

A Scholar's Journey On The Dark Side

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These past few years I have lectured for the Federalist Society. That combined with celebrating my fortieth anniversary as an academician has prompted considerable reflection. My initial inclination was to write about how free pizza has contributed to the dissemination of conservative legal education (free pizza is frequently offered at lecturing events to entice attendance), but when I learned that the American Civil Liberties Union used the same tactic, I abandoned the project. I eventually focused on my impressions of contemporary legal education.¹ But I get ahead of myself.

I. INTRODUCTION

In the twilight of my career I now realize that even in my youth my inclinations were conservative. Born in Bensonhurst, Brooklyn, I was nurtured in a close-knit Sicilian, Roman Catholic, extended family. The neighborhood I grew up in was lower-middle class, dominated by registered democrats who, much to the chagrin of local party functionaries, consistently voted republican. In 1960 I passionately supported John F. Kennedy, which disappointed my parents, aunts, and uncles. One could conclude that my views at the time were rather conventional.² 1964 and

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¹ See generally The Federalist Society, <http://www.fed-soc.org/> (last visited Sept. 3, 2007). While the Federalist Society undoubtedly has a point of view, no one there has ever offered me guidance or asked me to subscribe to any litmus test. I often am amused when liberally inclined students, drawn to my lecture by the offer of free pizza, comment afterwards that a lot of what I had to say made sense.

² My colleague, Professor Robert Pecorella, kindly pointed out two books illustrating the trend of previously Democratic Italian-Catholic-Americans toward Republicanism in the 1960–70s, demonstrating that my views were fairly typical. RICHARD GAMBINO, BLOOD OF MY BLOOD: THE DILEMMA OF THE ITALIAN-AMERICANS (1974); KEVIN P. PHILLIPS, THE EMERGING REPUBLICAN MAJORITY (1969). Evidently, the Italian attachment to family, and resistance to government, made them suspicious of the Democratic Party's statist approach. That, plus Irish control of the New York Democratic Party left them wary. See *id.* I recall assigning EDWARD C. BANFIELD, THE UNHEAVENLY CITY REVISITED (Little, Brown and Co. 1974) (1968) to my first classes, and being struck by his analysis. When studying minorities, rather than race, one should examine future orientation. *Id.* at 52–57. He contended that children of the poor and rich shared similar orientation—a tendency to seek immediate gratification. To be sure, their reasons were different—the poor because of despair and the rich because things were too easily acquired. He also concluded privacy was primarily a matter of upper class con-

the completion of my BA found me torn between two career paths: law or political science. I decided to pursue my master's and Ph.D. in political science, reasoning that the eventual teaching life style would allow me time to obtain a law degree, while the opposite choice would not be equally true.³

After my MA, I enrolled at the University of Notre Dame and before long (or so it seems in hindsight) I became deeply immersed in dissertation research, spending untold hours in the scintillating company of English common law volumes. Back then (I have not seen it in forty years) the law library was quaint, with spiral staircases leading up to what at the time was called the "stacks" (the various case reports and law reviews). It was a dusty, musty place, probably unsafe by today's environmental standards, but I loved it. I not only felt a kinship with the students who had preceded me, but like many before me, fell under the spell of Holmes and Brandeis, Cardozo and Frankfurter.⁴

Eventually I encountered a brilliant article by Herbert Packer.⁵ Several things about it struck me. First, the simplicity and clarity of his hypothesis that "the shape of the criminal process has an important bearing on questions about the wise substantive use of the criminal sanction."⁶ I wondered why it had never been posited before. Second, he embraced the legitimacy and usefulness of "normative model" building.⁷ Third, he painstakingly sifted through conflicting viewpoints and did so with relative

cern since in such families each child typically had his own bedroom. That was not true in poor, lower or even middle class homes, particularly where several generations of family members lived together. *Id.* at 52–77. Some of Banfield's other comments still ring true: "But facts are facts, however unpleasant, and they have to be faced unblinkingly by anyone who really wants to improve matters . . ." *Id.* at xi. With chapter titles such as "Race: Thinking May Make It So," and "Rioting Mainly for Fun and Profit," the rumor was that the book had been banned as racist in the City universities. *Id.* at xiii.

³ My calculations did not (though perhaps they should have) encompass the realities of marriage and children, and the need to earn a living. I shrugged off the fact that one of my professors drove a ten year old car, and I knew nothing about "publish or perish." Thinking back, I realize that perhaps the strongest factor in my career choice was my aversion to commuting! Although not explored here, serious introspection makes one realize how easily the intellect is commandeered by acquired attitudes—that is, attitudes frequently bend the intellect to its will rather than the other way around. See WILLIAM GANGI, SAVING THE CONSTITUTION FROM THE COURTS 286 (1995) [hereinafter SAVING], available at <http://facpub.stjohns.edu/~gangiw/Saving.pdf>.

⁴ I distinctly recall often finding Frankfurter's opinions illuminating; primarily because of his penchant for thoroughness—his footnotes would occupy me for weeks afterward. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961). Years later I concluded that Frankfurter distorted the law. See SAVING, *supra* note 3, at 99–102. Such distortions however were quite innocent. None of us totally escape the assumptions of our era. Publius (the common pen named used by the authors of *The Federalist Papers*—Alexander Hamilton, James Madison, and John Jay) notes: "They who have turned their attention to the affairs of men must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure." THE FEDERALIST NO. 64, at 393 (John Jay) (Arlington House 1965).

⁵ Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). Compare Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (proposing a third model to complement Packer's two models).

⁶ Packer, *supra* note 5, at 1–2.

⁷ *Id.* at 5 (emphasis omitted). Packer carefully comments that "[t]hese models [referring to the Crime Control and Due Process models] may not be labeled Good and Bad, and I hope they will not be taken in that sense." *Id.* On that score successors would disappoint him.

dispassion. Finally, although he forthrightly acknowledged that under the Due Process Model, legal reform became indistinguishable from the criminal process and it would inevitably result in the guilty escaping punishment, he nevertheless embraced it.⁸ It is fair to say, I think, that Packer characterized those who embraced the Due Process Model (particularly students) as being on the side of the angels. He predicted it would dominate the “future” of criminal law and on that score he certainly proved prescient.⁹ Today, the Due Process Model so completely dominates the perspective of most criminal law professors, that few law students are ever exposed to pre-Warren Court precedents.¹⁰ I will return to that particular point later.¹¹

Although I rejected Packer's substantive conclusions, I now realize how fortunate I was to have encountered such a superb scholar so early in my career.¹² In that regard, throughout my career I have indeed been fortunate. For years (decades when added together), I have struggled with the work of one great scholar or another, and I have never regretted doing so. They taught me important lessons about my craft: to forthrightly confront one's opponents and to be intellectually honest.¹³ I likewise urge today's law students to identify excellent scholars. If they are as good as you think they are they will point you in the direction of the best with whom they disagree. Learn to master opposition arguments as well as your own. It will make you a far better lawyer.

⁸ *Id.* at 18. “[T]he criminal process is viewed as the appropriate forum for correcting its own abuses.” *Id.* at 17. “[W]hile it may in the first instance be addressed to the maintenance of reliable fact-finding [sic] techniques, [the Due Process Model] comes eventually to incorporate prophylactic and deterrent rules that result in the release of the factually guilty even in cases in which blotting out the illegality would still leave an adjudicative factfinder [sic] convinced of the accused's guilt.” *Id.* at 18.

⁹ Packer's own preferences are not at issue here. With respect to his model building he observed: “When we polarize, we distort. The models are, in a sense, distortions This Article does not make value choices, but only describes what are thought to be their consequences.” *Id.* at 6. Compare William Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation*, 34 *DRAKE L. REV.* 33, 107–10 (1984–85) [hereinafter *Exclusionary*] (the exclusionary rule is not mandated by the Constitution).

¹⁰ See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 47–48 (1977) (noting that for some time the ability to identify the correct precedents has played an influential role in our law). I for one, insisted that our law school retain its copy of John Henry Wigmore's 1940 Edition of *EVIDENCE*. JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (3d ed. 1940) (1904). Subsequent editions incorporated progressivist assumptions, and by doing so, diminished the work as a valuable resource. See *id.* at vii. As our libraries become digitized, not only will much of this information probably disappear (who will keep older editions?) but whoever decides what is available will have a controlling voice.

¹¹ See *infra* notes 279–280 and accompanying text.

¹² I would also add Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME I* (A. E. Dick Howard ed., 1965) as well as sources cited *infra* notes 14, 17, 19. But see William Gangi, *The Inbau-Kamisar Debate: Time for Round 2?*, 12 *W. ST. U. L. REV.* 117 (1984) [hereinafter *Inbau-Kamisar*] (Kamisar's analysis rests on sub-constitutional grounds). “Our society is free to select the positions of either Kamisar or Inbau, or anyone else, on police interrogation and the appropriateness of various remedies for abuse of constitutional rights on a subconstitutional [sic] basis. Such decisions represent what self-government is all about.” *Id.* at 153.

¹³ See *supra* note 4; *infra* note 196 and accompanying text (discussing thesis books).

From what law students have told me, however, this generation may have to work harder than I did. When I began my career, reformers were in the minority and had to first demonstrate their mastery of our legal tradition before they were given much credence. For example, by probing the *footnotes* in one of Yale Kamisar's articles, one still acquired considerable insight into the very traditions he advocated abandoning in his *text*.¹⁴ Young professors today are far more likely to be theoretically grounded than precedent grounded, and as a result (I hope to illustrate), law students find it much more difficult to escape the conventional wisdom that surrounds them.¹⁵

Returning to my own professional journey, my dissertation and initial publications (one and the same) chronicled the Supreme Court decisions on coerced confessions.¹⁶ Before long however, I focused on and pursued the exclusionary rule. Drawn to that topic, I ran across yet another brilliant article.¹⁷ The authors equated the imposition of the exclusionary rule as synonymous with the exercise of the power of judicial review.¹⁸ They labeled their approach the judicial integrity argument¹⁹ and it dazzled me. Although I *knew* their conclusions were wrong, I could not find fault in their approach. Now, pretty grumpy, I pushed on, and the deeper I immersed myself the more one question emerged: *What was the proper role of the Supreme Court?* Recognizing (not too graciously) that I was in over my normative head, I abandoned the exclusionary rule research and focused my attention on the issue of judicial power.

A virtuoso performance by Raoul Berger soon caught my attention.²⁰ As a result I collected, read, and digested hundreds of pro-and-con articles.

¹⁴ See Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1967).

¹⁵ See *infra* notes 35–37 and accompanying text. When lecturing, I point out that most constitutional law textbooks are around fifteen hundred pages. Each year the Supreme Court decides approximately eighty cases. Since many of these new cases have a significant impact on the law, textbook editors are compelled to make room for them. Over the past twenty-five years, I have noticed that many textbooks have dropped quite a few traditional precedents or retained almost only the holding. As a consequence, unless one's professor points them in the right direction, many law students have become unfamiliar with older precedents.

¹⁶ See William Gangi, *Confessions: Historical Perspective and a Proposal*, 10 Hous. L. Rev. 1087 (1973) [hereinafter *Confessions*]; William Gangi, *The English Common Law Confession Rule and Early Cases Decided by the United States Supreme Court*, in AMERICAN JUDICATURE SOCIETY 1973 (INFORMATION REPORT SERIES, No. 205, Sept. 1973) [hereinafter *English*]; William Gangi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases*, 28 ARK. L. REV. 1 (1974) [hereinafter *Critical*]; William Gangi, *The Supreme Court, Confessions, and the Counter-Revolution in Criminal Justice*, 58 JUDICATURE 68 (1974).

¹⁷ See Thomas S. Schrock & Robert C. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975). Compare *Exclusionary*, *supra* note 9, at 86–87, 118–20 (citing Schrock & Welsh for the contention that the exclusionary rule is really judicial review and questioning the constitutional basis thereof).

¹⁸ Schrock & Welsh, *supra* note 17, at 324–25.

¹⁹ *Id.* (noting that the exclusionary rule provides a judicial method for refusing to validate police illegalities).

²⁰ Raoul Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527 (1979).

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I then created about a forty square-inch chart as well as a citation system in order to efficiently identify which articles (or part of articles) discussed which topic. Related issues grew so numerous, complex, and interwoven, it took me a year to sort, organize, and label them before I could publish my findings.²¹

The remainder of this article is divided into five parts, each of which is designed to advance the article as well as provide support for succeeding parts. Part II briefly reviews the principles that separate those who support contemporary judicial power from those who oppose it. Part III asserts that by caring too much about important things, students undermine the competencies of federal and state governments, as well as diminish the people's right to self-government. Part IV describes which issues law students must confront and what tools they must acquire before, if ever, constitutional law is re-founded. Part V places the preceding parts in the context of our Madisonian schema, and finally, Part VI offers my conclusions.

II. WHAT DIVIDES US

Constitutional scholars in the United States today may be said to reside in two camps: interpretivists and non-interpretivists.²² I contend that the vast majority (including the faculties of our most prestigious legal institutions and political science departments) champion non-interpretivism. When that view is examined *in toto* its premises are integrated, complex, and comprehensive.²³ Generally speaking, non-interpretivists view many constitutional phrases as ambiguous, abstract, open-ended, malleable, and expandable. In this regard, for example, some argue that since the Constitution's ratifiers are long dead, their understanding of the document should

21 William Gangi, *Judicial Expansionism: An Evaluation of the Ongoing Debate*, 8 OHIO N.U. L. REV. 1 (1981), [hereinafter *Expansionism*] (arguing that Raoul Berger's position in the debate over judicial power is supportable). My admiration and respect for Berger's contribution to my growth as a scholar may be found elsewhere. See William Gangi, *Raoul Berger's Impact on Constitutional Law*, 3 BENCHMARK 189 (1987). Three years after publishing the *Expansionism* article I returned to the exclusionary rule. See *Exclusionary*, *supra* note 9. A simple comparison of the titles indicates Berger's impact on my research.

22 This assertion is of course an exaggeration. First, many scholars consider themselves somewhere in the middle. Whether or not that stance is viable, I'll leave to the reader to determine. Publius suggests that at times it is not possible. See THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 4, at 105 (noting that there are times when the road citizens must travel is complex and full of obstacles, but a final decision must nevertheless be made). Second, I omit what I consider mostly semantic differences between the use of the terms "interpretivist," "originalist," or "intentionist." See William Gangi, *The Supreme Court: An Intentionist's Critique of Non-Interpretive Review*, 28 CATH. LAW. 253, 273-84 (1983) [hereinafter *Intentionist*]. Perhaps I could have categorized the two positions as "models," as did Packer on another subject (see *supra* note 5), but I chose to label each non-interpretivist argument strand as "symbols." See *Expansionism*, *supra* note 21, at 17 n.149. Finally, it would be more accurate to characterize the division between the two camps as one between those who are *aware* there is a debate, and those who think none exists. The latter either believe nothing important has changed about constitutional law, or that non-interpretivists view interpretivists as simply having different public policy preferences than they do. Law students sense something is going on, but they are not quite sure what it is. The forces of non-interpretivism have become so strong that many law school professors dismiss the interpretivist position as either literalism, attempts to read the minds of the framers, or the increasingly popular "fundamentalist" condemnation.

23 See *SAVING*, *supra* note 3, at 194-225; *Expansionism*, *supra* note 21, at 17-55.

no longer be determining. Instead, every generation should be entitled to redefine the Constitution to suit its needs.²⁴

Other non-interpretivist arguments recall the *ideals* professed by the American people when they fought the Axis powers, and contrast them with the actualities persisting after World War II: racial segregation, inadequate state systems of criminal justice, and continued gender discrimination.²⁵ They contend that during the late 1940s and early 1950s attempts at legislative reform either failed or never materialized, and federal and state executives far too often proved unsympathetic to marginal voting blocks.²⁶ The legislative process (whether at the state or federal level) and the amendment process simply proved far too *cumbersome* to be of any practical use. These developments indicated that our democratic processes were seriously flawed, if not outright defective, and that something had to be done before untold damage, perhaps even civil unrest, ensued.²⁷

Non-interpretivists point out that it was the judiciary—particularly the Supreme Court—that bridged the *gap* between American ideals and existing realities. Courts stepped into the *vacuum* created by the unresponsive political branches.²⁸ By actively pursuing much needed societal reform, the Supreme Court soon became our nation's moral conscience. Courts could act boldly, non-interpretivists claim, because, unlike elected officials, judges could do the *right thing* without fear of losing their jobs. As a consequence, for more than fifty years, the Supreme Court has changed public social policies for the better. Having done so, Americans are far more dedicated to personal liberty and equality than ever before. In fact, the Supreme Court has almost single-handedly erased our past failures, increasingly shaping the law to make us more the people we had professed to be. Now is no time to stop these advances. The justices should continue to make decisions that encourage us to become more the people we *ought* to be.²⁹ In short, the non-interpretivist position is a pretty impressive point of view. Law students should recognize it, even if they remain unfamiliar with its more sophisticated arguments.

In contrast, interpretivists are a small, isolated, and embattled minority who contend that constitutional interpretation should usually begin with the ratifiers' understanding of the Constitution. They also maintain that since the Supreme Court often neglected to follow that approach, many landmark decisions are illegitimate. Put another way, interpretivists assert that con-

²⁴ *Expansionism*, *supra* note 21, at 18. See, e.g., Arthur Selwyn Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 601 (1973) ("The Founding Fathers have been buried. They should not rule us from their graves.").

²⁵ *Expansionism*, *supra* note 21, at 22–24.

²⁶ *Id.* at 37–38.

²⁷ *Id.* at 48–49.

²⁸ *Id.* at 23.

²⁹ See generally CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001). "The Constitution's open texture invites judges to engage in principled argument about moral and political issues." *Id.* at 6. But see William Gangi, Book Review, 31 PERSP. POL. SCI. 113 (Spring 2002).

siderable doubt exists as to whether we are still a republic, or whether the Constitution has become “a dead letter.”³⁰

When not ignoring or belittling their opponents' views, non-interpretivists reject interpretivist arguments as much ado about nothing. They point out that over the past fifty years, greater judicial involvement has not only produced positive public policy results, but disputes over interpretation are hardly new.³¹ Such disputes have long existed and have historically been even more vehement than they are today. Furthermore, they charge that interpretivists neglect to mention that constitutional adjudication has remained largely unchanged: litigants file suits, district court judges preside over trials and render opinions, and appeals proceed as they always have. Likewise, the Supreme Court remains, as the Constitution's framers intended, the Court of last resort, and it continues to exercise a power long considered legitimate—the power of judicial review.³² Finally, they observe that astute scholars still analyze and comment upon the Court's work.³³ In sum, once differences in time, circumstances, and ideology are accounted for, despite interpretivist claims to the contrary, the Supreme Court plays its traditional role and constitutional law remains alive and well.

Interpretivists like me respond by asserting that courts have assumed a new and revolutionary role, one inconsistent with the framers' design. We insist that beneath the veneer of continued normalcy, constitutional law has been shorn of its substance and that under the guise of interpretation our tradition of self-government has been replaced by *de facto* judicial governance. While acknowledging that non-interpretivist policy preferences (e.g., race, equality, or freedom of speech) are laudable, many precedents remain suspect on two grounds. First, noble intent is an inadequate defense against the charge of illegitimacy, and second, public policy preferences are for the *people*, not courts, to decide.³⁴

³⁰ George W. Carey, *The Philadelphia Constitution: Dead or Alive?*, in LIBERTY UNDER LAW 71, 75 (Kenneth L. Grasso & Cecilia Rodriguez Castillo eds., 2d ed. 1998). See also GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION (Liberty Fund, Inc. 1995) (1989) [hereinafter DEFENSE]. Carey speculates that the framers' limited understanding of judicial review may well be “passé” and “[w]hat we have in its place is a theory of judicial supremacy, a theory that, remarkably enough, is supported by most of our elected leaders, who accept the notion that the Court is the final arbiter as to the meaning of the Constitution.” *Id.* at 186–87. I resist Carey's conclusion, but concur in his second finding. See *infra* note 354 and accompanying text. Even more intriguing and somewhat ironic is that when the framers created the judiciary, they purposely *departed* from the republican elective principle (e.g., they granted life tenure to judges during good behavior rather than periodic election), in an effort to *reduce* the prospect of governmental tyranny (i.e., the consolidation of executive, legislative, and judicial power into a single hand). See DEFENSE, *supra* note 30, at 132–35; *infra* notes 240–247 and accompanying text.

³¹ See SAVING, *supra* note 3, at 221–22.

³² *Id.* at 195–205.

³³ *Id.* at 220.

³⁴ See generally LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). We can briefly mention here that laissez-faire capitalism captured the imagination of the American intelligentsia—including its judges. As a result, for fifty years (between the 1880s and 1930s), the Supreme Court struck down state and federal legislation attempting to ameliorate

In the name of frank disclosure let this interpretivist put some of his cards on the table. I do not ask readers to agree with me, only to be forthright with themselves, that is, to admit when at one point or another, even briefly, they entertained conclusions similar to those reached herein. The first reading assignment in my undergraduate courses in constitutional law is Plato's analogy of the cave.³⁵ I then ask students to imagine the Supreme Court justices standing at the rear of the cave, casting shadows (decisions) upon the front wall. Seated in successive rows are constitutional scholars, members of the intelligentsia (lawyers, political scientists, and educators), and behind them elected officials and media representatives. Common citizens fill the remainder of the cave. As in Plato's analogy all those seated are prisoners with chains about their necks, their heads fixed to view the shadows on the front wall.

Each October, when the Court starts a new term, I claim that yet another round of shadows is cast upon our political life. Presumed experts and media representatives soon confidently speak of *new* rights—or rights *dashed*—while in learned journals constitutional scholars eventually explain how the newly-designed shadows portend a deepening of—or a retreat from—our cave's commitment to greater personal liberty, equality, or social justice. In this manner, common citizens learn from those supposedly *more expert*, that the new shadows are full of wonders or dangerous consequences.

Law students, I suggest, are particularly vulnerable to these shadow-makers. They learn that the law craft consists of three steps. First, they must identify what desirable public policy outcomes they want. Then they must use their imagination, combined with recently minted interpretive approaches,³⁶ so as to bring the policy outcome they desire within the meaning of one constitutional phrase or another—that is, either linking it with an existing right (e.g., free speech) or creating a new one (e.g., privacy). Finally, law students practice honing their reductionism skills—that is, the ability to minimize or obliterate any competing value or precedent—which once again requires their imagination. Put another way, their constitutional law education often boils down to learning how to get a court to do what they believe is right.

What, I ask rhetorically, could be the motivation for pursuing constitutional law in such a manner? The motivation is—what law students should always expect it to be—virtuous, but that makes it no less dangerous. By using judicial power many non-interpretivists wish to perfect the Constitu-

the ill effects of modern industrialization. The justices then, as now, claimed that the *Constitution* compelled their decisions. But, in fact, they simply imposed upon the American people the dominant intellectual prejudices of their era. See *Intentionist*, *supra* note 22, at 260–64; *DEFENSE*, *supra* note 30, at 3–17; *SAVING*, *supra* note 3, at 94–97; *infra* note 327 and accompanying text.

³⁵ PLATO, *Republic*, in *THE COLLECTED DIALOGUES OF PLATO* 575, 747–51 (Edith Hamilton & Huntington Cairns, eds., Paul Shorey trans., Princeton Univ. Press 1961) (1938).

³⁶ *SAVING*, *supra* note 3, at 125–67.

tion as well as our societal faults.³⁷ Put another way, they envision a world where the sacrifices of Martin Luther King would become unnecessary. Non-interpretivists see themselves as occupying the moral high ground.

Curmudgeon that I sometimes am, I characterize many widely-admired Supreme Court doctrines as containing little legal substance. I am referring to such doctrines as: evolving standards of decency, fundamental rights, preferred freedoms, a whole *bag full* of nexus and balancing tests, as well as intriguing phrases such as penumbras and emanations, vagueness, overbreadth, chilling effect, expectations of privacy, excessive entanglement, grossly disproportionate, and perhaps, the mother of all shadows—selective incorporation. Although some are admittedly snazzy and others possess a modicum more of traditional interpretive merit than do others, more often than not what one finds beneath their glossy surfaces are public policy arguments dressed-up as constitutional ones. As one scholar astutely observed of the Warren Court opinions: they “seem more and more devious, sloganistic and directed to the human thirst for fairytales Surely [the] purpose [being] to obscure (for lesser minds) . . . raw exercise[s] of judicial fiat.”³⁸ Since that statement was made in 1979, nothing has materially changed.

Once law students penetrate the rhetoric (not easy to do if you share either the mindset or *cause*) they will realize that many Supreme Court opinions simply provide the rationalizations of five Justices for imposing their public policy predilections on the American people, and they do so by skillfully hiding them under the subterfuge of *interpretation*. The Justices are constantly creating new shadows and tweaking old ones, and in doing so, they also use other modern so-called interpretive devices—such as approaching constitutional phrases at higher levels of generality.³⁹ Or a ma-

³⁷ See generally Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). The reader may wish to keep Publius' comment in mind:

On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants.

THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 4, at 35.

³⁸ Wallace Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437, 440–41 (1979).

³⁹ See, e.g., Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 662 (1985) (“level of generality”); Larry A. Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 452 (1983) (“higher and higher levels of generality”); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1035, 1045 (1981) (“different levels of generality” and “sufficiently high level of abstraction”); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 742 (1982) (“general language”); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1245 (1987) (“historical intent may be fixed at highly varied levels of abstraction.”). We have moved further and further away from our legal tradition. One of my all time favorites is Professor Leif Carter's use of “intersubjective zap.” Professor Les-

jority will turn to the ever-popular—though maddeningly and inconsistently applied—appropriate level of judicial scrutiny. In this context, is it any wonder why, over the past fifty years, once clearly-understood constitutional phrases have become mysteriously *ambiguous*?

I fully understand how exciting and tempting it is to be swept into these powerful shadows and into the impressive imaginations of so many first-rate scholars. But I counsel law students to recognize these doctrines and interpretive devices only for what they *functionally* accomplish: allowing judges, under the guise of interpretation, to substitute *their* judgments for those of legislators. Conversely, if some among you wish to be constitutionalists in the traditional sense, you face some tough choices. Even if you believe that the public policy preferences enunciated by Supreme Court majorities are morally superior, more ethically correct, or otherwise preferable to those presently operative in our society, you must decide whether or not they have been illegitimately imposed.⁴⁰ Other questions you must ask and answer are: Where would you locate the authorization for courts to do so? And, would such a power change our regime from a democratic republic to a judicial oligarchy?

I will briefly return to the interpretivist/non-interpretivist dispute, but before doing so, I cannot mislead you into believing that any conclusions you reach on the merits of said dispute would tip the balance one way or the other. As I mentioned earlier non-interpretivists clearly dominate in the law schools, as they do elsewhere in academia. My purpose here is simply to increase your awareness of the assumptions that very likely pervade your education. After spending more than thirty years periodically examining the legal literature, I am convinced that much of what today masquerades as profound non-interpretivist normative constitutional theory, more often than not, is utter nonsense. Far too often such literature ignores the framers' design, historical facts, contrary precedents, makes innumerable unsupported assertions, or is permeated with personal assessments about what the American people need or should desire. Furthermore, in their desire to empower the Supreme Court, non-interpretivists have redefined republicanism, and in so doing *have ignored the need to obtain the people's consent*.

One aside: When I'm out lecturing, students frequently report that their courses in constitutional law have become truncated, consisting almost exclusively of either First Amendment, privacy issues, or whatever

lie Goldstein quoted him in a paper: "Does the Court opinion produce in its audience a felt sense of 'intersubjective zap,' as a good rock concert does? If so, it is a good opinion." Leslie F. Goldstein, *Judicial Review and Democratic Theory: Guardian Democracy vs. Representative Democracy*, 40 W. POL. Q. 391, 395 n.17 (1987).

⁴⁰ It is far easier to persuade a few judges of the merits of one's public policy views than embracing the far more arduous task demanded by the Constitution: to convince your fellow citizens. Professor Eisgruber, for example, combines moral fervor, and simultaneously redefines democracy. See EISGRUBER, *supra* note 29. "I maintain that the Supreme Court should be understood as a kind of representative institution well-shaped to speak on behalf of the people about questions of moral and political principle." *Id.* at 3. Uh, no thank you.

topics have captured their professor's fancy. My own impression is that selective Bill of Rights provisions, or the Fourteenth Amendment, have almost completely swallowed the original Constitution. The constitutional law tradition is far richer than what many law students are experiencing today. These "Johnny-One-Note" (or Two, or Three) constitutional law courses are analogous to the sometimes female complaint that far too many men think with a single appendage.

In sum, the legitimacy of Supreme Court decisions cannot rest upon the fact that the public policies implemented are worthy ones, or the ultimately unknowable conviction that without judicial intervention, public policy reforms never would have materialized. But if the reader thinks otherwise, finds contemporary sleight of hand arguments convincing, agrees that courts ought to make public policy determinations, or holds certain policy results so dear that any other considerations—including constitutional legitimacy—pale in comparison, all I can do is ask what they will say if a Court majority emerges with a *different* personal agenda? For the imprudent or those who have a perverse desire to go against conventional wisdom, or even those who are simply unable to stifle their intellectual curiosity, read on . . . and welcome to the Dark Side.⁴¹

III. CARING ABOUT IMPORTANT THINGS AND ITS IMPACT ON GOVERNMENTAL COMPETENCY

To probe *any* substantive area of constitutional law leaves one embarrassed. I speak here, not about whether you agree with one Court decision or another, but about whether you find the decisions cogently (not simply logically) argued. Do precedents form a coherent body of law? There actually has been a "mess" for quite some time.⁴² All this I suggest is not accidental; it was inevitable once the Supreme Court became a dominant force in public policy-making. That new role (or, perhaps, that march in a new direction) was bound to distort our history and precedents. You cannot have one without the other.⁴³ I put aside here legitimacy issues in deci-

41 See *supra* note 2; Gary L. McDowell, *Introduction* to JUDITH A. BAER ET AL., *POLITICS AND THE CONSTITUTION: THE NATURE AND EXTENT OF INTERPRETATION*, at vii, vii (1990) ("it is not too much to say that the preference for the rule of law over the rule of men depends upon the intellectual integrity of interpretation."); Compare J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971) (discussing Bickel's assertion that the Warren Court was "result-oriented," relying "on events for vindication more than on the method of reason for contemporary validation") with Aileen S. Kraditor, *On Curiosity: or, the Difference Between an Ideologue and a Scholar*, 15 INTERCOLLEGIATE REV. 95 (Spring 1980) (describing an ideologue as someone who ignores information contrary to his hypothesis and a scholar as someone who humbly seeks the truth).

42 See Gary C. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1361 (1979). See Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43; SAVING, *supra* note 3, at 252–56 (tracing the roots of modern substantive due process). See also *infra* note 138.

43 When legislative thinking changes, no one expects continuity. It is a matter of counting votes. For a brilliant manual on how the Supreme Court might (and did!) change public policy direction without letting the cat out of the bag, see Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211. As one scholar observes, it should not come as a surprise if students today conclude that "the Supreme Court [is] first among the presumed equals." GEORGE W. CAREY, THE

sions, which under the rubric of interpretation, blatantly legislate,⁴⁴ and those decisions in which previously-unknown rights were created,⁴⁵ and even those decisions where the people ultimately are coerced to adhere to policy options not mandated by the Constitution.⁴⁶ I want to focus here instead on government competency—an issue of concern to democrats and republicans, liberals and conservatives. In some respects the examples that follow I have chosen arbitrarily, and students may eventually wish to apply the criteria employed to other areas of constitutional law where, for one reason or another, they suspect legislative discretion has been curtailed because legislators anticipated (or were advised) that the proposals contemplated would not be acceptable to a majority of Justices.

