open-ended charge to the judiciary to articulate a total theory of rights is, to say the least, in tension with the concept of checks and balances, a doctrine that had its roots in skepticism about untrammelled power anywhere.¹⁴¹ While there are important formal and informal checks on the Supreme Court—including the appointment

power, amendment of the Constitution, and the possibility of impeachment—none may be sufficient to prevent abuse of power by a Court that considers itself the moral prophet to the nation. The most important check is the Court's willingness to question its own exercise of power.¹⁴² As a people who have been warned of the tendency of almost all men to exercise power inappropriately (D&C 121:37), we are likely to appreciate Justice Jackson's reminder to his colleagues on the Court that "we are not final because we are infallible; we are infallible only because we are final."¹⁴³

This debate over our individual rights tradition and the role of courts in a democratic society is bound to divide even those of us who see the divine spark within the Constitution. It may even prompt a degree of internal tension. That portion of ourselves that feels commitment to the abstract ideals of liberty and justice and the concept of natural, or basic moral, rights may be drawn to a broad, Contractarian model for constitutional decision making. That portion that doubts our own wisdom, recalls the debatable historical underpinnings of the unenumerated rights tradition, and perceives the risks of abuse of power by any branch of government may feel less at ease about the broadest views of the judicial role being marketed today. Where we fall on the spectrum of views about the Supreme Court and the Constitution will be determined by the relative strength of these competing impulses within us.

The unenumerated rights debate need not, however, radically alter our conclusions about constitutional interpretation in general. If the unenumerated rights tradition is justified, it is precisely because the text in context points us beyond the text, or at least does not preclude such a reading. (Alternatively, we may have concluded that the text contemplates that judicial decisions might under certain circumstances become the authoritative construction of the constitutional text.) If this tradition potentially gives a degree of freedom and power to the courts in the area of individual rights, this does not imply that there are no limits on the Court or that every area of constitutional decision making is equally indeterminate. In at least one important area, of course, acceptance of this tradition will make constitutional interpretation, in any narrow sense, less central to the debate over the proper direction of constitutional decision making. It does not, however, work any general repeal of the duty of decision makers to abide by the terms of our written compact.

NOTES

¹See, for example, Robert W. Bennett, "Judicial Review as Law," *Illinois Bar Journal* 75 (December 1986): 202.

²See Raoul Berger, *Congress vs. the Supreme Court* (Cambridge: Harvard University Press, 1969), 170–76; Julius Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, ed. P. Freund, 9 vols. (New York: Macmillan, 1971), 1:241.

³5 U.S. (1 Cranch) 137 (1803), 176–80.

⁴Alexander Hamilton, no. 78 of *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1982), 529 (hereafter referred to as *The Federalist*).

⁵See Berger, *Congress vs. the Supreme Court*, 148; Goebel, *History* 1:792. For Joseph Story's 1833 attempt to sum up the canons of construction, see his *Commentaries on the Constitution of the United States*, ed. Ronald D. Rotunda and John E. Nowak (1833; reprint, Durham, N.C.: Carolina Academic Press, 1987), 134–62.

⁶Alexander Hamilton, no. 78 of *The Federalist*, 526.

⁷*Ibid.*, 525.

⁸See, for example, Mark V. Tushnet, "A Note on the Revival of Textualism in Constitutional Theory," *Southern California Law Review* 58 (1985): 683; Mark V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review* 96 (February 1983): 781–827.

⁹The debate has been framed around the search for "original intent," which for many implies combing legislative (or convention) debates in search of actual or subjective intent. By "original context" I mean the Constitution or amendment read as a whole, extrinsic evidence as to the concerns leading up to the enactment, legislative history, and evidence of relationship to other enactments that might bear on meaning. While the debate over original intent had been waged for years in the law journals, it broke free of the academic setting and entered the public domain because of the advocacy of Attorney General Edwin Meese and the opposition of two Supreme Court justices. For addresses by Meese and Justices Brennan and Stevens, see "Addresses—Construing the Constitution," *University of California at Davis Law Review* 19 (1986): 1. For the views of the current chief justice, see William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (May 1975): 693–706.

¹⁰See, for example, Larry G. Simon, "The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation," *Southern California Law Review* 58 (1985): 603.

¹¹Raoul Berger is the legal historian who comes closest to concluding that original intent is capable of answering every important question (see Thomas B. McAfee, "Berger vs. the Supreme Court—the Implications of His Exceptions Clause Odyssey," *University of Dayton Law Review* 9 [Winter 1984]: 219, 236–37, and n. 113). For the view that the framers' intention is relevant to our discourse but *never* binding, see Richard B. Saphire, "Judicial Review in the Name of the Constitution," *University of Dayton Law Review* 8 (Summer 1983): 745, 750; and Terrance Sandalow, "Constitutional Interpretation," *Michigan Law Review* 79 (April 1981): 1033, 1069–72.

