It Is a Constitution We Are Expounding: A Debate

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Chief Justice Marshall's immortal words have been repeated often in the Supreme Court's decisions, usually as support for expansive policy-making judgments. The appropriateness of expansive Supreme Court decision-making is addressed in the following debate between Judge Kozinski and Professor Williams. The debate is largely adapted from speeches delivered June 4, 1987, at the University of Utah, during the Scott and Kathy Wood Loveless Lecture. In Part I, Judge Kozinski contends that unfortunately Marshall's phrase has allowed the Court to read words into or out of the Constitution at its convenience. In Part II, Professor Williams argues that the words of the Constitution must be interpreted according to contemporary values, precisely because "it is a constitution we are expounding."

I. JUDGE KOZINSKI: THAT UNFORTUNATE IMMORTAL PHRASE

The debate topic tonight is *It Is a Constitution We Are Expounding*, with emphasis on the word "constitution." The topic is derived from one of the most celebrated phrases in our constitutional history, having had its genesis in Chief Justice John Marshall's 1819 opinion in *McCulloch v. Maryland*.[1]

The issue in *McCulloch* was whether Congress had the authority to charter the Bank of the United States. The authority was not otherwise expressly provided in the Constitution, and the Court had to decide whether that authority was implied by the necessary and proper clause from an enumerated power. While this does not present a difficult question today, at that early stage in our constitutional history, it required some thought. In resolving the issue Chief Justice Marshall noted that a written constitution could not enumerate every single act government might need to do. A man with a gift for writing and a sense for the dramatic, he en-

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1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

capsulated this thought in a passage that has since become famous:

> A constitution, to contain accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[2]

Marshall then concluded this very famous passage with an even more famous aphorism: "[W]e must never forget, that it is *a constitution* we are expounding."[3]

While the result Marshall reached is indisputably correct, had I been there, I would have encouraged him to take out that fateful phrase. With the benefit of a century and a half of hindsight, we can see that the phrase has taken on a life of its own and has come to symbolize a theory of constitutional adjudication that Marshall may not have fully envisioned when he wrote it. The phrase has been quoted more than five dozen times in the federal courts, about half of those times by the Supreme Court. Almost without exception the phrase is invoked by a judge who wishes to do something that is just not quite found in the Constitution. Sometimes the phrase is used to find new guarantees or rights; other times the phrase is advanced to abridge rights that are already there. There is almost nothing a judge cannot do, no matter how novel, if he is willing to say the phrase loud enough.

A good example is the Supreme Court's 1943 decision in *Hirabayashi v. United States*.[4] During World War II, Congress imposed an 8:00 p.m. curfew on American citizens of Japanese descent. The curfew was challenged and the issue of its constitutionality came before the Supreme Court. The Court recognized the difficulty in squaring the Constitution's guarantee of equal protection with a curfew that discriminated on the basis of race and ancestry, but nevertheless upheld the curfew, relying on Marshall's incantation. The Court stated:

> Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing

2. *Id.* at 407.
3. *Id.* (emphasis in original).
4. 320 U.S. 81 (1943).

> with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which . . . may in fact place citizens of one ancestry in a different category from others. "We must never forget that it is *a constitution* we are expounding," "a constitution intended to endure for ages to come, and, consequently, to be adapted for various *crises* in human affairs."[5]

Even when the phrase is not explicitly invoked, it casts a very long shadow. The prevailing view among lawyers, law professors, and judges is that the Constitution must be interpreted in a materially different fashion than other legal instruments, such as statutes, regulations, or contracts. Probably the leading exponent of this view is Supreme Court Justice William Brennan. Justice Brennan, who has served since 1956, far longer than any other member of the current Court, sees a Constitution whose text is binding only in the limited sense that it sets forth ideals towards which society should strive. According to Justice Brennan, the Constitution contains "majestic generalities and ennobling pronouncements [that] are both luminous and obscure."[6] Thus, interpreting the Constitution means applying the broad visions of the Constitution—the aspirations toward "social justice, brotherhood, and human dignity"[7]—to contemporary problems. In a modern paraphrase of Chief Justice Marshall, Justice Brennan tells us that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[8]

With all appropriate respect for my friend and colleague, Justice Brennan's view does a serious disservice to the Constitution and the political system that it supports. The Constitution is a written document that serves as a charter for our self-government. It embodies a consensus about the way the political process must operate and sets important limitations on the power of government. But it is a consensus of a most peculiar sort; it transcends the present and encompasses generations both past and future.