A. We Care About Racism and Inequality

*Brown v. Board of Education*⁴⁷ is perhaps the most influential case decided by the Supreme Court in the twentieth century. It stands for the principle that all races should be treated equally. The Court's immediate concern of course had been with segregated schools, but *Brown* certainly contributed, a decade later, to the passage of the Civil Rights Act of 1964.⁴⁸ Since then, Americans have become more sensitive to gender discrimination as well as other areas of contemporary concern, such as sexual harassment and discrimination based on sexual orientation. Many non-interpretivists, in fact, proudly *locate the birth of modern judicial review in Brown*, and insist that, as a result, many Americans care more deeply about

FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 169 (1989) [hereinafter DESIGN]. There are many reasons for this observation. First, students tend to assume that scholars investigating our history apply consistent standards. Not so. See generally GILMORE, *supra* note 10. For a perceptive review of these issues, see Stephen B. Presser, *Confessions of a Rogue Legal Historian: Killing the Fathers and Finding the Future of the Law's Past*, 4 BENCHMARK 217 (1990). Second, insights are as often lost as found. See William Gangi, *The Supreme Court and Coerced Confessions: Arizona v. Fulminante in Perspective*, 16 HARV. J.L. & PUB. POL'Y 493, 524–26 (1993). Third, with increasing frequency the Justices cite their *own* prior opinions in a process that eventually converts initially unsupported assertions into settled case law, and which is then uncritically embraced by other scholars. See Klaus H. Heberle, *From Gitlow to Near: Judicial "Amendment" by Absent-Minded Incrementalism*, 34 J. POL. 458 (1972); *Expansionism*, *supra* note 21, at 41–43. Finally, we cannot assume that each new appointee is better than his/her predecessor, or even has a similar command of a body of case law.

⁴⁴ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁵ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁶ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴⁷ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

⁴⁸ 42 U.S.C. § 1971 (2000). See *Expansionism*, *supra* note 21, at 33–35 (to recognize that the Court is largely responsible for many social reforms does not resolve legitimacy issues). Students of constitutional law know that the Civil Rights Act of 1964 was passed under Congress' power to control interstate commerce—not the Fourteenth Amendment equal protection clause. The latter had been rejected as a sound basis for controlling private discrimination. See *The Civil Rights Cases*, 109 U.S. 3 (1883). *Brown* and the Civil Rights Act are related in more of a political than a constitutional sense. Implementation and enforcement of *Brown*, coupled with the Civil Rights movement, created powerful political images (black children denied entrance to school by an assembled national guard, images of dogs attacking crowds, beatings, and so on). While undoubtedly there were those committed to continuing segregation, others were equally determined to dismantle it. Media images apparently swayed a considerable mass of heretofore indifferent citizens, in favor of the Civil Rights Act. As I will suggest later in this article, American politics often places a determining voice in such hands. See *infra* text accompanying note 317.

all types of discrimination than they ever did before. They are probably right.

But things change. Once the Supreme Court turned to forced busing, the originally supportive public majority began to fall apart, both on and off the court. School desegregation cases soon metamorphosed into affirmative action, then into the far more complex issue of reverse discrimination, and more recently, centered on the constitutionality of school vouchers (which at least indirectly contains a racial component).⁴⁹ In fact, race issues persist today and plague our public schools, particularly in urban areas.⁵⁰ One specific concern is the disproportionately high drop-out rate among black male high school students, which in turn negatively impacts on the number of black males in colleges, graduate, and professional schools. That decline cascades adversely on black job opportunities, equal opportunity, and upward mobility.

Some educators argue that the high drop-out rate among black high school males is at least partially due to the lack of appropriate role models. These educators advocate that some *public* funds should be expended to create *all black* male high schools, where in a disciplined atmosphere, with a vigorous curriculum and black male teachers, the drop-out rate might be reduced. Would such an experiment work? I have not the foggiest idea. Would it be worth a try? In discussing it, interested parties might weigh evidence and alternatives, concluding that while it may not be the only proposal, or the best one, they will not know how effective it might be unless it is given a try.

But would public funding run afoul of the very principles established in *Brown*? Some scholars might argue that, no, it would not, because the Fourteenth Amendment does not prohibit *beneficent* discrimination. Other scholars would reply that such interpretive distinctions only encourage racial divisions. Still, other scholars may respond that *Brown* poses a constitutional obstacle to public funding because such funding would be unquestionably racist.⁵¹ My point is this: public policy race discrimination issues (and for that matter gender and sexual orientation ones) are far more complex today than they were when *Brown* was decided, and public opinion is far more fragmented. Why should judicial assessments carry more weight

⁴⁹ See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (racial desegregation); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (affirmative action); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (reverse discrimination); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (reverse discrimination); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school vouchers).

⁵⁰ Talk about odd bedfellows: an atheist donated 22.5 million dollars to New York catholic schools because he thought they were doing a better job than the public schools. Erin Einhorn, *My Faith is in Cash*, N.Y. DAILY NEWS, June 3, 2007, at 13. His approach is to help those who help themselves, by subsidizing those who sacrifice to put their children through private school. In his colorful language: "And to the extent that they don't help themselves, then f--- 'em." *Id.* Public schools he described as "'a horror and an outrage[.]' . . . 'I wouldn't give a nickel to the public school system.'" *Id.*

⁵¹ Similar issues arise with respect to publicly funded educational experiments based on gender segregation, which some educators have suggested to remedy unequal performance among females in mathematics and science programs.

than, or limit, legislative options?⁵² After all, those restrictions are ultimately arbitrary, meaning that upon careful examination, one finds that the so-called constitutional arguments are often indistinguishable from the sub-constitutional arguments supporting the same result.⁵³ Do law students imagine that such clashes of opinion and the realities they represent will be permanently resolved by judicial *fatwas*, or that there is only one way to resolve them? And in seeking a single *national* solution, are we compelled to ignore one of the most touted strengths of a federal system: state experimentation?⁵⁴ Today, *Brown* contributes to legislative incompetence because the once-named “last resort”⁵⁵ of constitutional argument (that is, equal protection) now inhibits legislative creativity.⁵⁶

B. We Care About Procedural Rights

Procedural rights traditionally revolve around the question of *how*: how executive and judicial officials must proceed before doing something, especially with respect to how criminal defendants are treated.⁵⁷ For more than forty years, the assumption that “[t]he quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of its criminal law” has dominated contemporary criminal law.⁵⁸ Non-

⁵² See generally Samuel G. Freedman, *Still Separate, Still Unequal*, N.Y. TIMES, May 16, 2004, Book Review, at 8 (demonstrating that beneficiaries of *Brown v. Board of Education* question its wisdom). Justice Clarence Thomas, for example, contends that affirmative action decisions may themselves perpetuate badges of racial inferiority. See *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part). But see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 127 S. Ct. 2738 (2007) (recent desegregation case).

⁵³ Law students are aware of that reality. Is it worse today than when Professor Bridwell described it nearly thirty years ago? He noted:

Many interested readers would be offended by the realization that *only* a policy debate over results is involved in much constitutional law scholarship, and perhaps some would be too embarrassed to conclude that they had been so far outside the prevailing ideological fashion that they failed to realize that a jargonized, result-oriented dialogue had largely replaced the analytical device of separating principles from results.

Randall Bridwell, *The Federal Judiciary: America’s Recently Liberated Minority*, 30 S.C. L. REV. 467, 473 (1979). See also *Expansionism*, *supra* note 21, at 35–37; SAVING, *supra* note 3, at 208–09.

⁵⁴ SAVING, *supra* note 3, at 97–98, 170–75. Although non-interpretivist generally applaud the benefits of federalism, for them, state experimentation is confined to the economic sphere. This double-standard was articulated by Justice Goldberg: “[E]xpansion of individuals’ rights is based on the fact that under our constitutional scheme these rights do and should expand. Overruling is therefore permissible, or rather intrinsically necessary, to facilitate this beneficial expansion, which I have shown to be sanctioned by tradition and reason.” ARTHUR J. GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT* 85 (1971).

⁵⁵ *Buck v. Bell*, 274 U.S. 200, 208 (1927).

⁵⁶ Berger demonstrates to my satisfaction that the Equal Protection Clause was understood by its framers to be “wedded and confined to those enumerated rights” subsumed in the privileges and immunities clause. Raoul Berger, *The Fourteenth Amendment: Facts vs. Generalities*, 32 ARK. L. REV. 280, 286 (1978) [hereinafter *Fourteenth*]. The contention that the framers of the Fourteenth Amendment, by use of the equal protection language, intended that all people in the future could or would have to be treated equally in all things, finds little support. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 166–69 (1977) [hereinafter *GOVERNMENT*]. See *infra* note 138.

⁵⁷ See *infra* notes 207–219 and accompanying text.

⁵⁸ *Walter v. Schaefer*, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956). But see *Exclusionary*, *supra* note 9, at 111–13 (contending that the statement does not reflect our histo-

interpretivists preach that Americans ought to care about protecting defendants' rights, first, because in the long run they have more to fear from abusive police conduct (alluding to the Nazi or Soviet examples), than they do from any criminal activity, and second, because each one of us one day might find ourselves a criminal defendant. Wouldn't we then want such rights to be defined generously?⁵⁹ Accordingly, non-interpretivists celebrate an ever-expanding plethora of rights, emphasizing that they be equally available to disadvantaged minorities.⁶⁰

There is no reason (*here*, at least) to quarrel with such assumptions.⁶¹ Both justifications assume that pertinent Bill of Rights provisions were always considered superior to, synonymous with, or preceded concern for, the common good. I wouldn't bet the farm.⁶² Taken individually or collec-

ry and is dependent upon defective premises); *Critical*, *supra* note 16, at 38–44 (proffering that the Supreme Court's use of "lessons of history" does not stand up to critical analysis).

⁵⁹ The intriguing question is: Is not that precisely the situation faced by the ratifiers of the Constitution and the Bill of Rights? Yet, evidence is lacking that any such intention existed. And if the second argument in the text is so telling, why do we not leave redefinition to the people? The non-interpretive response: *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (holding that courts are obliged to step in where the democratic process fails, such as with permanent minorities).

⁶⁰ See David L. Bazelon, Comment, *Equal Treatment in the Enforcement of the Criminal Law: The Bazelon-Katzenback Letters*, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 498 (1965); EDITORS, *THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH 1960–1971* (1972).

⁶¹ See generally EUGENE W. HICKOK, JR. ET AL., *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* (Eugene W. Hickok, ed.) (1991); William Gangi, *O What a Tangled Web We Weave . . .*, *THE PROSECUTOR: J. NAT'L DISTRICT ATT'YS ASS'N*, Spring 1986; *Exclusionary*, *supra* note 9, at 123.

⁶² As late as 1940, for example, John Henry Wigmore noted that courts did not reject the admissibility of confessions simply because promises were not kept, confidences betrayed, deceptions intentionally perpetrated, or the methods used to obtain them were illegal. WIGMORE, *supra* note 10, § 823, at 249. Similarly, in 1955, Albert R. Beisel, Jr. observed that "[c]onfessions at common law are not invalidated just because compulsion was applied or inducements held out to an accused, but because compulsion or inducement render or are likely to render an accused's confession untrustworthy as criminal evidence." ALBERT R. BEISEL, JR., *CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT* 47 (1955). The Fifth Amendment's privilege against compulsory self-incrimination apparently developed in the context of the "moral compulsion that an oath to a vengeful God commands of a pious soul." R. Carter Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A. J. 509, 510 (1956). According to Wigmore, courts also did not reject confessions on the basis of violating the privilege against self-incrimination. "The sum and substance of the difference is that the confession-rule aims to exclude self-criminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*." WIGMORE, *supra* note 10, § 823, at 250. Prior to decisions of the Warren Court the privilege against compulsory self-incrimination applied only in the courtroom, after a "criminal case" commenced, which occurred only after an indictment. U.S. CONST. amend. V. The framers of the Fifth Amendment evidently considered it inhumane to require a defendant to take an oath in such proceedings. It created a dilemma—if, on the one hand, the defendant told the truth, revealing his guilt, he could lose his life; on the other hand, if he lied after having taken an oath to tell the truth, he could suffer eternal damnation. WIGMORE, *supra* note 10, § 2263. See also JOHN MACARTHUR MAGUIRE, *EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE* 120–21 (1959); EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 146 (4th ed. 1963); CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 155 (1954); LEWIS MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT?* 10 (1959); BEISEL, *supra*, at 86–87; Kamisar, *supra* note 14, at 68–69; Charles T. McCormick, *The Scope of the Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938); William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 382 n.226 (1939), *English*, *supra* note 16; and LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (Ivan R. Dee 1999) (1968). Pittman describes the privilege as a defensive device against laws that did not enjoy the sanction of public opinion. Its growth paralleled the development of a jury trial. He observes:

tively, these assumptions contribute to legislative incompetence. Take the issue, for example, of profiling. Courts frequently condemn profiling; they claim that under strict scrutiny (one of those new interpretive devices I spoke of earlier) profiling of one sort or another constitutes an unreasonable search and seizure. At best—with a maddening array of ifs, whens, and buts—courts have reluctantly approved police profiling techniques designed to identify, for example, “drug courier profiles,” that is, behavior patterns of potential drug smugglers (flying repeatedly to particular locations, paying cash for the tickets, and seldom checking luggage).⁶³ Should considerations of race or ethnicity *automatically* result in a determination of unreasonableness?⁶⁴

While the Bill of Rights certainly placed restrictions on federal governmental conduct, *never* was it understood to require the suspension of common sense.⁶⁵ You know where I am going with this. Under what circumstances *could* the government utilize terrorist profiling that has a race or ethnicity component? More important still, who should make that determination: the President and Congress—both of whom are accountable at the polls; or life-tenured judges? The framers certainly were aware of the possibility of a government abusing its power. What did they advise? Be cautious. Do you doubt, even for a moment, that if a majority (or even a substantial minority) of citizens considered airport security measures unreasonable today, they could long endure? What if a court strikes down a security measure as unreasonable, and then, after some incident similar to

[A]ll that the accused asked for was a fair trial before a fair and impartial jury of his peers, to whom he should not be forced by the state or sovereignty to confess his guilt of the fact charged. Once before a jury, the person accused needed not to concern himself with the inferences that the jury might draw from his silence, as the jurors themselves were only too eager to render verdicts of not guilty

Pittman, *supra*, at 510. For an analogous discussion regarding the original meaning of the Sixth Amendment right to counsel and due process, see William Gangi, *The Sixth Amendment, Judicial Power, and the People's Right to Govern Themselves*, in HICKOK ET AL., *supra* note 61, at 367–68. The lynchpin of judicial imposition of these substantive changes to criminal constitutional law has been the Supreme Court's doctrine of selective incorporation and the exclusionary rule, which, as I have noted, some scholars defend on the basis of judicial integrity or as an equivalent of judicial review. See sources cited *supra* notes 5–10, 19, and accompanying text. These issues cannot be rehashed here. For further discussion regarding selective incorporation, see Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981) which notes that various doctrines of incorporation are without historical foundation. See also Charles Rice, *The Bill of Rights and the Doctrine of Incorporation*, in HICKOK ET AL., *supra* note 61, at 11–16. For more on the exclusionary rule's lack of a constitutional basis, see *Exclusionary*, *supra* note 9.

⁶³ United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (recounting that by using such profiles, drug enforcement authorities found drugs in 77 out of 96 searches). Would you consider an investment or any other thing with that degree of certainty, unreasonable? *But see also* City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (holding that a checkpoint program under which police, without individualized suspicion, stopped vehicles for the primary purpose of discovering and interdicting illegal narcotics constitutes an unreasonable search).

⁶⁴ See *Oliver v. United States*, 466 U.S. 170 (1984) (upholding a warrantless search of an open field for marijuana, on the grounds that the common law understanding of “effects” does not encompass an open field, or create an expectation of privacy). See *Exclusionary*, *supra* note 9, at 39–46.

⁶⁵ See *infra* note 257 (regarding Justice Jackson's admonition). The framers understood the need to provide sufficient power, and that any potential for abuse was considered a secondary matter. See SAVING, *supra* note 3, at 27–29; *infra* note 274.

September 11, 2001, a subsequent investigation reveals that had the offensive security measure been in place, the incident could have been prevented? Unfortunately, lack of common sense, political insensitivity, and an overzealous commitment to individual rights, are not impeachable offenses.⁶⁶ Nor should they be. But at least in such instances we can choose not to return *electable* officials to office!

C. We Care About Substantive Rights

Substantive rights issues revolve around *what* legislators must *never* do.⁶⁷ Take the death penalty, for example. After having failed to abolish it, the Supreme Court for decades now, has persisted in narrowing its application.⁶⁸ Nevertheless, some death penalty critics are dissatisfied. They insist that the death penalty is inconsistent with contemporary moral standards and should be declared unconstitutional, not simply when it is practiced arbitrarily, and not because an innocent person may be mistakenly executed, or because most other Judaic-Christian countries have abolished it, but *because* it is *morally wrong*.⁶⁹

Of course, opinions on whether or not the death penalty should be imposed and under what circumstances, had presumably been discussed in state legislatures when those statutes were reenacted after the *Furman* decision.⁷⁰ To be frank, in most states opponents simply failed to convince legislative majorities of their position. Instead of graciously accepting political defeat, or perhaps doubling their efforts to persuade their fellow citizens of the merits of their position, they ran to courts where their non-interpretivist allies transformed a judicial responsibility to *interpret* the law into the *power* to make laws contrary to the legislative will.⁷¹ In fact, that

⁶⁶ See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (warrantless use of thermal-imaging device aimed at private home from public street to detect relative amounts of heat within home, held to constitute unlawful search within meaning of the Fourth Amendment). Compare *Chandler v. Florida*, 449 U.S. 560 (1981) (holding that prior cases do not stand as an absolute ban on state experimentation with an evolving technology).

⁶⁷ SAVING, *supra* note 3, at 94–97 (informing that substantive rights are a relatively recent invention created during the laissez-faire period).

⁶⁸ See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion) (declaring existing state death penalty statutes unconstitutional because they were applied arbitrarily and/or unequally). In the years following the decision, thirty-eight states (a very significant number as this is sufficient to amend the Constitution) voted to reenact death penalty statutes in one form or another. Details do not here concern me. Yet, as we shall see, non-interpretivists frequently identify constitutional commands with moral correctness. See *infra* notes 81 and accompanying text. Today, interpretive disputes over the constitutional definition of “cruel and unusual punishment” are less about what the ratifiers of the Constitution meant by that phrase than they are about what the Justices believe should be acceptable conduct. See generally RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982).

⁶⁹ Compare *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that the Eighth Amendment permits execution of a mentally retarded person) with *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that Eighth Amendment does not permit execution of the mentally retarded).

⁷⁰ See *Furman*, 408 U.S. 238 (plurality opinion) (sanctioning several possible approaches to death penalty statutes). One of those approaches—mandatory death sentences—however, was subsequently struck down. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

⁷¹ Where have judges either been authorized to *veto* legislation without locating their basis in the

sums up the history of substantive rights in the United States: waves of judicial impositions.⁷²

Take a look at *Coker v. Georgia*.⁷³ Prior to 1972 Coker had been tried and convicted of rape and murder and sentenced to death.⁷⁴ His sentence had been commuted to life imprisonment when (as mentioned earlier) *Furman* temporarily overturned all state capital punishment statutes. Subsequently, while Georgia was one of many states that reenacted death penalty statutes, it was one of only two states that included the crime of rape as a capital offense.⁷⁵ Coker subsequently escaped from prison, but before being apprehended, raped a 16-year-old girl (an adult under Georgia law). For *this* rape Coker again was convicted and sentenced to death under the now constitutionally mandated requirement for a bifurcated trial.⁷⁶ The Supreme Court reversed his conviction, deciding that because the adult victim did not *die*, Georgia's penalty for rape was "excessive"⁷⁷ and "disproportionate."⁷⁸

I put aside here a conclusion that under the guise of interpretation, the Supreme Court acted as a super-legislature, substituting *its* assessment of competing ethical and public policy considerations for those of elected state officials.⁷⁹ That, of course, is illegitimate. My emphasis here is on growing government incompetence. The grossly disproportionate *constitutional* standard invented by the Court leaves unresolved issues such as whether or not the death penalty may be imposed for the rape of a child or

ratifiers' understanding, or where have they been granted the power to adapt the document to changing circumstances? Either power, I contend, is inconsistent with our republican form of government as understood by the framers. The responsibility to veto *constitutional* but *unwise* legislation is the President's—not the Supreme Court's—and I concur with those who contend that any lack of clarity of the framers' intentions *diminishes* the judicial power, not increases it. If the framers' intent is unclear, legislators—not courts—gain discretion. See *infra* note 275.

⁷² See generally Dixon, *supra* note 42. See also *supra* note 34; *infra* notes 85, 124, 138, 141, 220–221, 223, 228, 284, 304, 344 and accompanying text.

⁷³ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁷⁴ *Id.* at 586.

⁷⁵ *Id.* at 598. Under the federal nature of our union, states remain sovereign within their area of competency, serving as the locus of social experimentation. This fact was once considered a unique and beneficial attribute of our system of government. See *supra* note 54 and accompanying text. Today, however, the Court increasingly surveys state policies, sometimes prohibiting states from exercising their right when a majority of Justices decides that those states are out of synch with the actions of other states, or more precisely, out of synch with the views of a majority of Justices. *Coker* is but one example.

⁷⁶ Any such rules created by the Court are not legitimate exercises of its authority. See BERGER, *supra* note 68, at 142–52.

⁷⁷ *Coker*, 433 U.S. at 598.

⁷⁸ *Id.* at 599. We do not know whether that standard would apply to the rape of a child. Nor do I take a position on making rape a capital offense, but I cannot detect any constitutional principle to explain why a state could not do so.

⁷⁹ The history of death penalty imposition in the United States is equally unresponsive of the Court's decision on so-called grounds of being cruel and unusual. For example, some states had punished horse stealing and cattle rustling with death, and no one ever raised a constitutional objection. See BERGER, *supra* note 68, at 148. And, by the way, there were no females on the court when *Coker* was decided! Many women oppose the death penalty for rape because they believe it encourages rapists to kill their victims. Legislators, not judges, weigh such considerations.

an *attempted* presidential assassination. What about in treason cases where someone does *not* die? Or may we impose the death penalty for terrorist acts that, by chance, do *not* result in death? Can it be imposed on those who finance, plan, abet or otherwise assist but do not actually *conduct* the terrorist act? Would the imposition of the death penalty in any or all of these situations also be considered grossly disproportionate? After all, here we are not talking about mere BMWs.⁸⁰

What, I have to ask, makes judges more qualified than elected officials to determine the justness of criminal penalties?⁸¹ Non-interpretivists usually respond that since federal judges enjoy life tenure, they are freer to do the *right* thing. Do *you* find such reasoning convincing? When considering such issues, do you believe mastery of the interpretive craft should be determining? Why? Would you similarly accept the determination that the withdrawal of troops in Iraq is a credible tactic because of the expertise possessed by a heart surgeon? Once categorized as having constitutional stature, such judicially created doctrines may not be reversed by state or federal legislatures. The only way these doctrines can be reversed is if one or more Justices in the current majority change their mind, resign, or die (and then are replaced with judges who think differently). Even *then* the people must wait for a similar case to weave its way through the appellate process.⁸² Is *this* what you learned about republicanism? Decisions such as *Coker* render state and federal legislators, and thus the people, less competent to deal with perpetual change.⁸³

D. We Care About the First Amendment

Of all Bill of Rights provisions non-interpretivists hold none in higher esteem than the First Amendment right of free speech.⁸⁴ These rights, we are told, are *preferred* ones—rights that apparently enjoy both procedural

⁸⁰ *BMW v. Gore*, 517 U.S. 559 (1996) (jury's award of punitive damages for undisclosed repairs to a new vehicle held to be excessive).

⁸¹ I put aside here whether or not penalties must be just to be constitutional, but I side with Berger that nothing but confusion ensues once one no longer distinguishes law from morality. See *Expansionism*, *supra* note 21, at 24; *SAVING*, *supra* note 3, at 268–69.

⁸² Compare *Booth v. Maryland*, 482 U.S. 496 (1987) (victim impact statements violate the Eighth Amendment) with *Payne v. Tennessee*, 501 U.S. 808 (1991) (Eighth Amendment *does not* bar victim impact statements).

⁸³ I will not here belabor the fact that substantive rights established by the Supreme Court have a checkered history, first appearing in its decisions on economic rights, and more recently over application of Bill of Rights provisions (traditional or recently invented). See *Expansionism*, *supra* note 21, at 41–43; sources cited *supra* note 72.

⁸⁴ I put aside here other First Amendment areas, such as freedom of the press, or the establishment and free exercise of religion clauses, where the principles in the text and accompanying notes equally apply. See generally ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* (1982). But see William Gangi, Book Review, 7 *HARV. J.L. & PUB. POL'Y* 581 (1984); RELIGION AND POLITICS IN THE EARLY REPUBLIC (Daniel L. Dreisbach ed., 1996); Daniel L. Dreisbach, "Sowing Useful Truths and Principles": *The Danbury Baptists, Thomas Jefferson, and the "Wall of Separation"*, 39 *J. CHURCH & ST.* 455 (1997); Michael W. McConnell, *Free Exercise as the Framers Understood It*, in HICKOK ET AL., *supra* note 61, at 54; Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, in HICKOK ET AL., *supra* note 61, at 82.

and substantive characteristics.⁸⁵ Were you not taught that the First Amendment is at the very heart of American freedom, that you should take inordinate pride in possessing such rights (not only in the substantive sense, that is, the ability to say or print almost anything, but also because these rights form the foundation of the American tradition)?⁸⁶ If one envisions *Brown* as one leg of a three-legged stool supporting and justifying modern judicial power, surely the First Amendment is another leg.⁸⁷ Does the preceding assessment portray what you are being taught in law school? Students, I suspect, are often browbeaten to acknowledge that they care deeply

⁸⁵ DAVID B. MAGLEBY ET AL., GOVERNMENT BY THE PEOPLE, 397 (21st ed. 2006) (1952). The preferred freedoms doctrine was

advanced in the 1940s when the Court applied all of the guarantees of the First Amendment to the states. . . . Judges have a special duty to protect . . . [First Amendment] freedoms and should be most skeptical about laws trespassing on them. Once that judicial responsibility was established, judges had to draw lines between nonprotected and protected speech, as well as between speech and nonspeech.

Id. The doctrine usually refers to “freedom of expression and association, rights of political participation, rights of religious autonomy, and rights of privacy and personhood” LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (2d ed. 1988) (1978). Origin of the doctrine is usually attributed to Justice Stone’s opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). See LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT’S POWER TO REVISE THE CONSTITUTION 112 (1975). A classic statement can be found in ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (Harvard University Press 1954) (1941). More absolutist approaches can be found in Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); Edmond Cahn, *Justice Black and First Amendment “Absolutes”: A Public Interview*, 37 N.Y.U. L. REV. 549 (1962); GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971); NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA (1980). In 1963 Charles S. Hyneman concluded that after 1937, the Supreme Court substituted preferred First Amendment freedoms for the property rights favored by their laissez-faire predecessors. Both preferences erode the presumed constitutional protections that legislative acts enjoyed; instead, statutes affecting preferred rights began to be treated with suspicion, if not presumed unconstitutional. CHARLES S. HYNEMAN, THE SUPREME COURT ON TRIAL 226 (1963). One sample of what he found will suffice (he is quoting John Frank):

I suggest that the following proposals would bring us a little closer to the plan of the fathers. . . . [T]he doctrine of presumption should be completely eradicated in cases involving basic liberties. In that area, a presumption of unconstitutionality should prevail. In free speech cases, in particular, the Supreme Court has no business paying ‘great deference,’ or indeed any deference to the judgment of the legislature. It should do the exact opposite.

JOHN P. FRANK, SUPREME COURT AND SUPREME LAW (Edmond Cahn, ed., Indiana University Press 1954) quoted in HYNEMAN, *supra*, at 227 (alterations and omissions in original). When it comes down to submitting convincing proof that the framers shared such beliefs, non-interpretivists come up short. So-called preferred freedoms were nonexistent to the framers. For example, not only was application of the Bill of Rights to the states explicitly “voted down” by the First Congress, Berger, *supra* note 20, at 567, but even “Jefferson, that apostle of free speech, insisted that states have ‘the exclusive right’ to control freedom of the press.” *Id.* As noted above, not until the late 1930s did the Supreme Court accord the First Amendment preferred status. And that had been demanded by the intellectual fashion of the day—as were the economic rights before it. Justice Stone warned that “the constitutional device for the protection of minorities from oppressive majority action, may be made the means by which the majority is subjected to the tyranny of minority.” ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 331 (The Viking Press 1956) (1953). Professor Bridwell observed: “[O]ne might ask what makes the tyranny of the minority—the judiciary or those they favor—better than the tyranny of the majority? We get no answers.” Randell Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?*, 31 S.C. L. REV. 617, 654 (1980).

⁸⁶ MAGLEBY ET AL., *supra* note 85, at 387.

⁸⁷ I realize I am one leg short of a good analogy, but surely it is sufficient to say that the third leg is the right of privacy.

about the First Amendment.

But if law students perform even a rudimentary review of the pertinent literature, they will become suspicious of such claims. The framers certainly had a far narrower view of free speech than do the justices today.⁸⁸ Yet perhaps in no other area have legislative hands been so frequently tied.⁸⁹ In *Texas v. Johnson*,⁹⁰ for example, the Supreme Court declared unconstitutional state statutes that prohibited the burning (desecration) of the American flag. That case provides law students with as good an illustration of modern interpretive razzle-dazzle as any other. In a nutshell, the *Johnson* Court concluded that in this instance the First Amendment protected expressive conduct as well as ordinary *speech*.⁹¹

⁸⁸ See Lawrence J. Adams III, *The Reality of Seditious Libel in America: Zenger to the 1798 Sedition Act (June 17, 1998)* (unpublished M.A. thesis, St. John's University) (on file with St. John's University). The liberty of the press

consists in permission to publish, without previous restraint upon the press, but subject to punishment afterwards for improper publications. A law, therefore, to impose previous restraint upon the press, and not one to inflict punishment on wicked and malicious publications, would be a law to abridge the liberty of the press, and as such, unconstitutional.

Id. at 101 (quoting 9 ANNALS OF CONG. 2990 (Joseph Gales & W. Seaton eds., 1820) (1789)) (emphasis omitted). With respect to the free speech clause, Adams observes: "It certainly permitted prosecutions for seditious libel (not to mention such items as obscenity and blasphemy—that is, things the people considered licentious and not liberty.) [sic]" *Id.* at 80. I also put aside here the fact that, whatever protections were afforded by the First Amendment, they did *not* apply to the states. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). When the First Amendment proposals were first drafted in the House they "were designed to apply to state governments as well as the national government." FORREST McDONALD, *E PLURIBUS UNUM* 369 (Houghton Mifflin Co. 1965). The Senate, however, "removed the applicability of the bill of rights to the states . . ." *Id.* Kendall suggests that Madison knew that the Senate would not approve of applying the Bill of Rights against the states. "Of course that provision was, as Madison must have known it would be, duly struck out in the Senate; on Madison's own showing, the idea of a bill was to please the objecting minority, who were above all anti-consolidators, anti-centralizers, States' righters." WILLMOORE KENDALL, *CONTRA MUNDUM* 320 (Nellie D. Kendall ed., 1971) [hereinafter *CONTRA*]. See also SAVING, *supra* note 3, at 190–93. See generally ROBERT A. GOLDWIN, *FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION* (1997). But see William Gangi, Book Review, 27 *PERSP. POL. SCI.* 104 (Spring 1998).

⁸⁹ I was tempted to discuss the right of a free press. You know—what the media calls the people's "right to know"—although if you know anything about judicial decisions in this area, the people have precious little to say about it. Maybe just a few words on the media . . . When I first drafted this article several years ago, not a day passed in which the media did not divulge some information affecting our security. For instance, to the best of my recollection, the media published a diagram of New York City's water system, mentioning there was little or no security. Or, to take another example from television, there was a report that an Oregon town stores our biological and chemical weaponry (yes, they provided a map and a picture of the building!), and as if oblivious to recent events, noted that if a fully fueled plane crashed into that building, it would release enough biological and chemical weapons to kill some 10,000 nearby residents. Private libel, obscenity, and perhaps seditious libel (hard to tell) still lie outside the technical protection of the First Amendment, although applicable decisions have sharply and illegitimately contracted legislative discretion. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Roth v. United States*, 354 U.S. 476 (1957). Given the fact that these matters were originally outside such protection, upon what authority do the Justices impose their own preferences? I reject the proposition that all they are doing is traditional interpretation. Publius long ago rejected the position that the judiciary was entitled to interpret the Constitution according to what it believed was its *spirit*. See *THE FEDERALIST* NO. 81 (Alexander Hamilton), *supra* note 4, at 482. He was hardly unacquainted with the difficulties surrounding interpretations. See *infra* note 265.

