Supplementary Material

Chapter 10: The Reagan Era—Foundations/Principles

William J. Brennan, **"The Constitution of the United States: Contemporary Ratification"** (1985)[1]

William Brennan was a Democratic judge on the New Jersey Supreme Court when he was nominated to the U.S. Supreme Court by President Dwight Eisenhower on the eve of the 1956 election, in part to shore up Eisenhower's support among Catholic Democrats. Brennan soon emerged as the intellectual and political leader of the liberal wing of the Warren Court. He authored many of the Court's landmark decisions on voting rights, religious liberty, free speech, criminal procedure, and civil rights. Brennan remained a potent force on the Court until his retirement in 1990, but his influence waned over time with the addition of more conservative justices.

Brennan and Rehnquist were frequent sparring partners on the bench, offering sharply divergent views across a range of constitutional issues. Brennan regarded the Reagan administration's vocal defense of originalism and judicial restraint as a fundamental challenge to his constitutional vision and jurisprudential legacy. In this speech at Georgetown University, delivered shortly after Attorney General Edwin Meese's well-publicized address to the American Bar Association on originalism, Brennan offered an alternative vision of the Constitution that frankly embraced judicial activism and an ever-evolving "aspiration to social justice."[2] Is Brennan right that the Court's role is to "adapt" the terms of the Constitution to present values and social needs?

. . . [T]he Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress. Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text. . . .

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There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent for the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intentions. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. . . . And

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[1] Excerpted from William J. Brennan, in *The Great Debate: Interpreting Our Written Constitution* (Washington, DC: The Federalist Society, 1986). By permission of The Federalist Society.

[2] See also, Frank I. Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999).

apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive. . . .

Perhaps most importantly, while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should not escape notice. A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation—if there is such a thing as the "nature" of interpretation—commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the minority rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstances.

Another, perhaps more sophisticated, response to the potential power of judicial interpretation stresses democratic theory: because ours is a government of the people's elected representatives, substantive value choices should by and large be left to them. This view emphasizes not the transcendent historical authority of the framers but the predominant contemporary authority of the elected branches of government. Yet it has similar consequences for the nature of proper judicial interpretation. Faith in the majoritarian process counsels restraint. Even under more expansive formulations of this approach, judicial review is appropriate only to the extent of ensuring that our democratic process functions smoothly. . . .

The view that all matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do. Unabashed enshrinement of majority would permit the imposition of a social caste system or wholesale confiscation of property so long as a majority of the authorized legislative body, fairly elected, approved. Our Constitution could not abide such a situation. It is the very purpose of a Constitution—and particularly of the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities. The majoritarian process cannot be expected to rectify claims of minority right that arise as a response to the outcomes of that very majoritarian process. . . .

To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices. Each generation has a choice to overrule or add to the fundamental principles enunciated by the Framers; the Constitution can be amended or it can be ignored. Yet with respect to its fundamental principles, the text has suffered neither fate. . . .

We current Justices read the Constitution in the only way that we can: as Twentieth-Century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with the current problems and current needs. . . .

Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. . . .

. . . [T]he Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law. . . .

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If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. . . . As we adapt our institutions to the ever-changing conditions of

national and international life, those ideals of human dignity—liberty and justice for all individuals—will continue to inspire and guide us because they are entrenched in our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit is inherent in the aspirations of our people.

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