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5. *Id.* at 100-01 (quoting in part *McCulloch*, 17 U.S. (4 Wheat.) at 407, 415 (emphasis in original)).

6. W. Brennan, Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *reprinted in* The Great Debate: Interpreting Our Written Constitution 11, 11 (Federalist Society 1986) [hereinafter THE GREAT DEBATE].

7. *Id.*

8. *Id.* at 17.

The Constitution thus represents the will of a transcendent majority, tempering the excesses and passions of the transient majorities that may prevail from time to time. In a very real sense the Constitution is our compact with history.

The Constitution can maintain that compact and serve as the lodestar of our political system only if its terms are binding on us. To the extent we depart from the document's language and rely instead on generalities that we see written between the lines, we rob the Constitution of its binding force and give free rein to the fashions and passions of the day. What gives any instrument meaning, be it a constitution, statute, or contract, is not its guiding principles—luminescent or obscure—but its words, words that convey precise and identifiable concepts. I will not argue that judges ought to interpret the words of the Constitution more narrowly than the words of other documents. The words and concepts of the Constitution ought to be treated the same as words and concepts of other legal instruments, and afforded such specificity or generality as they naturally command. Judges should not look at the Constitution from a distance and distill from it some guiding principles that then serve as proxies for their own vision of right and wrong.

Admittedly there are difficulties in interpreting the constitutional text. For one thing, most of the text was written two centuries ago. The meaning of language has changed in subtle but important respects and it may be difficult for us to discern or understand the context in which particular phrases were used. In addition, since its original ratification, the Constitution has been amended a number of times. Some of these amendments modify in important respects the original constitutional scheme. The post-Civil War amendments, in particular, alter the original allocation of power and authority very significantly. Consequently, when we interpret the Constitution, we have to understand not only what was meant by the Framers, but also what was meant by those who drafted and ratified amendments a century or more later. Finally, as Justice Brennan notes, the world around us is constantly changing. The Framers could not have anticipated certain aspects of the modern world, such as modern communication, with its awesome power to disseminate information and invade privacy. To fit all these developments within the framework of a document written so long ago is a serious challenge.

It is a challenge we should accept and confront squarely, not use as an excuse for turning our backs on the constitutional text and concentrating on nebulous concepts such as human dignity, so-

cial justice, brotherhood, or other "transformative ideals," as Justice Brennan refers to them. Interpreting the language of legal instruments is never easy. For example, when construing statutes, even ones recently passed, a court has to contend with competing views as to what the drafters meant—whoever the drafters happened to be. Does one look merely at the language, or does one consider committee reports, floor statements, testimony, or other extrinsic evidence contained in legislative histories? This is a difficult problem, but one we confront every day.

The same is true of unforeseen problems. By and large, legal questions arise because of situations that were not expressly anticipated by those who draft statutes, regulations, and contracts. Applying the law to novel situations lies at the very heart of what we do as judges. I would suggest that interpreting the Constitution presents problems that are not different in kind, and sometimes not even in degree, from those encountered in interpreting other documents. Even where there are special difficulties in interpreting the Constitution, such difficulties have to be confronted squarely; that is part of our responsibility as judges. It will not do to hide behind phrases such as "it is *a constitution* we are expounding" and thereby avoid the difficult and sometimes painful task of understanding what the Constitution actually means and how it applies to particular fact situations. Aphorisms like those used by Marshall, and more recently by Justice Brennan, are simply a way of squinting intellectually.

Three principles I believe are applicable in constitutional interpretation. The first principle is textual fidelity. Whatever results are reached in a constitutional adjudication must be grounded in the words of the Constitution. There is much debate these days over whether we ought to read the words of the Constitution as they were used by the Framers, or as they are used today, or in some other fashion. This is a significant debate but one I will bypass at this time. Whatever approach is taken, it is important that our interpretation be grounded in the words actually used in the Constitution, not in words or concepts that are not there.