⁹⁰ *Texas v. Johnson*, 491 U.S. 397 (1989). See also *United States v. Eichman*, 496 U.S. 310 (1990).

⁹¹ *Johnson*, 491 U.S. 397 *passim*. For an articulate and (at times) convincing *sub-constitutional*

En route to that conclusion the majority acknowledged that the flag had symbolic importance. However, differences of opinion existed over *what* protection the flag should be afforded.⁹² Some Americans, they recounted, viewed the flag as symbolic of national unity and believed it should not be desecrated, while others viewed the very act of burning the flag a part of the free speech right.⁹³ At this point the Court reminds us that free speech is a “fixed star,” implying that the Court had *always* defined it broadly, and so the majority felt compelled to accept the second point of view.⁹⁴ They recognized that among American citizens the second view might be a minority one, but that must be irrelevant to the majority’s final determination.⁹⁵ Simply put, the Court declared that First Amendment constitutional protections (as now defined by the justices, not by the ratifiers) are not subject to legislative interference. The Court insisted that by its decision “the flag’s deservedly cherished place in our community will be strengthened, not weakened”⁹⁶

Johnson provides a representative example of how non-interpretivist methodology inevitably leads to the Justices substituting their predilections for both those of the ratifiers, and currently elected representatives.⁹⁷ By enacting the flag-burning statute, legislators presumably thought that *speaking freely* (subject to applicable legal consequences, such as those applying to libel and incitement) is one thing, and *doing* something is a different kettle of fish.⁹⁸ Nothing in the Constitution, I suggest, prohibits citizens from punishing crimes they consider grievous, whether it be flag burning, other *acts* of racial and religious desecration, or other hate

critique of state flag desecration statutes, see ROBERT JUSTIN GOLDSTEIN, *BURNING THE FLAG: THE GREAT 1989–1990 AMERICAN FLAG DESECRATION CONTROVERSY* (1996) (arguing that the Supreme Court rejection of federal and state flag desecration laws is consistent with the commands of the First Amendment). *But see* William Gangi, Book Review, 26 *PERSP. POL. SCI.* 168 (Summer 1997) [hereinafter Goldstein Review].

⁹² *Johnson*, 491 U.S. at 407–10. *See infra* notes 294–297 and accompanying text (noting that scholars have the obligation to determine the relative strengths of existing opinion). The approach used by the Court is faulty and self-serving. Guess who is the final arbiter regarding which voices shall be determinative? It is indeed a different thing than an election.

⁹³ *Johnson*, 491 U.S. at 413–16. “[T]he government may not prohibit expression simply because it disagrees with its message” *Id.* at 416.

⁹⁴ *Id.* at 415 (quoting *W. Va. Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)). “[T]he flag protects those who hold it in contempt.” *Johnson*, 491 U.S. at 421 (Kennedy, J., concurring).

⁹⁵ *Johnson*, 491 U.S. at 416–17. Presumably that conclusion is necessary because the right is preferred. For an analogous situation, see *infra* notes 106–114 and accompanying text.

⁹⁶ *Johnson*, 491 U.S. at 419. “The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.” *Id.* Is that not a statement of First Amendment faith? But, if the assumption for that act of faith is no where to be found among those who ratified the Constitution and Bill of Rights, upon what authority is it imposed upon the people?

⁹⁷ Of course at this juncture non-interpretivists wax eloquent about the defects of our political system. As I noted earlier, their arguments are complex and interrelated. I urge students to examine their complexity in *Expansionism*, *supra* note 21, at 17–55 or in *SAVING*, *supra* note 3, at 194–225.

⁹⁸ The Court’s recitation of precedent in such cases, as well as its reasoning, more often than not, amounts to casting shadows on the wall of American politics. For more on the framers’ understanding of speech and press, see *supra* note 88. With respect to the relationship between precedents and progressivist assumptions, see *infra* notes 249–282 and accompanying text.

crimes.⁹⁹ But rather than defend that assertion, I have bigger fish to fry. In every First Amendment case I have examined, not one Justice ever demonstrated more than an elementary appreciation of symbol utilization.¹⁰⁰ All have ignored an entire body of scholarship which contends that to fully understand what a people hold dear, it is important to establish correlations between their symbolic expressions and their perceived embodied truths, as well as between those symbols and the actions of the people.¹⁰¹ Instead, the Justices persist in viewing symbols solely as potential tools of manipulating the masses.¹⁰² This much seems self evident: *whoever defines our symbols, defines us as a nation*. So again I raise the issue: in whose hands would the framers have placed that responsibility? The only answer compatible with their design and with our history, is in the hands of elected *officials accountable to the people*—the same hands authorized to declare war and to send American sons and daughters, husbands and wives, broth-

⁹⁹ I make the distinction here between the legislature being *authorized* to pass the law and the wisdom of the legislation. Any consensus reached in the legislature does not necessarily mean the legislation is intelligent or moral. Marshall declared: “The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). See KRAMER, *supra* note 34, at 76–78. With respect to federal and state flag desecration statutes compare GOLDSTEIN, *supra* note 91 (arguing that the Court was justified in invalidating flag burning statutes due to the abridgement of free speech, and further noting that public outcry alone does not justify prosecution), with Goldstein Review, *supra* note 88, at 168 (disagreeing with Court’s conversion of conduct into expression).

¹⁰⁰ See *infra* notes 283–300 and accompanying text.

¹⁰¹ See *infra* notes 196–198 and accompanying text. My goodness, it sounds like a possible nexus test! Mom would have been proud! My point, however, is not that the majority should embrace yet another non-constitutional theoretical standard; rather that their unawareness of another viewpoint undercuts their authority. Elsewhere I have commented:

When symbol creators ignore the historical record or distort precedents in order to redefine the meaning of rights, or assert that their ideas of fairness are superior to those constitutionalized by the ratifiers, three consequences ensue. They have admitted that the authority for their views does not rest on choices made by the ratifiers; hence, they are obliged to respond to charges of illegitimacy and usurpation; and they acknowledge that they are no longer engaging in interpretation in any traditional meaning of that term. Instead, they are changing, or abusing, the meaning the rights in question originally had—without authorization to do so. They are in fact creating new symbols and interpreting the Constitution according to what they allege is its spirit—a position explicitly rejected by Publius.

SAVING, *supra* note 3, at 186. In the past, canons of construction offered a valuable check against such theorizing. Justice Story commented:

[W]here its words are plain, clear, and determinate, they require no interpretation . . . Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.

GARY L. MCDOWELL, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* 12 (1985) (quoting J. Story, 1 Commentaries on the Constitution of the United States § 405, at 387–88 (1833)) (omission in original). Professor Allen adds: “For Publius, the meaning of written law is plain, but only when texts are well-drafted in modes of discourse open to discernment, reason and common sense, and when those who purport to apply the texts rely on true and proper maxims of construction.” Anita L. Allen, *The Federalist's Plain Meaning: Reply to Tushnet*, 61 S. CAL. L. REV. 1701, 1715 (1988).

¹⁰² These issues go to criteria of relevance. For a discussion and sources associated with this topic see *Exclusionary*, *supra* note 9, at 106 & n.407; *Inbau-Kamisar*, *supra* note 12, at 146–49; SAVING, *supra* note 3, at 179–90.

ers and sisters, fathers and mothers into battle—perhaps to lose their lives.

Let's take a look at the same issue in a more recent case. The *oral arguments* in *Virginia v. Black* initially showed promise of a substantial discussion of symbol utilization because Justice Clarence Thomas observed that cross-burnings are “intended to cause fear and to terrorize a population.”¹⁰³ His observation was rooted in an experiential *fact*, one of concern to all governments—not some unauthorized First Amendment *theory*. What could the citizens of Virginia do about symbol usage that created a concrete concern for some of its citizens?¹⁰⁴

*Virginia v. Black*¹⁰⁵ demonstrates how deeply entangled the Court has become with the shadows (principles, corollaries, and doctrines) of its own creation.¹⁰⁶ Justice O'Connor's plurality opinion was predictable because it rests on modern First Amendment theory rather than an objective examination of our history.¹⁰⁷ Briefly put, paralleling the arguments made in *Johnson*,¹⁰⁸ Justice O'Connor concluded that while the First Amendment does not entirely proscribe states from banning cross-burning with intent to intimidate, Virginia's *prima facie* instruction “renders the statute unconstitutional” in its current form.¹⁰⁹

Let me provide a few additional details. First, as anticipated, Justice O'Connor cited the usual litany of First Amendment cases, including the stirring words of eminent jurists, which I am sure made the hearts of modern First Amendment advocates go pitter-pat. But, even if one puts aside the issue of the legitimacy of these cases, in at least two of them the inspiring words were articulated in *dissent* and/or the defendants were in fact convicted.¹¹⁰ The opinion also is replete with citations to seminal cases de-

¹⁰³ Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1.

¹⁰⁴ The statute in the Virginia case dated from 1952 in then-segregated Virginia, before *Brown v. Board of Education*. Compare *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding a law restricting “fighting words”) with *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (overturning a law banning “hate speech”), *cert. denied*, 439 U.S. 916 (1978).

¹⁰⁵ *Virginia v. Black*, 538 U.S. 343 (2003) (holding a statute that criminally punished any person who, intending to intimidate another person or group by burning a cross on another person's property, highway, or public place, unconstitutional since the statute may have required that any such cross-burning is *prima facie* evidence of an intent to intimidate). For an unusual perspective see Willmoore Kendall, *The People Versus Socrates Revisited*, 3 MODERN AGE 98 (1959) (discussing that under the circumstances, the Athenian assembly had a reasonable basis for condemning Socrates).

¹⁰⁶ The field is so dominated by First Amendment ideology that students tend not to examine its soundness. After all, there must be some truth under the barrage of literature, and of course, there is—but one has to dig for it. Talented students often expend a tremendous amount of energy skimming the surface of selected topics. I advise them that they would learn a great deal more about the topic and the scholarly craft if they narrowed the topic. Students must sift through a body of literature until there is repetition and one distinguishes degrees of proficiency among sources. To do that, the topic must be narrow. See *Exclusionary*, *supra* note 9, at 117–18. I can say this much with confidence: there is no necessary correlation between intensity and correctness—for them, their *laissez-faire* predecessors, or for me! See *infra* notes 317–341 and accompanying text.

¹⁰⁷ *Black*, 538 U.S. at 358–60.

¹⁰⁸ See *supra* notes 90–96 and accompanying text.

¹⁰⁹ *Black*, 538 U.S. at 364.

¹¹⁰ See, e.g., *infra* note 280; Heberle, *supra* note 43. The litany of such cases are intended to

cided during the Warren era¹¹¹ when our history often was ignored and our precedents rewritten.¹¹² Even the Court's quotation of the First Amendment¹¹³ is misleading because it implies that the provision's emphasis is on the "no law" language, whereas our history clearly demonstrates that it was the "abridging" language that was determining.¹¹⁴

As I have previously noted for some time now, the Supreme Court has cast more and more shadows on public policy choices touching upon free speech. They determine what is to be protected or unprotected speech and create alleged constitutional doctrines to manage, distinguish, and ultimately hide the fact that they have rewritten the framers' understanding. Prior to the current infections, state and federal governments *did* legislate in areas not specifically understood as being protected by those who ratified the First Amendment.¹¹⁵ Today, judges redefine constitutional phrases (in this instance speech); employ doubtful interpretive devices (such as approaching provisions at a higher level of generality so that speech becomes expression, which then morphs into symbolic speech); vary the level of judicial scrutiny (one suspects on the basis of what interests them or what

warm up the crowd and make sure citizens understand what is at stake, particularly if for one reason or another, citizens might fail to recognize those stakes. *See Exclusionary*, *supra* note 9, at 113–17.

¹¹¹ *See, e.g., Black*, 538 U.S. at 358. *See also infra* note 280.

¹¹² *See SAVING*, *supra* note 3, at 102–06. I have concluded elsewhere that when precedents are cited that do not *themselves* rely on the Constitution, both the authority of the case as well as the precedents remain suspect. *See Inbau-Kamisar*, *supra* note 12, at 122–123 and *supra* note 101.

¹¹³ *E.g., Black*, 538 U.S. at 358.

¹¹⁴ *See supra* note 88. The "no law" emphasis is associated with Justice Black. Adams notes: "The absolutist position taken by Justice Black . . . ignores the legal history of criminal libel law from [the 1730s] to the 1798 Sedition Act . . . [and] conflicts with the actions of elective assemblies in the post-Zenger era, the protections afforded by freedom of the press stipulations in the state constitutions, the context of press freedom in the ratification debate, and the passage and enforcement of the 1798 Sedition Act." Adams, *supra* note 88, at 109 (emphasis omitted). Adams further asserts that Justice Hugo Black "ignored the founding era's absolute prohibition against the printing of blasphemy and obscenity. . . . [Furthermore,] Justice Joseph Story rejected absolutist theory as 'a supposition to [sic] wild to be indulged by any rational man.'" *Id.* at 109–10 (emphasis omitted). In brief, "Black's position on the intent of the First Amendment's speech and press clause is simply wrong." *Id.* at 110. For the framers, areas such as libel, seditious libel, obscenity, and blasphemy were *never* thought to abridge the rights to free speech or press. Those subjects were *outside* First Amendment protection. *See id.* at 109. No other conclusion is possible, and technically speaking, it *still* remains true. The difference is today the judiciary is the sole arbitrator of defining the terms. James Wilson explained: "What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual." *Id.* at 57–58 (quoting 2 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 449 (1888)).

¹¹⁵ *See supra* note 111. I refer of course to the subjects mentioned in the prior note as well as to the fact that they were defined under the common law bad tendency test—a far more restrictive test than the clear and present danger or the preferred freedoms tests. The bad tendency test left a great deal of discretion in the hands of legislatures. And, much to the regret of some scholars, evidence does not support the claim that the First Amendment was intended to supersede the laws of seditious libel. *See LEONARD LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* xii, 10–15, 182–85 (Harper & Row 1963) (1960). In fact, the 1798 Alien and Sedition Acts *liberalized* protections afforded by the First Amendment because, by statute, it established that truth would be, as a matter of fact and law, an acceptable defense. Alien and Sedition Acts, ch. LXXIV, § 3, 1 Stat. 596, 597 (1798) (expired Mar. 3, 1801). The fact that President Jefferson extended amnesty does not repudiate my position. JAMES MAGEE, *FREEDOM OF EXPRESSION* 22 (Randall M. Miller, ed., 2002). It simply adds weight to my position that the legislature had considerable discretion.

they think they can get away with); apply equally suspect corollaries (such as overbreadth and chilling effect); create one nexus test or another; or discover successive overarching First Amendment principles (such as clear and present danger, and the more recently preferred freedoms test). As a consequence, unless they really need it, the Court more or less has abandoned the common law bad tendency test that the framers *did* understand, and in its stead, they have created various *balancing tests*, which of course ultimately leave in its own hands the resolution of such issues. Such flim-flam may be near and dear to First Amendment advocates' hearts, and law students may be compelled to spend innumerable hours mastering these materials (no doubt learning something in the process), but none of these doctrines or tests are necessitated by our history, precedents, or the Constitution.

For students who resist the above analysis in *Black*—examine Justice Scalia's concurring and dissenting opinion, where he observes that even if one *accepts* the authority of modern First Amendment precedents, the Court still prematurely decided the possible impact of the Virginia statute's *prima facie* provision.¹¹⁶ He describes the majority's approach to the "overbreadth analysis [as] unprecedented"¹¹⁷ because it struck down the statute on "the *possibility* of such convictions"¹¹⁸ without first determining whether "the enactment reache[d] a substantial amount of constitutionally protected conduct."¹¹⁹ Indeed, Scalia claims he is "aware of no case—and the plurality cites none—in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction."¹²⁰ So, as if there were not enough shells (i.e., doctrines) already under which the pea may be hidden, others are added in *Black*.

Although, regretfully, he does not challenge the body of First Amendment case law or doctrines, Justice Thomas' dissent comes closest to my assessment: "In light of my conclusion that the statute . . . addresses only conduct, there is no need to analyze it under any of our First Amendment tests."¹²¹ He concluded that the Virginia Legislature (especially given the State's segregationist history and the intimidating nature of cross-burning) had the right to pass such a law, and the *prima facie* "inference" contained in the statute was not fatal since it remained rebuttable.¹²² He points to other areas in the law where even *irrebuttable* presumptions exist and were *never* considered fatal to criminal statutes (such as in statutory rape cases where an underage victim forecloses a consent defense, or when

¹¹⁶ *Black*, 538 U.S. at 368–69 (Scalia, J., concurring in part and dissenting in part).

¹¹⁷ *Id.* at 371.

¹¹⁸ *Id.* at 373.

¹¹⁹ *Id.* (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982)).

¹²⁰ *Id.* at 376.

¹²¹ *Id.* at 394–95 (Thomas, J., dissenting). Justice Thomas was the only Justice to even mention *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833) in *Kelo v. City of New London*, 125 S. Ct. 2655, 2681 (2005) (Thomas, J., dissenting).

¹²² *Black*, 538 U.S. at 394–96 (Thomas, J., dissenting) (emphasis omitted).

an intent to sell narcotics is presumed by the quantity of drugs seized).¹²³ He acknowledges and accepts that *Black* involves the First Amendment, and so under applicable guidelines the burden of proof is on the state to prove that its interest in the statute is compelling.¹²⁴ But even accepting those criteria Thomas finds the Court inconsistent. He points out that in another case the Court had upheld “a restriction on protests near abortion clinics, explaining that the State had a legitimate interest . . . plac[ing] heavy reliance on the ‘vulnerable physical and emotional conditions’ of patients.”¹²⁵ In *Black*, however, “the plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so

¹²³ *Id.* at 397–98.

¹²⁴ *Id.* at 398. This compelling state interest requirement is part of the preferred status designation the First Amendment now enjoys, that is, unlike traditionally, when a law was presumed constitutional and the burden of proof fell on the plaintiff, under the preferred status requirement, laws touching upon the First Amendment are presumed unconstitutional and the burden of proof rests on the government to convince the judiciary that they have compelling reasons for doing what they voted to do. Elizabeth J. Wallmeyer, *Filled Milk, Footnote Four & the First Amendment: Analysis of the Preferred Position of Speech After the Carolene Products Decision*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1019, 1020 (2003). I find no support whatsoever for such a doctrine. The modern First Amendment faith has its theoretical roots in the “open society” symbol. See generally 1 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966). See also CHARLES FRANKEL, *THE CASE FOR MODERN MAN* (Beacon Press 1959) (1955); J. SALWYN SCHAPIRO, *LIBERALISM: ITS MEANING AND HISTORY* (Louis L. Snyder ed., 1958); *infra* note 132. Charles Wilson, Chairman of General Motors, once revealed that “[f]or years [he] thought what was good for our country was good for General Motors and vice-versa.” GEORGE STALK ET AL., *HARDBALL: ARE YOU PLAYING TO PLAY OR PLAYING TO WIN?* 22 (2004). Such thinking was typical of the laissez-faire period when many Justices assumed that an Invisible Hand somehow guided even the basest individual motives (e.g., greed) to the benefit of the public good. At the time, laissez-fairest judges struck down legislation prohibiting, for example, federal or state legislators from addressing issues such as economic dislocation. Presumably, these judges believed that such circumstances called for even greater faith in the Invisible Hand. Put another way, judges illegitimately substituted their economic preferences for those of federal and state legislators and created a sophisticated body of reasoning to do so. We have no reason to believe that they were motivated by any other motive than their idea of the common good. Ultimately, such reasoning was recognized as a charade. See *infra* note 222. These judges never convincingly grounded their preferences in the ratifiers’ intent, or established that determining national economic policy was within their competency. One also may point to two contemporary examples of the same approach. First, coupled with the usual religious fervor, First Amendment Invisible Hand advocates assume that the widest possible definition of free speech will not adversely affect the common good, while they also simultaneously prohibit legislators (more often than not and more frequently than before) from addressing its perceived shortcomings. These contemporary First Amendment Invisible Hand supporters cannot convincingly demonstrate that the framers rated First Amendment freedoms above all others, or that they did not anticipate legislative balancing. In fact, the evidence is clearly to the contrary. Today’s First Amendment Invisible Hand stands on no higher ground than that of the laissez-fairest. I suggest that such a position is also not supported by the ratifiers’ intentions, and lies outside judicial competency. Second, there is the judicial imposition of the exclusionary rule, not only within federal courts but also on the states—the latter even harder to justify since by the Court’s own admission, exclusion is not a personal constitutional right. Instead, it is a judicially created remedy for which I find no constitutional authority. Put another way, the Justices have imposed their beliefs upon the American people. See *Exclusionary*, *supra* note 9, at 54, 105, 117–18. Naturally, of course there is a degree of truth in all such impositions. *SAVING*, *supra* note 3, at 90–94. But the issue is this: Under the constitution of the United States do the people have the right to place limits on economic competition or freedom of speech, or to determine rules of evidence admissibility not specifically constitutionalized? The answer is clearly, yes. To make such a determination however, does not answer the issue of whether the limits imposed by the people’s representatives are wise or ethically correct.

¹²⁵ *Black*, 538 U.S. at 399 (Thomas, J., dissenting) (citations omitted).

without an intent to intimidate anyone.”¹²⁶ In Thomas’ words, “the connection between cross burning and violence is well ingrained,”¹²⁷ and in a state such as segregationist Virginia (when the original statute was enacted)¹²⁸ even its citizens “sought to criminalize [such] terrorizing *conduct*” because they believed no person should have to live under such fear or intimidation.¹²⁹ “The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression.”¹³⁰

When students probe the First Amendment faith they will find that it rests on little more than the logic of John Stuart Mill and his creative successors.¹³¹ These free speech theorists (or worshipers) usurp federal and state legislative power, and ultimately rest on unconvincing scholarship.¹³² Let me go further. *Even if* one embraces all their doctrines and assumptions as perfectly true, they would still *not* provide a constitutional standard. All they amount to are sub-constitutional arguments. They may be brilliant, they may be reasonable, they may be logical, and they may even be convincing, but they still are not compelled by the Constitution. Congress and state legislatures can reject their dictates or reasoning. They also, of course, can embrace them, and by statute or amendment, direct courts to apply them.¹³³ But I deny that *courts* have ever been authorized to impose them. So, I agree with Justice Thomas that cross-burning is conduct—not speech—and no amount of sophisticated reasoning can make it anything else. In contrast, in *Black*, a majority of Justices immersed themselves in the ungrounded imagination of theorists instead of the realities confronted by elected officials.¹³⁴ To impose an expanded definition of speech on

¹²⁶ *Id.* at 399–400.

¹²⁷ *Id.* at 390.

¹²⁸ The statute was enacted in 1952 following several cross-burning and other intimidations of blacks. *Id.* at 393. “It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message.” *Id.* at 394.

¹²⁹ *Id.* at 393.

¹³⁰ *Id.* at 394. “The legislature [found] the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator.” *Id.* at 397.

¹³¹ *Exclusionary*, *supra* note 9, at 105. See also JOSEPH HAMBURGER, JOHN STUART MILL ON LIBERTY AND CONTROL (1999); LINDA C. RAEDER, JOHN STUART MILL AND THE RELIGION OF HUMANITY (2002); George W. Carey, *The Authoritarian Secularism of John Stuart Mill*, 15 HUMANITAS 107, 107–19 (2002) (reviewing LINDA C. RAEDER, JOHN STUART MILL AND THE RELIGION OF HUMANITY (2002)) (predicting intense intellectual warfare between those who stubbornly cling to the idea that Mill was a champion of individual liberty, and revisionists who are not so sure when Mill’s public works are contrasted with his private correspondence). See *infra* notes 288–356 and accompanying text.

¹³² See sources cited *supra* notes 43, 88, 101, 114, 124. There is a direct relationship between progressivist assertions of the open society symbol (the forerunner of the contemporary intoxication with the First Amendment) and the growth of judicial power.

¹³³ See William Gangi, *The Sixth Amendment: Judicial Power and the People’s Right to Govern Themselves*, 66 WASH. U. L.Q. 71 (1988) [hereinafter *Sixth*] (Congress agreed to pay for counsel in capital cases—a more extensive provision than existed in England which was limited to treason cases—after having approved the Sixth Amendment right to counsel, but before it was ratified). That right, which had a long colonial history, had been understood to assure only the right to retain counsel if one could afford it. *Id.* at 76.

¹³⁴ See *Black*, 538 U.S. 343; *Exclusionary*, *supra* note 9, at 107–110. This model-building is an

Congress or state legislators—as the Supreme Court has done for over sixty years—is not interpretation, it is *judicial over-reaching*. If an act is within legislative competency, it is not the function of the judiciary to decide its wisdom, and if under one guise or another it does so, the Court acts illegitimately.¹³⁵ In sum, O'Connor's plurality opinion merely continues to promulgate unsupported modern First Amendment wishful thinking by selectively choosing precedents that define words, while ignoring what the people did, as well as contrary precedents.¹³⁶ The fact that some scholars have expended considerable effort in explicating First Amendment assumptions, or have probed, poked, or analyzed ad nauseum case law shadows, is neither here nor there. Two generations of laissez-faire scholars did the same thing.¹³⁷

Decisions such as *Johnson* and *Black* also intrude on states rights. I remind students (who often appear quite surprised) that when the Bill of Rights was adopted, it did *not* apply to the states; equally revelatory, apparently, is the fact that states' bill of rights provisions *preceded* the federal

intoxicating brew, as are the persuasive skills that sustain it. In Plato's words, speech is "a great and powerful master" that operates on man "with magic force." Eric Voegelin, *Wisdom and the Magic of the Extreme: A Meditation*, 17 S. REV. 235, 249 (1981). The spell of language "can swerve the soul when it is weakened, by passion or lack of knowledge, toward opinion . . . in conflict with truth." *Id.* Plato compared the power that language has over the soul to that of a drug over the body. "[A]s the drug can heal or kill, harmful persuasion can drug and bewitch the soul." *Id.* Even when the consequences of abusive persuasion are recognized as evil the situation may "resemble a sick man who wants the physician to cure him by treating the effects of dissipation . . . without giving up his way of life." *Id.* at 252. In short, the "desire for drugs is now related to the core of existential disorder, to the hatred of the truth that would interfere," *id.* that is, recognition of the truth that would force the dreamer to give up his dream, his perception of reality, his system. "In the clash between system and reality, reality must give way." ERIC VOEGELIN, *Science, Politics and Gnosticism*, in SCIENCE, POLITICS AND Gnosticism 1, 45 (William J. Fitzpatrick trans., Henry Regnery Co. 1968) (1959) [hereinafter VOEGELIN, *Science*]. See *infra* note 301 and accompanying text.

¹³⁵ "Laws may be unjust, may be unwise, may be dangerous, be destructive, and yet not be so unconstitutional as to justify the Judge in refusing to give them effect." Berger, *supra* note 20, at 628 (quoting James Wilson). *But see* KRAMER, *supra* note 34, at 76–77 (providing context to Wilson's remarks).

¹³⁶ See *supra* notes 110, 118; *infra* note 223.

¹³⁷ See GILMORE, *supra* note 10, at 62–64, 75–77, 101–05. I am not going to get involved in the results-oriented reasoning in cases such *Bolling v. Sharpe*, 347 U.S. 497 (1954). It is part of the body of modern case law I find embarrassing. One could also refute Justice Sutherland's parallel reasoning in *Powell v. Alabama*, 287 U.S. 45 (1932). See *Sixth*, *supra* note 133, at 77–81. In 1897, the Supreme Court held that the Fifth Amendment's condemnation of compulsory self-incrimination and the common law confession rule had common histories. See *Bram v. United States*, 168 U.S. 532 (1897). For an analysis of *Bram*, see *Critical*, *supra* note 16, at 4–14. By 1940 scholars, notably Wigmore, strongly criticized the *Bram* decision, claiming "[t]hat the two roles should be supposed to have something of a common principle or spirit is a not [sic] unnatural error. But that history should be rationally tampered with by asserting any common origin is inexcusable." 3 WIGMORE, *supra* note 10, at 250 n.5. He did not pull any punches: *Bram* "reached the height of absurdity in misapplication of the law[.]" *Id.* at 241 n.2. And again: "[H]ow much longer will that misguided and unrepudiated opinion continue to cloud the reputation of the Federal Supreme Court?" *Id.* at 264 n.1. Perhaps in response to this withering criticism, the Supreme Court abandoned the privilege-confession identity in *Brown v. Mississippi*, 297 U.S. 278 (1936). "[T]he privilege against self-incrimination is not here involved." *Id.* at 285. However, in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court resurrected *Bram*, substituting story-telling for scholarship. See WIGMORE, *supra* note 10, at 250 n.5. *But see* Dickerson v. United States, 530 U.S. 428 (2000) (upholding *Miranda v. Arizona* against congressional challenge, on the basis that warnings to criminal defendants have become embedded in our culture).

one.¹³⁸ Accordingly, some states had established religions until their citizens decided to abandon them.¹³⁹ Subsequent interpretations of the Fourteenth Amendment, including the creation of the selective incorporation doctrine (used to impose already defective federal Bill of Rights interpretations on the states), rests on a foundation of sand.¹⁴⁰ Selective incorporation lacks credible historical support, is logically absurd, and for two generations now, has masked judicial usurpations.¹⁴¹

Many precedents cited in related cases go so far beyond the well-understood and limited common law rights envisioned by the framers, that they amount to constitutional amendments. But the Constitution's Fifth Article requires *the people's consent* to make such changes, and it omits any judicial involvement.¹⁴² In contrast, some non-interpretivist scholars

¹³⁸ After ratification, the Bill of Rights did not apply to the states, and even if it had applied, the Fifth Amendment's due process clause guaranteed only long-accustomed *procedures*. See BERGER, *supra* note 56, at 193–200; HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 126–27 (1977) (pointing out that relevant due process procedures are specified in the Fifth and Fourteenth amendments). With respect to the oft-cited alleged generalities associated with due process, Berger questioned whether “due process of law” was loose language. Yet, Charles Curtis, an admirer of the Court's innovations, wrote that the meaning of due process of law in the Fifth Amendment “was as fixed and definite as the common law could make a phrase. . . . It meant a procedural process.” BERGER, *supra* note 56, at 200. The Court stated that the phrase in the Fourteenth Amendment was used “in the same sense and with no greater extent[.]” *Hurtado v. Cal.*, 110 U.S. 516, 534 (1884). John Bingham, the Amendment's draftsman, said that its meaning had been settled “long ago,” BERGER, *supra* note 56, at 203, by the courts and, but for a couple of cases which John Hart Ely justly labels as “aberrations,” John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, 417 (1978), “that meaning was all but universally procedural.” BERGER, *supra* note 56, at 204. So far as the framers were concerned, “due process” was not a “loose” term, but one of fixed and narrow meaning. *Id.* at 200. Professor Meyer concurs:

No one could dream that one day the United States Supreme Court would take a constitutional term, turn it into a nonsensical phrase—substantive due process—and misuse it as a cover-up for the absence of constitutional authority to interfere with the constitutional functions of the legislatures of the states, and even with those of Congress.

MEYER, *supra*, at 127. As I will soon make clear, I suggest students return to documents such as the Massachusetts Body of Liberties. See *infra* notes 177–195 and accompanying text.

¹³⁹ See sources cited *supra* note 85.

¹⁴⁰ Is it sad, though not surprising, that so many law students are frequently unfamiliar with *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). But *Barron* is only one among many. See *infra* note 202.

¹⁴¹ See *supra* note 137; *infra* note 205. As noted earlier the arrogance and self-serving justifications of the media's Invisible Hand, rival those of their laissez-faire predecessors. See *supra* note 124. See also, e.g., Eason Jordan, *The Awful News CNN had to Keep to Itself*, *INT'L HERALD TRIB.* (Paris), Apr. 12–13, 2003, at 6 (describing how CNN management chose to ignore the torture of its own personnel and Iraqi citizens, as well as the fact that the Iraqi government—under Hussein—severely circumscribed their movements and ability to report—all so they could report from Baghdad). Here is a respected journalist unable to see just how self-serving such arguments are, and how powerful are the assumptions that guide him.

