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CONSTITUTIONAL INTERPRETATION—THE USES AND LIMITATIONS OF ORIGINAL INTENT

Thomas B. McAfee*

I. INTRODUCTION

It is fitting that in the decade of the Bicentennial of the Constitution we have seen a renewal of debate over the meaning of the Constitution and what is required to remain true to it. An aspect of that debate has concerned constitutional interpretation and the role of “original intent”—or, perhaps more broadly, “original context”—in any proper approach to the interpretive process. Unfortunately, the debate is frequently approached from virtually an either/or perspective, as though the intent of the Framers must either control all constitutional questions or be used as no more than window-dressing. While

* Associate Professor of Law, Southern Illinois University School of Law; J.D., University of Utah College of Law (1979). A condensed version of this article has appeared in the January 1986 issue of the Illinois Bar Journal. I wish to acknowledge the help of my research assistant, Marcia Mulcahy, in the preparation of this article and to thank Professor Patrick J. Kelley for many insightful conversations about the nature of our Constitution and the interpretive process. I should also acknowledge an enormous intellectual debt to Professor Reed Dickerson. His rigorous, yet extremely readable, work on the interpretation and application of statutes has done more to illuminate for me the subject of legal interpretation than the largest amount of recent scholarly outpouring related to that subject. My debt will be obvious in the footnotes; indeed, I would be tempted to describe my effort as an attempt to apply his approach to statutory interpretation to the field of constitutional law—for it is nearly that—except that he will undoubtedly be disappointed that I view legislative history, with all its limitations, as a potentially relevant aspect of the context by which we ascertain statutory or constitutional meaning. In any event, the mistakes are mine; the genuine insights are largely his.


2. To some minds, the search for “original intent” implies combing legislative (or convention) debates in search of actual or subjective intent. By “original context,” I refer to the Constitution or amendment read as a whole, extrinsic evidence as to the concerns leading up to the enactment, legislative history, and evidence of relationship to other enactments that might bear on meaning.

3. Most recently, the debate has broken free of the law journals and entered the public domain with the help of Attorney General Meese and various respondents, including two Supreme Court Justices. For addresses by Meese and Justices Brennan and Stevens, see Addresses, Construing the Constitution, 19 U.C. DAVIS L. REV. 1 (1986). For the views of the newly-appointed Chief Justice, see Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693 (1976).

4. Although even Raoul Berger has acknowledged that “the framers’ intent is [not] a . . . generally applicable method of keeping faith with the Constitution,” Berger, The Scope of Judicial Review: The Continuing Dialogue, 31 S.C.L. REV. 171, 173 n.13 (1980), I have observed elsewhere that Berger has yet to devote substantial research time to a major constitutional issue without finding clearly binding intent that resolved any doubt presented by the text itself. McAf-
some advocates of original intent may overstate the extent to which historical evidence can aid constitutional construction, commitment to the principle that evidence extrinsic to the text can clarify meaning in ways that bind decision-makers does not entail seeing historical evidence as a grand key that removes most or all difficulties in constitutional interpretation or entirely resolves the riddle of determining the proper role for judicial review in a democratic society. It will hardly do to launch a broad-scale attack on the use of original context on the ground that claims as to its potential have been inflated.

Some seeming opponents of original intent have even been somewhat obscure as to whether they are opposed to seeing original intent as a panacea or are staking out the much stronger claim that, based on theoretical or practical objections, original intent can never raise binding obligations. Some have argued that the search for original intent does not provide answers to the difficult issues of contemporary application of constitutional provisions but have not clarified whether text read in context might resolve ambiguities or establish outside boundaries or, at least, some core applications of a particular provision. Those most emphatic about the total poverty of original intent seem in general to be those committed to the views that (1) the search for binding intent is practically impossible or even theoretically incoherent so that only