This is by no means a universally shared view. For example, Justices Brennan and Thurgood Marshall have taken the position that capital punishment at all times and under all circumstances violates the eighth amendment's proscription of "cruel and unusual punishment."[9] This conclusion would not be at all troubling

9. U.S. CONST. amend. VIII.

if the Justices based their view on the language of the Constitution, but this is not the case. While most people might agree that the death penalty is cruel, there is a second question raised by the constitutional text: Is it unusual? During the past ten years or so there have been dozens of executions carried out in this country.[10] Thirty-six states have passed capital punishment statutes since 1972.[11] In 1978, a plebescite in California, the nation's most populous state, endorsed this penalty by an overwhelming margin.[12] In 1986, three justices of the California Supreme Court were voted out of office, largely, it is believed, because they voted consistently against the death penalty.[13] Except for a brief period in the 1960s and 1970s, when there was some doubt about the constitutionality of the death penalty, capital punishments were carried out every year in this century, and probably every year going back to the ratification of the Bill of Rights. In light of this data, it is difficult to justify the view that capital punishment is unusual. Nevertheless, Supreme Court Justices are entrusted with the responsibility of interpreting the law and the Constitution. If a Justice believes, in the face of this information, that capital punishment is nevertheless unusual, he has a duty to hold death penalty statutes unconstitutional. If Justices Brennan and Marshall did so on that ground, it would be entirely within their prerogative and my disagreement with them would be merely a quibble.

That is not, however, the rationale Justices Brennan and Marshall have adopted. Specifically, Justice Brennan tells us that he opposes capital punishment because it is inconsistent with the concept of "human dignity" that he considers to be the supreme principle embodied in the Constitution.[14] He admits that "[t]his is an interpretation to which a majority of my fellow Justices—not to mention, it would seem, a majority of my fellow countrymen—does not subscribe. . . . On this issue, the death penalty, I hope to embody a community striving for human dignity for all, although perhaps not yet arrived."[15] Ennobling, and doubtless sincere, as are Justice Brennan's views on this subject, they have nothing to do

10. *See* NAACP Legal Defense & Educational Fund, Inc., Death Row, U.S.A. (May 1, 1987) (unpublished statistics).

11. *See id.*

12. *See* CALIFORNIA SECRETARY OF STATE MARCH FONG EU, STATEMENT OF VOTE GENERAL ELECTION NOV. 7, 1978, at 39 (1978).

13. *See* CALIFORNIA SECRETARY OF STATE MARCH FONG EU, STATEMENT OF VOTE GENERAL ELECTION NOV. 4, 1986, at 36-37 (1986).

14. *See* W. Brennan, *supra* note 6, at 24.

15. *Id.*

with the text of the Constitution. Quite simply, Justice Brennan has rejected the constitutional phrase "cruel and unusual" and has substituted a moral principle that he derives from some other source. I respectfully suggest that whatever latitude the Constitution might afford judges simply does not extend that far.

The second principle of constitutional interpretation I would advance is that of consistency. This means that in interpreting the Constitution judges have a responsibility to construe phrases of similar generality in more or less the same way. The Constitution is made up of a series of articles and amendments, and each, in turn, has various sections, sentences, clauses, and phrases, some of them quite specific, allowing little room for interpretation. Examples include the requirement that the President be at least thirty-five years of age,[16] and that two-thirds of each house of Congress vote to propose a constitutional amendment.[17]

There are other provisions in the Constitution that are much more general, however. For example, the first amendment prohibits abridgement of free speech and the fourth amendment prohibits unreasonable searches and seizures. Interpreting these kinds of provisions calls for judgment. While staying well within the constitutional text, judges may have an honest disagreement as to whether a particular search is reasonable or whether a particular governmental action abridges free speech. While judges may interpret these provisions according to their own sense of right and wrong, they have a responsibility to interpret clauses that have similar generality more or less consistently.

Let me offer an example. The self-incrimination, due process, and takings clauses of the fifth amendment were all drafted and passed at the same time; they all seem to have the same level of generality. The natural inference is that the Framers thought those clauses embodied closely related concepts and expected them to be treated *in pari materia*. The courts, however, have interpreted those clauses separately and inconsistently. For example, extensive procedures have been adopted by judicial decree for handling criminal cases. Persons suspected of crime must be given a *Miranda*[18] warning at the time of their arrest; they are entitled to a variety of procedural protections before and during trial. Much of this is based on the fifth amendment's prohibition against self-in-

16. U.S. CONST. art. II,§ 1, cl. 5.
17. *Id.* art. V.
18. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

crimination and its injunction against the deprivation of "life, liberty or property" without "due process of law."[19] By judicial interpretation these vague phrases have been given specific detailed meanings.