¹⁴² U.S. CONST., art. V. There are two methods of amending the constitution, although throughout our history we have only used one. A suggested Council of Revision, giving the Justices a role in judging the wisdom of legislation before it was implemented, was rejected at the Convention. See SAVING, *supra* note 3, at 128–29. But see KRAMER, *supra* note 34, at 280 n.1. Take this question: Can the Supreme Court declare a federal constitutional amendment, unconstitutional? I recall, but cannot locate, one scholar's judgment that the Bill of Rights could not be repealed by amendment because it would violate the *spirit* of the document. I disagree. The Supreme Court has declared an amendment to a state constitution, unconstitutional. See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

argue that the people's consent may be assumed to have been tacitly granted since the people have not objected to the judiciary's expanded role or because elected representatives have failed to chastise the Court and refused to employ the counter-measures at their disposal.¹⁴³ I disagree. First, the Justices have never collectively informed the people that they believe they are more capable than legislators or the people themselves to make wise public policy. Instead, behind the smoke and mirrors of their own creation they inform the people, as did their laissez-faire predecessors, that the decisions they make are based on the *Constitution*. And then they coerce obedience by reminding the people of their solemn promise to obey the document their forefathers shed blood to secure. Second, the Justices forego the people's allegiance when, violating their oath on the level of practice if not principle, they abandon the *only* authority they ever possessed: the ratifiers' understanding of the Constitution.¹⁴⁴ In light of such deception and ordinary canons of construction, consent of the people to a greater judicial role than was understood by the ratifiers *should be explicit*.¹⁴⁵ The Court today acts not only as if it was authorized to sit as the second Philadelphia Convention, but after it finishes its work, the Justices ratify their own proposals. The people's *present* representatives, for whatever reason (ideological, political, practical, or theoretical), may accept this new judicial role, but unless the Constitution is formally modified, at any subsequent time that role may be unceremoniously repudiated by the representatives who succeed them.¹⁴⁶

No word, phrase, or portion of the Constitution—be it “liberty,” “equal protection,” “due process,” “free speech,” or the Bill of Rights *in toto*—can swallow up and render ineffective or superfluous the people's charter of self-government—the Constitution.¹⁴⁷ Unless proscribed by the

¹⁴³ SAVING, *supra* note 3, at 218–23.

¹⁴⁴ To avoid being misinterpreted, I want to remind the reader that the issue is not the *power* of judicial review, but its *scope*. See Berger, *supra* note 20.

¹⁴⁵ See *infra* note 205.

¹⁴⁶ “Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 470. Publius is being perfectly consistent. If a limited constitution is to endure, it must be respected by all, including those who would be entrusted with the task of changing it. The capacity of the present generation to amend the Constitution by the procedures provided does not permit them to abandon those ratified limitations until the change is procedurally enacted. *Id.*

¹⁴⁷ Twenty-five years ago I speculated that the scholarship of Raoul Berger would necessitate that teachers lie about what was known or unknown about the intent of those who framed the Fourteenth Amendment. Law students are in a far better position than I to judge whether there has been any change in how professors confront the following questions:

What then will the Justices and we scholars do about fourteenth amendment [sic] cases in the context of Berger's findings? There are, of course, several options.

... Ignore Berger's conclusion; they will go away; nobody really cares—it's results that count

... The Justices and we scholars could claim that the history is not relevant [sic]. . . .

... The history is ambiguous. Thus far, this certainly has been the most prominent theme. This approach holds a lot of promise, if as scholars and/or justices, we don't mind

text or rooted in the ratifiers' understanding or historical practice, the people are entitled to govern themselves as they see fit. After all, as Publius reminds us, the cure for an ill-administration most often is a change in elected representatives.¹⁴⁸ As for the American people, and for law students, I have nothing but the highest expectations. I have never regretted placing my faith in either (well, okay, most of the time). The American people cannot be faulted for accepting the Court's (or its supporter's) word on what is constitutional or not, any more than a car owner should be faulted for accepting a trusted mechanic's word that a repair is needed. Despite frequent and grave misgivings about the wisdom of what the judges have decided, the people have remained extraordinarily faithful to our Constitution,¹⁴⁹ and constitutional scholars should expend every effort to distinguish what is, and what is not, constitutionally binding. Judges must embrace self-government in its *full* measure, and not limit the people's options to what they believe is wise public policy.

Am I (under the guise of expressing concern for interpretive rules, government competency, or self-government) merely substituting my own public policy preferences for those championed by my non-interpretivist brethren? The reader must ultimately decide. But I suggest that issue misses the point. Do *law students* believe the framers authorized *judges* to impose *their* will on the American people? And if the framers did not, who did? Finally, public policy resolutions requiring the balancing of competing constitutional claims, or necessitating moral judgments, are at the very heart of politics. Isn't that precisely what *making law* is all about? Can law students separate what they hold most dear, from what the Constitution may or may not require?

IV. TASKS AND TOOLS: THE INTERPRETIVIST CHALLENGE

This article maintains that constitutional law has been seriously damaged, and if it is ever to be repaired, law students must address several questions: What and from whom did they learn about A) the limits of judicial power, B) the American political tradition, C) the authority of precedents, and D) contemporary standards of scholarship? I begin by discussing the limits of judicial power, since today I better appreciate that the non-interpretivist approach is only a symptom, rather than the disease itself.

participating in a lie. All we have to do, once we examine the evidence is, forget it, distort it, ignore it. . . .

There is the related problem of what to do with our students? Do we tell them a straight-out, bald face lie—for their own good, naturally. 'Despite the alleged findings of Berger *et al*, the evidence is ambiguous.' Or kind of slip it by—more an admission than a confession: 'The evidence *seems to be inconclusive*, but naturally you will have to make your own judgment.' Or 'Whatever the Berger *et al* findings, the question is, what do we want the Constitution to mean today? How can we make it work for us? It is more important to focus on the results obtained.'

Expansionism, *supra* note 21, at 62 n.472 (citations omitted).

¹⁴⁸ THE FEDERALIST NO. 21 (Alexander Hamilton) *supra* note 4, at 140.

¹⁴⁹ As evidenced by the fact that our Constitution has remained in place for over two centuries.

A. Approaching the Limits of Judicial Power

Despite earlier characterizations, law students will find the non-interpretivist position far from monolithic. Some non-interpretivists contend the Supreme Court should use its power *only* to defend the structures created by the framers;¹⁵⁰ others contend that judicial power should only be confined to assuring fair access to the democratic process;¹⁵¹ still others turn to the courts only to expand traditional rights, to create new substantive rights, or both.¹⁵² Most discerning non-interpretivists, however, admit that the power wielded by the Supreme Court today certainly was not the power sanctioned by the framers.¹⁵³

Law students will further find that interpretivists and non-interpretivists are actually in agreement about certain things. For example, both camps acknowledge that those who proposed and ratified the constitution understood it to have created a limited government—one “contain[ing] certain specified exceptions to the legislative authority”¹⁵⁴ They also agree that a life-tenured judiciary and judicial review are essential to preserve those aforementioned limitations, and both acknowledge that the constitution placed limits on Congress because otherwise, as Publius noted, “the servant [would be] above his master . . . [and] the representatives of the people [would be] superior to the people themselves”¹⁵⁵ Interpretivists firmly maintain, however, that in accepting judicial review, the framers never authorized judges to impose *their* sense of wisdom or morals on the people, expand the constitutional restrictions on Congress or the President, or to create new rights. The points need not be belabored. George W. Carey succinctly sums them up:

We submit, then, that Federalist 78, when read in its entirety . . . amounts to a perfectly sensible statement with which few, if any, would seriously disagree, given the fact that we have a written charter of government. To note, as Hamilton does, the feebleness and weakness of the judiciary, the fact that it cannot take any “active resolution whatever,” that it is to be a passive institution exercising only JUDGMENT, that its powers extend to declaring acts of the legislature unconstitutional only when contrary to the “manifest tenor” of the Constitution . . . that it can only use this power when there is an “irreconcilable variance”

¹⁵⁰ See, e.g., MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* (1995) (disagreeing with one set of interpretive rules being applied to political structures while another is used in personal rights cases). See also William Gangi, Book Review, 90 AM. POL. SCI. REV. 200 (1996) (reviewing MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* (1995)).

¹⁵¹ See, e.g., JOHN HART ELY, *ON CONSTITUTIONAL GROUND* (1996). But see William Gangi, Book Review, 27 PERSP. POL. SCI. 52 (Winter 1998) [hereinafter Ely Review].

¹⁵² Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

¹⁵³ See, e.g., William Ray Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212 (1977); Louis Lusky, “*Government by Judiciary*”: *What Price Legitimacy*, 6 HASTINGS CONST. L.Q. 403, (1979). The Supreme Court has a “new and grander conception of its own place in the governmental scheme.” *Id.* at 408.

¹⁵⁴ THE FEDERALIST NO. 78 (Alexander Hamilton) *supra* note 4, at 466.

¹⁵⁵ *Id.* at 467. In the text I refer only to Congress, because ultimately they can pass laws with or without the President’s consent.

between the statute and the Constitution, and, finally, that it is “indispensable” that it be “bound down by strict rules and precedents,” hardly lends support to the thesis that he sought to vest the judiciary with the kind and degree of powers that modern-day “judicial activists,” among others, impute to it. Put otherwise, we have noted that, if judicial review is indeed a part of the contract to which we have given our tacit consent, we must, perforce . . . go to Federalist 78 to see the justification for it and to understand its scope as well as the obligations of the Court in exercising this power. When the terms of the contract are broken by the Court, our obligation to respect or obey its power of judicial review is severed, and the other branches of government, principally the Congress, are entitled, nay *obliged*, to use the constitutional means at their disposal to curb, regulate, and control the Court in such a manner as to compel conformance with the terms of the contract. This line of reasoning is but a corollary of the line of reasoning by which the courts lay claim to the power of judicial review. The Court is equally obliged as a creature of the Constitution not to overstep its bounds or exceed its constitutional authority. To argue otherwise would be to say that the Court endorses judicial supremacy.¹⁵⁶

As we have detailed earlier, however, many non-interpretivists reject being bound to the *framers'* understanding of judicial review or to the limited scope of its appropriate application. They hop-skip-and-jump from the legitimacy of judicial review to the unsupported conclusion that the role played today by the Supreme Court is *consistent* with the ratifiers' understanding.¹⁵⁷ But assuming for the moment that the interpretivist position summarized by Professor Carey is correct, how did an independent federal judiciary fit into the framers' design?¹⁵⁸ I reject non-interpretivist assertions that the contemporary role of the Supreme Court is indistinguishable from the role sanctioned by the framers. The preponderance of the evidence is to the contrary, and in fact, there is little difficulty in meeting the more demanding burden of beyond a reasonable doubt.¹⁵⁹

Publius of course had explicitly characterized the judiciary as “the

¹⁵⁶ DEFENSE, *supra* note 30, at 135. A tribute to Carey's scholarship is the fact that these words were penned prior to 1977 when Raoul Berger's *GOVERNMENT BY JUDICIARY* (a seminal work upon which much of the modern critique of the Supreme Court rests) was published. See *GOVERNMENT*, *supra* note 56; *supra* note 21. Carey had articulated components of these conclusions earlier. See Willmoore Kendall & George W. Carey, *Introduction to What to do About the Court?*, in *LIBERALISM VERSUS CONSERVATISM: THE CONTINUING DEBATE IN AMERICAN GOVERNMENT* 277, 277–84 (1966) [hereinafter *CONTINUING*]. For an illustration of the varying viewpoints on the role of the Court, compare Eugene V. Rostow, *The Supreme Court in the American Constitutional System*, in *CONTINUING*, *supra*, at 285, 285–300; Charles S. Hyneman, *Frontiers of Judicial Power*, in *CONTINUING*, *supra*, at 301, 301–10; Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, in *CONTINUING*, *supra*, at 310, 310–22. See also WILLMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 139–42 (1970) [hereinafter *BASIC*]. “Judges did not typically intervene unless the unconstitutionality of a law was clear beyond doubt, which as a practical matter left questions of policy and expediency to politics.” KRAMER, *supra* note 33, at 150.

¹⁵⁷ SAVING, *supra* note 3, at 194–225.

¹⁵⁸ George W. Carey, *The Supreme Court, Judicial Review, and Federalist Seventy-Eight*, 18 *MODERN AGE* 356 (1974), reprinted in DEFENSE, *supra* note 30, at 122, 122–38.

¹⁵⁹ Of course my assumption in the text is dependent upon an agreement that our history—not speculation—should be the governing criterion.

weakest of the three departments of power”¹⁶⁰ He assumed judges would use traditional canons of statutory construction, and if they strayed too far from their interpretive responsibilities, Congress could limit its appellate jurisdiction, reduce the budget of the judicial branch (but not the salary of judges), regulate how courts conducted their business, or, ultimately, impeach judges.¹⁶¹ To deduce, as many non-interpretivists must, that by authorizing judicial review Publius or the ratifiers somehow signaled a repudiation of the republican character of the government, is patently absurd.¹⁶²

Although Publius staunchly defends an adequately empowered independent judiciary, as we all should, his remarks cannot fairly be construed as sanctioning the exercise by the judiciary of either legislative or executive powers—powers that have a different nature. He carefully rejected the Anti-Federalist charge that by citing the “*spirit* of the constitution” the federal judiciary could by manipulative reasoning impose their beliefs on the people.¹⁶³ More or less the same contention was resurrected a century later by the Revisionists¹⁶⁴ who contended that the framers’ entire constitutional design was intended to thwart popular majorities and charged that judicial review was the “final bastion against majorities intent upon regulating property rights.”¹⁶⁵ The legacy of scholarship that supported Revisionist reasoning is, I suspect, what continues to provide justification for many contemporary non-interpretivist assumptions.¹⁶⁶ I will return to this point.

If law students examine Publius’ defense of an independent judi-

¹⁶⁰ THE FEDERALIST NO. 78 (Alexander Hamilton) *supra* note 4, at 465–66 (citing Montesquieu: “Of the three powers above mentioned, the JUDICIARY is next to nothing.”).

¹⁶¹ THE FEDERALIST NOS. 78–83 (Alexander Hamilton). *See also* SAVING, *supra* note 3, at 40–51.

¹⁶² DEFENSE, *supra* note 30, at 133–35. “[T]he Court has itself violated the manifest tenor of the Constitution and it has done so in these and like cases by failing to observe the injunctions that Hamilton set forth.” *Id.* at 138. *See also* KRAMER, *supra* note 33, at 102–03; *Id.* at 108 (quoting Thomas Jefferson). Kramer quotes John Tyler: “[T]he violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good.” *Id.* at 102 (alteration in original). *See also supra* note 30.

¹⁶³ THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 4, at 482. Publius dismisses Anti-Federalist objections on the grounds that “there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution” *Id.* He says that his proposition about the power to declare acts void, however, was perfectly consistent with “the general theory of a limited Constitution” *Id.* Publius contends that the proposed solution, a completely independent judiciary, is preferable to the British model. In fact, since more of the American states use a model similar to the one proposed at Philadelphia, the proposed constitution is in this respect not “as novel and unprecedented” as its critics suggest. *Id.* at 483–84. Publius goes on to give his reasons for reaching these conclusions. *See id.* It should be kept in mind that Publius’ analysis in all the papers is made in the absence of a Bill of Rights, a situation which would have added to the number of prohibitions to be monitored by the judiciary.

¹⁶⁴ *See infra* text accompanying notes 220–230.

¹⁶⁵ DEFENSE, *supra* note 30, at 122–23.

¹⁶⁶ There are some differences between the *laissez-faire* and the contemporary non-interpretivists. Today, non-interpretivists *support* increased judicial power (at least in the personal rights area), while the original Revisionist critics *chastised* the Court for using judicial power to limit legislative power (at least in the property rights area). At one lecture of mine, I suggested that both Courts were equally guilty of imposing their will, to which a law professor (about my age as well as extraordinarily articulate and civil), frankly commented that, “the *laissez-faire* were simply wrong!”

ciary,¹⁶⁷ they will reach two conclusions. First, “there is no denying that Federalist 78 clearly constitutes the most authoritative evidence we possess that the Framers intended judicial review.”¹⁶⁸ And second, the power of judicial review championed by Publius is *not* equivalent to the claim of “judicial *supremacy*” put forth by modern judicial power proponents.¹⁶⁹ While the non-interpretivist defense of modern judicial power is certainly sophisticated, if students investigate it, they ultimately will find it unconvincing.¹⁷⁰ In the end the non-interpretivist position provides students with a short-term fix—they get to dress up the results they prefer in constitutional garb. Students who aspire to walk in the shoes of the framers, however, must oppose court decisions that usurp the legislative role. At times this may be difficult because some students care so much about a particular issue, but they must oppose illegitimate decisions even when they agree with the wisdom of the public policies said decisions promote.

Let us assume for the moment that the forgoing brief presentation has convinced you that there is some merit in the interpretivist position that the framers’ understanding of judicial review is incompatible with the modern non-interpretivist model. Would that determination have any bearing on how you view the authority of the Supreme Court? Non-interpretivists contend that any discrepancy with what the framers understood as the judicial power, is simply no longer important. Why, they ask, should Americans today still be bound by the views of those long dead? I call this the “so what” argument, and as you might suspect (and I will demonstrate), it has many applications. It amounts to this: “I do not care what the framers believed about judicial power, or what our history demonstrates, or what precedents held, because I support the Supreme Court’s decisions, even if they *are* illegitimate.” If such is the case, there is little need to read on. Such students have foregone reason and embraced will. I wish them productive careers.

B. Approaching the American Political Tradition

Assuming that at least some students have survived this assault on everything they hold dear, and remain intrigued, or they agree that the “so what” line of argument evinces will rather than judgment, they might next consider probing our history. But where should they begin?¹⁷¹ Over the

¹⁶⁷ DEFENSE, *supra* note 30, at 125–29.

¹⁶⁸ *Id.* at 129.

¹⁶⁹ *Id.* (emphasis added). Carey also notes the parallel reasoning between Federalist Paper 78 and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Id.* In many respects Carey’s analysis preceded and parallels my own. See SAVING, *supra* note 3, at 40–51. Many non-interpretivists in fact concede that the modern idea of judicial power is something new. They just don’t think that fact is particularly relevant. See *Expansionism*, *supra* note 21, at 20–22; sources cited *supra* note 153.

¹⁷⁰ I assume, of course, they will evaluate the conflict impartially, without focusing on how it may impact the results they favor.

¹⁷¹ Let me make a few suggestions for curious souls looking for something to research. You could compare the contemporary definition of free speech in England and the United States. If you look back, I suspect you will find a great deal of similarity up until the decisions of the Warren Court. I might suggest also that if students examine contemporary English law on the subject they may get a better

past years, having been asked that very question on several occasions, I acknowledge that rediscovering what has been lost is not as easy as it once was.¹⁷² I suggest pursuing this objective on three levels: select original sources, be careful about secondary sources describing the American founding, and remain historically grounded.

1. Selecting Original Sources: The Enduring Contribution of the Federalist Papers

Students should get in the habit of examining original sources. The Mayflower Compact (1620) and the Massachusetts Body of Liberties (1641) would certainly be a good start, but when it comes to appreciating the framers' design, there is no better place to begin than *The Federalist Papers*.¹⁷³ The *Papers* of course stand on their own merits and this article cannot possibly review particulars. My focus here, instead, is to increase your awareness of the negative sentiment that exists among non-interpretivists regarding the importance of the *Federalist Papers*. To do so, I suggest one essay that might be helpful in weighing the various charges.¹⁷⁴

Students are usually familiar with *Paper Nos. 10, 51*, and, maybe, *78*, which are often conveniently included in college text book appendices. College text book authors sometimes also cite these papers to buttress two assumptions. First, the core characteristic of American politics is competing interest groups (you know—"The 'Mischiefs of Faction'").¹⁷⁵ Second, the Supreme Court (having been granted the power of judicial review), is therefore charged with resolving public policy disputes.¹⁷⁶ Kendall and Carey advise that to put *Papers Nos. 10, 51*, and *78* in context students should read *all* of the *Papers*.¹⁷⁷ Unlike what students are most likely taught from non-interpretivist sources, these authors advise that the *Papers* are neither "'mere' journalism" nor "propaganda."¹⁷⁸ And they are any-

grasp about how far we have deviated from our common law history. Hurry up though—there is some speculation that before long the English Bill of Rights may be replaced by decisions of the European Court of Justice. See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 277–78 (1982).

¹⁷² See *supra* note 12–16 and accompanying text.

¹⁷³ See THE FEDERALIST PAPERS, *supra* note 4.

¹⁷⁴ Willmoore Kendall & George W. Carey, *How to Read "The Federalist"*, Introduction to THE FEDERALIST PAPERS, *supra* note 4, at v [hereinafter *How to Read*], reprinted in CONTRA, *supra* note 88, at 403.

¹⁷⁵ MAGLEBY ET AL., *supra* note 85, at 132.

¹⁷⁶ See, e.g., *How to Read*, *supra* note 174. Later on I will have more to say about modern democratic theory. Textbooks frequently articulate two other unsupported assumptions about American Government: the framers founded three equal and coordinate branches (*poppycock*), and the purpose of separation of powers was to protect minority rights. With respect to the first, the fact that Congress can impeach the President and Justices, yet, remain the sole judge of its own members, should be sufficient alone to ignore that contention. See William Gangi, Professor, St. John's University, New York, Department of Government and Politics, Lecture No. 8 on Chapter Twelve: The Presidency, MAGLEBY ET AL., *supra* note 82, (2006) available at <http://members.aol.com/gangibill/lecture8.htm>. With respect to the second contention see *infra* notes 240–246 and accompanying text.

¹⁷⁷ *How to Read*, *supra* note 174, at v.

¹⁷⁸ *Id.* at vi–ix, xiii–xv (emphasis omitted).

thing but simplistic. On the contrary, the *Papers* are “a ‘basic document’ of the American political tradition”¹⁷⁹ that constitutes “a re-enactment, in miniature, of the *miracle* of the Philadelphia convention”¹⁸⁰

But, wait—did not Hamilton and Madison subsequently express divergent views, and is not that sufficient reason to reject the contributions of both?¹⁸¹ The authors respond, yes and no. Yes, because the two authors subsequently expressed different views. No, because that is insufficient reason to reject their common understanding at the time of ratification. “[T]he holistic perspective of *The Federalist* . . . holds out the best prospect for identifying, illuminating, and comprehending these and like concerns surrounding the foundations of our system.”¹⁸² The fact that three writers contributed to the product, or that subsequently two of these authors had divergent views, is not only largely irrelevant, it misses the point. They add:

The Constitution became possible because, increasingly, the delegates were willing to ask themselves not “What do *I*, personally, think the Constitution ought to be?” but rather “How *much* of what I think can I insist on with any hope of getting others to go along with me?” and “How *much* of what we can all get together on is there any hope of getting accepted by the American people?”. (Not, as that famous book puts it, “What do I will?”, but “What is the general will?”) *The Federalist*, we are saying, re-enacts that political miracle—as, we would add, with the exception of the tragic years that produced the Civil War, American political life has re-enacted it over and over again ever since—and eventuates in a public act that became possible only because the authors were prepared to submerge their individual personalities, their individual political philosophies, in the common enterprise.¹⁸³

Early in my career I was thus inoculated against the then-current, and still-prevalent, attitude that the *Papers* contain “mutually inconsistent positions and values” that mask the framers’ undemocratic motives.¹⁸⁴ That perception has led far too many political scientists to ignore or dismiss the *Papers* (with the notable exception of *Paper No. 10*).¹⁸⁵ Are law students

¹⁷⁹ *Id.* at xv (emphasis omitted).

¹⁸⁰ *Id.* at xii.

¹⁸¹ See George W. Carey, *Publius—A Split Personality?*, 46 REV. POL. 5 (1984) reprinted in DEFENSE, *supra* note 30, at 18.

¹⁸² DEFENSE, *supra* note 29, at 33.

¹⁸³ *How to Read*, *supra* note 174, at xii. Intriguing of course, is the fact that neither Alexander Hamilton nor James Madison were satisfied with the final product. See Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215 (1979).

¹⁸⁴ DESIGN, *supra* note 43, at xiii. Carey points out that “authors who focus on the political-economic dimensions . . . are prone to read Publius as saying that the ‘first object of government’ is the protection of property per se, rather than, as he states it, the protection of ‘the diversity in the faculties of men, from which the rights of property originate.’” *Id.* at 27.

¹⁸⁵ *Id.* at xiii–xiv. See also Douglass Adair, *The Tenth Federalist Revisited*, 8 WM. & MARY Q. 48 (1951). One other point: the participants at the Philadelphia Convention were *practicing* politicians. They understood only too well, as the quoted portion (*supra* text accompanying note 183) makes clear, that if they had failed to obtain a consensus acceptable to the people, any schema they produced would, like so many others before it, be heaped on the junk pile of history. Years earlier Carey had introduced me to John Roche’s seminal piece, John P. Roche, *The Founding Fathers: A Reform Caucus in Action*,

aware—in the words of John Jay previously quoted¹⁸⁶—that “tides” surround them, and if so, how can they escape (or even minimize) the dominant opinions of their era? You realize, of course, that years of intense toil and reflection are ahead of you, and you will be compelled, to one degree or another, to rely on the scholarship of those who preceded you.¹⁸⁷ The former builds expertise and a sense of continuity, while the latter encourages you not to confuse ego with professional obligations. Examine the work of any great scholar, and you will find curiosity and meticulousness, as well as a sense of fairness.¹⁸⁸ True scholars treat their opponents with respect and civility, although they do not run from a fight.¹⁸⁹ If scholarship is about anything, it is about being honest with ones’ self and those with whom one disagrees. It entails sifting through and evaluating evidence to reach conclusions, while simultaneously—and as much as humanly possible—acknowledging and putting aside one’s personal preferences and biases.¹⁹⁰ *The Federalist Papers* preserve a legacy of knowledge about human nature, politics, power, freedom, honor, and faith, as well as wariness and respect for one’s fellow citizens. They are about “whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”¹⁹¹ *The Federalist Papers* are certainly *not* about judicial oligarchy or intellectual elitism.

2. Approaching Secondary Sources: Beware of Unstated Assumptions

Throughout your secondary school education (perhaps even in college and law school), did your professors often cite the Declaration of Indepen-

55 AM. POL. SCI. REV. 799 (1961) reprinted in CONTINUING, *supra* note 156, at 33.

¹⁸⁶ See *supra* note 4.

¹⁸⁷ As, for example, George W. Carey has done throughout his career. In one work the dedication is to his friend and colleague, Willmoore Kendall, BASIC, *supra* note 156, and in another work the dedication is to Charles S. Hyneman, DESIGN, *supra* note 43. He had acknowledged the latter’s influence on his earlier work, in Willmoore Kendall & George W. Carey, *The “Intensity” Problem and Democratic Theory*, 62 AM. POL. SCI. REV. 5, 6 n.1 (1968) [hereinafter *Intensity*] reprinted in CONTRA, *supra* note 88 (subsequent citations will be to this book). Elsewhere, Carey credits Hyneman for his early perception of the possible consequences of the Supreme Court’s desegregation decisions, namely, “whether the Court would be so bold as to take upon itself the task of correcting the presumed ‘political failures’ of the elective branches.” DEFENSE, *supra* note 30, at 4–5.

¹⁸⁸ Kraditor, *supra* note 41. That is not to say that their conclusions are always right, or that, like all human beings they do not have their failings, personal or professional, or that they are exempt from the normal scholarly perils. See *infra* notes 286–303 and accompanying text.

¹⁸⁹ Despite his tendency toward being overly polemic, I recommend Raoul Berger as a model.

¹⁹⁰ The ability to be more objective comes in a variety of guises. Take Warren Buffet’s recent acknowledgement after his wife died, that he better appreciated his talent to make money, and that he would not be as good as Bill and Melinda Gates at expending it for noble causes. Carol J. Loomis, *Warren Buffett Gives it Away*, FORTUNE, July 10, 2006, at 56. Buffet decided to give the Bill & Melinda Gates Foundation 10 million shares of Berkshire Hathway stock, to be gifted at a rate of 5% of the designated shares each year. *Id.* at 62. The value of this stock today is over \$30 billion. See *id.* While we are on the topic of separating judgment from ego, one might also cite John Travolta’s character in *Saturday Night Fever* when, despite winning the support from his friends, he recognized his opponent was the better dancer. SATURDAY NIGHT FEVER (Paramount Pictures 1978). See also *supra* note 50 (regarding the blunt assessment of a New York City atheist).

¹⁹¹ THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 4, at 33.

dence as marking the beginning of our political tradition? Was emphasis placed on individual rights and equality above all other values, closely followed by professors waxing eloquent about the Bill of Rights? I am willing to wager that, for most of you, more time and energy was spent on the Bill of Rights (especially the First Amendment) and how the Supreme Court has adapted society to changing circumstances (of course citing *Brown v. Board of Education*)¹⁹² than on the framers' understanding of republican government, judicial power, or even the powers of Congress.¹⁹³

During my Ph.D. candidacy years I obtained an underground copy of two of Willmoore Kendall's five Vanderbilt Lectures. While I found them interesting, I had a dissertation to complete and put them aside. Several years later those lectures, as well as four by George W. Carey, were published in book form.¹⁹⁴ Close inspection of the materials initially left me troubled. My personal copy of the Mayflower Compact (1620) (contained in a volume of important American documents) omitted some of the language that the *Basic* authors quoted as being in the Compact. Eventually, however, I noticed that my copy of the Compact was an *edited* one, that is, one in which the editor obviously had deleted various words and phrases because he had thought them extraneous.¹⁹⁵

That was an important lesson for me to learn about scholarship: look for unstated assumptions. The difficulty of that task is compounded if you share an author's assumptions. *Basic* sensitized me to two things. First, to "thesis books," that is, books wherein the authors pretty much know their conclusions before they begin.¹⁹⁶ As a result, scholars often unintentionally distort our history, and because they do so, subsequent scholars rely on skewed research. For considerable periods of time original sources may remain unexamined.¹⁹⁷ The second is what Kendall and Carey labeled as

¹⁹² 347 U.S. 483 (1954).

¹⁹³ See *infra* notes 197–223 and accompanying text.

¹⁹⁴ BASIC, *supra* note 187. After Willmoore Kendall's untimely death his widow asked George W. Carey to edit and expand the original Vanderbilt Lectures. *Id.* at vii.

¹⁹⁵ Compare The Mayflower Compact (Nov. 21, 1620), in RICHARD B. MORRIS, BASIC DOCUMENTS IN AMERICAN HISTORY 7, 7–8 (Louis L. Snyder ed., D. Van Nostrand Co. 1956) with BASIC, *supra* note 151, at 157–58. Once I obtained a full version of the Compact, Carey's scholarship proved impeccable. The problem I encountered however, has tainted two generations of research materials, particularly with respect to the injection of progressivist assumptions. Later in this article I put forth several rules for scholars dependent upon historical works. See *infra* notes 293–297 and accompanying text; SAVING, *supra* note 3, at 252. See also ERIC VOEGELIN, THE NEW SCIENCE OF POLITICS 4–6 (1952). Voegelin notes that "[t]he damage is . . . done through interpretation. The content of a source may be reported correctly as far as it goes, and nevertheless the report may create an entirely false picture because essential parts are omitted. And they are omitted because the uncritical principles of interpretation do not permit recognizing them as essential." *Id.* at 10.

¹⁹⁶ BASIC, *supra* note 187, at 9. This occurrence is perhaps more widespread than we care to admit. The far greater danger however, is that focused on one's thesis, contrary evidence goes unrecognized.