5. For example, two prominent theorists who contend that original intent cannot (or should not) place substantial restraints on judges have focused near-exclusive attention on individual rights provisions, including extrinsic evidence that supports an essentially open-ended judicial role in that area. J. Ely, Democracy and Distrust 11–41 (1980); Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 717 (1975). See also Bennett, The Mission of Moral Reasoning in Constitutional Law, 58 S. Cal. L. Rev. 647 (1985) [hereinafter Moral Reasoning]; Bennett, Objectivity in Constitutional Law, 132 U. Pa. L. Rev. 445 (1984) [hereinafter Objectivity]. For evidence that such open-ended readings of the individual rights provisions of the Constitution need not preclude discovery of binding intent, see infra note 79 regarding the comments about David Richards.

6. For example, the sources cited at supra note 5 do not address these separable questions. In particular, Robert Bennett and John Ely offer various objections to reliance on original intent, but each focuses concern on broadly worded, vague constitutional provisions. Even Larry Simon, who clearly argues that the intentions of the Framers are not knowable and have no authoritative status, nonetheless comments in passing that "the Slaughter-House Cases have gutted whatever meaning the privileges and immunities clause might have had." Simon, supra note 1, at 603 n.2. Inasmuch as this assertion is literally false—the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), ascribed a meaning to the provision—it appears that Simon is here joining the host of modern scholars who agree that the Slaughter-House Cases adopted an incorrectly narrow view of that clause. As we shall see, such a view is only as obvious as Simon apparently finds it to be if the clause is read in original context.
the text (if anything) binds us or that (2) the Framers lacked authority to bind us.

This essay will largely address the first of these claims. As to the second, it would require a separate article to defend fully the traditional assumptions that the Constitution binds us until it is amended and that we are bound by the ascertainable meaning of the document where it is clear from text and context. These assumptions are woven into the fabric of our law. At a more practical level, the view, for example, that we are not bound by the clear meaning of the text would not be sustained by the American public for a month if the Supreme Court announced it as the basis for “constitutional” judgment.

7. For skeptical treatment of one or both of these assumptions, see R. DWORKIN, A MATTER OF PRINCIPLE 34–38 (1985); Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204 (1980); Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation, 58 S. CAL. L. REV. 551 (1985); Simon, supra note 1. For a representative formulation of these assumptions, see Monaghan, supra note 1, at 374–75, 383.

This essay, however, will not address the difficulties presented by the doctrine of stare decisis for determining what is authoritative in constitutional law. At least some who see original context as binding on constitutional interpreters nonetheless see room for stare decisis to shield even some incorrect decisions. See Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. REV. 1, 7–10 (1979).

8. As for example, in Richard Saphire’s suggestion that the Court could treat article I’s requirement that Senators be thirty years old as “a symbolic reference to maturity” and thereby allow a twenty-nine year old to serve. Saphire, supra note 4, at 795. Interestingly, while Saphire posits significant changes in the pace of physical and intellectual maturity to bolster the appeal of this example, his more general premise is that specific texts receive weight not because we are trying to do the Framers’ will, but because such provisions seldom implicate important welfare issues, do not involve “prior authoritative interpretations,” and because interpretation must at least begin with the text. Id. at 793–95. Elsewhere, Saphire makes clear his view that the Constitution’s “writtenness” is not “its most crucial or determinative characteristic”, id. at 801, and provides an example of a derogation from plain text. Id. at 801 n.201.

But if the whole point is not to do the will of the Framers as revealed in the text, it would be equally plausible to treat the thirty-year age requirement as a symbolic reference to “maturity” and to hold that, by today’s values, a twenty-five year old is mature enough to be a Senator. If a poll revealed that 65% of all Americans agreed that twenty-five year olds were mature enough to be Senators, it is difficult to see why (in the light of the status of stare decisis in constitutional law) the absence of “prior authoritative interpretations” should make much difference. Given Saphire’s broad premise, one can even imagine a court blithely telling the twenty-year-old that wants to be a Representative (the text requires him to be twenty-five) that the applicable text is also a symbolic reference to maturity, but that the same opinion poll suggested that the modern consensus is that congressmen should be twenty-five as well.