By contrast, a neighboring clause of the fifth amendment—the prohibition against the taking of private property for public use "without just compensation"[20]—has been read far more cautiously. The Supreme Court has consistently held that government can take a variety of actions that drastically diminish the value of private property and enhance the public weal without compensating the affected property owners. I find this troubling. The self-incrimination clause, the due process clause, and the takings clause are the last three clauses of the fifth amendment. They are obviously viewed by the Framers as embodying closely related concepts. Yet courts have interpreted them separately and, in my view, inconsistently. This differential reflects the judicial philosophy that deprivations of life and liberty are fundamentally more deserving of protection than deprivations of property. This philosophy is not supported by the constitutional text, which speaks of life, liberty, and property in one breath. Consistency would seem to suggest that we have either fewer procedures in dealing with criminal defendants or greater protection against governmental impairment of property rights. While the Constitution does not tell us which course to follow, whatever course we do choose we should follow consistently.

The third principle of constitutional interpretation is that of completeness. The Constitution is a relatively compact document. The Framers and the drafters of the various amendments were deliberately terse. Many ideas that might constitute good government were omitted, probably to allow legislators to make judgments in light of changing circumstances. The strong inference is that when something was put in the Constitution it was meant to have a purpose and ought not be ignored. Yet surprisingly, there are a number of provisions in the Constitution that have been ignored or emasculated by judicial interpretation. A classic example is the privileges and immunities clause of the fourteenth amendment, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

19. U.S. CONST. amend. V.
20. *Id.*

United States."[21] Shortly after ratification of the fourteenth amendment in 1873, however, the Supreme Court considered this clause and, in effect, held that it had no meaning.[22] That decision has never been revisited. To many students of constitutional law this interpretation is difficult to accept, particularly in light of the Court's vigorous enforcement of the succeeding two clauses of the fourteenth amendment, which guarantee due process and equal protection of the laws. The privileges and immunities clause is not the only example of a part of the Constitution left largely bereft of meaning: The ninth and tenth amendments, for example, have met the same fate.

It is not intellectually honest or wise for courts to pick and choose among constitutional provisions. The Constitution represents a consensus embodying all of its provisions. It is a charter for our government comprising all the authorizations and limitations written into it. By vigorously enforcing some and ignoring others, judges are able to engraft their own philosophies onto the Constitution, rather than accepting and applying the philosophy of the document.

In sum, we do a disservice to the Constitution, and to the political system it supports, when we give the Constitution special treatment. As our organic law, it deserves the highest respect. Respect, however, comes not from shutting our eyes to the words, phrases, and concepts written in the Constitution, but from examining them closely and interpreting them squarely. There is still much we can disagree about while staying well within the confines of the constitutional text. But we ought not to disagree that we are interpreting the Constitution as written, not as we wish it had been. Yes, it *is* a constitution we are interpreting, not our own sense of virtue or morals or justice. If we can all agree on that, we can make a significant advance in the process of constitutional adjudication.

II. Professor Williams: Original Intent—A Plea in Bankruptcy

For many, the dramatic moment in the confirmation hearings of Judge Robert Bork's nomination to the Supreme Court came on September 19, 1987, when the former Yale law professor met his equal, Yale law school graduate Arlen Specter, now a Republican

21. U.S. Const. amend. XIV, § 1.
22. *See* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

Senator from Pennsylvania. In 1985, Judge Bork had advocated a jurisprudence of "original intent" when he said, "The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments."[23] Senator Specter, on the other hand, has never believed that the Framers' intent is readily discernible.[24] When Senator Specter asked Judge Bork how he could advocate such a simplistic standard, the judge had to concede that the "contours are not clear cut" and that judges who apply the standard will "in borderline cases often come out differently."[25]

In reality, Judge Bork had already abandoned the original intent argument, at least in the critical area of school desegregation, in a controversial article[26] that addressed *Brown v. Board of Education*,[27] the Supreme Court decision that radically departed from the long-standing interpretation of the equal protection clause.[28] Although the fourteenth amendment was approved in 1866 by a Congress that simultaneously granted land to the sole use of segregated schools in the District of Columbia,[29] Judge Bork abandoned the apparent intent of that Congress. Instead, he accepted *Brown* as correctly applying a *contemporary* standard of equal opportunity. Finally, again at his confirmation hearings, Judge Bork condoned the desegregation ruling of *Brown*, despite the evidence that the "original intent" of the 1866 Congress, which passed the fourteenth amendment and its equal protection clause, favored segregated schools.[30] Judge Bork concluded his exchange with Senator Specter by admitting that both schools of jurisprudence—original intent and a "contemporary" constitutional interpretation—are rooted in "very strong tradition[s]."[31]

The opening fusillade in the most recent battle over original

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23. R. Bork, Remarks Before the University of San Diego Law School (Nov. 18, 1985), *reprinted in* THE GREAT DEBATE, *supra* note 6, at 43, 45.