¹⁹⁷ See *infra* notes 287–292 and accompanying text. This is why earlier in this section I urged students to consult original sources. For some time now, Supreme Court decisions have been replete with assumptions of progress, including such phrases as "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). By the Warren Court years, that assumption had become so embedded in adjudication, Earl Warren could use it without feeling the need to quote its originator. See SAVING,

the “official literature,” that is, secondary literature which contends that our entire tradition has been one of liberty and equality.¹⁹⁸ *Basic* provides a potent vaccination against the pernicious ramblings of college textbooks that often ignore or distort our history. Admittedly, students bitch and moan because *Basic* requires so much more thinking than the standardized American government college textbook—those that all-too-frequently highlight important information in contrasting black or purple. But after some initial struggle, more perceptive undergraduates become resentful, and law students become down right livid!¹⁹⁹ They demand to know: “Why didn’t our college or law professors raise these issues before?” I reply: “Surely your teachers had good intentions. They probably didn’t want to confuse you, believing it was best to teach you the ideal, rather than unpleasant realities.” Perhaps they believed these were noble lies.²⁰⁰

As adults, law students are entitled to frankness and convincing evidence. My experience as a lecturer thus far is that students are receiving neither. Not unexpectedly, students learn their contemporary catechism, that is, at least some professors regularly make them aware of our nation’s failures (against blacks, Indians, women and, now, illegal immigrants), while our prior generations are collectively labeled racists or misanthropes. To this Brooklyn boy, such accusations are akin to hitting an opponent when they are down. Maybe the rules have changed, but in my youth, such conduct was considered unsportsmanlike. It also seems intellectually dishonest. After all, one’s opponents are dead. They cannot explain why they believed or acted as they did, although one of course expects that they believed they were doing the *right* thing.²⁰¹ The primary assumption today

supra note 3, at 102–03; Nat’l Mut. Ins. v. Tidewater Transfer Co., 337 U.S. 582, 646–47 (1949) (Frankfurter, J., dissenting) (noting that the founders intended for certain concepts in the Constitution to evolve with society). As I mentioned in *SAVING*, there is no need to accuse Warren of plagiarism, only to appreciate the nature of unstated assumptions. *SAVING*, *supra* note 3, at 103 n.77. *See also id.* at 183 n.59, 254 n.114. For examples see the statements of Justice O’Connor, *infra*, notes 244 (noting the importance of legal education given that a large percentage of senators and judges are products of elite law schools), 340 (commenting on societal changes with regard to race-conscious admissions policies).

¹⁹⁸ *BASIC*, *supra* note 156, at 9–10. *See, e.g.*, *MAGLEBY ET AL.*, *supra* note 85, at 430 (“The Declaration of Independence proclaims the precious rights of *equality* and *liberty* [I]t took almost 200 years for that definition to be expanded to include all races, all religions, and all women as well as men.”). Compare William Gangi, Professor, St. John’s University, New York, Department of Government and Politics, Lecture No. 12 on Chapter Seventeen: Equal Rights Under Law, with *MAGLEBY ET AL.*, *supra* note 82, (2006) available at <http://members.aol.com/gangibill/lectur12.htm>. *See also* William Gangi, Professor, St. John’s University, New York, Department of Government and Politics, *Caring Too Much About Very Important Things: The Decline of American Constitutional Law*, Address at Southwest Texas State University (Nov. 15, 2001) available at <http://members.aol.com/gangibill/texas50.htm>.

¹⁹⁹ The Department of Government & Politics at St. John’s University has a joint degree program with the School of Law—an M.A./J.D. program. St. John’s University School of Law, Academics and Programs, <http://www.stjohns.edu/academics/graduate/law/academics/jd.sju> (last visited July 28, 2007).

²⁰⁰ For a discussion of “noble lies” see 3 ERIC VOEGELIN, *ORDER AND HISTORY: PLATO AND ARISTOTLE*, 105–07 (1957). “[W]hat is that ‘Big Lie’? It is the simple truth that all men are brothers.” *Id.* at 105. *See supra* note 147 (asserting that scholars must find a way to handle Fourteenth Amendment facts).

²⁰¹ One wonders if succeeding generations will find contemporary abortion justifications as convincing as we do today.

appears simplistic: this generation is smarter and morally superior to any that preceded it. While such lack of humility is bound to reap its comeuppance, it helps explain why precedents are no longer considered a repository of legal wisdom (or folly, and I wonder if the two are not intimately related) and thus discarded as no longer instructive.²⁰²

But *Basic* does more than undermine the official literature. It contends that above all, our tradition is about *self-government*. If that realization is placed center-stage, the continuity of the American political tradition, from the pre-revolutionary period to the present, almost magically emerges. Some distasteful facts certainly still must be acknowledged. But in doing so, students should minimize judgments of hypocrisy or stupidity, and be dissuaded from applying twentieth century moral sensibilities retroactively to eighteenth century citizens. In that historical context students no longer perceive citizenship solely in terms of *rights* enjoyed. Rather, they come to understand the awesome responsibility they have to define who we are as a nation, defend that meaning, and pass the legacy of self-government onto their children.²⁰³ *Basic* also offers this important guideline: "Unless we can see a *correspondence* between the symbols we have in hand and the people's action in history, the symbols we have in hand do not in fact represent that people, and we must look a second time for the symbols that do in fact represent them."²⁰⁴ As discussed later in greater detail, if a scholar speculates that particular words in the Constitution were understood by the people to mean one thing, but the people's actions are inconsistent with that meaning, it is far more likely that the *scholar* misconstrued what the people meant, than to assume the people did not comprehend the consequences when they selected the words they did. To charge the people with being either stupid or hypocritical (because their words did not allegedly match their actions) is at best premature.²⁰⁵

202 Law students are seldom assigned seminal articles or even complete classic cases, and my impression is that competing views and precedents are often ignored. When lecturing, I ask law students if they have ever read the *full* versions of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Rarely do students acknowledge reading even *two* from the above list (and even then, may have done so only as undergraduates). Of course, many have read truncated textbook versions of these cases. I understand that students are pressed for time, so their energy is spent mastering shadows. While I cannot really fault them, the loss of intimate knowledge of such cases is impacting negatively on our legal tradition, or more precisely, it is substituting a manufactured tradition for the actual one. How can students tell the difference?

203 See generally *BASIC*, *supra* note 156. *Basic* also introduces students to an entirely new set of theoretical tools crafted by Eric Voegelin. *Id.* at 22–23. He put forth the proposition that once a people perceive themselves distinct from other peoples, they engage in "self-interpretation," that is, through myths and symbols they express what they believe. *Id.* at 21–23. Contrary to modern usage, myths and symbols are not means of manipulation—an assumption that remains at the heart of many Supreme Court decisions, including *Texas v. Johnson*, 491 U.S. 397 (1989), see *supra* notes 88–102 and accompanying text, and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Instead, symbols are a means by which a society represents its "truth" as a society. *BASIC*, *supra* note 156, at 17–29.

204 *BASIC*, *supra* note 156, at 26.

205 The applicable canon might be that, once a word's meaning has been established, departures ought to be explicit. For example, in response to his non-interpretivist opponents, Berger had replied

Before drawing this section to a close, examine a copy of the Massachusetts Body of Liberties (1641).²⁰⁶ A discerning analysis will reveal, first, phrases that eventually became part of our Constitution and Bill of Rights. Second, while the liberties identified there address abuses common in preceding English history, the precautions taken are applied only against judicial and executive officials. Third, in areas which all of us recognize as particularly sensitive, the legislature (that is, the Massachusetts General Court) is authorized to make exceptions to cautions detailed.²⁰⁷ Note, however, that “there is no hint of any right that *limits* the power of the legislature[.]”²⁰⁸ because “escape clauses” lodged significant discretionary power in their hands.²⁰⁹ In class discussions I am fond of quoting the following passage:

No man shall be forced by Torture to confesse any Crime against himselfe nor any other unless it be in some Capitall case, where he is first fullie convicted by cleare and sufficient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.²¹⁰

that his Fourteenth Amendment conclusions, as those of other Fourteenth Amendment historians, were based on the unequivocal statements of the Amendment's framers. GOVERNMENT, *supra* note 55, at 6. But even if this was not the case, the burden of proof (the obligation to present concrete evidence of intended change) falls squarely on those suggesting a radical departure from the announced objectives of the Amendment, because the Constitution granted only limited powers to the federal government—a principal reaffirmed by the addition of the Tenth Amendment. *Id.* at 16–17. That burden of proof is particularly high because its framers *clearly* expressed the desire to constitutionalize only the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981, 1981a, 1983, 1988 (2000)), *rejecting* earlier drafts of the Amendment that had been broader in scope. *Id.* at 6–10. In such instances, sound interpretive principles require that any conclusion regarding their intentions “should be expressed in plain and explicit terms.” United States v. Burr, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693). Professor Monaghan concluded:

I find too little in the relevant source material, including the constitutional text, to think it more probable than not that any such sweeping change in the governmental structure was intended. Moreover, and more importantly, I am unable to believe that in light of the then prevailing concepts of representative democracy, the framers or ratifiers of [sec.] 1 intended the *courts* (rather than the national legislature pursuant to [sec.] 5) to weave the tapestry of federally protected rights against state government.

Henry Paul Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 127–28. I suggest that self-government is more about the power possessed by the people, than it is about (as the official literature would have us believe) individual rights and the role of the Supreme Court to create or enforce them.

²⁰⁶ The Massachusetts Body of Liberties (Dec. 1641), in COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY, at 70 (Donald S. Lutz ed., 1998).

²⁰⁷ BASIC, *supra* note 156, at 52–53.

²⁰⁸ *Id.* at 53.

²⁰⁹ *Id.* at 52.

²¹⁰ MORRIS, *supra* note 195, at 13–14., *quoted partially in* BASIC, *supra* note 156, at 52 (errors in original). As Carey observes “the Massachusetts Constitution is generally conceded to be the most ‘advanced’ or sophisticated of the early State constitutions”, George W. Carey, *Liberty and the Fifth Amendment: Original Intent*, 4 BENCHMARK 301, 301 (1990), which to me means we ought to study it more closely in order to better understand our tradition of liberties. I cannot here emphasize how much the competing values were weighed in the provision quoted in the text. But such weighing was common. For example, with respect to early coerced confession history, see *English*, *supra* note 16; *Critical*, *supra* note 16.

Of course most non-interpretivists today would be apoplectic at the suggestion that the quoted provision guaranteed *any* right. Where, they would ask, is the *unchanging* protection from possible *legislative* interference? But—and I cannot overemphasize the point—the good citizens of Massachusetts *demand*ed that provision; and they believed that writing it down offered a better means to secure and preserve their liberties.²¹¹ They did *not* find the escape clause language troubling or *inconsistent* with the liberty secured.²¹² Why? Because they understood that at the next election they could remove any legislator who did not warrant the discretion entrusted.²¹³ The Body of Liberties recognizes what students today often instinctively sense (once inoculated against rights rhetoric): that few, if any, rights can exist in all times and circumstances.²¹⁴ Liberties always require a balancing of competing concerns.²¹⁵ Once again I ask students: who does the Constitution authorize to perform that *balancing* function?²¹⁶

True, the approach exemplified by the Massachusetts Body of Liberties changed once equivalent “liberties” became constitutionalized rights, that is, once the Bill of Rights was added to the federal Constitution. But in what manner and to what degree did that occur? It is precisely here that in-

²¹¹ Professor Gary McDowell states:

To the Founders the Constitution’s principles, though fixed, were of a nature sufficient to allow for *political* change under them. What the ideology of a ‘living’ Constitution argues is not that the Constitution—by its own terms and language—allows political solutions to the exigencies time inevitably will bring, but that the terms and the language of the Constitution itself must be understood as changing.

McDOWELL, *supra* note 101, at 28. The issue then is not whether the Constitution should remain adaptable—of course it should—but rather which institution was charged with that responsibility.

²¹² BASIC, *supra* note 156, at 52–53. “[T]here is no hint of any right that *limits* the power of the legislature.” *Id.* at 53.

²¹³ The authors put the matter in a larger context.

And the breath-taking powers attributed to the General Court must be understood in that context: The General Court that is to pass laws on the delicate topics touched upon, to pass laws in the sensitive areas from the standpoint of freedom, is to be made up of servants of humanity, civility and Christianity, sitting as a deliberative body, and subordinate to the ‘call’ of humanity, civility, and Christianity.

Id. at 55. I have not investigated whether or not at that time, recall also was available. See also KRAMER, *supra* note 34, at 83–84.

²¹⁴ They probably would understand such instincts more thoroughly after reading all *The Federalist Papers*. Publius, for example, frankly asserts that powers of national defense cannot be safely limited “because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.” THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 4, at 153. Does that position increase the prospect of abuse? Publius replies, perhaps, but nevertheless that possibility must be a *secondary* consideration. Why? Because, if you try to hedge your bets, either the government eventually will fail for want of the very power withheld, or, should the power be eventually required, it will be exercised despite its unconstitutionality—which then means the framers of that constitution built into it the seeds of its own destruction. See generally SAVING, *supra* note 3, at 27–29.

²¹⁵ See SAVING, *supra* note 4, at 8–9. Two months after September 11, 2001, I raised the question of the impact of terrorism on constitutional law. William Gangi, Professor, St. John’s University, New York, Department of Government and Politics, *The Impact of Terror: Rethinking Civil Liberties?*, Address to Faculty at Southwest Texas State University (Nov. 15, 2001) available at <http://members.aol.com/gangibill/texas20.htm> [hereinafter Terror].

²¹⁶ “In republican government, the legislative authority necessarily predominates.” THE FEDERALIST NO. 51 (James Madison), *supra* note 4, at 322.

terpretivists and non-interpretivists part company.²¹⁷ *Basic* suggests that up until the Virginia Declaration of Rights the change in the words (from liberties to rights) did *not* portend a change in approach: as important as individual rights were to our predecessors, they did not singularly or collectively substitute for the right of self-government. The common good preceded individual benefit. Self-government, after all, was the right to create and define individual rights.²¹⁸ Once students grasp the framers' limited view of judicial power and the central role the legislature plays in a republican form of government, they may well evaluate the authority of contemporary precedents quite differently than they did before.²¹⁹

3. Are You Historically Grounded?

It is hardly surprising that law students often lack historical grounding. They are young, their backgrounds vary, and there is the pervasiveness of the "so-what" attitude. They already know more than did any Renaissance man. But even if our intellectual climate was more hospitable, a solid historical grounding still would be difficult to acquire. Nevertheless, insufficient grounding of our nation's founding period, its Civil War, the rise of laissez-faire, and the boom-and-bust years of recession and depression from the 1870s to the 1930s, is not without consequences. Students are left overly dependent on theoretical speculations, post-World War II adjudication, and, perhaps most telling, on precedents *since* the Warren Court. I already suggested students familiarize themselves with the founding period, but if they cannot *start* there (it is a lifetime task), I suggest they better acquaint themselves with the rise and fall of the laissez-faire period.²²⁰

Among others, in the late nineteenth and early twentieth centuries, James Allen Smith, Charles Beard, and Herbert Croly, made up the Revisionist school. They accused the founders of blatant self-interest and undemocratic motives, and renounced Darwinian-derived theories about social evolution and natural selection. The Supreme Court had implicitly used these theories to strike down reform legislation.²²¹ The Revisionists

²¹⁷ Two issues are not explored here. First, whether using "rights" versus the more traditional "liberties" constituted a substantive change in how such matters were viewed—I do not think so. See *BASIC*, *supra* note 156, at 62–67. Second, Congress certainly was restrained by the ratifiers' understanding of those rights, but, as noted elsewhere, free speech did not encompass blasphemy, libel, seditious libel, or obscenity. See *supra* notes 88, 110, 114 and accompanying text. See also *SAVING*, *supra* note 3, at 236–49 (discussing Fourth and Fifth Amendment examples).

²¹⁸ *BASIC*, *supra* note 156, at 63–67. The text accepts the fact that Bill of Rights provisions stand on higher ground than statutory or common law rights. The specific understanding of what protection was afforded by such rights should be respected by the legislature and defended by the courts. See *Sixth*, *supra* note 133, at 71–73, 86; *SAVING*, *supra* note 3, at 236–48. I also put aside the issue of the application of the Bill of Rights to the states through such doctrines as selective incorporation. See *supra* note 62 and accompanying text.

²¹⁹ See *supra* Part IV.A.

²²⁰ *DEFENSE*, *supra* note 30, at 3–17. Kendall and Carey had raised the issue earlier. See *BASIC*, *supra* note 156. I often use the term progressivists, instead of Revisionists, when their critique of laissez-faire moved from academic criticism to political action.

²²¹ After all, it was the application of Darwinian biology that formed a cornerstone of laissez-faire economics. See RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (George Brazil-

claimed laissez-faire economic principles were incompatible with the American people's sense of fairness—including the teachings of Christianity. Responding to the judicial vetoes of federal and state legislative proposals designed to address economic dislocation and depression, the Revisionists intensified their attack, wishing to undermine the authority upon which the laissez-faire Supreme Court decisions purportedly had rested—the intentions of the founding fathers. Revisionists reasoned that if both the founders *and* Supreme Court decisions were discredited, the American people would elect candidates who in turn would support reform legislation. By the mid-1930s, under considerable political pressure and the country in the midst of severe depression, the Supreme Court cautiously reevaluated the connection between what was demanded by the Constitution and laissez-faire economic theory.²²² Thirty years would pass before the Justices formally acknowledged the inappropriateness of judges attempting to oversee national economic policy.²²³

Not only were portions of the original Revisionist critique subsequently embedded in the scholarship of Vernon Parrington, Douglas Adair, Alpheus T. Mason, and Gordon Wood,²²⁴ but within a generation Revisionist

ler, Inc. 1959) (1944). See also SAVING, *supra* note 3, at 94–97. “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

²²² *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. at 41. This change in the majority’s perspective took place *without* any change in court personnel. WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 127 (5th ed. 1980). Given the political climate and F.D. Roosevelt’s court reorganization plan, Schwartz refers to the change in the Court’s perspective as “a switch in time [that] saved Nine.” BERNARD SCHWARTZ, *THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* 16 (1957).

²²³ The Court explicitly rejected any economic role for itself in *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (“Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.”). The Court went on to say, “We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” *Id.* at 730. For a description of the political climate in which the Court reversed its due process approach, see LOCKHART ET AL., *supra* note 222, at 127–28. Professor Gilmore observes that the change from laissez-faire thinking to a New Deal philosophy was “not much more than a changing of the guard[.]” GILMORE, *supra* note 10, at 87, or “a change of course, not a change of goal.” *Id.* at 100. This much is clear: “[T]he slogan ‘law is a science’ became ‘law is a social science.’ Where Langdell had talked of chemistry, physics, zoology, and botany as disciplines allied to the law, the Realists talked of economics and sociology not merely as allied disciplines but as disciplines which were in some sense part and parcel of the law.” *Id.* at 87. During this period, it was fashionable for liberals and progressivists to view the states as social laboratories. *Id.* at 91. See also Maurice Holland, *American Liberals and Judicial Activism: Alexander Bickel’s Appeal from the New to the Old*, 51 *IND. L.J.* 1025, 1036 n.23 (1976). While the Realist-Progressivist movement rejected the substitution of judicial preferences for those of the legislature with respect to national economic policy, within several years (late 1930s, early 1940s), they began to use judicial power to set national policy goals in three other areas: the rights of criminal defendants, race relations, and voting rights. *Id.* at 1043–45.

²²⁴ DEFENSE, *supra* note 30, at 9–33. Many of these charges were, of course, initially made by the Anti-Federalists. See generally *THE ANTI-FEDERALIST* (Herbert J. Storing ed., 1985) (1981). As early

scholarship (depicting the American founders as motivated by economic self-interest and possessing an anti-democratic bias) was seriously undermined by scholars such as Forrest McDonald and Robert E. Brown.²²⁵ Students ought to become aware that this is business as usual.²²⁶ Insights in one field are often eagerly applied to a second allied field, and before long, to a third unrelated field (more about this later).²²⁷ While scholarly cross-pollenization for a time is invigorating, once it occurs, it may take a generation or more before a succeeding scholar (with the same curiosity and set of competencies) points out that the insights (which still dominate the thinking in the second or third fields) have been found wanting, or totally discarded in the field where they originated.²²⁸

The initial charges made by Revisionist scholars nevertheless continue to cast a long shadow over an accurate understanding of the framers' design, despite the fact that within their fields of origin their conclusions have been discredited. Exposure continues through the back door, that is, the Revisionist findings still appear in college textbooks (and other scholarship) in which the authors seldom explicitly reveal the authorities upon which they rely. Students sense that something is going on. I for one have experienced it. Some professors *believe* the original Revisionist conclusions are *true* (ignoring the counter evidence) because ultimately, those findings better square with their own prejudices. Somewhat like Sally,²²⁹

as 1966 Kendall and Carey collected a number of essays intended to help students understand the changing perspectives on democratic theory and the role of political parties. If one examines the first chapter in CONTINUING, *supra* note 156, one finds essays by James Allen Smith, Martin Diamond, Richard Hofstadter, John P. Roche, Charles Beard, and Robert E. Brown. The date is significant, since it fell during the heyday of the Warren Court, which is to say, during the period when the Supreme Court redefined republicanism and nationalized an expanded Bill of Rights. See CHRISTINE L. COMPSTON, EARL WARREN: JUSTICE FOR ALL (2001). During this period leading American democratic theorists also were advocating that American political parties should move closer to the European parliamentary model, by offering clear programmatic differences. See CONTINUING, *supra* note 156, at 389–446. I am unaware of another volume that contains such rich resources and such even-handed treatment! See *also, e.g.*, HOWARD BALL, THE WARREN COURT'S CONCEPTION OF DEMOCRACY (1971). *But see* William Gangi, Book Review, 122 U. PA. L. REV. 505 (1973) [hereinafter BALL Review]. There is another issue that intrigues me: the assumption that the quality of scholarship perpetually improves—which again raises the matter of progressivist assumptions. I have my reservations. See *Exclusionary*, *supra* note 9, at 40 n.10; SAVING, *supra* note 3, at xix, n.14; 245 n.73. Put another way, the Court frequently forgets its own precedents and insights. For example, I have insisted that our law school retain its copy of John Henry Wigmore's 1940 Edition of EVIDENCE. WIGMORE, *supra* note 10. See *also supra* note 10.

²²⁵ Compare CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), with ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" (1956) (arguing that Beard's thesis lacks support) and McDonald, *supra* note 88, at 19–20.

²²⁶ See *infra* notes 286–303 and accompanying text.

²²⁷ See *infra* text accompanying notes 269–272. Contributions to the legal literature by non-lawyers certainly seem to be on the increase.

²²⁸ See SAVING, *supra* note 3, at 249–250; for example, *supra* note 4. Is it not time for the founding period to be re-examined without the veneers of *either* the laissez-fairest or their Revisionist critics? I have not investigated the matter, but my impression is that the Revisionist position still dominates in academia. I further believe that specific courses on *The Federalist Papers* are rare in American universities. And, of those offered, I don't know whether students are encouraged to read *all* the *Papers*, or if instructors uncritically bring the Revisionist critique to bear.

²²⁹ WHEN HARRY MET SALLY (Castle Rock Entertainment 1989).

they “fake it,”²³⁰ that is, they give students the impression that such matters are well settled and only an idiot (and a naive one at that) would dare question relevant conclusions. So when your professors make some sweeping generalizations about the framers’ distrust of the people, or that they lined their own pockets, ask them to cite their sources. Surely such assertions should be supported by evidence.

Let me explain how all of this might impact what you learn and how you learn it. Have your professors mentioned that not all colonialists were comfortable with the idea of republican government? Many colonialists, in fact, believed that monarchies and aristocracies offered far better long-term prospects for securing peace and prosperity than did democracies or republics.²³¹ Hence, for *good* (meaning intelligent and politically astute) reasons, the Philadelphia Convention delegates cautiously placed governmental power in the hands of the people. Past “pure democracies” and some republics had checkered histories.²³² But the beliefs held by these delegates were far more complex than a simple choice between, on the one hand, democracies or republics, and, on the other hand monarchies and aristocracies. One concern, particularly for Anti-Federalists, was that states be the proper size. Small republics or pure democracies (where all citizens participated directly in decision making) were preferred because it was believed that citizen liberty could best flourish there. But many understood that those governmental forms had poor track records for providing efficient, stable governments that were capable of preserving themselves and citizen liberty.²³³ They not only were frequently in a “state of perpetual vibration between the extremes of tyranny and anarchy,” but they were regularly conquered by larger, stronger states.²³⁴ Besides, only so many people could meet in one place at one time, and so such democracies had to be “confined to a small spot.”²³⁵

While republics could be extended over a larger territory than could pure democracies (since elected representatives would make public policy decisions instead of all the people), many colonialists (particularly among the Anti-Federalists) maintained that by their nature, republics ought to remain relatively small.²³⁶ Increased geographic size however, would inevit-

²³⁰ See, e.g., CONTRA, *supra* note 88, at 479; *infra* notes 308–310 and accompanying text.

²³¹ See generally THE FEDERALIST NOS. 14, 37, 39, 49, 51 (James Madison) (demonstrating that the republican form of government was debated by colonialists).

²³² See generally THE FEDERALIST NO. 4 (John Jay), *supra* note 4, at 49; THE FEDERALIST NOS. 6, 9 (Alexander Hamilton), *supra* note 4, at 54–59, 71–76; THE FEDERALIST NO. 10 (James Madison), *supra* note 4, at 81 (explaining “pure democracy”).

²³³ THE FEDERALIST NOS. 10, 63 (James Madison), *supra* note 4, at 81–82, 387–88.

²³⁴ THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 4, at 71. Compare KRAMER, *supra* note , at 165, 196.

²³⁵ THE FEDERALIST NO. 14 (James Madison), *supra* note 4, at 101.

²³⁶ Allen and Lloyd comment that the Anti-Federalists “believed that republican liberty was best preserved in small units where the people had an active and continuous part to play in government.” THE ESSENTIAL ANTIFEDERALIST, at xiii (W. B. Allen & Gordon Lloyd et al. eds., 1985). By co-opting the term *Federalists*, opponents of the proposed constitution were forced to take on the name *Anti-Federalists*, which they insisted was a misnomer, contending that what the so-called Federalists really

ably lead to the concentration of power necessary to govern the outer reaches of a more expansive territory. That in turn, would lead to adoption of monarchical or aristocratic forms of government which could act more vigorously since decision-making power was lodged in a few, or even a single hand.²³⁷ In sum, colonialists were between a rock and a hard place. On the one hand, small republics were preferable, however they were inevitably defeated in war by larger enemies, most frequently governed by a monarchy or aristocracy. On the other hand, if they adopted a government more suitable to governing large land masses, power would soon become concentrated and before long tyranny and the suppression of individual liberties would ensue.

Putting Republican theory aside,²³⁸ how does the above discussion illuminate the issues before us? First, many Anti-Federalists opposed the Constitution because they believed strong governments were naturally more tyrannical than weak governments, and that the extended territory encompassed by the proposed union eventually would require a monarchical or aristocratic form of government. The Anti-Federalists argued that the so-called Federalists were delusional—or worse, had nefarious intentions—ignoring traditional political wisdom. As we know, however, Publius rejected their assumptions as well as their insistence that representatives be elected from distinct classes and interests. Instead, Publius contended that an extensive territory, coupled with fewer representatives and other features, would have a moderating impact on legislative decision-making.²³⁹ Students ought to bring that context to an understanding of the Constitution's design.

Second, students should reassess the common non-interpretivist assumption that the separation of powers “was intentionally fused into our system to thwart *majority rule* in one way or another.”²⁴⁰ On the contrary, the separation of powers instead was designed to prevent *governmental tyranny*, which the framers and Anti-Federalists understood as the consolidation of legislative, executive, and judicial power into a single hand.²⁴¹ That

wanted (but were afraid to admit), was a *national* government. The so-called Anti-Federalists were, they argued, the true Federalists because it was they who fought for preserving the state sovereignty they had possessed under the Articles of Confederation. Some Anti-Federalists had been prepared to grant the national legislature more powers than had existed under the Articles, but not as much as were Federalists. These different perspectives toward the proposed constitution are of course at the core of the arguments in *The Federalist Papers*. See *id.* at viii–x; Maryland Farmer, *Essay III, Part I*, in THE ESSENTIAL ANTIFEDERALIST, *supra*, at 117–18; THE FEDERALIST NO. 14 (James Madison), *supra* note 4, at 100.

²³⁷ Tyranny was not just about the concentration of legislative, executive, and judicial power, it was also about that power being employed, not for the common good, but for the benefit of those who wielded it. See *supra* note 30; *infra* note 241 and accompanying text.

²³⁸ See *infra* Part V.

²³⁹ DEFENSE, *supra* note 30, at 34–52, 77–121.

²⁴⁰ *Id.* at 56 (emphasis added). See also *id.* at 53–76 (discussing the Madisonian Model).

²⁴¹ “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” THE FEDERALIST NO. 47 (James Madison), *supra* note 4, at 301.

tendency was the most serious threat confronting *all* governmental forms (monarchical, aristocratic, or popular). In response, they divided governmental power between the federal government and the states, separated the powers granted to the federal government among the three departments, and took the further cautionary step with the most likely culprit, by dividing the legislative power between two houses. These were the principal means by which the liberties of *all* citizens (whether a majority or a minority) were to be secured from the ability of the federal government to oppress the people, while at the same time, creating a stable and competent government. The Anti-Federalists rejected these devices as inadequate, but that was settled in the ratification debate.

Non-interpretivists rarely acknowledge the above purpose of the separation of powers, or they interpret it while ignoring the framers' insistence on having a competent government capable of addressing any set of circumstances. Finally, they fail to understand that the framers understood *majority* tyranny (the use of governmental power against a *minority* of citizens) to be a very different problem than that of *governmental tyranny*.²⁴² The problem of majority tyranny required a distinctly republican solution—namely a dependency on the moderating effect of a multiplicity of interests and an extensive territory. It was not simply that the framers believed the cure would be efficacious, but frankly put, they understood that Americans would not accept a governmental form other than a republican one.²⁴³ The framers envisioned that the judiciary would determine whether the authority exercised, by either the President or Congress, was granted in the Constitution. But by doing so, judges were never understood as having the authority to pass judgment on the wisdom of those decisions made under the power granted.²⁴⁴ The framers rejected even a modified judicial veto (granted instead only to the executive) when the powers exercised by Congress *did not exceed the powers granted*.²⁴⁵ Any other role for the judiciary, the framers contend, would be more appropriate in a hereditary form of government.²⁴⁶

²⁴² DEFENSE, *supra* note 30, at 61–62.

²⁴³ *Id.* at 62–64.

²⁴⁴ See *supra* notes 99, 223. The Convention had rejected a Council of Revision as inconsistent with the republican schema (separation of powers) as well as on the grounds that judges did not possess any particular insight on public policy decisions. See SAVING, *supra* note 3, at 61 n.145, 128 n.15. See also KRAMER, *supra* note 34, at 80, 98. Kramer makes clear that the framers understood the power of judicial review would be exercised only in a clear case, *id.* at 102–03, as did Publius who said, “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.” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 466.

²⁴⁵ EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS 44–49 (1989).

²⁴⁶ See THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the framers' view of a veto power as virtually monarchical). Of course there is no explicit provision in the Constitution that guarantees the separation of powers. We deduce it from the structure of the Constitution, colonial history and comments of the participants. In that context, as well as with respect to the powers granted, Congress was to play the pivotal role. It had the responsibility to adapt the society to changing circumstances. See SAVING, *supra* note 3, at 231–36. I ignore in the text other precautions the framers took to minimize prospects of government tyranny, including, but not limited to, delegating only *enumerated*

For these reasons, those who understood that monarchical or aristocratic forms of government were inconsistent with the spirit of the Revolution and would never gain the approval of the American people were pessimistic about the country's future. I suggest that when students examine some of the negative comments made by the framers about democracy or the people (oft quoted by non-interpretivists), they will conclude that the framers were not so much anti-democratic as they were *wise* democrats. Rather than closing their eyes to weaknesses inherent in popular governments, the framers unflinchingly addressed the weaknesses and provided a republican cure. The intricate inter-and-branch power-sharing and power-checking was *intentionally* designed to foster deliberation and encourage consensual politics, and in doing so, address the problem of intensity, a subject temporarily postponed.²⁴⁷

C. The Problem of Precedents

Having come this far, perhaps readers better appreciate the skepticism I bring to contemporary Supreme Court decisions. But my concern goes deeper than that. Law students are taught that the interpretative skills they acquire are unique to their profession—and they are. But have your professors acknowledged and schooled you in the long tradition of acquiring those skills?²⁴⁸ Interpretive difficulties are hardly a modern phenom-

powers to the federal government, and an independent judiciary capable of striking down legislation or actions inconsistent with the Constitution (i.e., judicial review). With respect to the last, however, the power was confined to legislation or actions that exceeded the powers granted, *as understood by those who ratified the document*.