¹²John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 11–41; Thomas C. Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 27 (1975): 703, 717. See also Robert W. Bennett, "The Mission of Moral Reasoning in Constitutional Law," *Southern California Law Review* 58 (1985): 647; and Robert W. Bennett, "Objectivity in Constitutional Law," *University of Pennsylvania Law Review* 132 (March 1984): 445–96.

¹³Robert Bennett and John Ely, in particular, offer various objections to original intent but focus their concern on broadly worded, vague constitutional provisions.

¹⁴For skeptical treatment of one or both of these assumptions, see Ronald M. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 34–38; and Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980): 204. For a representative formulation of these assumptions, see Henry P. Monaghan, "Our Perfect Constitution," *New York University Law Review* 56 (May–June 1981): 353, 374–75, 383.

This essay will not address the difficult questions presented by the doctrine that courts are bound by prior judicial decisions in determining what is authoritative in constitutional law. At least some who see original intent as generally binding on constitutional interpreters nonetheless find room for *stare decisis* (the doctrine of following precedent) to shield even some incorrect decisions (see Henry P. Monaghan, "Taking Supreme Court Decisions Seriously," *Maryland Law Review* 39, no. 1 [1979]: 1, 7–10).

¹⁵Even scholars who criticized resort to original intent as "a fileo-pietistic notion that has no place in the jurisprudence of the twentieth century" and contended that "the framers should not rule us from their graves" have nevertheless acknowledged that clear text is binding (Arthur S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Law," *University of Chicago Law Review* 27 [1960]: 661, 683).

¹⁶See, for example, Bennett, "Objectivity," 474; Saphire, "Judicial Review," 774–75; and Brest, "Misconceived Quest."

¹⁷Brest, "Misconceived Quest," 214–15, 222.

¹⁸Monaghan, "Our Perfect Constitution," 353, 374–76.

¹⁹See, for example, Frederick Schauer, "An Essay on Constitutional Language," *UCLA Law Review* 29 (April 1982): 797–832; compare Bennett, "Objectivity," 457–60.

²⁰For an argument that framers' intent should generally count as the ratifiers' intent, see Monaghan, "Our Perfect Constitution," 375 n. 130.

²¹Compare, for example, Max Radin, "Statutory Interpretation," *Harvard Law Review* 43 (April 1930): 863–85, with Reed Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown, and Co., 1975), 71–79 (critiquing Radin's skepticism as to the coherence of the notion of legislative intent).

²²See, for example, Brest, "Misconceived Quest," 211.

²³Brennan, "Construing the Constitution," 8, 10.

²⁴See Sandalow, "Constitutional Interpretation," 1038–39.

²⁵Gerald C. MacCallum, "Legislative Intent," *Yale Law Journal* 75 (April 1966): 754–55; see also Dickerson, *Interpretation and Application*, 77.

²⁶At the end of an important skeptical piece, for example, Paul Brest acknowledges that text and original understanding create a defeasible presumption that would "exert the strongest claims when they are contemporary and thus likely to reflect current values and beliefs" (Brest, "Misconceived Quest," 229). To exert even a strong claim, original understanding must be knowable.

²⁷*Slaughterhouse*, 83 U.S. (16 Wall.) 36, 77 (1873).

²⁸*Ibid.* at 77.

²⁹*Ibid.* at 78.

³⁰*Ibid.* at 77, 80.

³¹*Ibid.* at 79. Miller's conclusion was no coincidence. He had been the author of *Crandall vs. Nevada*, 73 U.S. (6 Wall.) 35 (1867), in which the Court struck down a Nevada head tax because it interfered with the right to travel to the nation's capital that the Court found was derivable from the relationship between United States citizens and their national government. He was thus the logical person to perceive the possibility that the amendment's protection of the privileges or immunities of national citizenship was designed primarily to provide an explicit textual foundation (and a certain federal remedy) to rights already implicit in the structure and relationships created by the Constitution.

³²See, for example, Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977), 25–26 (quoting the Senate sponsor of the Civil Rights Act, Senator Trumbull, and citing references in the Black Codes throughout the congressional debates).

³³*Ibid.* See, generally, Richard Bardolph, *The Civil Rights Record: Black Americans and the Law, 1849–1870* (New York: Crowell, 1970), 36–37.

³⁴It was explicitly invoked by Senators Lyman Trumbull and William Howard and Congressman James Wilson, the Civil Rights Bill's House sponsor (see *Congressional Globe*, 39th Cong., 1st sess. 600 (1866) (Senator Trumbull); *ibid.*, 1118 (Congressman Wilson); *ibid.*, 2765 (Senator Howard)).

³⁵See Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review* 2 (1949): 5, 10, 17. *Corfield* is reported at 6 F. Cas. 546 (C. C. E. D. Pa. 1823) (No. 3230).

³⁶*Corfield*, 6 F. Cas. at 551–52.