24. *See* N.Y. Times, Sept. 20, 1987, at 50, col. 1.

25. *Id.*

26. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 42 IND. L.J. 1 (1971).

27. 347 U.S. 483 (1954).

28. U.S. CONST. amend. XIV, § 1.

29. *See* Act of July 28, 1866, ch. 307, 14 Stat. 343 (1866).

30. *See Hearings on the Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court Before the Senate Judiciary Comm.*, 100th Cong., 1st Sess. (Sept. 15, 1987) (statement of Judge Bork), *reprinted in* 45 CONG. Q. WEEKLY REP. 2258, 2258 (1987).

31. N.Y. Times, Sept. 20, 1987, at 50, col. 1.

intent was fired by Attorney General Edwin Meese in his address to the American Bar Association on July 9, 1985.[32] The Attorney General stated:

> It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as *amicus*, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.[33]

I will critically assess the original intent aspect of Attorney General Meese's address.

A. The Politics of Original Intent

Attorney General Meese, in his 1985 address, argued that "[a] jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection."[34] But the very page on which this "no politics" commitment appears reveals the underlying hypocrisy of the speech—and what the original intent advocates have in mind. Earlier in the same address, Attorney General Meese declaimed "the radical egalitarianism and expansive civil libertarianism of the Warren Court."[35] He was apparently referring to *Brown v. Board of Education*,[36] *Baker v. Carr*,[37] *Mapp v. Ohio*,[38] *Gideon v. Wainwright*,[39] and the other equal protection and due process decisions of the Warren Court that notably advanced equality and liberty in this country. Attorney General Meese re-

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32. *See* E. Meese, Remarks at the Meeting of the American Bar Association (July 9, 1985), *reprinted in* THE GREAT DEBATE, *supra* note 6, at 1.

33. *Id.* at 10. In this address, Attorney General Meese also voiced his approval of United States Supreme Court decisions that upheld warrantless searches; accommodation, rather than separation, of church and state; and disincorporation of the Bill of Rights from the fourteenth amendment. The Attorney General also asserted that Chief Justice Marshall's dicta in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1814), which stated, "[W]e must never forget, that it is *a constitution* we are expounding," *id.* at 407 (emphasis in original), meant that the Constitution was a limitation on judicial power rather than a document into which the Court was to breathe life continually. *See* E. Meese, *supra* note 32, at 5-10; *see also* Wall St. J., June 13, 1986, at 22, col. 4 (Meese disapproving the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), which set forth the requirement that a criminal defendant be notified of his constitutional rights upon arrest).

34. E. Meese, *supra* note 32, at 9.

35. *Id.*

36. 347 U.S. 483 (1954).

37. 369 U.S. 186 (1962).

38. 367 U.S. 643 (1961).

39. 372 U.S. 335 (1963).

jects these decisions because he cannot find original intent for equality in education or apportionment, or for the exclusion of tainted evidence, or the assurance of counsel in state cases in his reading of the Bill of Rights and the fourteenth amendment.

Recently, the wrath of the original intent school of thought has focused on the right to privacy.[40] Finding no mention of a right to privacy in the wording of the Constitution, these critics wear blinders as they skip over the assurance in the ninth amendment of "other[] [rights] retained by the people,"[41] and of that dearest prize of all, *liberty*, which is guaranteed by the fifth and fourteenth amendments.[42] Original intent thus appears to be a "head-in-the-sand, feet-in-cement" and a not-very-clever jurisprudence of reactionary politics that would reverse two hundred years of our nation's development.

Immediate targets seem to be the right to privacy, affirmative action, restoration of school prayer, overturning or greatly limiting the *Miranda* decision,[43] expunging the exclusionary rule,[44] and authorizing more warrantless searches. Disincorporating the Bill of Rights and selling the courts on original interpretation are the two principal tactics for accomplishing this noxious agenda.