²⁴⁷ See *infra* notes 304–352. Professor Kramer states the various devices “complicated and slowed politics long enough for reason to prevail.” KRAMER, *supra* note 34, at 114.

²⁴⁸ SAVING, *supra* note 3, at 139–44. “Canons [of construction] are to judges what hand tools are to carpenters: both simultaneously enable the task to be performed while limiting the performance of the task. The better and more specialized the tools, the easier the task and the more craftsmanlike the product.” *Id.* at 140–41. I only wish non-interpretivist intellectual energy was applied to, among other things, principled canon application, rather than being permeated by a great deal of results orientation and moral arrogance.

Justice Story . . . listed nineteen rules that today continue to provide an excellent jumping-off point for contemporary scholarship. From that list, Christopher Wolfe has distilled four basic tenets:

First, the interpreter should start with the plain and common meaning of words, which are the best expression of the lawgiver's intention, in this case, the intention of the people, who adopted the Constitution on a “just survey” of its text. Yet words may be ambiguous, or of doubtful meaning and so recourse must be had to other rules. Thus, the second rule is that doubtful words may be clarified best by looking to the nature and design, the scope and objects of the instrument. . . . The third rule . . . is that the nature of the Constitution is a frame or fundamental law of government, which requires a reasonable interpretation giving to the government efficacy and force, with respect to its apparent objects. The powers of the government are to be neither narrowed, because of probable conjectures about their impropriety, or fear of abuse, nor enlarged beyond their limitations because of fear that these limitations are impolitic. The fourth and final rule is that rules of verbal criticism and particular maxims arising from the use of words in practical life, shall be used to assist the interpretation of the instrument, insofar as their use stands well with the context and subject matter.

Id. at 141 (citing Christopher Wolfe, *A Theory of U.S. Constitutional History*, 43 J. POL. 292, 294–95

non²⁴⁹ and students should ignore attempts to change our regime through interpretive cleverness. Yet, if law students examine the non-interpretivist literature that is exactly what they will find: so-called interpretation that turns the framers' design on its head.²⁵⁰ Fifty years ago, some political scientists became infatuated with parliamentary systems; and today their non-interpretivist successors champion judicial power to impose their public policy preferences.²⁵¹ As I have already noted, this game is fraught with danger.²⁵² Non-interpretivists ultimately promote neither good scholarship, nor a sound basis for constitutional law.²⁵³

Non-interpretivists believe that a never-ending expansion of rights will foster a democratic regime far superior to the framers' republican de-

(1981)).

²⁴⁹ Publius commented:

All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfections of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. . . .

Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.

THE FEDERALIST NO. 37 (James Madison), *supra* note 4, at 229.

²⁵⁰ SAVING, *supra* note 3, at 267–69. “For it is substantive goals—like moral equality, private autonomy, and general economic well-being—that define ‘democratic’ when that term describes a community rather than a particular political institution.” Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 9 (1978).

²⁵¹ See Committee on Political Parties, American Political Science Association, *The Need for Greater Party Responsibility*, in CONTINUING, *supra* note 156, at 403.

²⁵² See *supra* note 37.

²⁵³ See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (while supporting the decision's substance, the author has grave reservations about its constitutionality, at least as the opinion was written). Gerald Gunther, like Ely, personally favors abortion legislation, but nevertheless describes *Roe v. Wade* as “an abomination, an outrage, one of the worst Supreme Court decisions in terms of constitutionally mandating what ought to be legislatively mandated responses to political pressures.” Henry Steele Commager, *The Constitution and Original Intent*, CENTER MAG., Nov.–Dec. 1986, at 4, 17 (quoting Gerald Gunther). More recent decisions by the Supreme Court offer additional examples. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action policies at the University of Michigan Law School). Cf. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (denying the use of affirmative action in the admissions process at the University of Michigan undergraduate program). See also *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a same sex Texas sodomy law, and presumably all state sodomy laws). Surely law students discern that these opinions rest more on sub-constitutional reasoning than constitutional principles? The issue is not whether these are good or bad public policies, but whether or not the Supreme Court is authorized to impose them.

sign. The faith required to sustain their belief also makes it difficult to repudiate it—until perhaps it is too late. As I have tried to demonstrate, however, one long term effect is predictable: *growing government incompetence*.²⁵⁴ Even more pernicious is the probability that the distinction between rights illegitimately expanded or created by the Supreme Court, and rights actually ratified by the people, will eventually be lost. Faced with one unanticipated circumstance or another (such as provided by September 11, 2001), traditional rights may as easily be lost as illegitimately expanded ones.²⁵⁵ To paraphrase Chief Justice John Marshall's well-known phrase, the power to create rights is the power to destroy them.²⁵⁶

When students examine Supreme Court decisions, they should ask themselves whether or not the Justices are acting as if they sat as a secular Chair of Peter.²⁵⁷ In doing so, they have repeatedly ignored arguments challenging their right to do so. Non-interpretivist scholars sanction this new judicial role (particularly when it coincides with their own policy preferences), and because they do, they elevate what they consider good results over sound constitutional principles.²⁵⁸ Of course, non-interpretivists do not see it that way. They believe that even if the Court has deviated from the framers' understanding or from long understood precedents, at best, these are minor matters when compared to the good results the Supreme Court has initiated or fostered.

In sum, while many scholars (unnamed here) proceed with good inten-

²⁵⁴ Publius astutely observed that "liberty may be endangered by the abuses of liberty as well as by the abuses of power . . ." THE FEDERALIST NO. 63 (James Madison), *supra* note 4, at 387.

²⁵⁵ That creates an environment where multiple factions perceive themselves as defenders of the Constitution, and that is a recipe for civil war. See *Inbau-Kamisar*, *supra* note 12, at 135–41. See also *Terror*, *supra* note 215.

²⁵⁶ *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819) ("An unlimited power to tax involves, necessarily, a power to destroy").

²⁵⁷ See Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981) [hereinafter *Human*]. "The Supreme Court is *not* an American Chair of Peter, such that when a majority of the Justices speak *ex cathedra* on matters of political faith and morals, they speak infallibly." *Id.* at 291 (first emphasis added). I would say many non-interpretive scholars think otherwise. See EISENGRUBER, *supra* note 29, at 7 ("I . . . argue that Supreme Court justices [sic] have a constitutional duty to speak about justice on behalf of the American people."). Many scholars ignore Justice Jackson's admonition that the "Bill of Rights [is not] a suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). As I comment later, this approach may have unanticipated consequences. See *infra* note 366 and accompanying text. The Secular Chair of Peter apparently needs priests as much as the papal one. Justice O'Connor implied that such priests would be drawn from the ranks of lawyers, and by analogy, the elite law schools have become our most important seminaries. She states: "A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges." *Excerpts from Justices' Opinions on Michigan Affirmative Action Cases*, N.Y. TIMES, June 24, 2003, at A24. See also *Grutter*, 539 U.S. at 332.

²⁵⁸ They abandon our tradition of self-government, ignore pertinent questions, and compromise their professional integrity. See *Expansionism*, *supra* note 21, at 62 n.472 (contending that various dilemmas confront those who put results ahead of principled scholarship—one such dilemma is that a professor may feel compelled, in one way or another, to lie to his students and perhaps to himself). See *supra* note 147. Today, the same judgment may be applied to those who fail to appreciate the complexity of politics and the Madisonian model, or who attempt to redefine it without the people's consent. See *infra* notes 304–352 and accompanying text.

tions as well as vivid imaginations, the work of other scholars (also left unnamed) cannot be so charitably described. Neither group, however, puts self-government center stage; that self-government should always be center stage is far more discernible from our history than the manufactured legacy of rights to which both groups subscribe. I do not wish to be unkind, but taken as a whole, the sub-text of much of contemporary scholarship seems to say: Look at how smart we are; we can construct premises and analogies and, from either, tease-out an unlimited number of principles (corollaries, nexus tests) about what must be done to make our governmental system what it *ought* to be (in their view).²⁵⁹ Put another way, their version of constitutional law consists of repackaging their *intensely* held elitist public policy preferences and pouring them into constitutional phrases they unceasingly redefine. In that manner, their preferences become the law of the land. Sadly, they have often successfully convinced other public policy participants, most of whom already share those preferences, that there is some compelling constitutional reason that requires yet another imposition. If law students swallow such reasoning, I suggest they might be interested in the Emperor's new clothes.

Had these non-interpretivist scholars followed the footsteps of their more confident progressivist predecessors by attempting to persuade the people or, the people's representatives, of their preferences, more likely than not they would have been met with stifling apathy.²⁶⁰ They, of course, know that. So, to avoid the frustrating and perhaps humiliating experience of having their most cherished beliefs rejected by their fellow citizens, they instead run to the courts—citing inadequate structures of representation (they have polls to prove it!), the cumbersomeness of the legislative and amendment processes, or the self-interest of their opponents. All these obstacles, they claim, prevent their pet proposals from getting a fair hearing in the existing and *obviously defective* political process. They charge that our system resists change, and they are certainly right on that score. For these non-interpretivist scholars, the fact that judges are unaccountable at the polls has become a virtue rather than the traditional mark of judicial limitation.²⁶¹

Point out that the framers certainly did not envision the judicial power

²⁵⁹ In their minds the premises they embrace, or the analogies they posit or construct, are integral to the American system of government—as if Americans had *approved* them. Then using the standards *they* created, these authors arrogantly identify our vices. But if the premises, analogies, and so on, are false or defective, the entire structure collapses. The fact that they never were approved is an additional reason for their illegitimacy. These premises, analogies, and so on are usually based on nothing more than a fragment of relevant experience. They perhaps begin with an experiential truth, but before long, that truth is distorted. See SAVING, *supra* note 3, at 181–90.

²⁶⁰ See *supra* notes 221–223 and accompanying text. With the non-interpretivists, the start-up costs are very low: to get the ball rolling all you need is to convince one judge. After all, every judge has the same authority as a Justice of the Supreme Court. The only difference is that the Supreme Court Justices speak *last*.

²⁶¹ SAVING, *supra* note 3, at 202–05; *Expansionism*, *supra* note 21, at 52–53; *Intentionist*, *supra* note 22, at 264–68. It is amusing when some of these same people accuse the framers of being undemocratic!

as non-interpretivists do, and they reply, “Why should that restrict us today?” Demonstrate that precedents (those that survive) are contrary to the proposed imposition they have in mind, and they reply, “Well, so what?”²⁶² Show that their premises are defective, and they reply, “Who is to say they are defective?” Prove that their historical assumptions are faulty, or that in pursuing the object of their heart’s desire other important considerations are obliterated, and more often than not they respond by saying (some more subtly than others) that those considerations are of little consequence, since—in the *big picture* (the one their preferences create of course)—the net result is good. If any of this disturbs you (as it should), please study the complexity of politics as understood by James Madison,²⁶³ because when law students only see the Constitution through a rights prism, to that proportionate degree, self-government will inevitably wither and die.

In order to consider precedents from an *un*-modern perspective, I wish to add, as promised earlier, a few words on interpretation. Interpretation is not a science—it is a craft, one dependent upon both acquired skills and integrity in application. We already noted that the complexity surrounding interpretation has been around for quite some time.²⁶⁴ Today, as then, it is about applying common sense rules acquired over centuries.²⁶⁵ Some rules are comparatively simple, such that the granting of a larger power usually encompasses the exercise of a lesser power, or when two laws conflict and cannot be reconciled the last shall prevail.²⁶⁶ Other rules require training to master. But once Raoul Berger published his seminal work, all hell broke loose because he dared to argue that the ratifiers’ understanding of constitutional phrases ought to be respected.²⁶⁷ Put more specifically, he con-

²⁶² SAVING, *supra* note 3, at 154.

²⁶³ See *infra* notes 306–354 and accompanying text.

²⁶⁴ See *supra* note 249.

²⁶⁵ Publius described “rules of legal interpretation [as] rules of *common sense*, adopted by the courts in the construction of the laws.” THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 4, at 496. Throughout *The Federalist Papers*, Publius provides examples of such rules: (1) “NEGATIVE PREGNANT,” THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 4, at 200; (2) “every part of the expression ought, if possible, to be allowed some meaning,” THE FEDERALIST NO. 40 (James Madison), *supra* note 4, at 248; (3) “where the several parts cannot be made to coincide, the less important should give way to the more important part,” *id.*; see also THE FEDERALIST NO. 41 (James Madison), *supra* note 4, at 263; THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 4, at 497; (4) “A specification of particulars is an exclusion of generals,” *id.* at 496. See also THE FEDERALIST NO. 41 (James Madison), *supra* note 4, at 263; *infra* note 266.

²⁶⁶ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 468. “[T]he last in order of time shall be preferred to the first.” *Id.* See also Peter S. Onuf, Forum, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. AND MARY Q. 341 (1989). Onuf observes that the “[Federalists] emphasized the document’s similarity to the state constitutions, promising that traditional canons of construction would be applied to its provisions.” *Id.* at 369.

²⁶⁷ See generally GOVERNMENT, *supra* note 56. When speaking of intent Berger most commonly refers to the publicly and contemporaneously expressed understanding of a constitutional provision. Sometimes intent is also described as the ratifiers’ will. Such will refers, not only to the intentions of the framers of the original document, but equally to those who framed and ratified the Bill of Rights and all subsequent amendments. The initial task of interpretation is to identify, if possible, that intent. Let me provide two examples. I still find the arguments in *The Federalist Papers* (defending the unlimited re-eligibility of the president) far more persuasive than those defending the Twenty-Second Amendment. See THE FEDERALIST NOS. 71–72 (Alexander Hamilton). Nevertheless, as a constitutional scho-

tended that the Supreme Court had ignored the intent of those who framed and ratified the Fourteenth Amendment.²⁶⁸

I concurred in Berger's assessment, but as already noted, non-interpretivists often do not. Instead, they accuse those who share Berger's views as advocating a literal or fundamentalist interpretation of the Constitution.²⁶⁹ In turn, I for one reject such characterizations as not on point and assert that those denying an allegiance to the framers' intentions inevitably rewrite the framers' constitutional schema and/or distort our tradition of republican self-government.²⁷⁰ Clearly there are important differences of opinion for law students to consider. Unfortunately, this is not the place to explore the definition of intent—what it means (and what tools can be used to discern it) or what it does *not* mean—and why it does not amount to an attempt to read the framers' minds.²⁷¹ All agree, however, that considera-

lar I am obliged to put my personal views aside, and when asked to do so, clearly articulate the intentions of those who framed the amendment against any misconstructions. It is not that I am prohibited from putting forth my personal assessment, only that I should not confuse my personal preferences with an accurate discernment of relevant intent. So too I think the Seventeenth Amendment's repeal of state legislative election of United States senators has damaged the original constitutional structures, but again, my professional obligation is to articulate what that Amendment was intended to accomplish, and how it modified the original document.

²⁶⁸ GOVERNMENT, *supra* note 56.

²⁶⁹ See SAVING, *supra* note 3, at 145–50.

²⁷⁰ A unanimous 1872 Judiciary Committee Report noted:

In construing the Constitution we are compelled to give it such interpretation as will secure the result which was intended to be accomplished by those who framed . . . and adopted it A construction which should give [a] phrase . . . a meaning different from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution A change in the popular use of any word employed in the Constitution cannot retroact upon the Constitution, either to enlarge or limit its provisions.

Raoul Berger, "Government by Judiciary": *Judge Gibbons' Argument Ad Hominem*, 59 B.U. L. REV. 783, 785 n.12 (1979) (second ellipses in original) (citing A. AVINS, THE RECONSTRUCTION AMENDMENT DEBATES 2, 571–72 (1967)).

Judge Thomas Cooley wrote:

The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time. . . . [T]he object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.

Id. (quoting T. COOLEY, CONSTITUTIONAL LIMITATIONS 69 (6th. ed. 1890)).

²⁷¹ See generally, *Expansionism*, *supra* note 21; SAVING, *supra* note 3, at 150–62. Here, I suggest that the reader put aside issues such as difficulty in ascertaining intent, and the nonexistence or application of a known intent to new circumstances (e.g., *ex post facto*). These are relatively minor issues where disputes will occur, and as always, you have to discern and weigh the best arguments. But am I a literalist because I reject the contention by Richard Saphire that a judge would be justified in claiming eligible a candidate for the U.S. Senate who had not yet achieved the age of thirty? Saphire argues that this requirement should be placed in the context of its time, and when interpreting it—at the right level of generality—the 30-year requirement conveys only the framers' concern with "maturity." His contention therefore is that today a younger candidate, certified by a judge, would be eligible. Raoul Berger, *Lawyering vs. Philosophizing: Facts or Fancies*, 9 U. DAYTON L. REV. 171, 194–95 (1984).

"[A]t some future time the senatorial age requirement might . . . plausibly be deemed ambiguous [?] . . . [or] interpreted in a nonliteral sense," viewing it as a "symbolic reference to maturity." The Court would not be "overstepping its legitimate function . . . to hold that a twenty-nine-year-old is eligible for election to the Senate."

Id. (alterations in original). Or, can a judge confidently update the Constitution by excising the "natural born" requirement (known in some circles as the "Arnold" clause) as no longer relevant in today's day

tions of intent are part of the interpretive craft.

I often ask law students what interpretive rules they are learning, and whether or not they believe these rules are being equally and fairly applied, for example, to statutory as well as constitutional law. Are these rules applied evenhandedly in structural cases (such as separation of powers) as well as in personal rights cases?²⁷² If not equally applied in either of those situations, do your professors explain why? Are you satisfied with their explanations? Are the explanations a variation of the parental one: "Because I said so?" Do your professors embrace mastery of such rules as an integral part of your legal training and do they insist that applying them fairly is a measure of your professional integrity? Or, do you get the impression that your professors look upon the rules as tools that can be manipulated to reach some preordained result?

When I ask such questions my impression is that the teaching of interpretive rules has declined in direct proportion to the intensity of their professors' public policy beliefs. The trend is to ignore canons of construction or to sanction their manipulative use. Of course, when pursuing results, such occurrences are hardly unprecedented.²⁷³ While this decline in the

and age? I also suggest that students put aside issues such as the difficulty of discerning the intent of a group, whether it be the ratifiers or legislators. In the end, the argument proves too much; that is, it renders all deliberative processes irrational, and that denies every day reality. Michael Perry bluntly advised:

Those who seek to defend noninterpretive review—"judicial activism"—do it a disservice when they resort to implausible textual or, more commonly, historical arguments; nothing is gained but much credibility is lost when the case for noninterpretive review is built upon such frail and vulnerable reeds.

Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 275 (1981) [hereinafter *Freedom*].

²⁷² See REDISH, *supra* note 150, at 131–33.

²⁷³ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Chief Justice Taney cites *The Federalist Papers* with respect to the acquisition and regulation of territories acquired as a result of the Revolution, charging that the national government under the Articles of Confederation had exceeded the powers ceded to it by the states. *Id.* at 447. From that discussion the Chief Justice concludes that Publius "urges the adoption of the Constitution as a security and safeguard against such an exercise of power." *Id.* Curiously, having just warned readers of the danger of taking remarks out of context, *id.* at 442–45, Taney does just that. If you examine *The Federalist No. 38*, Publius scolded his Anti-Federalist critics for wanting their cake and eating it too. THE FEDERALIST NO. 38 (James Madison), *supra* note 4, at 238–39. They wanted a strong central government, but Publius charged they were unwilling to give the new national government sufficient powers to accomplish national ends. *Id.* Thus, Publius concludes (speaking about actions of the Confederate Congress with regard to the acquired territories) that "[a]ll this has been done; and done without the least color of constitutional authority." *Id.* at 239. Publius' remarks imply that any new proposed constitution *ought to be prepared to deal with such matters from the very beginning*. See *supra* note 214. Taney's interpretation, however, implies Publius' disapproval of the actions taken under the Articles. *Dred Scott*, 60 U.S. at 447. That is not confirmed by Publius' concluding paragraph which was *ignored* by Taney:

I mean not by anything here said to throw censure on the measures which have been pursued by [the Confederate] Congress. I am sensible they could not have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects? A dissolution or usurpation is the dreadful dilemma to which it is continually exposed.

THE FEDERALIST NO. 38 (James Madison), *supra* note 4, at 239–40. The context of Publius' remarks

lawyerly craft is of course disturbing, it should have been anticipated. The original purpose for demanding consistent and conscientious application of the rules of interpretation was to restrict judicial discretion. Indeed, if anything, mastery and dispassionate application of interpretive rules were an integral part of defining judicial temperament. Judges, after all, were not presumed to have any special capability or insight (or responsibility, for that matter) in determining desirable public policy. For these reasons Publius argued that there was nothing to fear from the creation of an independent judiciary. Judges only had the soundness of their judgment.²⁷⁴

Returning to the matter of precedents, the *first* obligation of a constitutional scholar (unlike political scientists in general, and political theorists in particular—who should trace reconfiguration of power within society) is to convey the ratifiers' meaning of the text.²⁷⁵ Assuming that task is a rele-

leads one to believe that Taney's narrow reading of the clause in question did not reflect the Philadelphia convention's intent as much as Taney's preference. Certainly Publius' remarks—as Taney suggests—cover the Northwest Territories, but to so confine them would be to ignore another Publius caution about “the danger resulting from a government which does not possess regular powers commensurate to its objects[.]” *Id.* at 240. Taney's interpretation leaves the Union Congress in the same boat as the Confederation Congress. It also ignores Chief Justice Marshall's advice that where doubtful intent exists, courts ought to defer to *legislative* interpretation. I share that view. To take another example, in *The Federalist No. 83* Publius recognizes that canons of construction could be abused, but that is no reason to deny their usefulness. He states that “certain *legal maxims* . . . [could be] perverted from their true meaning” THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 4, at 496. Publius is perfectly consistent on this topic throughout their discussions, arguing that the potential for abuse is not in itself an adequate reason to deny a needed power. See SAVING, *supra* note 3, at 27–29 (noting that governments ought to have powers sufficient to achieve their objectives, the possibility of abuse of power is a secondary consideration, and that any other approach will result in incompetent government or its dissolution). In an article, Professor Allen specifically discusses *No. 83* to demonstrate her contention that the framers' understanding of the “plain meaning rule” was more sophisticated than had been characterized by other scholars. Allen, *supra* note 101, at 1712–13.

²⁷⁴ “The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 4, at 469. Elsewhere Publius refers to the constitutional text which provides for appellate jurisdiction “with such Exceptions and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl.2. See, e.g., THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 4, at 481 (noting that Congress has the authority to “make such *exceptions* and to prescribe such regulations” as necessary). In *No. 81*, Publius quotes from that provision observing that “the Supreme Court would have nothing more than an appellate jurisdiction ‘with such *exceptions* and under such *regulations* as the Congress shall make.’” THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 4, at 488. Several pages later he repeats the point, claiming that it is only proper that a power first be couched in broad terms and then provide “that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe.” *Id.* at 490. The purpose for doing so is also clearly described: “This will enable the government to modify [jurisdiction] in such a manner as will best answer the ends of public justice and security.” *Id.* His complete statement reads: “To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe.” *Id.* (emphasis omitted). Two paragraphs later, for the fourth time Publius refers to the power to regulate and make exceptions to the appellate jurisdiction. The context of these remarks leaves little doubt that it was Publius' belief that, given the impressive precautions taken against the possible abuse of judicial power, the nation had much more to gain than to fear from the creation of a truly independent judiciary. “[A]n ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary without exposing us to any of the inconveniences which have been predicted from that source.” *Id.* at 491.

²⁷⁵ SAVING, *supra* note 3, at 150–57. To find fault with the framers' meaning or to suggest alter-

vant and doable one, they must examine pertinent case law for—among other things—the injection of illegitimate assumptions. I present this challenge: If law students put aside modern non-interpretivist shadows and approach *any* body of case law with an objective eye, in *any* subject area, they will find that even after adoption of the Bill of Rights Congress retained considerable discretion with respect to rights definition.²⁷⁶ Congress of course was (and still is) prohibited from breaching the specific restriction imposed on them, and if they did breach it, the framers anticipated courts would strike the law down as unconstitutional.²⁷⁷ If Congress perhaps came close, but did not breach a provision's strictures, the people still could vote them out of office. But, of course that is what I have been saying all along: We must respect the framers' understanding of constitutional provisions, and if respect is not given by Congress, or the President, or both, the Supreme Court is to protect the meaning given by those who gave the Constitution life. The people could also show their displeasure, or support, in forthcoming elections. The Bill of Rights, singularly or collectively, did not supersede the people's right of self-government—which, after all, ultimately is the right to create and define individual rights, both statutory and constitutional.²⁷⁸

Today, more discriminating law students might discern a double standard in how various constitutional provisions are treated. The Supreme Court, ignoring its past errors, repeatedly informs us that it must scrutinize legislative decisions affecting personal rights much more strictly than those touching upon economic ones. Can students locate any justification for doing so in the text, in the framers' intentions, or in our history? Or does such an assessment ultimately depend upon assumptions intimately related to the desired results? Are law students aware of additional corollaries that support the preceding assumptions? First, personal rights should only ex-

natives, are important responsibilities of the scholar, but their first obligation is to understand and convey that meaning. Furthermore, the responsibility to veto unwise legislation is the *President's*—not the Supreme Court's! I concur with those who contend that as the clarity of the framers' intentions diminish, the judicial power *decreases*—not increases. *Legislatures* gain discretion—not courts. Robert Bork puts it this way: "The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990).

²⁷⁶ See *supra* note 115 (noting that the Alien and Sedition Acts liberalized First Amendment free speech standards); *supra* text accompanying note 136.

²⁷⁷ As we noted, for example, First Amendment protections did not encompass private or seditious libel, obscenity, or even blasphemy. See *supra* note 114. With respect to other Bill of Rights provisions and particulars in general, see HICKOK ET AL., *supra* note 61.

²⁷⁸ See BASIC, *supra* note 156, at 63–67. All I am saying is that it is the ratifiers' specific understandings of which protections were included that must be respected by the legislature and defended by the courts. Beyond that, canons of interpretation would apply. See *Sixth*, *supra* note 133, at 82–84; SAVING, *supra* note 3, at 236–49. See generally KRAMER, *supra* note 34. I also put aside the doctrine of selective incorporation. Professor Louis Henkin observed: "Selective incorporation finds no support in the language of the amendment, or in the history of its adoption[,] . . . [and is] more difficult to justify than Justice Black's position that the Bill of Rights was wholly incorporated." Louis Henkin, "Selective Incorporation" in *the Fourteenth Amendment*, 73 *YALE L.J.* 74, 77 (1963). See *supra* note 62; SAVING, *supra* note 3, at 103 n.79.

pand, not contract. Second, precedents inhibiting the expansion of personal rights should be overruled, while those expanding such liberties should be defended. Finally, state experimentation with respect to personal liberties (as distinct from state experimentation with economic policy) are to be struck down as being inconsistent with Fourteenth Amendment requirements.²⁷⁹ Can students find one iota of support for such corollaries outside of the logical construction created by the theorists themselves?

Additionally, there is a high degree of probability that the perceptions students have about personal rights are dependent upon their professors overemphasizing Warren Court precedents. If some departure from those precedents is suggested, do your professors characterize them as dangerous “retreats”?—assuming of course they have not already run screaming into the street predicting imminent book burnings, a police state of the same character as the Nazi one, a Taliban-like government just around the corner, or some other Chicken Little “the-sky-is-falling” scenario. Or, in our post-9/11 environment, if some modification of personal liberties is undeniably necessary, do your professors guiltily confess to abandoning civil liberties he or she has long embraced? But the framers understood that self-preservation and government competency are related, and in a republican government the people ultimately must approve or disapprove of any government actions taken, including a diminution of liberties enjoyed under ordinary circumstances.²⁸⁰ That is the essence of self-government. So when you evaluate the soundness of any body of existing precedent, understand that your starting point—self-government or individual rights—makes all the difference in the world.²⁸¹

D. Approaching Contemporary Scholarship

Of all the topics discussed in this part of the article, standards of contemporary scholarship are the most important. Unless you grasp the dis-

²⁷⁹ See SAVING, *supra* note 3, at 216; *Expansionism*, *supra* note 9, at 45–47 (rejecting justifications of a double standard of judicial scrutiny for economic and personal rights cases). See *supra* note 54.

²⁸⁰ Justice Holmes stated, “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²⁸¹ One may not assert some abstract principle (massaged until it is to their own liking) and then choose to begin an inquiry from that vantage point. Evidence must justify one’s starting point, and given our history, to claim that rights—in any modern sense of that term—constituted our beginning, is an impossible task. Said statement is not equivalent of contending that individual rights were *unimportant*, or that by taking that position, it is legitimate to conclude that rights become “meaningless,” or other such characterizations. See SAVING, *supra* note 3, at 175–94. There is another underlying assumption among the rights-are-first crowd, namely, that an enormous gap divides *us*—individual citizens—from *them*—the government. That attitude was not shared by the framers. They believed the government is *our* servant, which is to say that they shared the same view as the good citizens of Massachusetts. See *supra* notes 209–219 and accompanying text. In fact, until the damage wrought by the Warren Court, that view is the only one that would emerge from an unbiased examination of our history and precedents. See generally Larry Kramer, *We the People: Who has the Last Word on the Constitution?*, 29 B. REV. 1, 6–7 (2004).

tinctions made herein, you are unlikely to appreciate the damage wrought on subjects such as the limits of judicial power, the character of our tradition, and how to approach precedents. Arguably, this section should have been discussed first; yet, I chose not to, hoping to both provide a broader context as well as to pique the reader's interest.

Let me begin by noting that more than ever before, scholars today have enormous difficulty mastering a specialized field. The problem is not simply unparalleled access to materials in any one specialty, or even in one discipline: it is the need to grasp the relationship between one's specialty and the general discipline, and then, between one's general discipline and allied fields.²⁸² All scholars must separate important information from unimportant information, and to do that he or she—explicitly or implicitly—creates criteria of inclusion and exclusion. And remember this—more often than not, to one degree or another, the scholarly criteria used in one generation are eventually found partially or wholly defective by succeeding generations.²⁸³ But between the time criteria are initially explicated in one discipline, and the time they are eventually found deficient or defective (partially or completely) in that discipline, that criteria also is embraced by scholars in allied disciplines where almost inevitably they are then distorted or overextended—usually by less discerning scholars.²⁸⁴

²⁸² This discussion proceeds along traditional analytic lines, and as such is open to challenge by behaviorists, feminists, critical legal scholars, and deconstructionists.

²⁸³ That is why, if you recall, well-intentioned editors excised words they believed (under their criteria of relevance) were unimportant to the Mayflower Compact. Using another set of criteria, Kendall and Carey found them crucial. See *supra* note 195 and accompanying text.