³⁷See, for example, *Congressional Globe*, 39th Cong., 1st sess. 474–75, 600 (1866) (statements of Senator Trumbull).

³⁸See, for example, Fairman, "Bill of Rights," 9–12.

³⁹Michael Kent Curtis, "The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger," *Wake Forest Law Review* 16 (February 1980): 45, 59, 67–68. When Congressman Bingham introduced a resolution proposing an amendment that evolved into section 1 of the Fourteenth Amendment, he pointed out that he had intentionally drawn the language from the fourth article of the Constitution (*Congressional Globe*, 39th Cong., 1st sess. 1033–34 [1866]).

⁴⁰Ely, *Democracy and Distrust*, 22–24 (superfluous). Justice Field in dissent said the majority opinion made it a "vain and idle enactment" (173 U.S. at 96).

⁴¹Ely, *Democracy and Distrust*, 22.

⁴²For the broadest and narrowest readings, respectively, see Ely, *Democracy and Distrust*, 22–30, and Berger, *Government by Judiciary*, 20–51.

⁴³Prominent examples are Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven: Yale University Press, 1982); and Simon, "Authority of the Constitution."

⁴⁴For the best summary of the alternative possible readings of the war clause and the evidence for the reading described in text, see William Van Alstyne, "Congress, the President, and the Power to Declare War: A Requiem for Vietnam," *University of Pennsylvania Law Review* 121 (November 1972): 1, 51. See, generally, Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* (Dallas: Southern Methodist University Press, 1985).

⁴⁵Typical of the statements of the framers is James Madison's assertion that "the power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature" (James Madison, *Letters and Other Writings* [New York: R. Worthington, 1884]: 2:642–43). Pronouncements by all three branches throughout the nation's history support the traditional understanding. It was not until the Korean War that a president claimed that his powers as commander-in-chief fully authorized him to initiate war without the consent of Congress (Firmage and Wormuth, *To Chain the Dog of War*, vii, 17–160). Interestingly,

David Richards, a scholar known as a forceful critic of “originalism” as a general methodology, has acknowledged that the weight of text, context, and history makes a compelling case that Congress has in recent decades abdicated its constitutional power and duty over war (David A. J. Richards, “Interpretation and Historiography,” *Southern California Law Review* 58 [1985]: 490, 519).

⁴⁶See, for example, Laurence H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978), 174 (contending that the framers’ narrow view of the power to repel sudden attacks was in proportion to the military needs of their day; attack on “a strategically important ally” might require similar dispatch today). The issue raised is probably not a critical one, in that Congress would undoubtedly concur in presidential action in the contexts in which the principle would clearly be applicable, as in Western Europe.

⁴⁷Wormuth and Firmage, *To Chain the Dog of War*, 29.

⁴⁸Some would make the President’s emergency power the wedge that would reverse the original implications of the war clause. In 1966, for example, Leonard Meeker, the legal adviser to the State Department, contended that the executive’s emergency power could justify the war in Vietnam because in modern times we recognize that “an armed attack against Vietnam would endanger the peace and safety of the United States” (Leonard Meeker, “The Legality of the United States Participation in the Defense of Vietnam,” *Department of State Bulletin* 54 [1966]: 484). But surely that is precisely the sort of question that the framers left to Congress. For additional perspectives on these issues, compare J. William Fulbright, “American Foreign Policy in the 20th Century under an 18th-Century Constitution,” *Cornell Law Quarterly* 47 (Fall 1961): 1–13 (expressing Senator Fulbright’s early view that presidents must have full responsibility for military decisions in a shrinking world, and questioning whether we can afford the luxury of eighteenth-century procedures), with Wormuth and Firmage, *To Chain the Dog of War*, 267–77 (arguing that need for deliberation and consensus is even greater in the nuclear age with so much at stake).

⁴⁹*McCulloch vs. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

⁵⁰See Frederick Schauer, “Easy Cases,” *Southern California Law Review* 58 (1985): 399. For a more skeptical view, see Tushnet, “Textualism.”

⁵¹Consider, for example, Laurence H. Tribe, “On Our Constitution, Meese Is True Radical,” *USA Today*, 17 October 1985: “Madison didn’t even have a telephone; why try to imagine how he would feel about wiretapping?”

⁵²See Perry, *The Constitution, the Courts, and Human Rights*, 32–33.

⁵³Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), 84.

⁵⁴The example is from Dickerson, *Interpretation and Application*, 129.

⁵⁵*Ibid.*, 80; see also 23–24; A. J. Ayer, *Language, Truth and Logic*, 2d ed. (New York: Dover Publications, 1952), 86; and Josef Kohler, “Judicial Interpretation of Enacted Law,” in *Science of Legal Method*, trans. Ernest Bruncken and Layton B. Register (1921; reprint, New York: A. M. Kelley, 1969), 187, 188.