B. The Case for a "Living Jurisprudence"

I advocate a different decision-making mode for the courts to follow—a "living jurisprudence" comprised of three simple canons. First, the wording of the Constitution should be followed when its meaning is plain.[45] Second, the Constitution should be interpreted with all the wisdom the Court can muster, including contemporary wisdom. Third, its provisions should be applied in a manner that advances the great purposes set forth in the Constitution—to promote the liberty, equality, and general welfare of the people. This prescription for a living jurisprudence frankly admits the truth of Justice Frankfurter's dream of years ago that "[l]egislatures make

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40. *Cf., e.g.*, Roe v. Wade, 310 U.S. 113 (1973) (abortion decision); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy implied from "penumbras" of Bill of Rights).

41. U.S. CONST. amend. IX.

42. *See, e.g.*, Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Bork, *supra* note 26.

43. Miranda v. Arizona, 384 U.S. 436 (1966).

44. The exclusionary rule is a general rule of law that operates to render inadmissible evidence that has been improperly obtained. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

45. An example of plain constitutional language would be the requirement that the President must be at least thirty-five years of age. *See* U.S. CONST. art. II, § 5.

law wholesale; judges make it retail."[46]

The leading advocate of a living jurisprudence is Justice Brennan. In a speech at Georgetown University in October 1985 he stated:

> We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, *what do the words of the text mean in our time*? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.[47]

The case for that kind of jurisprudence rests on three pillars: (1) the constitutional language, which so clearly differentiates the document from a statute, requires judicial interpretation; (2) original interpretation should include an inquiry of whether the Framers provided clues to how they hoped the document would be interpreted; and (3) recognition of the absolute necessity for change in a changing country.

1. The Broad Wording of the Constitution Demands Judicial Interpretation—This extraordinary document is no codex, no statute with its minutiae that governs us. It is a constitution in the truest sense of the word. Note some of its great phrases that are listed in Table 1 below, and consider if each could possibly spawn the developments set forth opposite such phrases:

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46. Remark by Felix Frankfurter to Hugo Black (Dec. 15, 1939), *quoted in* Hugo Black Papers (collection available in Library of Congress).

47. W. Brennan, *supra* note 6, at 17 (emphasis added). Justice Hugo Black, in his dissent in Griswold v. Connecticut, 381 U.S. 479 (1965), stated:

> I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy.

Id. at 522 (Black, J., dissenting).

TABLE 1

The Great Provisions	Development
"[T]o form a more perfect Union"[48]	Establishment of Martin Luther King holiday.
"[E]stablish Justice"[49]	Hold President Nixon accountable to the fifth and sixth amendments, and President Reagan to the first amendment.
"[P]romote the general Welfare"[50]	Legislate Project Headstart, unemployment compensation, and provide educational aid to the handicapped.
"To regulate Commerce . . . among the several states"[51]	Ban racial discrimination by hotels and employers and prohibit child labor.
"[N]ecessary and Proper"[52]	Establish a national bank, the Tennessee Valley Authority, and the Food and Drug Administration.
No "establishment of religion"[53]	Prohibit prayer in the schools and high school graduation credit for Old Testament classes in nearby church seminaries.
"[F]reedom of speech [and] of the press"[54]	Strike down bans on publishing the Pentagon Papers and on subscriptions to Cuban magazines.
"[D]ue process of law"[55]	Assure Clarence Gideon a lawyer, and protect Dolly Mapp from an unreasonable search.
"[E]qual protection of the laws"[56]	Prohibit segregated schools and busing.
"Other[] [rights] retained by the people"[57]	Recognize the right to privacy in family planning.

48. U.S. Const. preamble.
49. *Id.*
50. *Id.*
51. *Id.* art. I, § 8, cl. 3.
52. *Id.* art. I, § 8, cl. 18.
53. *Id.* amend. I.
54. *Id.*
55. *Id.* amend. XIV, § 1.
56. *Id.*
57. *Id.* amend. IX.

These constitutional phrases were broadly drafted by design to allow Congress, the President, and the courts to interpret them as our nation developed, continuously checked by each other. Imagine how long the Constitution would be if the Framers had used statutory language. Consider, for example, that it required two amendments—the eighteenth and twenty-first—to deal with the "statutory" subject of prohibition.