If we may so confidently substitute our own application of a purported underlying purpose of a text for the intent embodied in the text itself, it would seem equally legitimate to substitute a trivializing purpose to the end of simply getting any meaning from even the most specific texts. It is little wonder that the most thoughtful commentator on statutory interpretation takes the view that legislative intent should prevail over legislative purpose. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 98–101 (1975). None of this is to deny that perplexing issues as to how literally texts should be interpreted do present themselves. A familiar example is whether the thirty dollar predicate to the seventh amendment jury trial right should be read in pre-inflation or post-inflation (real) dollars. For a critique of the view that such examples drive a large wedge through the assumption that specific provisions can present easy cases, see Hegland,
icates of such positions would have a difficult time convincing Presidents and legislators that they should consider themselves bound by Supreme Court decisions interpreting the Constitution if the Court viewed itself as empowered to amend clear text by ascribing a meaning of its own. If courts are bound by clear text, as most have supposed, it is difficult to see why they should not be equally bound by context fully capable of clarifying the meaning of text.

II. THE POSSIBILITY OF FINDING ORIGINAL INTENT

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

No detailed response to these various objections will be attempted in this short essay. Instead, this essay will offer, first, some general criticism about this sort of interpretive skepticism, followed by a counter-example designed to provide some confirmation of these general observations.


9. After rejecting resort to original intent as "a filiopietistic notion that [has] little place in the adjudicative process of the latter half of the twentieth century," Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 683 (1960), and contending that the Framers should not rule us from their graves, see id., two critics of original intent acknowledged that clear text is binding, without offering to explain why the Framers in that case are not equally ruling us from their graves. After all, societal consensus changes even about so-called "housekeeping" issues; a majority of Americans right now might well favor allowing a third presidential term as a permanent feature of our constitutional system. Why must they struggle with article V? For helpful discussion, see Kay, Book Review, 10 Conn. L. Rev. 801, 808 n. 28 (1978).

10. E.g., Objectivity, supra note 5, at 474; Brest, supra note 7; Saphire, supra note 4, at 774–75.

11. Brest, supra note 7, at 222; see also Saphire, supra note 4, at 772–74.


13. Monaghan, supra note 1, at 374–76.

A. Some General Observations

First, it seems apparent that the most powerful and cogent objections to discovering the original intent underlying constitutional provisions apply equally well to the attempt to discover the ordinary legislative intent underlying any statute.\footnote{15. The common problems include the difficulty of ascribing intent to any individual, the complexities associated with counting intentions and determining the intent of large numbers of people, and the problems presented by distorting aspects of group decision-making. The constitutional context presents the unique problem of determining whose intentions count, whether ratifiers or Framers, and how the intentions of many ratifiers could reliably be determined. Virtually all the skeptical literature, however, treats the remaining problems associated with determining intent as being sufficient to suggest a skeptical position. For an argument that the Framers' intent should generally substitute as the ratifiers' intent, see Monaghan, supra note 1, at 375 n.130.} While there exists a parallel controversy in the world of statutory interpretation as to the role that extrinsic evidence of intent should play,\footnote{16. Compare Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930) with R. Dickenson, supra note 8, at 71–79 (critiquing Radin's skepticism as to the coherence of the notion of legislative intent).} it is at least noteworthy that the trend among modern courts has been in the direction of increased use of relevant context, including legislative history, to shed light on the intended meaning of statutes.\footnote{17. See, e.g., Brest, supra note 7, at 211.} Theoretical objections to our ability to discover the collective intent of large groups of individuals have given way to the practical experience of most judges that original context can shed light on statutory meaning. For example, despite his own reliance on the theoretical objections to the use of original intent in constitutional interpretation,\footnote{18. See, e.g., United Steelworkers v. Weber, 443 U.S. 193 (1979) (Brennan, J., majority). In fairness to Justice Brennan, his objection to the use of original intent in constitutional interpretation went to the meaningfulness of any notion of "legislative intent" when the "legislators" are the many people who ratify the document or amendment. While this objection is unique to the constitutional setting, equally cogent objections (of which Justice Brennan is surely aware) apply to the search for the intent of any collective body.} Justice Brennan, for one, seems quite comfortable with the search for legislative intent in statutory interpretation.\footnote{19. See, e.g., United Steelworkers v. Weber, 443 U.S. 193 (1979) (Brennan, J., majority).} The question raised is whether something more is at work, such as a basic, underlying commitment to the general concept of a living constitution, without a fixed meaning.