²⁸⁴ Chance is also at work here, that is, there must be scholars from two or more generations with the same multiple interests. When one acquires greater historical perspective, students will find that at various times physicists, biologists, and economists each believed they could explain *all* reality; eventually each retreated to study only their proportionate part. See SAVING, *supra* note 3, at 94–96, 274–76. See generally MIRCEA ELIADE, *IMAGES AND SYMBOLS* 9–21 (Philip Mairet trans., Sheed & Ward Search Book ed. 1969) (1952) (describing how modern society relies on myths); HANS JONAS, *THE GNOSTIC RELIGION* xv–xvii (2d ed. 1963) (discussing Gnostic manipulation of concepts); ERIC VOEGELIN, *ANAMNESIS* 143–46 (Gerhart Niemeyer ed. & trans., 1978) (discussing noetic and non-noetic interpretations). For example, my colleague, Dr. Robert Pecorella, recounted the origins of the Rational Choice Theory. He observed that its roots had been in principles of micro-level economics, utilizing two-person and multi-person “games” to explain the outcomes of political conflicts. It was then applied to “studies of negotiation and ultimate equilibrium points based on two-person and multi-person ‘prisoner dilemmas’ or ‘games of chicken’ (employed in international relations); analyses of voting studies based on ‘spatial modeling’ of party positions,” and so on. As of late, it “employs highly mathematical modeling as its primary communication tool,” although there has been criticism that “it appears to be empirical when in fact it is a decidedly deductive application of general principles to a set of particular situations.” Thanks to attempts made “to refine the model by more closely reflecting ‘empirical reality,’ it has become more burdensome—and consequently less useful”—as a basic model. Rational Choice Theory also attracted “theological” interest. Email from Dr. Robert F. Pecorella, Associate Professor, Dep’t of Gov’t & Pol., St. John’s Univ., to William Gangi, Professor, Dep’t of Gov’t & Pol., St. John’s Univ. (Jan. 21, 2003) (on file with author). This recounting provides a concrete example of the problem noted in the text, namely, the creation of criteria of relevance in one area, its subsequent extension to other areas, and the difficulty of later assessing whether its original premises remain viable, especially after they have been partially or completely discarded within the original discipline. Upon what possible grounds can we believe that unelected judges are better equipped to make public policy choices than legislators we can refuse to reelect? The track record of the Court (slavery and *laissez-faire*) is not impressive. See KRAMER, *supra* note 34, at 209–23. See also, e.g., *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). Even at the time this case was decided, labor-

Given this reality, why anyone would think we are exempt from a fate similar to that of preceding scholars is beyond my comprehension. Having mastered aspects of a single discipline, how many are equally capable of the same degree of mastery in specialties other than their own? The current generation of scholars is equally susceptible to applying those insights to their specialty or to their general discipline; competently deciding whether the insights are in fact defective; and finally, recognizing that such insights have been distorted or over extended. These issues barely scratch the surface. During the time the criteria are first enunciated and applied to allied disciplines, twenty-five years or more may lapse. A similar time-lapse may again occur before the criteria are found deficient. Thus, fifty or more years may lapse before the process comes full circle. Not to be facetious, but law students today must decide whether the “tides” they embrace (and which perhaps surround them) are coming or going! Even how one approaches *that* problem requires adequate criteria.²⁸⁵

There is no reason to believe that judges are better equipped than legislators to sort out this constantly changing flux of ideas, practical applications, and unanticipated consequences. If anything—contrary to what non-interpretivists would have us believe—the fact that judges are unaccountable at the polls probably makes them *less* objective. They remain *experientially* insulated from shifting social, economic and political currents, or they grow overly dependent upon friend-of-court briefs. These briefs are by parties who often share the current intellectual mindset and who thereby probably exaggerate the potency of those currents. Intellectual elites habitually find convincing arguments when they share the same premises.

The fact of the matter is, at momentous turns in American history (such as with respect to slavery and economic cupidity), members of the judiciary remained far more infatuated, for far longer, with both, than did legislators. Many judges, in fact, resisted change, more so than the framers ever imagined they could, exacerbating economic and social strains and rendering the national and state governments incompetent—because then,

management relations already had changed drastically, from the Samuel Gompers model of confrontation to greater cooperation.

²⁸⁵ Given such considerations, one may approach topics such as slavery, racial segregation, the treatment of Native Americans, or gender issues, differently than before. As befitting a scholar, one should abhor moral arrogance and flip judgments of hypocrisy. See *supra* note 201. The objective of course is not to shrink from our historical blemishes or to deny their pertinence to contemporary politics or policy-making. Rather, it is to better grasp the complexity of our history and to distinguish constitutional from sub-constitutional issues so that under our constitutional schema we, as a people, know at what legal level we should address the legacy before us. One of the dangers that exists in model-building, for example, is that the models become *more real* to their builders and subsequent adherents than either the framers' design, constitutional history, or the original milieu of concerns that defined those ideals, models, rights, or needs, not to mention present experience. So, when Packer used the Crime Control and Due Process models, he remained rooted in reality. See *supra* note 9 and accompanying text. Ten years later Professor Chase used Packer's legal and *factual* guilt concepts as if they had always been part of constitutional interpretation and mistakenly implied that both concepts may be attributed to the framers' design! See Edward Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 518–19 (1977). His entire article is dependent upon those two assumptions.

as now, the Justices were reading their own predilections into the Constitution. In contrast, legislators have consistently adapted our society to changing circumstances, despite occasional initial resistance.²⁸⁶ They did so, or they lost their jobs.

Bringing prior analysis to bear, it is apparent that for several generations thesis books have distorted our history.²⁸⁷ They undoubtedly have influenced how law students viewed our traditions, precedents, Supreme Court decisions, and, of course, the interpretivist-non-interpretivist debate. That is why the issue of appropriate standards of scholarship is so crucial. Let us get a little more particular. Take the hypothetical example of a scholar convinced that American history is a tale of progress; that is, the increasing actualization, dissemination, and expansion of liberty. In 1941, he decides to investigate how a particular right was understood during the American Revolutionary period.²⁸⁸ Given his above-noted conviction, when this scholar approaches *primary* materials he may find it difficult to put aside how that provision came to be understood *after* the Revolutionary period, that is, between 1776 and 1941. And so our scholar might inadvertently discount facts which, within the revolutionary time period, might illustrate with greater clarity what that right was perceived to protect. This scholar's conviction that American history is a tale of unfolding and increasing liberty, may well lead him to interpret the historical materials before him in such a way as to emphasize *only* those aspects he *knows* would eventually emerge; writing in 1941 one has the benefit of hindsight. In short, scholars who view history as the progressive evolution of liberty and equality have a tendency to smooth out rough edges (noted inconsistencies) in order to demonstrate that the continuity was "natural"—nay, almost *inevitable*. In sum, their works are not so much about scholarship as they become the means of self-prophecy. Our hypothetical scholar's view of history takes on the characteristics of any good novel; for instance, selected revolutionary activities become the seeds of the liberty that eventually grow and bear the fruit of what is, or is perceived to be, the public posture in 1941.²⁸⁹

²⁸⁶ JAMES WILLARD HURST, *DEALING WITH STATUTES* (1982). Too often, it seems to me, non-interpretivists recount legislative *failures*, rather than their overall success.

²⁸⁷ See generally GILMORE, *supra* note 10; DEFENSE, *supra* note 30, at 8–17, 122–23. As a result, scholars subsequently rely on skewed research, and primary sources may not be reexamined for considerable periods of time. Supreme Court decisions over the past one hundred years are permeated with various assumptions of progress or moral progress. See *supra* note 197.

²⁸⁸ See, e.g., ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 1–35 (1941). As I mentioned earlier, every age has its *Zeitgeist* or "tides," *supra* note 4, and thus in every era, *some* common assumptions will be made. If this was not the case, a societal consensus would be impossible to forge. I am not suggesting that scholars, past or present, are guilty of committing intentional fraud, only that we must seriously take to heart the fact that every age has its climate of opinion—its own distinctive set of common (and uncritically accepted) assumptions. These assumptions will probably distort scholarship. We must therefore strive to understand what these assumptions are, and how they may have influenced scholarly works. We should also recognize that we are probably guilty of doing the very same thing (that is, allowing the commonplaces of our day to influence our work).

²⁸⁹ Cf. e.g., CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* (1953).

Such thesis books have influenced our precedents. Citing to thesis books, a judge justifies the decision before him (and up the appellate ladder), and the next thesis book writer uses that court's decision(s) to justify yet another expansion of the original thesis—and so on.²⁹⁰ Can you now see how such scholarship has swept through our body of precedents for three generations? The likelihood of the preceding occurrence increases exponentially *when the word studied* (free speech) remains identical throughout.²⁹¹ Scholars should no more take a word or phrase from the constitution, and retroactively read their current understanding into them, than they should judge the actions of prior generations by today's standards and sensibilities. They may use impeccable logic or a vivid and creative imagination to explicate protections that the word *could* or *should* today guarantee, but law students should recognize the speculative nature of such efforts, as well as how it provides the means by which scholars and judges inject their own predilections into constitutional law under a pretense of *interpreting* the Constitution. Such an approach is totally inadequate and should be rejected regardless of how *clear* the meaning of the word or phrase, or how natural or favorable the consequences appear to these speculators.²⁹²

Before students can determine what the ratifiers of the Constitution intended by the words they used, the words must be placed in context.²⁹³ Historical studies purport to provide that context should possess at least four characteristics:

²⁹⁰ See *supra* notes 195–197. As noted, for some time now, the Supreme Court and its non-interpretivist supporters have engaged in that aforementioned shell game (casting more and more shadows) with respect to protected and unprotected “speech.” They are creating more and more doctrines, and making more and more distinctions, in order to hide the fact that they have illegitimately broadened the meaning of the word “speech” far beyond what the framers ever intended it to encompass. See *supra* Part III.D.

[W]hatever fine declarations may be inserted in any constitution respecting [First Amendment rights], must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 4, at 514–15. See generally KRAMER, *supra* note 34. The non-interpretivist understanding of First Amendment provisions are shot through and through with progressivist assumptions. The accompanying litany of created rights and the doctrines used to impose them, frequently usurp federal and state legislative power and rest only on the personal theoretical preferences of their advocates. In the end, because the American people have never embraced them, they can never amount to anything more than sub-constitutional arguments. Congress and state legislatures, of course, could adopt such reasoning by statute or amendment, or direct courts to apply them, but imposing their strictures on the American people is illegitimate.

²⁹¹ See, e.g., LEVY, *supra* note 115, at vii–xii. After studying the historical evidence Levy “reluctantly” concluded that the framers of the Bill of Rights did not envision a “broad scope for freedom of expression.” *Id.* at xxi. However, he believes that the framers fashioned the language of the First Amendment to permit future broadened interpretations. *Id.* at xxiii–iv. For Levy, non-interpretivist interpretative methodology is a legitimate attempt “to breathe a liberality of meaning into [the First Amendment], in keeping with the ideals of our *expanding* democracy.” *Id.* at xxvi (emphasis added). I reject his view as imprecise, masking the imposition of views he favors, and contrary to the evidence. But see H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 680 n.48 (1987).

²⁹² Powell, *supra* note 291, at 659. See also, SAVING, *supra* note 3, at 180–90.

²⁹³ I refer, not only to the specific words used but also to their purpose, that is, the use of adequate canons of construction. See *supra* note 248; SAVING, *supra* note 3, at 48, 139–44.

1. The understanding of the words used by historical figures should be conveyed as the figures themselves understood them.²⁹⁴
2. The meaning those principles or words acquired *after* the period being studied should be exorcised from any purported reconstruction.²⁹⁵
3. If, during the period studied, the principles or words had several usages, scholars or judges should determine which views *dominated* and how influential were those who shared those views.²⁹⁶ Accordingly, scholars should not focus on a *minority* point of view because they *know* that a century later that view will become the dominant one.
4. Perhaps most importantly, scholars should test the word's *alleged* meaning against *actual practice*. Scholars should not be satisfied with logical explications: they must zero in on the *action*. A people's actions provide a crucial context for the interpreter, just as, in adjudication, concrete facts provide a more appropriate setting than do hypotheticals. Students should be leery when discrepancies between belief and action are characterized as ignorance of the words' true meaning, or are due to the people's alleged hypocrisy.²⁹⁷

In sum, law students must realize that the debate between interpretivists and non-interpretivists goes far beyond perceptions of judicial power, specific public policy disputes, or even tradition and precedents. It is a quarrel about appropriate standards of constitutional interpretation. In that regard, interpretivists find themselves between a rock and a hard place. Their very operating premises make them necessarily dependent upon historians. (Who else can provide context and insight to the ratifiers' specific understandings?) Yet regrettably, historical scholarship is often marred—uncritically biased in favor of progressivist or personal rights assumptions. The legal literature has probably become even more damaged than the historical literature because it is the last to embrace the contemporary criteria of relevance. We have alluded to the “tides in the affairs of men,” but I want to remind readers that this is not the first time, nor will it be the last, that various academic disciplines have engaged in shadow construction.²⁹⁸

²⁹⁴ Leo Strauss observes that “[o]ur most urgent need can then be satisfied only by means of historical studies which would enable us to understand classical philosophy exactly as it understood itself” LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 33 (The University of Chicago Press) (1953); see also LEVY, *supra* note 115, at xiii-xx (understanding historical principles is made difficult by gaps in relevant evidence).

²⁹⁵ See BERGER, *supra* note 56, at 5–6. Nothing has distorted historical materials more than those who relate past events though present perceptions or others who delude themselves into thinking they can predict future developments.

²⁹⁶ See, e.g., LEVY, *supra* note 115, at 313–20 (questioning actual impact of Lockean principles on eighteenth-century thought in America). The reader may refer to earlier comments and sources on such topics as First Amendment interpretation, or other court doctrines relating to coerced confessions or the exclusionary rule. See *supra* notes 9, 16, 43, 62, 66.

²⁹⁷ See *supra* text accompanying note 204.

²⁹⁸ See *supra* note 34 and accompanying text; sources cited *supra* note 72 and accompanying text (discussing developments during the laissez-faire period). See also Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property”*, 4 HARV. L. REV. 365 (1891) (developments today parallel those at the beginning of the laissez-faire period).

While all of these considerations prompt cautious treatment of contemporary scholarship, at the same time, we must be cautious lest we throw the baby out with the bath water. Even within prejudiced assumptions, one might still discern important insights.²⁹⁹

Far too much legal scholarship encountered over the years has fluctuated between the “rah-rah” and “boo-hoo” varieties. The former claims a commitment of the American people to a personal rights tradition that far exceeds the evidence, or assumes that judicial redefinition of personal rights is without practical or theoretical consequences. The “boo-hoo” literature pines over our failures as a people, but when it is examined more closely, one is forced to conclude that our predecessors were human beings capable of error—errors often related to the “tides” of their day. Once students appreciate how much modern scholarship is biased by thesis books, and how much our history, political traditions, and legal precedents have been distorted, the more they will appreciate that the dispute between interpretivists and non-interpretivists is ultimately about the nature of republican government—the subject to which I now turn.

V. POLITICS AND THE REPUBLICAN SCHEMA

Political theory is (or should be) about *deep thinking*—an inquiry into how human beings live in an organized society under an infinite variety of favorable and unfavorable circumstances. Politics, then, is about people—their beliefs as a society as much as the institutions they create. This is a startlingly broad subject that we are forever destined to explore. A disproportionate share of legal theorizing today, however, concentrates on system-building, that is, theoretical constructions in which logic is substituted for experience. Characteristically, portions of this literature consist of thesis books run amok.³⁰⁰ Theorists create intricate logical systems or enticing analogies, but once prodded, one understands that either they rest upon faulty or incomplete premises, or they reflect only fragments of reality in which an author attempts to persuade the reader to ignore all other experience.³⁰¹

²⁹⁹ Interpretivists certainly are not exempt from reading their own prejudices into the framers’ intent. See Powell, *supra* note 291, at 680. Liberals are subject to similar criticism from Critical Legal Studies scholars; as are many male scholars from female scholars and many white scholars from minority scholars.

³⁰⁰ See *supra* notes 196–197 and accompanying text.

³⁰¹ Publius wisely rejected that approach: “But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice.” THE FEDERALIST NO. 43 (James Madison), *supra* note 4, at 276. Elsewhere Publius adds: “Imagination may range at pleasure till it gets bewildered amidst the labyrinths of an enchanted castle, and knows not on which side to turn to escape from the apparitions which itself has raised.” THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 4, at 196. Eric Voegelin elsewhere comments:

[T]hat I can build a system on a false premise is not even considered. The system is justified by the fact of its construction; the possibility of calling into question the construction of systems, as such, is not acknowledged. . . . [W]e now see more clearly that an essential connection exists between the suppression of questions and the construction of a system.

VOEGELIN, *Science*, *supra* note 134, at 44. See also BALL Review, *supra* note 224 (commenting on

Madison appreciated that free citizens disagree over the wisdom and appropriateness of public measures. That is natural. He also understood that anticipated alliances might never materialize, and even if they did, they would not remain cohesive for any length of time.³⁰² People engage more than just logic into their politics, just as they do in the rest of their daily lives. Much to the chagrin of system-builders (academic and political), people even *ignore their own logic*.³⁰³ For example, should any of us become jammed in traffic, we often rile in disgust at rubber-neckers who are obviously slowing things down, only to find ourselves inexorably sneaking a glance as we pass the accident scene. One might say, “that is only human nature.” That is exactly my point. Humans conduct themselves according to more than simple logic, and a good government schema—our Madisonian one—was designed with that in mind. In contrast, over at least the past sixty years, Supreme Court decisions taken cumulatively, evince a disturbing pattern of rights re-definition, expansion, creation, and destruction, which—whatever the variant—has markedly reduced the right of the American people to govern themselves.³⁰⁴ Many non-interpretivists remain undisturbed because over the years they have simultaneously redefined republicanism in order to make it more compatible with the activist judiciary they endorse.³⁰⁵

At the heart of the Madisonian approach is the recognition that “people feel[] strongly *against* legislation or policy . . . [as well as] *for* legislation or policy[.]” which is to say, “that the normal situation in democratic policies *is* the ‘apathetic’ majority”³⁰⁶ Though often maligned

Howard Ball’s redefinition of American democracy and his defense of Warren Court decisions). For a contemporary, bolder and franker model of judicial power, see EISGRUBER, *supra* note 29. Elsewhere I dissect contemporary model-building which is a very different animal than Packer’s original approach. See *Exclusionary*, *supra* note 9, at 107–10; *supra* notes 5–9 and accompanying text.

³⁰² After all, citizens are fathers, sons, brothers, mothers, daughters, sisters; male or female; of different races, religions, and ethnic backgrounds; of varying professions and skills; of distinct economic or employment status; and much more—all interwoven into a complex tapestry. See THE FEDERALIST NO. 10 (James Madison).

³⁰³ Law students should investigate the inclination of various human types to the legal profession. By discovering their own personality preferences, they learn where their weaknesses lie. See DAVID KEIRSEY, PLEASE UNDERSTAND ME II: TEMPERAMENT, CHARACTER, INTELLIGENCE (1998).

³⁰⁴ During the *laissez-faire* period many Americans embraced property rights with the same passion that today is afforded privacy rights (or First Amendment, or equality rights). Most of us perceive “the switch in time to save Nine,” see *supra* note 222, that is, the rejection of *laissez-faire* premises by the Supreme Court, as the beginning of the modern constitutional law era—or at least the scholars who taught my generation did. But during the transition (the abandonment of the *laissez-faire* belief structure by the nation and courts), *laissez-faire* adherents probably believed that the country was going to hell in a hand-basket. That of course, is precisely what current supporters of judicial power think will happen if law students embrace this article as a legitimate point of view! Some pundits already are crying chicken-little. See Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1. As I mentioned at the beginning of this article, my inclinations are conservative, but I do not favor injecting those predilections into the Constitution any more than I do injecting liberal ones. Taken as a whole, all this article urges is that non-interpretivists return to the same faith in the people as did their Revisionist predecessors.

³⁰⁵ It would be more accurate to say that many non-interpretivists believe that their particular variation poses no theoretical, practical, or legitimacy issues—but they are *not* too sure about some of their non-interpretive competitors. See Tribe, *supra* note 152.

³⁰⁶ *Intensity*, *supra* note 187, at 469, 485.

in the legal literature, Congress is quite good at seeking consensus and muddling through complex public policy debates.³⁰⁷ However, many contemporary democratic theorists and proponents of judicial power simply do not think Congress is good enough. These non-interpretivists look suspiciously at the division or separation of powers when either obstructs their non-interpretivist goals.³⁰⁸ But the framers made no attempt to deceive the Constitution's ratifiers.³⁰⁹ They explicitly informed them that should the proposed constitution be ratified, limitations would be placed on sovereignty, and limitations on the people's right to govern themselves were intended to guard against excess. To accomplish this goal, obstacles had to be placed in the path of both good and bad *ordinary* legislation, and even greater obstacles in the path of amendments.³¹⁰ The framers believed that over time, most of the good laws or amendments would pass through the so-called "filter puzzle."³¹¹

Frankly put, our system was intentionally designed to *delay* legislative proposals (although that comment elicits surprise from some law students). Delay, I remind my students (with a glint in my eye), has the tendency to diminish *all* passion! It provides time for reflection (such as, "Do we really want to do that?"; "In the way proposed?"; "What happens if . . . ?"), as well as an opportunity for opposing forces to coalesce. That, in turn, usually leads to better (more moderate) laws—ones that enjoy wider subscription (and therefore, greater conformity with its dictates). In sum, Publius reasoned that it was far better to consistently delay and perhaps defeat many *bad* laws, even if as a result, a few *good* laws were temporarily thwarted. Different constituents, staggered terms, and competition amongst the three branches were intended to prevent public passion from being immediately injected into public policy-making—an occurrence that had ren-

³⁰⁷ Furthermore, Carey notes, *The Federalist Papers* "treats *deliberation*, that is, dialogue back and forth among members of the assembly and among the 'branches' of the government, as the be-all-end-all of the democratic process, and claims for it that it will produce the 'sense' (*not* the will) of the people as a whole." *Id.* at 500–01. Put another way, the Madisonian model "regards elections as means through which the voters express not their 'preferences' on issues of policy . . . but their considered judgment, amongst the candidates who present themselves, as to which is the 'best' [person] they can send forward to participate in the deliberative process . . ." *Id.* at 501. That of course is not to say that at times it is better than at other times.

³⁰⁸ See BASIC, *supra* note 156, at 108–18.

³⁰⁹ That is why I urge law students to read *all* of *The Federalist Papers*.

³¹⁰ In my lectures I challenge students to think about the non-interpretivist allegation that our amendment process is cumbersome. I suggest that if they find that charge valid, they should explain to the American people why they think so, and ask them if they want to amend the amendment process to make it less cumbersome. Law students soon realize that making the amendment process less demanding (cumbersome) may not be such a good idea—particularly given the framers' concern with passion injection. On that score the New York Times recently reported that internet communication, coupled with radio talk hosts, successfully lobbied legislators to reject a compromise immigration bill. Julia Preston, *Grass Roots Roared, and an Immigration Plan Fell*, N.Y. TIMES, June 10, 2007, at A1. Such passion injections cannot be prevented, only controlled—the great lesson of *Federalist Paper No. 10!* See THE FEDERALIST NO. 10 (James Madison). Sometimes the fruits of the amendment process will be good; other times it will be bad, and, of course, over time the more it is used the less effective it will be.

³¹¹ BASIC, *supra* note 156, at 109.

dered past popular governments ineffective, indecisive, or erratic.³¹² Our system integrates institutional delay with the faith that, given adequate time, most Americans will opt for justice.

The framers' design is often portrayed very differently by non-interpretivist proponents. Some wish raw voter sentiment to be quickly translated into public policies, while others have unceasingly cajoled and flattered the judiciary to become our moral preceptor.³¹³ The former at least remain within the democratic genre, but the latter want courts to *impose* (under the ruse of interpretation) what they cannot secure through either the elective *or* the deliberative processes. That is why I have repeatedly stated that our *aristocratic* framers had far more faith in the American people than our non-interpretivist brethren.³¹⁴ We will return to these themes later.

Consider this oft-ignored seminal question: Why has the Constitution placed "severe limitations upon temporary majorities, and left the path to the statute-book open only to serious, deliberate majorities—that is, majorities able to keep themselves in being long enough to gain control of both houses of Congress, of the Presidency, and of the Supreme Court[?]"³¹⁵ Even a casual reading of the Constitution puts Congress (the *maker* of the law) at the center of our compound republic. After all, laws ultimately reflect how a people rank their values, and that certainly can be influenced by considerations of self-interest as well as by concern for justice or rights.³¹⁶ Public policy clashes habitually divide us as a people, and when those divisions become intense, instability occurs—a serious danger to *all* governments regardless of form. James Madison believed that consensus-building through deliberation would provide the means for an enduring government. But for consensus-building to work, the relatively *indifferent* citizen had to

³¹² See *supra* notes 233–237 and accompanying text.

³¹³ Even if we assume that judges are more intelligent than you or I, there is no reason to believe that intelligence would have *any* bearing on the passion-injection issue. Publius commented: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." THE FEDERALIST NO. 55 (James Madison), *supra* note 4, at 342. Professor Kramer expresses doubts about assumptions of judicial competence in such matters, and describes the apparent lack of deliberation among the Justices. KRAMER, *supra* note 34, at 237–40. Faculty members routinely experience the truth of this statement at department meetings—with or without the presence of *prima donnas*—as well as at conventions, where intense personal preferences are often masked by mathematical formulas and intellectual razzle-dazzle.

³¹⁴ Carey contends that a close reading of the *Papers* reveals that while Publius was reluctant to appeal to the people on "horizontal distribution of powers between the legislature, executive, and judiciary[.]" he "was willing to allow the people to 'hold the scales in their hands,'" with respect to "maintaining the proper equilibrium between the state and national governments. And this proper equilibrium turns out to be whatever the people declare it to be." DESIGN, *supra* note 43, at 114–15. Contrast KRAMER, *supra* note 34, at 79, 98, 108, 142. Professor Kramer largely ignores Hamilton's remarks, see THE FEDERALIST NOS. 79–83 (Alexander Hamilton), which would add weight to his position that the people had a significant role to play through the political process.

³¹⁵ *Intensity*, *supra* note 187, at 470.

³¹⁶ But see RONALD DWORKIN, LAW'S EMPIRE 97 (1986). See William Gangi, Book Review, 15 PERSP. POL. SCI. 186 (Winter 1986) [hereinafter Dworkin Review]; Raoul Berger, *Ronald Dworkin's The Moral Reading of the Constitution: A Critique*, 72 IND. L.J. 1099 (1997) [hereinafter *Moral*]; JOHN RAWLS, A THEORY OF JUSTICE (1971). See also DEFENSE, *supra* note 30, at 189.

play a pivotal role.³¹⁷

Let me explain. To build a consensus you need players who embrace the rules of the game, that is, they possess skills other than just logic. Each participant or group of participants—factions if you will—must have the capacity to assess just how intense they feel about the issue before them, and also, be able to assess, as *accurately* as possible, how intense their opponents feel about the same subject.³¹⁸ Without such skills, how can factions prioritize what they want, and what the other factions may or may not be willing to give them, so as to obtain their cooperation? When either or both skills are lacking, the likelihood for serious miscalculations increases—the result of which can be anything from an inability to reach a consensus on topics of common concern, to the equivalent of civil war.³¹⁹

Why did Madison consider relative indifference essential?³²⁰ Perhaps a simple example will illustrate the answer. One member of your group of friends suggests, “Let’s go to XYZ restaurant,” only to find that some are intensely for the suggestion, some equally against it, and the remainder are indifferent. Assume the group adopts majority rule as a fairest basis for reaching a decision.³²¹ This possibility now arises: In the course of the group’s deliberation, some of the previously indifferent suggest they could be swayed to join one side or the other if one side is willing to make an unrelated concession, for instance, “We’ll go to restaurant XYZ, if next week all of us go to the jazz club.”

Measuring political intensities on an almost infinite variety of subjects is of course far more complex than our example. Or, is it? Factions, for example, frequently “fake” (“manufacture”) a nonexistent intensity in a calculated ploy to obtain some advantage, that is, to get a little more from the other faction than would otherwise be possible, or even to get something entirely different—something they *suspect* the other faction feels *less* intense about than they do.³²² Faking occurs, mind you, in the larger context of normal citizen *apathy*.³²³ On an infinite number of public policy is-

³¹⁷ See *supra* note 307 and accompanying text. I put aside another facet of the schema mentioned earlier, that is, Madison’s insistence on fewer representatives.

³¹⁸ *Intensity*, *supra* note 187, at 483–86.

³¹⁹ Such occurrences are hardly new or surprising in either the personal or the international arenas. The former may well be reflected in our nation’s divorce rate (an inability of at least one, but probably both parties, to assess each other’s intensity, or the use of tactics of intensity which backfire). And with respect to the latter, diplomatic miscalculations have had the same impact on international relations since the dawn of time. For recent examples one may point to the European community’s inability to assess the impact of September 11th on American foreign policy, or the American failure to gauge the European reaction to the American led invasion of Iraq, or perhaps France and Germany’s inability to understand that Americans did not care what they thought.

³²⁰ *Intensity*, *supra* note 187, at 470.

³²¹ I put aside here considerations such as a desire for all of you to remain together which, of course, some might feel *more* intensely about than *where* the group goes, or the desire to avoid a decision that would hurt the feelings of some of your group (again, which *some* members may (silently or verbally) judge as important as any decision made).

³²² *Intensity*, *supra* note 187, at 478–79. Of course I simplify all these issues.

³²³ *Id.* at 485.

sues typically before Americans, few citizens feel intensely about more than one—if any. For instance, when it comes to horse-trading on various issues, particularly at the end of congressional sessions, one must put one's cards on the table and demand a reasonable “payment” for support (taking intensities on both sides into account). If the price is perceived by opponents as being too high, or the attitude that compromise is unacceptable is conveyed (because of some strongly-held principle or ethical concern), some of those who started out as your allies may swing their support to your opponent—because they sense there is more to be gained by “selling” their support to the other side. Instead of getting *something* for joining a potential majority, you may wind up totally ignored. They call that politics.³²⁴

Consider for a moment—regardless of whether you are pro-choice or anti-abortion; for or against capital punishment; for or against legal recognition of gay rights or affirmative action—do not some of your bedfellows' proposals appear to go *too* far? Do you not shy away (if not cringe) at seeing your beliefs carried to their *logical* end? And, even if *you* do not, surely you recognize that some of your bedfellows will. Single-minded advocates may judge their potential allies weak-minded or illogical, and that may be infuriating, but Madison *depended upon* a disinclination toward the extreme, to *moderate* the adverse consequences of factions. For Americans who believe that tempering principles is *itself* unprincipled or illogical, those individuals often find themselves condemned to political irrelevancy, that is, at least those who seek election.³²⁵ Every husband and wife (or those who cohabit), as do participants in organizations or businesses (especially family-run businesses), recognizes the realities of intensity, even if they do not fully comprehend it. If relationships are to endure, compromise is required. As Billy Joel astutely observed in *Piano Man*, even the waitress practices politics.³²⁶

Our governmental schema encourages consensus-building even among competing factions and parties.³²⁷ Preferences, whether personal or societal, however, “must be weighed as well as counted, and weighed in such a manner that the heavier ones tip the scale more than the lighter ones.”³²⁸ While those who feel intensely are perhaps best equipped to raise

³²⁴ Does this not merely parrot what we know about the dynamics at the 1787 Philadelphia Convention—large states against small ones, pro-slavery versus anti-slavery states, and so on? Professor Kramer does an admirable job discussing the realities and responsibilities of politics. KRAMER, *supra* note 34, at 205, 236.

³²⁵ And that is why non-interpretivists often chose to circumvent the political system as understood by the framers, or redefine our political system, confining their appeal to the intelligentsia.

³²⁶ BILLY JOEL, *PIANO MAN* (Columbia 1973).

³²⁷ Divided government nonsense. See William Gangi, Professor, St. John's University, New York, Department of Government and Politics, Lecture No. 5 on Chapter Seven: Political Parties: Essential to Democracy, MAGLEBY ET AL., *supra* note 85, (2006) available at <http://members.aol.com/gangibill/lecture5.htm>; William Gangi, Professor, St. John's University, New York, Department of Government and Politics, Lecture No. 8 on Chapter Twelve: The Presidency, MAGLEBY ET AL., *supra* note 85, (2006) available at <http://members.aol.com/gangibill/lecture8.htm>.

³²⁸ *Intensity*, *supra* note 187, at 475.

public consciousness, or to help define all the stakes, more often than not, their intensity jeopardizes their objectivity. Focused as they are on the subject, they tend to view the stakes or weigh competing values very differently than do those who feel less intensely. Deliberation and decision-making become cooler, as Madison suggested, when the relatively apathetic control those processes.³²⁹

Law (public-policy) is an imprecise and very complex business. There are many uncertainties and the republican form of government makes matters infinitely more difficult because it places the ultimate responsibility in the hands of the people.³³⁰ The people are responsible for the quality of their society, and we are, after all, human beings. We get frightened, embrace stereotypes, and—in one intensity or another—hold certain beliefs based on our experiences and our intelligence (though, Lord knows, the latter is exceedingly fragile). All of this, mind you, in the context of trying to anticipate eventualities so numerous, even today, they remain impossible to catalogue.³³¹ Nevertheless, even great constitutions depend on great execution.³³² Ultimately, good governance, like virtue, exists in an unnamable mean, which *is* the object of deliberation and consensus building.³³³

Members of the judiciary are far more likely to misconstrue intensity, both their own and that of others.³³⁴ They are poorly suited to make realistic assessments of opposing intensities, and they certainly cannot determine to what extent such intensities are “manufactured.” It is hardly surprising, therefore, that courts and non-interpretivists have increasingly turned to

³²⁹ See *supra* note 307 and accompanying text. Is not that the justification used by lawyers and courts when selecting a jury?