⁵⁶For a brief treatment see Thomas B. McAfee, “Berger vs. the Supreme Court,” 268–71.

⁵⁷Dickerson, *Interpretation and Application*, 240.

⁵⁸Schauer, “Constitutional Language,” 801, 806–7.

⁵⁹As to what does follow, representative responses are Perry, *The Constitution, the Courts, and Human Rights*; Brest, “Who Decides,” *Southern California Law Review* 58 (1985): 661; Bennett, “Moral Reasoning”; and Frank H. Easterbrook, “Legal Interpretation and the Power of the Judiciary,” *Harvard Journal of Law and Public Policy* 7, no. 1 (1984): 87–99.

⁶⁰Dickerson, *Interpretation and Application*, 243, 246–47.

⁶¹See, for example, Sandalow, “Constitutional Interpretation.”

⁶²A good example is Madison’s flip-flop on the constitutionality of legislative prayer. See *Marsh vs. Chambers*, 463 U.S. 783, 807, 815 (1983) (Brennan, J., dissenting). It is difficult to believe his original position represented a view of the “meaning” of the establishment clause so much as a position on the appropriate scope and application of a principle whose contours awaited defining.

⁶³See, for example, Neil K. Komisar, “Back to the Future—An Institutional View of Making and Interpreting Constitutions,” *Northwestern University Law Review* 81 (1987): 191; and Brest, “Who Decides.”

⁶⁴Komisar, “Back to the Future,” 210–16.

⁶⁵Terrance Sandalow, “The Distrust of Politics,” *New York University Law Review* 56 (1981): 446, 460.

⁶⁶See Thomas C. Grey, “Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,” *Stanford Law Review* 30 (1978): 843–93; Grey, “Unwritten Constitution?”; and Edward S. Corwin, “The ‘Higher Law’ Background of American Constitutional Law,” *Harvard Law Review* 42 (December 1928–January 1929): 149–85, 365–409.

⁶⁷3 U.S. (3 Dall.) 386, 388 (1798).

⁶⁸Edward S. Corwin, *Liberty against Government* (Baton Rouge: Louisiana State University Press, 1948), 66.

⁶⁹This tension was first brought to my attention by Grey, “Unwritten Constitution?” 708–9.

⁷⁰*Marbury vs. Madison*, 5 U. S. (1 Cranch) at 179.

⁷¹See U.S. Constitution, article 3, section 2, clause 1 (emphasis added).

⁷²*Calder vs. Bull*, 3 U.S. (3 Dall.) at 399 (Iredell, J.). Iredell had been a delegate to the North Carolina ratifying convention and an ardent defender of the power of judicial review from that period forward (see Berger, *Congress vs. the Supreme Court*, 20).

⁷³Corwin, *Liberty against Government*, 89.

⁷⁴See, for example, the Fifth Amendment of the U.S. Constitution.

⁷⁵See, for example, Rex E. Lee, *A Lawyer Looks at the Constitution* (Provo: Brigham Young University Press, 1980), 163; and Corwin, *Liberty against Government*, 91.

⁷⁶Thus, in *Hurtado vs. California*, 110 U.S. 516 (1884), the Supreme Court reasoned, “Law is something more than mere will exerted as an act of power,” and therefore enacted law must “not be a special rule for a particular person or a particular case, but . . . the ‘general law’ . . . so that ‘every citizen shall hold his life, liberty, property and immunities under the protection of the general rules that govern society,’ and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation . . . and other similar special, partial and arbitrary exertions of power under the forms of legislation” (535–36).

⁷⁷For a brief account of this development, see Tribe, *American Constitutional Law*, 427–36.

⁷⁸It has been estimated that 197 state or federal regulations were stricken by the Supreme Court between 1899 and 1937 (Tribe, *American Constitutional Law*, 435 n. 2).

⁷⁹*Ibid.*, 450–55.

⁸⁰For a general treatment of the right of privacy, see *ibid.*, 886–990.

⁸¹As to the text, see Ely, *Democracy and Distrust*, 18–19; and Schauer, “Easy Cases,” 431 n. 83. As to the preconstitutional history of due process, see Ralph U. Whitten, “The Constitutional Limitations on State Choice of Law: Due Process,” *Hastings Constitutional Law Quarterly* 9 (1982): 851, 861–67. As to the more ambiguous historical context of the Fourteenth Amendment due process clause, see Whitten, “Due Process,” 867–94.

⁸²Corwin, *Liberty against Government*, 114–15.

⁸³Justice Black opposed application of substantive due process in every context (see *Griswold vs. Connecticut*, 381 U.S. 479, 511–13 [1965] [Black, J., dissenting]). Justice Harlan, by contrast, relied on the doctrine but appealed for judicial restraint in its application (*ibid.* at 501–2 [Harlan, J., concurring]).

⁸⁴See, for example, Grey, “Unwritten Constitution?” 716; and Corwin, *Liberty against Government*, 152–53. Grey, however, acknowledges that there is room for doubt as to whether the Ninth Amendment was intended to embody the principle of the unwritten constitution.