Second, it is ironic that, at least with Justice Brennan, the objections to the search for original intent lie right alongside an eloquent appeal to "the vision of the individual embodied in the Constitution"\footnote{20. See, e.g., United Steelworkers v. Weber, 443 U.S. 193 (1979) (Brennan, J., majority). In fairness to Justice Brennan, his objection to the use of original intent in constitutional interpretation went to the meaningfulness of any notion of "legislative intent" when the "legislators" are the many people who ratify the document or amendment. While this objection is unique to the constitutional setting, equally cogent objections (of which Justice Brennan is surely aware) apply to the search for the intent of any collective body.} and on behalf of "the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure."\footnote{21. Id. at 10.} Public officials are thus called on to "recognize human dig-
nity and accept the enforcement of constitutional limitations on their power conceived by the Framers to be necessary to preserve that dignity and the air of freedom which is our proudest heritage."

The appeal to the basic, yet very general, "vision" or "design" to preserve human dignity can be viewed realistically as a simple device of linking modern value choices to the most general formulation of the weight of our political tradition. On this view, it is little more than window-dressing. Perhaps it is nothing else. Still, it has a peculiar ring to it. The repetition of the appeal alone suggests something more—that Brennan is claiming fidelity to what is most basic about our constitutional system itself, to the Framers' own commitment to freedom and dignity.

But why should we be confident about our ability to discern what is central to the constitutional design if we cannot possibly divine what was intended by any particular provision? Some of the most thoughtful commentators on statutory interpretation have observed that one of the ironies of the attack on the concept of legislative intent is the frequent substitution of talk about "‘legislative purposes,' ‘policies,' and ‘objectives'" without any attempt to show "that arguments leading to the rejection of talk about legislative intent have no force against these new expressions." Such observations seem equally applicable to appeals to the purpose of the Constitution as a guiding force to remaining true at least to the spirit of the document.

As with many forms of skepticism, when proponents of skeptical views complete their argument, they frequently turn (in other writings or sections) to familiar discourse about the purposes and intentions of those responsible for the Constitution or one of its important amendments—as if it were possible to discern such purposes and to apply them, to the extent that they are relevant, in interpreting constitutional provisions. What this suggests is that, although real difficulties are

22. Id. at 9.
24. In my view, this is what the uses of history espoused by Sandalow and Saphire amount to in large part. Id.; Saphire, supra note 4, at 799–801.
25. If so, Brennan's argument has a similar ring to David Richards' views. See Richards, Interpretation and Historiography, 58 S. CAL. L. REV. 490 (1985). Richards appears to hold the view that historical intent is knowable, but that constitutional interpretation should look to abstract intent rather than the specific intentions of the Framers.

Admittedly, Justice Brennan's view does not suggest a static view of the content of these basic principles—but it does purport nonetheless to know that they are central to the purpose of the Constitution.