2. Original Intent versus a Living Jurisprudence: The Framers' View—At the New York ratifying convention in 1788, Alexander Hamilton discussed with the delegates why the Framers had chosen broad language for the Constitution: "Constitutions should consist only of general provisions: the reason is, that they must necessarily be permanent, and that they cannot calculate for the possible change of things."[58]

Chief Justice John Marshall, who participated in the Virginia ratifying convention, devoted a lengthy passage in *McCulloch v. Maryland*[59] to the issue of textual construction:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, *but from the language.*[60]

The evidence is abundant that the Founding Fathers realized that they had launched a permanent revolution that initiated a change in the status quo. James Madison stated: "In framing a system which we wish to last for ages, we [should] not lose sight of the changes ages will produce."[61] Similarly, Alexander Hamilton's view was that the Supreme Court would play a fundamental role in the

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58. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 364 (J. Elliot 2d ed. 1907) (remarks of Alexander Hamilton to the New York Ratifying Convention, June 28, 1788).

59. 17 U.S. (4 Wheat.) 316 (1819).

60. *Id.* at 407 (emphasis added).

61. J. Madison, Journal of the Federal Convention (proceedings of June 26, 1787), *reprinted in* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 422 (M. Farrand rev. ed. 1937).

management of change, which would flow from its special responsibility to interpret the broad phrases of the Constitution. In the critically important paper *The Federalist* No. 78, Hamilton wrote:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.[62]

He then set forth what was missing in article III of the Constitution, the definition and case for judicial review:

> The complete independence of the courts of justice is particularly essential in a limited Constitution [prohibiting such things as ex post facto laws and bills of attainder] . . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.
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> . . .
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> *The interpretation of the laws is the proper and peculiar province of the courts.*[63]

In *McCulloch v. Maryland*,[64] the Supreme Court was faced with a litmus test of original intent. Could Congress create a bank, an instrument not mentioned in article I, section 8? In *McCulloch*, Chief Justice Marshall laid down the classic test for living jurisprudence: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[65] Unconcerned about the Framers' attitude towards a national bank, the Court found a plentitude of powers for the creation of a bank. These included the powers to collect taxes, to pay national debts, to regulate commerce, and to pass laws that are "necessary and proper" for carrying out the enumerated powers. For all generations to come, Chief Justice Marshall provided the guiding vision: "[W]e must never forget, that it is *a constitution* we are ex-

62. THE FEDERALIST No. 78, at 429, 430 (A. Hamilton) (G. Smith rev. ed. 1901).
63. *Id.* at 505 (emphasis added).
64. 17 U.S. (4 Wheat.) 316 (1819).
65. *Id.* at 421.

pounding."[66] Those who try to put that great sentence into a limitationist mold simply cannot read.

3. The Necessity for Change and a Jurisprudence to Match—Visualize that little seaboard nation of thirteen states, four million people, a five million dollar budget, no emancipated slaves, few women in the workforce, no airlines, no television, and no birth control pills. Eventually, states are carved out of the Northwest Territory and admitted to the Union; the permanence of that Union is tested in a hideous Civil War; the slaves are freed, but one-third of their great-grandchildren will live in poverty; the Union expands to fifty states and over 240 million people; telephones will link us from sea to shining sea; and an American will take one giant step for mankind on the surface of the moon. That is a picture of the permanent revolution in America.

How astonishing it is to discover an Attorney General, nominees to the Supreme Court, and others who would lock the aspirations of the latter-day Americans in the hidden musings of their eighteenth-century forbearers. Imagine trying to read the Framers' minds on such contemporary issues as Social Security, Medicaid, farm subsidies, and Project Headstart. It is much more sensible to try to understand the vision of Madison, Marshall, and Jefferson on the full meaning of change in a dynamic nation. For Marshall, this is "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[67] For Jefferson:

> [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. *We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.*[68]

This nation, thank goodness, was not founded by men who looked at the future through rear-view mirrors. This nation added to the Constitution a Bill of Rights, established a bank, freed the

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66. *Id.* at 407 (emphasis in original).

67. *Id.* at 414 (emphasis in original).

68. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *reprinted in* THOMAS JEFFERSON ON DEMOCRACY 67 (S. Padover ed. 1939).

prisoners of the Sedition Act,[69] and sent Lewis and Clark into the great unknown. Most important, the drafters of the Constitution created a charter of liberty that could be adapted by all the branches of the government to meet the needs of a changing nation. Perhaps the real miracle at Philadelphia, then, was giving us a Constitution that recognized Jefferson's great truth: "The earth belongs always to the living generation . . . ."[70] On that truth rests the case for a living jurisprudence.

69. Ch. 74, 1 Stat. 596 (1798) (expired 1801).

70. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* THE MIND OF THE FOUNDERS 15 (M. Meyers ed. 1973).