⁸⁵See, for example, David A. J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986), 256; Tribe, *American Constitutional Law*, 570–71; Bennett B. Patterson, *The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights under Social Condition of Today* (Indianapolis: Bobbs-Merrill, 1955); and Norman Redlich, “Are There ‘Certain Rights . . . Retained by the People?’ ” *New York University Law Review* 37 (1962): 787–812. John Ely goes even further, asserting, “In fact, the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond the rights specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support” (Ely, *Democracy and Distrust*, 38).

⁸⁶*Griswold vs. Connecticut*, 381 U.S. 486 (Goldberg, J., concurring).

⁸⁷As long ago as 1980, more than a thousand cases were found in which state courts and lower federal courts cited the Ninth Amendment (Raoul Berger, “The Ninth Amendment,” *Cornell Law Review* 66 [1980]: 1 n. 2).

⁸⁸See, generally, *ibid.*; Redlich, “Are There ‘Certain Rights?’ ”; and Leslie W. Dunbar, “James Madison and the Ninth Amendment,” *Virginia Law Review* 42 (1956): 627–43.

⁸⁹See, for example, Berger, “The Ninth Amendment,” 3–6.

⁹⁰Washington wrote to Lafayette that the convention decided not to include a bill of rights because “the people evidently retained every thing which they did not in express terms give up” (*The Writings of George Washington from the Original Sources*, ed. John C. Fitzpatrick, 9 vols. [Washington, D.C.: United States Printing Office, 1931–1944], 29:478; also quoted in Berger, “The Ninth Amendment,” 6). Hamilton wrote that “in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations” (no. 84 of *The Federalist*, 578).

⁹¹Madison was speaking before the first Congress as he presented resolutions that became the Bill of Rights (quoted in Patterson, *The Forgotten Ninth Amendment*, 114).

⁹²Quoted in Dunbar, “James Madison,” 629–30. Hamilton agrees in *The Federalist*, no. 84, 579.

⁹³*The Writings of James Madison*, ed. Gaillard Hunt, 9 vols. (New York: G. P. Putnam, 1904), 5:271; also quoted in Berger, “The Ninth Amendment,” 8.

⁹⁴381 U.S. at 507 (Black, J., dissenting); *ibid.* at 527 (Stewart, J., dissenting).

⁹⁵These proposed amendments are reprinted in Dunbar, “James Madison,” 631–32.

⁹⁶Quoted in Patterson, *The Forgotten Ninth Amendment*, 111 (emphasis added).

⁹⁷*Ibid.*, 115.

⁹⁸Richards, Tribe, Patterson, Redlich, and Ely all take this view (see n. 85).

⁹⁹At least one commentator, John Ely, has contended that the clause was designed to preclude a construction of enlarged powers as well as denying additional rights (Ely, *Democracy and Distrust*, 36. Compare Joseph H. Story et al., *Commentaries on the Constitution of the United States*, ed. E. S. Arthur, 3 vols. [1833; reprint, New York: Da Capo Press, 1970], 3:752 [ambiguous statement arguably supporting a dual purpose reading]).

¹⁰⁰Randolph’s argument was summarized in these words in a letter to Madison from Burnley, a member of the Virginia legislature (see *Documentary History of the Constitution of the United States, 1786–1870*, 5 vols. [1905; reprint, New York: Johnson, 1965], 5:219).

¹⁰¹*Ibid.*, 221.

¹⁰²It may be significant, then, that Madison’s single allusion to the judicial role in enforcing rights observed that the courts “will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights” (quoted in Patterson, *The Forgotten Ninth Amendment*, 116; see also Berger, “The Ninth Amendment,” 8–9).

¹⁰³Some commentators, for example, have pointed to expressions of concern by Madison that basic rights might not be drafted or construed with sufficient latitude (*Writings of James Madison* 5:271–72). Compare Redlich, “Are There ‘Certain Rights,’ ” 805 and n. 86 (relying on Madison’s assertion in no. 37 of *The Federalist* that words are incapable of expressing complex ideas with complete accuracy). The suggestion is that the Ninth Amendment serves the purpose of avoiding limiting constructions. The only problem is that no such statements were made in the context of debate over the Ninth Amendment itself.

¹⁰⁴At the state level, the device of generally declaring the existence of inherent and inalienable rights as part of a declaration of rights was already established prior to ratification of the federal constitution (see Patterson, *The Forgotten Ninth Amendment*, 22).

¹⁰⁵See Ely, *Democracy and Distrust*, 203 n. 87.

¹⁰⁶See, for example, Lawrence Tribe, “Celebration of the Mind,” *Harvard Law Bulletin* 38 (Winter 1986): 6.

¹⁰⁷See, for example, Ely, *Democracy and Distrust*, 37; and Redlich, “Certain Rights,” 805.