27. Id. at 755; accord R. Dickerson, supra note 8, at 77.
28. At the end of an important skeptical piece, for example, Paul Brest acknowledges that text and original understanding create a defeasible presumption that would "exert the strongest
presented by constitutional text and history in regard to discovery of a usable original intent, those difficulties often seem surmountable with respect to certain issues. As with some forms of philosophical skepticism, it is perhaps easier to accept that skepticism about original intent cannot be altogether correct than it is to offer overwhelming arguments as to why.29 It is, in any event, not an infrequent experience in the arena of science or philosophy to see good reasons to proceed on the basis of less than perfect certainty, particularly as to how we might know something, in light of the available alternatives. The example which follows illustrates that it is possible to achieve sufficient certainty to warrant reliance sometimes decisive reliance, on extrinsic evidence of intended meaning.

B. The Counter-Example

In the Slaughter-House Cases,30 the Supreme Court adopted a reading of the basic thrust of the "privileges or immunities" clause of section one of the fourteenth amendment31 that ran against the purposes of the clause as revealed by the legislative history of Congress' deliberations. In terms of the present debate, the lesson can be stated more strongly: when the privileges or immunities clause is read in historical context, there are overwhelming grounds for rejecting the reading of the clause adopted by Justice Miller, writing for the majority, even though the arguments for the opposing view are neither overwhelming nor even conclusive on textual grounds alone. Since the theoretical objections to reliance on historical context apply equally to the issue regarding the basic thrust of the privileges or immunities clause as they do to more particular issues of intent arising under that clause or other provisions, the apparent implication (if our case is quite convincing) is that, as a practical matter, reasonable minds may correctly reach consensus about the resolution of at least some issues of original intent.

In the Slaughter-House Cases, New Orleans butchers challenged the constitutionality of a state legislative grant of a monopoly in butchering. They contended that the pursuit of a professional calling fell within the scope of the "privileges or immunities" protected by the

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29. This kind of total skepticism represents, in Bertrand Russell's words, "one of those views which are so absurd that only very learned men could possibly adopt them." B. RUSSELL, MY PHILOSOPHICAL DEVELOPMENT 148 (1959), quoted in R. DICKERSON, supra note 8, at 75.

30. 83 U.S. (16 Wall.) 36 (1872).

clause and that the granting of a monopoly constituted a prohibited abridgment of their rights. In rejecting their claim, Justice Miller addressed the contention that the fourteenth amendment "privileges or immunities" clause was essentially derived from the "privileges and immunities" clause of article IV, section 2. Miller posited that the article IV clause was an anti-discrimination provision to protect nonresidents in the exercise of rights otherwise within the exclusive regulatory domain of the states. In turn, he concluded that adoption of the "article IV" reading of the fourteenth amendment clause would entail a revolutionary enlargement of the powers of Congress and the federal courts—enlargement beyond what he was willing to acknowledge animated the Framers of the amendment.

As an alternative, Justice Miller relied on section 1's explicit distinction between state and national citizenship to buttress his conclusion that the "privileges or immunities of citizens of the United States" referred to rights uniquely tied to an individual's national citizenship. Justice Miller's conclusion was no coincidence; he had been the author of Crandall v. Nevada, in which the Court struck down a Nevada head tax on the basis of the implications derivable from the relationship between United States citizens and their national government. Justice Miller was thus a logical person to perceive the possibility that the amendment's protection of the privileges or immunities of national citizenship was designed primarily to provide an explicitly textual foundation as well as a certain federal remedy to rights already implicit in the structure and relationships created by the Constitution.

There is only one significant problem with Justice Miller's reading of the privileges or immunities clause—it is clearly wrong. Indeed, this is one of the few important constitutional issues about which virtually every modern commentator is in agreement. This near-unanimity is surely significant, for if there is opportunity for serious disagreement about such issues, the disagreement generally emerges. Even so, Fair-