³³⁰ THE FEDERALIST NO. 51 (James Madison), *supra* note 4, at 322 (“[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself.”).

³³¹ As Publius put it, “there ought to be no limitation of a power destined to affect a purpose which is itself incapable of limitation.” THE FEDERALIST NO. 31 (Alexander Hamilton), *supra* note 4, at 193.

³³² In unusual circumstances, the line between statesman and demagogue is not so easily drawn. “Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator” THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 4, at 423. And do not forget for a moment that all constitutional provisions may fall before the exigencies that confront a nation’s self-existence. Publius notes:

If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government and set bounds to the exertions for its own safety.

How could a readiness for war in time of peace be safely prohibited, unless we could prohibit in like manner the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation.

THE FEDERALIST NO. 41 (James Madison), *supra* note 4, at 257. See also STRAUSS, *supra* note 294, at 160–61. Publius’ position is in the Aristotelian tradition.

³³³ SAVING, *supra* note 3, at 260 n.15 (citing VOEGELIN, *supra* note 284, at 62–63).

³³⁴ Needless to say, even if it could measure intensity, many of the decisions of the past sixty years would still remain illegitimate. Again, I ask readers to separate their predilections from legitimate constitutional criteria.

polls (the more sophisticated of which include so-called intensity scales).³³⁵ But such polls measure only initial preferences, that is, the “yes or no” (to whatever degree) responses of citizens. Far more often those responses reflect *not* deliberative thought, but surface attitudes, which in turn are usually based on emotions that are particularly susceptible to manipulation. Polls include only a finite scale of responses because they could not anticipate or encompass the variety of human choices possible on even the simplest subject. For instance, just stand in line at Starbucks and listen to the variety of coffee preferences!³³⁶ While polls record initial voter preferences (for example, the *direction* of public opinion),³³⁷ any decision solely based on mere direction is the antithesis of the Madisonian model which assumed that converting immediate public sentiment into public policy was far more likely to be dangerous to the public good.³³⁸ True enough, in a well-constructed and popular government, the expression of strong public sentiment deserves an initial political focal point (such as the House of Representatives), but only after the passage of time can voter sentiment be accurately gauged. How else may a popular government evaluate faction intensity—in other words, the faction’s ability to endure?³³⁹ To imagine that polls or consensus-building among members of the Supreme Court provide adequate substitutes for legislative deliberation, is to embrace that which the framers studiously *avoided*: the injection of passion directly into public policy-making.³⁴⁰ Not surprisingly, as previously noted with respect

³³⁵ Such polls consist of questions which include phrases like “on a scale of 1 to 5” (or “1 to 10,” or “very satisfied to very dissatisfied”), what are your preferences on A, B, or C? See *Intensity*, *supra* note 187, at 476 n.7. Frequently poll questions are biased—whether intentionally or unintentionally.

³³⁶ Try raising this question among friends: Should roast beef be served rare, well done, or somewhere in between? Record the variety (and intensity) of the answers. See if substituting lamb for beef changes the responses. The more apathetic among us might conclude that people are entitled to their own preferences, whatever they may be. In this context, consider a few of today’s current public policy disputes: an effective and fair tax stimulus package, partial-birth abortions, equitable reform of Social Security, professional standards for accountants and lawyers, and how to reduce American dependency on foreign oil. Are you still apathetic? Equally so? On each topic?

³³⁷ *Intensity*, *supra* note 187, at 476 n.7.

³³⁸ See *id.* at 500–01. It was precisely that tendency that made pure democracies a defective form. It led to instability as popular emotion whipped one way and then another. See *supra* notes 231–246 and accompanying text. For example, a citizen might respond to the question, “Do you favor the death penalty?” with a “No.” But polls rarely obtain from responders the deeper particulars that often confront a legislator who must then try to anticipate how intensely his constituents feel about the matter. He must discern whether or not other issues are more important to the voters, and of course, how their vote on the topic will affect his reelection prospects. Would a legislator’s calculations differ if the death penalty legislation in question punished a child murderer? As a private citizen you might come down on punishing child murders one way or another, but as a legislator, you must assess whether the issue is of concern to your constituents. What if there was a recent child murder? Or perhaps you think there are far more important issues—for example, our presence in Iraq. But maybe your constituents rank this issue differently than you. On the level of theoretical principle we should not let the polling method determine how we look at politics. “The subordination of theoretical relevance to method perverts the meaning of science on principle.” VOEGELIN, *supra* note 195, at 6.

³³⁹ In four years a faction may completely dominate the American political system. Believers get two chances to change the entire House of Representatives, elect two thirds of the Senate, and elect the President. If they can sustain a simple majority, they can even change the *number* of justices on the Supreme Court so as to fill vacancies with sympathetic nominees. If they can sustain an extraordinary majority they may amend the Constitution.

³⁴⁰ See *supra* note 312 and accompanying text. As George W. Carey notes:

to slavery and laissez-faire, judges are not immune from passion injection. In sum, modern democratic theorists and their non-interpretivist allies often champion a democratic model (an unauthorized one, of course) which is very different from Madison's *post-election* deliberative one.³⁴¹

On such matters students certainly must make their own assessment, but it seems to me that much of our influential legal literature is dominated by scholars who elevate logic and imagination above common experience and our tradition of self-government.³⁴² They expend an enormous amount of energy to convince readers that each of their speculations, unlike those of competing scholars, is *really* important to the health of the body politic. Distracted thusly, truly gifted students are no longer guided by daily experiences or political realities as in Plato's prescription that political society is man writ large.³⁴³ On that score—model builders of democracy,³⁴⁴ jus-

Unlike the Congress, [the Court] has no reliable means to gauge the relative intensity of the interested parties, what the reactions will be to any given pronouncement or, *inter alia*, what obstacles are likely to arise in its execution. And once having embarked on a path, it can pull back or reverse itself only at great cost to its own prestige and the principle of the rule of law. Moreover, leaving aside the legitimacy of these activities, its members are ill equipped for such tasks because legal training scarcely provides the breadth of knowledge in fields such as philosophy, history, the sciences, and social sciences necessary for this mission.

DEFENSE, *supra* note 30, at 179. While I concur in Carey's assessment, SAVING, *supra* note 3, at 249–250, I don't think any scholar anticipated the statement by Justice O'Connor regarding *prospective* constitutionality:

[R]ace-conscious admissions policies must be limited in time. . . .

. . . .

[The Court] take[s] the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions as soon as practicable. . . . [The Court] expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Grutter v. Bollinger, 539 U.S. 306, 342–43 (2003) (citation omitted).

³⁴¹ CONTRA, *supra* note 88, at 500–02. In the text I ignore Madison's argument that the extension of the territory will contribute to the moderating effect.

³⁴² See, e.g., DWORKIN, *supra* note 316; EISGRUBER, *supra* note 29; ELY, *supra* note 151; Human, *supra* note 257; Freedom, *supra* note 271; RAWLS, *supra* note 316; TRIBE, *supra* note 85. For additional sources on the subject, see the bibliography of *Expansionism*, *supra* note 21, at 904–06. Of course not all scholarship is inflicted to the same degree. Still, if younger scholars perceive this as the game being played, this is the direction they will take. My impression is that there are outstanding minds engaged in system-building (masked under economic, philosophical, or theological speculations) or preoccupied with minutiae stripped of context. But see INVESTIGATING SUBJECTIVITY 1–13 (Carolyn Ellis & Michael G. Flaherty, eds., 1992); IRA L. STRAUBER, NEGLECTED POLICIES: CONSTITUTIONAL LAW AND LEGAL COMMENTARY AS CIVIC EDUCATION 1 (2002). But see William Gangi, Book Review, 32 PERSP. POL. SCI., 46–47 (Winter 2003).

³⁴³ Plato comments:

Are you aware, then, said I, that there must be as many types of character among men as there are forms of government? Or do you suppose that constitutions spring from the proverbial oak or rock and not from the characters of the citizens, which, as it were, by their momentum and weight in the scales draw other things after them?

PLATO, *Republic*, *supra* note 35, at 774. Earlier in this piece I used Plato's Cave analogy to convey that today the Supreme Court and its supporters, like the elite in Plato's Cave, cast shadows on the front wall of our national political life and mislead law students into believing these shadows represent the substance of constitutional law. See sources cited *supra* notes 35–36 and accompanying text. See also SAVING, *supra* note 3, at xiv–xv. But, the fact of the matter is that law students today are obliged (compelled) to master such shadows (tests, doctrines, etc.). Gaining mastery takes a considerable

tice,³⁴⁵ or rights³⁴⁶ fall short. What law students must rediscover and appreciate is the complexity of American politics, citizen participation in self-government, and our uniqueness as a nation. All of these require an understanding of our history,³⁴⁷ the principles of our founding, and the way the Constitution (including the Bill of Rights) embodies those principles. Losing sight of any of these components leads us astray, not just temporarily (for that is inevitable), but permanently, which is the present danger. Instead of swallowing whole the simplistic analyses of modern democratic theorists (disguised by the illusion of complexity), students must learn to embrace political complexity (similarly disguised under the illusion of simplicity).³⁴⁸ Law students remain equally subject to the dictates of Madisonian politics and the realities of intensity. Some of them have become so committed to one cause or another, they may find it impossible to travel the road I urge them to consider. I understand. But it may be the relatively indifferent who hold the fate of constitutional law in their hands.

VI. CONCLUSIONS

Non-interpretivists have succeeded in transforming the power of judicial review into a doctrine of judicial supremacy, and converting a constitution intended by its framers to “regulate and restrain the government” into one in which the Supreme Court “restrain[s] the people.”³⁴⁹ The mounting number of Supreme Court tests and distinctions chip away and erode constitutional law and government competency, political accountability, and common sense. But, as I noted,³⁵⁰ the fact that both scholars and students acquire so-called mastery of these subjects, or expend a great deal of energy doing so, does not prove their legitimacy. Each time, for example, critics express doubt over how the Supreme Court balances First Amendment concerns with other considerations, do your professors evaluate the merits of such claims? Or do they simply warn of censorship’s slippery slope or the practices of totalitarian regimes?³⁵¹

amount of time and energy, leaving little time for much else. The most proficient at mastering these shadows become authorities on the Court (and they are!). The shadows in turn create “realities” (i.e., more tests, distinctions) that erode constitutional law, political accountability, and common sense. But the fact that mastery is acquired or energy is expended, neither validates nor proves the shadows’ assertions.

³⁴⁴ See generally ELY, *supra* note 151. But see Ely Review, *supra* note 151, at 53.

³⁴⁵ See RAWLS, *supra* note 316. But see DEFENSE, *supra* note 30, at 189 (describing Rawls’ work as “a tedious and rather feeble philosophical defense of the secular welfare state.”).

³⁴⁶ See generally DWORKIN, *supra* note 303. But see Dworkin Review, *supra* note 303; Moral, *supra* note 303.

³⁴⁷ See *supra* Part IV.B. On a related matter, Carey observes: “[G]iven its origins, the expression ‘law of the land’ . . . was not intended to limit the legislatures; instead, the expression ‘law of the land’ embraces the laws duly enacted by the legislature that apply to executive and judicial proceedings.” DEFENSE, *supra* note 30, at 165. Put another way, the Massachusetts Body of Liberties contributes mightily to understanding the status of rights. See *supra* text accompanying notes 210–219.

³⁴⁸ See generally DEFENSE, *supra* note 30, at 34–121.

³⁴⁹ Kramer, *supra* note 281, at 14.

³⁵⁰ See *supra* note 343.

³⁵¹ See *Exclusionary*, *supra* note 9, at 117–18.

I have mentioned that some non-interpretivists apparently believe the Supreme Court should act as the secular Chair of Peter,³⁵² contending that the Court can more objectively weigh competing principles—as if this (rather than the legitimacy of it doing so) was the issue. They further assert that the Court is able to more competently discern the meaning of a particular Bill of Rights provision, however the Supreme Court often ignores both the ratifiers' understanding and legislative preferences. Should not professors point students in the direction of where to find convincing evidence of those assertions?³⁵³ Instead of providing elected representatives with considerable discretion to address change (as did the framers), non-interpretivists restrict that ability by wrongly elevating to constitutional status their own sub-constitutional public policy preferences. Unfortunately, many interpretivists, instead of confronting that development head on, have devoted their energies to seizing control of the judiciary. That may be a natural thing to do, but it fritters away the people's right to government.

So where do we stand? On the one hand, principled non-interpretivists (of one stripe or another—here unnamed) sincerely believe that the judiciary should adapt the Constitution to changing circumstances, wishing it to act as our moral conscience, or that judicial review and interpretation may be used to secure some process or substantive right. Many of them recognize that constitutional law has been altered. However, at the end of the day, all of them profess an allegiance to one desirable result or another, as opposed to the framers' understanding of judicial review, various constitutional provisions, or the Madisonian schema. Other non-interpretivists (again unnamed) are undoubtedly self-promoting opportunists. They care little about the implications of the legitimacy issue. They simply believe it is more cost-effective to convince *judges* of the policy preferences they espouse, than it is to convince a majority of state legislators, Congress, or the American people.

Interpretivists, on the other hand, remain defensive. Not that I fault them, but interpretivists lack a coherent strategy, instead reacting to specific judicial usurpations which they seek to minimize or halt. Some focus their ire on the judiciary's expansion of personal liberties; others object to the creation of some heretofore unknown rights; and still others are offended by judicially imposed challenges to traditional cultural mores. Minimally, some interpretivists seek to stop new usurpations from occurring, and at their most aggressive, they want to reverse decisions they find distasteful. More often than not, they focus tactically on specific public policy content rather than the broader issue of legitimacy. The net result of their strategy, however, has been to alarm non-interpretivists, making judicial

³⁵² See *supra* note 257.

³⁵³ For example, legislators have *always* brought their ethical and religious values (or lack thereof) to public policy debates. See *How to Read*, *supra* note 174, at xii (“American political life has re-enacted . . . [a process whereby individuals are] prepared to submerge their individual personalities, their individual political philosophies, in the common enterprise.”).

appointments more contentious, with both camps fearing control of the judiciary by the other. Legislative resistance to judicial usurpations—by such traditional means as slashing judicial appropriations, removal of Supreme Court appellate jurisdiction, or commencing impeachment proceedings against judges—are either no longer attempted or, in the specific context in which they occur, seem excessively partisan.

Congressional resistance to acts of judicial illegitimacy has lost its potency, not because the tools would be ineffective, but because evidently a majority of *Congress* unknowingly embraces non-interpretivist premises.³⁵⁴ Congress currently lacks the strong *institutional* pride upon which the framers so heavily depended. It has chosen to ignore the “Court’s self-aggrandizing tendencies” and the growing elitism “among lawyers, judges, scholars, and even politicians . . . [who believe] that ordinary people are foolish and irresponsible when it comes to politics . . . [which is] grounded less in empirical fact or logical argument than in intuition and supposition.”³⁵⁵ In sum, many members of Congress are ill-equipped today to preserve and defend our republican regime.³⁵⁶

Occasionally, interpretivists advocate issue-oriented constitutional amendments. Such proposals, however, do not challenge the non-interpretivist legacy—the creation of a judicial oligarchy. The situation grows increasingly ironic. The framers (many, aristocrats by birth and certainly among the intelligentsia of their day) turned out to have greater faith in the people, as well as the constitutional structures they created, than do their congressional successors. Even in the 1930s, the Progressivists (similarly part of the intelligentsia of their day) never dreamed of circumventing elected officials. At least *initially*, they concentrated their efforts on halting illegitimate judicial vetoes of legislative economic reforms.³⁵⁷ For example, as a private citizen, Felix Frankfurter sought political remedies,³⁵⁸ and as a Justice of the Supreme Court he cautioned that “[t]he Court is not saved from being oligarchic because it professes to act in the service of humane ends.”³⁵⁹ Today the situation could not be more different. Our in-

³⁵⁴ I am sure the motivations are the usual suspects: sincere belief, ignorance, and opportunism. See *The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial, Hearing on S.3 Before the S. Comm. on the Judiciary*, 104th Cong. 27–28 (1998) (comments by William Gangi, Professor, Dep’t of Gov’t & Pol., St. John’s University) [hereinafter Hearing].

³⁵⁵ Kramer, *supra* note 281, at 18.

³⁵⁶ See Hearing, *supra* note 354, at 28.

³⁵⁷ SAVING, *supra* note 3, at 99–102 (detailing how the Court majority eventually coalesced around personal rights—initially those of criminal defendants, and more recently, those with respect to the First Amendment and privacy).

³⁵⁸ Professor Holland explains that Felix Frankfurter was one of the formulators of “Robert La Follette’s platform plank in 1924 which called for a constitutional amendment giving Congress power to override Supreme Court invalidation of federal statutes by a two-thirds vote. Frankfurter even advanced the modest proposal of excising the due process clause from the fourteenth amendment [sic].” See Holland, *supra* note 223, at 1036 n.23.

³⁵⁹ Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 815 (1974) (quoting *AFL v. American Sash & Door Co.*, 335 U.S. 538, 555–56 (1949) (Frankfurter, J., concurring)). See also, CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY?* 74–77 (1991).

telligentsia, including elected officials, have become part of the problem—not any possible solution. They evince an unprecedented lack of faith in the very people who have elected them, standing idly by as members of the judiciary claim to know what is *best* for the very constituents who elected them. Still, they deny the pertinence of a comparison to their laissez-faire predecessors. Worst of all (though not unusual), our intelligentsia deceives itself. Far too many elected officials have swallowed judicial deception (even self-deception)—hook, line, and sinker—that is, the judicial pretension that the *Constitution* commands the various public policies they assert, policies which in fact, only reflect the preferences of non-interpretivists, a majority of justices, and some legislators.

With our intelligentsia (most of the Justices of the Supreme Court included) having become so enamored with judicial power, it will be exceedingly difficult for Americans to extricate themselves from the inevitability of subsequent judicial usurpations. Surely, law students also understand that the interpretive tools employed by non-interpretivists are inherently expansive. Is that not what some law students find so enticing about the law or the prospect of becoming a judge? The chance, as they say, to make a difference or to do the right thing?³⁶⁰ Fertile imaginations will continuously redefine constitutional phrases, and impeccable logic again and again will be used to destroy competing values. Once the judiciary creates a “right” (e.g., privacy), or redefines a constitutional phrase (e.g., free speech), logic either will brush aside competing values not enjoying similar status, or the Court will create yet another *balancing test* by which it can mask the majority’s predilection imposition. Considerations such as the republican character of our regime; our tradition of self-government (which in fact placed much of the balancing of rights in legislative hands); or the framers’ understanding of the limited scope of judicial power, become, at best, secondary considerations subject to redefinition by imagination and logic. Subsequently, this redefinition will take on a life of its own, inevitably drawing the judiciary deeper and deeper into areas traditionally reserved to the legislature.³⁶¹

At times the Justices crudely attempt to replicate the Madisonian con-

³⁶⁰ The causes change but the thirst for power never goes away. It is not that Publius did not expect such occurrences, in fact, they took precautionary measures. “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.” THE FEDERALIST NO. 51 (James Madison), *supra* note 4, at 322.

³⁶¹ Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to adopt a more expansive view of the Court’s authority to find fundamental rights not explicitly stated in the Constitution, noting that the Court is most susceptible to attacks of illegitimacy “when it deals with judge-made law” having “no cognizable roots” in the language of the Constitution) with *Lawrence v. Texas*, 539 U.S. 558 (2003) (noting that the *Bowers* Court failed to appreciate the liberty at stake, found by this Court, in the Due Process Clause of the Fourteenth Amendment). These cases again illustrate themes in this article. The problem initially was that the *Bowers* decision did not fit in with the various “shadows” previously cast on the front wall of American political life. In *Lawrence*, the majority acknowledged that fact. For an excellent discussion, see Jeffrey Rosen, *Immodest Proposal*, THE NEW REPUBLIC, Dec. 22, 2003, at 19 [hereinafter REPUBLIC]; Cass R. Sunstein, *Federal Appeal*, REPUBLIC, *supra*, at 21; Richard A. Posner, *Wedding Bell Blues*, REPUBLIC, *supra*, at 33.

sensus-building schema. They either try to demonstrate wide-based public support for their decisions, or try to bluntly reject one or more of their encyclicals. These devices are all geared to support an institutional desire to retain its power and prerogatives.³⁶² True, under fortuitous political circumstances, each time the Court has gone too far, it has retrenched sufficiently to enable it to retain popular support. It did so with the establishment of the religion line of cases, as with the rights of criminal defendants, death penalty, abortion, and perhaps racial discrimination cases. But if my analysis is sound, such retreats are only tactical and temporary. They provide respite—an opportunity for consolidation or the emergence of new alliances among the justices—before the Court marches forward in a particular direction.³⁶³ Since the Warren Court, no majority has foresworn expansionary and illegitimate non-interpretivist premises. Sooner or later creative imagination and/or political exigency will spark subsequent attempts to secure, expand, and invent new rights.

There is no way to predict the outcome of this interpretivist/non-interpretivist clash over the nature of constitutional law and republicanism. Interpretivists, already a minority, may simply fade away, because they either die off, or cannot attract sufficient numbers of adherents to sustain intellectual or political coherence. Such has always been a constitutionalist's greatest fear.³⁶⁴ Or conversely, interpretivists may be revitalized should a Court majority seriously misjudge hostility to one of its policy impositions.³⁶⁵ Or—as is quite normal in Madisonian politics—some non-interpretivist proponents may reconsider, and splinter off from or leave the existing coalition as new or more complex issues work their way through the fabric of American politics; thereby paving the way for a *new* majority faction to emerge within the Supreme Court, as the current non-interpretivist reform agenda is increasingly actualized. There are those who are far more astute than I at analyzing the many possibilities.³⁶⁶

³⁶² See *Stump v. Sparkman*, 435 U.S. 349 (1978).

³⁶³ The non-interpretivist fear is that a new majority will march in the opposite direction! See *supra* note 304. Upon what *principles* do they object to such a move? They abandoned any applicable principles in their rush to acquire good results.

³⁶⁴ See Shattuck, *supra* note 298.

³⁶⁵ See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

³⁶⁶ There is also the matter of unintended consequences. For example, the manner in which European scholars perceive judicial power in the United States. Actually, they are more discerning than their American counterparts. They recognize that the public policy-making role performed by the federal judiciary (as well as the *American* preoccupation with rights) is relatively recent. Nevertheless, the power wielded by the Supreme Court is accepted by Europeans as a distinctive American symbol. See HERBERT JACOB ET AL., *COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 38 (1996). Thus, we are exporting to an admittedly skeptical audience (many Europeans find it odd that Americans place that much power in a judiciary) “judicial supremacy” rather than “judicial review.” See *supra* text accompanying note 30. As an interesting example take this comment by Hassan Khomeini, the former ayatollah's grandson, in Iran: “‘We should value the achievements of the revolution,’ he said. ‘This is a country that elects its own president, its own Parliament, its own leadership.’ By contrast, he said, George W. Bush was elected president ‘fraudulently with the power of the judiciary behind him.’” Elaine Sciolino, *Iran's Revolutionary Fervor is Now All but Spent*, N.Y. TIMES, Feb. 2, 2003, at A6. Still—and especially in the context of the emergence of multi-nation courts—Europeans remain intrigued with our experiment.

What disturbs me most, however, is the growing gap between what our ratifiers understood as the power of the people to govern themselves, and the non-interpretivist empowerment of the judiciary to determine public policy. That gap far exceeds the one which initially served the non-interpretivists' cause so well.³⁶⁷ Elsewhere, I propose confronting non-interpretivists through amendment,³⁶⁸ but here my focus is on students. To that end, I advise them to keep their eye on the ball.

First, *if* the framers' intentions can be reasonably ascertained, we as a people and our judges remain bound to that meaning. That is the *only* position consistent with constitutionalism in any meaningful use of that term. I categorically reject any other understanding as profoundly ignorant. Any implicit assumption that those who crafted our Constitution imagined that after it was adopted the need for change would cease, or that they envisioned *judges* to take on such a task, is patently ridiculous. Those who crafted our Constitution expected legislatures to address change. If constitutionalism means *anything*, it means that fundamental choices are made for both present and future generations. For example, the framers unquestionably intended that our nation would have a *republican* rather than an *oligarchic* form of government.³⁶⁹

Without ignoring the fact that the interpretive task is complex,³⁷⁰ or denying that discerning the framers' intentions often is fraught with danger,³⁷¹ or creating unrealistic expectations, I ask: how may students pursue the craft of constitutional law? Lest we forget, it requires that every inquiry begin by attempting to discern, if available, the framers' intentions. However difficult this task may be, in the long run, it will entail less difficulty than any other approach suggested by non-interpretivists. If you omit that all-important first step under one guise or another, you most assuredly will impose your personal predilections on the American people, and at the same time, recast the fundamental principles of our republican regime. In short, you will rewrite the Constitution in your own image and likeness.³⁷²

Second, demand to know where *exactly* do non-interpretivists (and

³⁶⁷ *Expansionism*, *supra* note 21, at 22–24; *SAVING*, *supra* note 3, at 199–200; *supra* text accompanying notes 28–29.

³⁶⁸ See *Expansionism*, *supra* note 21, at 46.

³⁶⁹ See *SAVING*, *supra* note 3, at 36–39. As a demonstration that we have strayed from the framers' intended government, more than twenty years ago I constructed a fictitious debate on the exclusionary rule that illustrated the circular reasoning, unsupported premises, and misconceptions typical of modern case law. See *Exclusionary*, *supra* note 9, at 36–38.

³⁷⁰ *SAVING*, *supra* note 3, at 125–68.

³⁷¹ See, e.g., Powell, *supra* note 291.

³⁷² *SAVING*, *supra* note 3, at 267–69. There certainly are interpretive issues that fall outside the framers' intentions. One might even concede a tentative interpretive right to define twentieth century equivalents of eighteenth century prohibitions. But, by and large, the crisis today is caused by the Supreme Court's illegitimate assumption that they may *expand* the prohibitions. Judge Robert H. Bork concludes: "A theory of Constitutional law must . . . set limits to judicial powers as well as to legislative and executive powers; there is no theory of Constitutional adjudication that can set limits to judicial power other than the philosophy of original intent." Robert H. Bork, *The Inherent Illegitimacy of Non-interpretivism*, in *BAER ET AL.*, *supra* note 41, at 111.

perhaps your professors) find justification for the role they believe the Supreme Court should play in our governmental system. As I hope I have demonstrated, they certainly *cannot* ground such a power in the Constitution, or in our history, or in the framers' understanding of judicial review. The *scope* of the power non-interpretivists support simply is incompatible with both the framers' understanding and with the republican design of the Constitution.

Let me raise this question: Are judicial actions today any less bound by the framers' understanding of constitutional limits than would be those of Congress or the President? Would law students entertain from either of those branches, claims regularly put forth by non-interpretivist champions of judicial power? For example, would you entertain a claim that their particular branch was legitimately *best suited* to manage our national budget, or the fight against terror? Would you sanction the same kind of unilateral actions you permit the Court, if either one of those other branches of government claimed that a *vacuum* existed that only it could fill? Or would Congress or the President be justified in acting unilaterally because, in their opinion, the other branch had *failed to act*? If you accept the non-interpretivist position, you must embrace such arguments. Such justifications for contemporary judicial power, however, are analogous to rewriting history. It is the same as claiming that World War I was fought to make the world safe for *judicial oligarchy*.

Third, to the degree that the framers' intent is either unclear or non-existent, should the judicial power increase or diminish? To preserve a limited constitution and the republican character of our government, any inability to determine the framers' intent, I suggest, increases *legislative—not judicial—discretion*. The absence of intent is akin to a court not having jurisdiction. As Judge Bork noted, having no authority, judges should cease their activity.³⁷³ By the way, *that* is the true import of various quotations taken from Marshall's opinion in *McCulloch*: a caution to *judges* not to unnecessarily inhibit Congress' discretion, *not* a claim for expanding the narrow scope of judicial review sanctioned by the framers.³⁷⁴

As illustrated earlier, the framers carefully considered what structural devices were crucial to reducing the risk of governmental tyranny, how to reduce the risk of majority tyranny, and by what means they could foster deliberation. I repeat what I mentioned earlier—the framers believed moderation was far more likely if the relatively indifferent representative had a

³⁷³ See *supra* note 275.

³⁷⁴ According to Professor Gunther non-interpretivists frequently misconstrue Marshall's remarks in *M'ulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 185 (Gerald Gunther ed., 1969). When *M'ulloch* came under attack, Marshall defended that he was pleading for elasticity in Congress' "choice of *means*," BERGER, *supra* note 56, at 376 (emphasis added), to execute existing powers and denied any "constructive assumption of powers never meant to be granted." *Id.* (footnote omitted). Again and again he repudiated any claim for "extension by construction," *id.* at 377, and flatly disclaimed a judicial "right to change that instrument." *Id.*

deciding voice. Possessing a powerful intellect does not make one immune to the human tendency to inject passions into one's theorizing. The unceasing barrage of legal literature based on little more than fertile imagination should be sufficient proof of that.

Fourth, remember that every state, as well as members of the Philadelphia Convention, relied on a shared tradition which put the common good and the right of self-government *before* individual rights. So allow me to raise this issue: if, under non-interpretivist methodology, the Supreme Court can legitimately expand the meaning of rights *beyond* those understood by the framers, may some future Supreme Court majority in like manner reduce them *below* what the framers understood? If your professors answer negatively, ask them *why*?³⁷⁵ By my reckoning, under non-interpretivist criteria what the judges giveth, they can take away.³⁷⁶ That is why interpretivists insist on being bound by the framers' discernible intentions. I have asserted this for more than twenty years—certainly before the recent appointments to the court. In contrast, modern constitutional theory has become the means to acquire, through judicial stealth, what neither the political right nor the political left might otherwise acquire through the hurly-burly of American politics.

Fifth, weigh the interpretivist position against the legitimacy issues non-interpretivists all too often refuse to acknowledge.³⁷⁷ Any problems of interpretation associated with my position pale in significance when contrasted with those facing non-interpretivists. One is tempted to use a phrase allegedly attributed to Governor Arnold Schwarzenegger, that what this nation needs among our elected representatives are fewer "girlie men." But of course that phrase is both insulting and sexist. More important, it is inaccurate. What we need are more politicians of *both* genders and of every political persuasion, who are willing to fight for what they believe is good public policy, but who have in common an ability to separate their fondest desires from what is required by the Constitution. This principled type of politician does not run to the courts when they lose legislative policy debates, and they will not support judicial usurpations in order to achieve by coercion what they cannot obtain by persuasion. This goal may be naïve on my part and it may be simplistic, but it is what is needed if we are to preserve for our children's children's children, what we have inherited—the right to self-government.

Americans were gifted with a brilliantly crafted Constitution, one capable of responding to every imaginable crisis, while itself remaining open to

³⁷⁵ See *supra* notes 89, 101, 142, 163, 290.

³⁷⁶ It is no secret that the non-interpretivist literature is dominated by the liberal perspective. The danger to conservatives (such as myself) is that non-interpretivists find their own public preferences in the framers opinions, without locating them in the text, or crimping legislative discretion.

³⁷⁷ I am not insisting on any interpretive orthodoxy. Other interpretivists may reach positions, particularly on public policy measures, inconsistent with my own. Interpretivist inclined judges are in a tougher position still. They must weigh considerations of prudence, because their words have immediate consequences for specific people.

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change—all of which is subsumed under the right of self-government. I therefore ask law students to give serious consideration to this final question: Why are you being counseled to hand over to five Justices—as so many current legal professionals are prepared to—the right to self-government, and why are so many legal professionals prepared to give to *five* Justices, what our forefathers risked their lives, fortunes, and sacred honor to secure in the Constitution?³⁷⁸

³⁷⁸ 2 WILLIAM SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 319–26 (2d ed. 1985).