¹⁰⁸The “incorporation” theory is associated with Justice Black, *Adamson vs. California*, 332 U.S. 68 (1947) (Black, J., dissenting), but a number of other justices have held to this view. I say *presumably* this incorporation view would include the Ninth Amendment because one of the speeches from the legislative history of the Fourteenth Amendment relied on for this view states only that “the personal rights guaranteed and secured by the first eight amendments” would be included (Congressional Globe, 39th Cong., 1st sess. 2765 [1866] [statement of Senator Howard]). An alternative route to the same end is the argument that the “privileges or immunities” clause of the Fourteenth Amendment is properly read as delegating authority to elaborate a broad set of rights not described within the text (see, for example, Ely, *Democracy and Distrust*, 22–30). This claim is also controversial, however, but the arguments are too involved to go into here. The best summary may be Timothy S. Bishop, “The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent,” *Northwestern University Law Review* 79 (March 1984): 142–90.

¹⁰⁹See, for example, Richards, *Toleration and the Constitution*; R. Dworkin, *Taking Rights Seriously* (1977); and Grey, “Unwritten Constitution?” Richards and Dworkin are the names most closely associated with the view of a moral and political theory as immanent in the Contractarian underpinnings of the Constitution. Others believe that the premises of the Constitution’s antimajoritarian individual rights provisions necessarily rest in moral theory, but are not necessarily committed to any sort of historical explication or to the nonutilitarian versions of liberalism defended by Richards and Dworkin (see, for example, Michael S. Moore, “A Natural Law Theory of Interpretation,” *Southern California Law Review* 58 [1985]: 277; and Michael D. Bayles, “Morality and the Constitution,” *Arizona State Law Journal* [1978], 561–71).

¹¹⁰See Perry, *The Constitution, the Courts, and Human Rights*.

¹¹¹Robert M. Cover has observed that, notwithstanding the social contract and natural rights thinking of the founding period, the most important figures of the period “were seldom, if ever, guilty of confusing law with natural right” (Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* [New Haven: Yale University Press, 1975], 27). The sources of thinking about rights during the revolutionary and founding period included the British constitution, colonial charters, and “immemorial usage,” as well as natural law thinking (Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* [Lawrence: University Press of Kansas, 1985], 12–13, 36–39, 152–53). Many who embraced natural law moral and political theory would not have inferred that natural law was a source of authority for enforceable rights in a duly-constituted legal system.

¹¹²See Grey, “Origins,” 860–61; McDonald, *Novus Ordo Seclorum*, 7, 66, 152, 235; R. Kent Greenawalt, “The Enduring Significance of Neutral Principles,” *Columbia Law Review* 78 (1978): 982, 1019; and Bayles, “Morality,” 566.

¹¹³Grey, “Origins,” 892.

¹¹⁴See, for example, Richard Vetterli and Gary Bryner, “Public Virtue and the Roots of American Government,” in this issue of *Brigham Young University Studies*, 29–49.

¹¹⁵McDonald distinguishes “agrarian” and “puritanical” strands of republicanism. Of the latter form he writes: “Almost nothing was outside the purview of a puritanical republican government, for every matter that might in any way contribute to strengthening or weakening the virtue of the public was a thing of concern to the public—a *res publica*—and was subject to regulation by the public.” While agrarian republicanism saw institutional arrangements rather than direct regulation as the key to ensuring development of virtue, its populist and egalitarian tendencies did not preclude it from having a religious bent or from sanctioning state regulation of morals (McDonald, *Novus Ordo Seclorum*, 16 and n. 9, 71, 73–77, 89–90, 160).

¹¹⁶During the last twenty years, revisionist historians have rediscovered and given renewed emphasis to the elements of classical republicanism in the founding period (see, for example, J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* [Princeton: Princeton University Press, 1975]; and Gordon S. Wood, *The Creation of the American Republic, 1776–1787* [Chapel Hill: University of North Carolina Press, 1969]). While some historians have contended that this new emphasis on classical republicanism gives insufficient attention to the growth of new forms of republicanism based on premises of liberal individualism (see, for example, Joyce Appleby, “Republicanism in Old and New Contexts,” *William and Mary Quarterly* 43 [1986]: 20), my own review of the literature uncovered nothing to refute Lance Banning’s claim that the new history at least establishes “that nineteenth-century America did not begin with and may never have achieved a liberal consensus” (Lance Banning, “Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic,” *William and Mary Quarterly* 43 [1986]: 3, 13).

¹¹⁷Morton J. Horwitz, "Republicanism and Liberalism in American Constitutional Thought," *William and Mary Law Review* 28 (1987): 57. Almost all the modern commentators place human autonomy—the liberty to make fundamental decisions about one's life plan or style—as central in our constitutional scheme. Contrast the Pennsylvania constitution's prescriptions that "laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force" (McDonald, *Novus Ordo Seclorum*, 90). McDonald cites five state constitutions that contained provisions giving explicit foundation for "sumptuary" (or morals regulating) laws. For the general view that modern autonomy-based constitutional theories cannot be squared with the Constitution as conceived by the framers, see Monaghan, "Our Perfect Constitution."