32. Id. art. IV, § 2, cl. 2.
34. Id. at 478.
35. Id. at 480. At least this is the conventional reading of Slaughter-House, and the one adopted by the Court itself in United States v. Cruikshank, 92 U.S. 542 (1875). In recent years Slaughter-House has been interpreted by some as creating new rights against state governments based on rights enumerated in the constitution, but previously applicable only against the federal government. J. Ely, supra note 5, at 196–97; Palmer, The Constitutional Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment, 1984 U. ILL. L. REV. 739. The analysis in this article applies equally to either interpretation of the theory of the case.
36. 73 U.S. (6 Wall.) 35 (1867).
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man, 38 Crosskey, 39 Berger, 40 Curtis, 41 Ely, 42 Grey, 43 Tribe, 44 and Currie 45—an incredibly diverse group of commentators, both in their constitutional philosophies and in their conclusions on the remaining issues concerning the meaning of the privileges or immunities clause—all concur that Justice Miller abused section 1 in construing the privileges or immunities clause as being limited to a narrow group of uniquely national rights and privileges. Equally important, the conclusion reached by all these scholars is unassailable when the provision is read in historical context, even though the text is ambiguous.

It is tempting to believe that the text alone is sufficient to undergird this consensus of opinion. The phrase “privileges or immunities” in section 1 certainly suggests a possible connection to the antecedent article IV provision. It would be logical to construe the section 1 provision as giving national protection to the same sorts of rights protected by article IV—that is, the rights to contract, to own property, and to obtain access to judicial remedies, among others. 46 The problem, of course, is that the language of section 1 as easily supports in Justice Miller’s interpretation. Section 1’s language refers to the “privileges or immunities of citizens of the United States,” 47 as opposed to article IV’s “[p]rivileges and [i]mmunities of Citizens in the several States.” 48 Considering that the first sentence of section 1 specifically distinguishes state and national citizenship, it is equally plausible as a matter of textual construction to read the clause as recognizing a second, distinguishable set of rights.

It has been further argued that Justice Miller’s construction ren-

42. J. ELY, supra note 5, at 22–30.
43. Grey, supra note 5, at 716.
46. See, e.g., Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. (1823) (No. 3230) (construing article IV privileges or immunities clause).
47. U.S. CONST. amend. XIV, § 1 (emphasis added).
48. id. art. IV, § 2, cl. 2 (emphasis added). Given that it is generally “presumed that the author has not varied his terminology unless he has changed his meaning,” R. Dickerson, supra note 8, at 224, Miller plausibly concluded in effect that the relevant term was “privileges and immunities of citizens of the United States.” In fact, it remains obscure, so far as I know, why the language of section 1 took the final form it did. It is known that Bingham’s initial draft tracked the article IV language and referred to the earlier provision parenthetically.
ders the clause superfluous or trivial. The construction is thought to be superfluous because, by Miller's own formulation, it is referring to rights which already receive protection under the Constitution, either implicitly or explicitly. The same, however, can be said about the tenth amendment and the privileges or immunities clause as it was understood by John Bingham and others who were instrumental in its passage. The theory underlying the Civil Rights Act of 1866 was that Congress had the power to protect the basic civil rights which all citizens possessed by virtue of their relation to the nation. For some, the fourteenth amendment simply placed their constitutional theory beyond doubt and strengthened the civil rights protections in a changing political environment; for Bingham, the only non-superfluous provision was section 5, as it rectified a supposed lack of constitutional enforcement power in the federal government.

The charge that Miller's construction renders the provision trivial is equally lacking without the help of historical context. Providing greater security for several of the rights enumerated by Justice Miller, by making some of them explicit in the text and empowering Congress to enforce them, begins to look trivial only if we already agree that the immediate purpose of section 1 of the fourteenth amendment was to protect the basic civil rights of the freedman against hostile state action. Apart from our earlier observation that there appears to be no theoretical reason why original "purpose" should be easier to find than "intent," it is not clear that Miller's construction remains trivial when read in the context of his construction of the other two clauses of section 1. After all, the immediate and most often stated purpose of section 1—to constitutionalize the protections found in the Civil Rights Act of 1866—is completely fulfilled in Miller's construction of the

49. J. Ely, supra note 5, at 22–24 (superfluous). Justice Field in dissent said the majority opinion made it a "vain and idle enactment." Slaughter-House, 83 U.S. (16 Wall.) at 96. On the alternative construction of The Slaughter-House Cases, of course, some important new rights—and perhaps all of the bill of rights—are granted to individuals as against state deprivations. See supra note 35.