¹¹⁸See, for example, McDonald, *Novus Ordo Seclorum*, 85; and Raoul Berger, *Death Penalties: The Supreme Court's Obstacle Course* (Cambridge: Harvard University Press, 1982), 164. The framers' skepticism, of course, went to the granting of power to all branches and levels of government.

¹¹⁹See, for example, Bradford, "Such a Government as the People Will Approve: The Great Convention as Comic Action," *St. Louis University Public Law Review* 6 (1987): 215; McDonald, *Novus Ordo Seclorum*, 7–8, 59–60, 68–70, 144, 234–35; and Forrest McDonald, *E Pluribus Unum* (Boston: Houghton Mifflin, 1965), 72, 121, 157–58.

¹²⁰See Dworkin, *A Matter of Principle*, 38–57 (as to abstract or general intention); Richards, *Toleration and the Constitution*, 35–38 (as to abstract intention), and 52–63 (as to Contractarian moral theory as the best way to interpret the abstract intentions of the framers).

¹²¹Sandalow, "Constitutional Interpretation," 1046. A number of scholars have been critical of any historical claim that the framers intended for us to elaborate moral theories of individual rights as they evolved over time. See, for example, Perry, *The Constitution, the Courts, and Human Rights*, 70–72; and Henry P. Monaghan, "Professor Jones and the Constitution," *Vermont Law Review* 4 (Spring 1979): 87, 91.

¹²²Judge Bork is clearly correct in his assertion that the argument that courts should go directly to moral theory to develop a complete system of human rights, with or without reliance on specific constitutional texts, is a view not expressed by courts or theorists until the last thirty years (Robert H. Bork, "Styles in Constitutional Theory," *South Texas Law Review* 26 [Fall 1985]: 383–84).

¹²³See, for example, Corwin, *Liberty against Government*, 81–82, 87–89.

¹²⁴See, for example, *Mugler vs. Kansas*, 123 U.S. 623, 661 (1887); and McDonald, *Novus Ordo Seclorum*, 288.

¹²⁵During the Supreme Court's laissez-faire era, for example, the Court defined the "public interest" that a state might pursue through its police power by reference to a liberal theory of government that assumed that the common law rights of property and contract represented a baseline of neutrality and fairness, departure from which would be suspect (Cass R. Sunstein, "Lochner's Legacy," *Columbia Law Review* 87, no. 5 [1987]: 873, 877–79). This view that freedom of contract is "the general view and restraint the exception" (*Adkins vs. Children's Hospital*, 261 U.S. 525, 546 [1923]) has been criticized because in practice it amounted to recognition of a superprotected right and frequently precluded serious consideration of the argument that the interests of society as a whole are promoted by labor-protective and other types of social legislation (Gerald Gunther, *Constitutional Law* [Mineola, N.Y.: Foundation Press, 1985], 458).

¹²⁶When the modern Supreme Court, for example, required a "compelling state interest" to justify any regulation of the "fundamental" right to choose abortion (*Roe vs. Wade*, 410 U.S. 113, 154–56 [1973]), it implicitly acknowledged that the state's justifications of protecting fetal life and maternal health could be seen as meeting the traditional rationality standard of promoting the general interest and that only the special force of the "right of privacy" excluded it from falling within the scope of the police power. As a modern version of the doctrine of substantive due process, *Roe* has thus been criticized as a departure even from the traditional understanding of that doctrine as a device for ensuring that legislatures enact "general" rules to promote the public interest rather than as a source for super-protected fundamental rights (see John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe vs. Wade*," *Yale Law Journal* 82 [1973]: 920, 940–43; and Thomas B. McAfee, "Constitutional Interpretation: The Uses and Limitations of Original Intent," *University of Dayton Law Review* 12 [1986]: 275, 292–93).

¹²⁷See, for example, *Lochner vs. New York*, 198 U.S. 45, 75–76 (Holmes, J., dissenting); *Adamson vs. California*, 332 U.S. 46, 67–68 (1947) (Frankfurter, J., concurring); *Griswold vs. Connecticut*, 381 U.S. 479, 501–02 (1965) (Harlan, J., concurring).

¹²⁸Even in *Roe vs. Wade*, 410 U.S. 113 (1973), for example, the Court's opinion can be read either as recognizing a specially protected fundamental right, rooted in liberal political theory, or as essentially a judicial act of balancing interests on some utilitarian scales (see Donald H. Regan, "Rewriting *Roe vs. Wade*," *Michigan Law Review* 77 [August 1979]: 1569, 1641). Considering the Court's own unwillingness to extend the decision to consensual adult sexual activity, one prominent scholar has suggested that the decision more likely rests on premises of enlightened conservatism than on liberal theory (Thomas C. Grey, "Eros, Civilization and the Burger Court," *Law and Contemporary Problems* 43 [Summer 1980]: 83–100).

¹²⁹Alexander M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), 4. See also Bickel's discussion on 3–25.

¹³⁰*Ibid.*, 4.

¹³¹Among the most articulate of these theorists are Komesar, "Back to the Future"; Bennett, "The Mission of Moral Reasoning in Constitutional Law," *Southern California Law Review* 58 (1985): 647; Harry H. Wellington, "History and Morals in Constitutional Adjudication," *Harvard Law Review* 97 (November 1983): 326–35; and Sandalow, "Constitutional Interpretation."

¹³²See, for example, D&C 98:5–6, 101:77–78; and Joseph Smith, Jr., *Teachings of the Prophet Joseph Smith*, ed. Joseph Fielding Smith (Salt Lake City: Deseret News Press, 1938), 147. Compare D&C 134:5.

¹³³Ezra Taft Benson, “The Constitution—A Glorious Standard,” *Ensign* 17 (September 1987): 6.

¹³⁴*Pierce vs. Society of Sisters*, 268 U.S. 510 (1925); *Griswold vs. Connecticut*, 381 U.S. 479, 497 (Goldberg, J., concurring): “Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. If upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid.” A Latter-day Saint critic of unenumerated fundamental rights, Rex E. Lee, has acknowledged that the right to privacy could serve as a bulwark against invasion of traditional family rights (Lee, *A Lawyer Looks*, 188–89).

¹³⁵See, for example, Benson, “The Constitution—A Glorious Standard,” 10 (“The Constitution was designed to work with only a moral and righteous people”); and Richard L. Bushman, “Virtue and the Constitution,” in *By the Hands of Wise Men: Essays on the U.S. Constitution*, ed. Ray C. Hillam (Provo: Brigham Young University Press, 1979), 29–38.

¹³⁶See, for example, Dallin H. Oaks, *The Popular Myth of the Victimless Crime*, Commissioner’s Lecture Series (Provo: Brigham Young University Press, 1974).

¹³⁷For persuasive statements of skepticism as to whether the Constitution as an inspired document can become the authoritative source for resolving our basic political disputes, see Noel B. Reynolds, “The Doctrine of an Inspired Constitution”; and Rex E. Lee “The Enduring Constitution: A Document for All Ages,” both in Hillam, *By the Hands of Wise Men*, 1, 99.

¹³⁸Latter-day Saint scripture emphasizes the connection between political freedom and free agency, but this connection is somewhat problematic, for our agency need not always be seriously threatened by the existence of consequences, such as the threat of punishment, eternal or temporal. Totalitarian regimes probably threaten meaningful agency most directly by denying access to understanding a range of truth systems, including perhaps (in the minds of Mormons) knowledge of the restored gospel, and somewhat less directly by imposing immediate and serious threats to personal security for the exercise of free choice. Obviously, the more certain, immediate, and severe the risk of punishment, the more such threats become sufficiently coercive to meaningfully interfere with human agency. On the other hand, the existence of legal norms may frequently do little more than provide a counterweight to the temptation—sometimes in the form of countervailing social pressure—to violate traditional moral norms.

¹³⁹For a liberal critique of this sort of “alienation” argument, see David A. J. Richards, *Sex, Drugs, Death, and the Law: An Essay on Human Rights and Overcriminalization* (Totawa, N.J.: Rowman and Littlefield, 1982), 173–77.

¹⁴⁰See, for example, Lynn D. Wardle, *The Abortion Privacy Doctrine: A Compendium and Critique of Federal Court Abortion Cases* (Buffalo: W. Hein, 1980). For the view that the abortion decision can be squared with traditional liberal premises, see Regan, “Rewriting *Roe vs. Wade*.”

¹⁴¹See Rex E. Lee, “Preferring Separation of Powers: A Rejection of Judicial Legislation through the Fundamental Rights Doctrine,” *Arizona Law Review* 25, no. 4 (1983): 805–13.

¹⁴²For analysis by thoughtful Latter-day Saints acknowledging the important role courts play but also perceiving risks of judicial excess, see Dalin H. Oaks, “Judicial Activism,” *Harvard Journal of Law and Public Policy* 7 (Winter 1984): 1–11; Rex E. Lee, “Legislative and Judicial Questions,” *Harvard Journal of Law and Public Policy* 7 (Winter 1984): 35; and J. Clifford Wallace, “A Two Hundred Year Old Constitution in Modern Society,” *Texas Law Review* 61 (May 1983): 1575–86. See also Bruce Hafen, “Bicentennial Reflections on the Media and the First Amendment,” in this issue of *Brigham Young University Studies*, 171–83.

¹⁴³*Brown vs. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).