50. U.S. Const. amend. X.

51. See Graham, Our "Declaratory" Fourteenth Amendment, 7 Stan. L. Rev. 3 (1954).

52. ch. 31, 14 stat. 27.

53. E.g., Cong. Globe, 39th Cong., 1st Sess. 474–75, 600 (1866) (statements of Senator Lyman Trumbull, the Senate sponsor of the Civil Rights Act).

54. See, e.g., R. Berger, supra note 40, at 23.

55. U.S. Const. amend. XIV, § 5.


57. U.S. Const. amend. XIV, § 1.


59. See supra notes 6–9 and accompanying text.
equal protection clause. With the section’s central purpose already met, the privileges or immunities clause could easily be a supplementary protection of certain national rights in the context of an environment of state hostility to all rights of the freedman, or simply an additional provision to clear up another area of rights in which some uncertainty had persisted.

The real reason that Justice Miller’s construction of the clause rendered it trivial is because there are good grounds for believing “that it was probably the clause from which the framers of the Fourteenth Amendment expected most.” There is no question that article IV figured heavily in the arguments justifying the view that Congress could act to enforce civil rights belonging to individuals because of their United States citizenship. The early construction of article IV in Corfield v. Coryell became the foundation of an argument that all American citizens had fundamental rights that states could not violate. Further, Corfield was relied on in defense of the Civil Rights Act and the fourteenth amendment. There is also no doubt that John Bingham held this view of article IV and purposely drafted the privileges or immunities clause to link it to article IV. In short, there is no room for doubt that the link between article IV and section 1, rejected by Justice Miller, was specifically intended by the draftsman. Moreover it is clear that this link comports with the known purposes of section 1 and that Miller’s interpretation finds absolutely no support in the legislative history of the provision. Justice Miller’s opinion demonstrates that textualism unaided by context may easily produce more confusion than the search for meaningful evidence of intended meaning.

It is consistent with the thesis that the text alone is not sufficient to conclude the issue that Thomas M. Cooley, a textualist and well-

60. Slaughter-House, 83 U.S. (16 Wall.) at 81 (Miller’s treatment of the equal protection clause). As to protecting civil rights as being central, at least in the legislative debates, see R. BERGER, supra note 40, at 22–23.

61. Given that in reality Bingham thought that the Congress lacked enforcement powers as to article IV rights, see supra note 48, it would not have been inconceivable that similar apprehensions were held as to other sorts of rights.

62. J. ELY, supra note 5, at 22.

63. U.S. CONST. art. IV was explicitly invoked by Senators Trumbull, CONG. GLOBE, 39 Cong., 1st Sess. 600 (1866), and Howard, id. at 2765, and the Civil Rights Bill’s house sponsor, Congressman James Wilson, id. at 1118.

64. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

65. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 STAN. L. REV. 5, 10, 17 (1949).

66. See supra notes 51–56 and accompanying text.

67. Even Justice Miller’s reliance on the first sentence of section 1 is rebutted by the legislative history: The clause was added to the amendment during floor debate and did not influence its drafting at all. See R. BERGER, supra note 40, at 434.
known constitutional commentator of the period, reached essentially
the same conclusion as to the meaning of the clause as did Justice
Miller in The Slaughter-House Cases. In his supplement to the
fourth edition of Story's Commentaries on the Constitution, Cooley
insisted that "privileges which pertain to citizenship under the general
government are as different in their nature from those which belong to
citizenship in a State as the functions of the one are different from
those of the other." Charles Fairman, one of our most distinguished
scholars on the history of the fourteenth amendment, has concluded
that there is a strong relationship between Cooley's textualism and this
"product of an eminently respectable mind, free from any captivation
of fancy."

No doubt, Miller and Cooley were also animated by their own
sense of the purpose of the fourteenth amendment, particularly as they
saw the potential mischief that the article IV reading could work. Underlying policy concerns undoubtedly influenced each author's resolu-
tion of the ambiguity that clearly was present if one was willing to see it. On the other hand, Miller's constructions of article IV and
Corfield reflected more painstaking attention to these legal texts than
to the thrust of the legislative history, which Miller must have viewed
somewhat skeptically. Nonetheless, even if Cooley and Miller simply

68. VI C. FAIRMAN, supra note 38, at 1370.
70. Id. at 1368–69 (quoting T. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS
(1868)).
71. Id. at 1370. Fairman also stated:
[For Cooley a] constitution derived its force from ratification: one should act on the supposi-
tion that those who ratified accepted the text "in the sense most obvious to the common
understanding;" in construing, one should not look "for any dark or abstruse meaning;" he
cautions against giving "a controlling force" to remarks of the debates of its framers,
especially where to do so would give a meaning different from what the words would "most
naturally and obviously convey." It is not surprising that when a mind so organized read
the Fourteenth Amendment—and saw that two citizenships were identified, and that then a
 provision was made for the privileges of United States citizenship—the conclusion was that
the privileges incident to State citizenship were not included.
Id. at 1369 (footnote omitted).
72. Id. at 1354, 1368.
73. 6 F. Cas. at 551.
74. This caste of mind, of course, was not Justice Miller's alone. Only one brief filed in the
case referred to the "legislative history" of the amendment. VI C. FAIRMAN, supra note 38, at
1348–49. Yet closer attention to context could have also allayed at least the most extreme fears
held by Justice Miller. Miller's claim that the contrary reading would give Congress power to
define all the basic civil rights in the first instance is supported by neither text nor history. When
section 5 (and its history) is read in conjunction with section 1, it seems clear that the states were
to retain sovereignty over basic rights subject to an essentially exclusive judicial responsibility to
determine under what circumstances the protected privileges had been "abridge[d]." See, e.g., R.
BERGER, supra note 40, at 46–47; Berger, supra note 4, at 183–92.
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construed the text consistently with biases antithetical to the purposes of the fourteenth amendment, the text alone is insufficient to establish the point.

One might question how significant these conclusions are, particularly given the remaining controversy over the proper construction of the privileges or immunities clause. Apart from the historical impact of the construction of section 1 in *The Slaughter-House Cases*, the practical implication of modern skepticism about the search for intended meaning is that the application of many provisions is reduced to a debate about “constitutional policy”: should we construe the clause broadly so as to maximize the protection given to individuals against the State, or are we more properly concerned about the potential impact of a broader reading on our federal system or on the exercise of judicial power? Our most absolute skeptics about intent frequently seem quite confident that they have the best answers to these sorts of questions, perhaps better than any the Framers intended to embody in the text. For myself, I am much more certain that Justice Miller acted illegitimately in construing the clause contrary to the overwhelming evidence as to its intended meaning than I ever could be that his decision as to federalism and judicial power concerns was illegitimate as lacking judicial statesmanship. For those interested in preserving individual rights, the battle against original understanding could work in the long run to dislodge our commitment to abiding by the rights recognized in the text, properly read.

The privileges or immunities example demonstrates that, contrary

75. Virtually all of the commentators cited in supra notes 39-45 hold somewhat different readings of the clause. Significantly, however, the only one whose critique of the *Slaughter-House Cases* that even claimed it could stand on text alone was Crosskey’s. Crosskey, supra note 39, at 4-10. In fact, while Crosskey insists that we look for what the words would mean to “in the mouth of a normal speaker of English, using them in [those particular] circumstances in which they [in fact] were used,” *id.* at 4 (quoting *Holmes, Collected Legal Papers* (1921)), rather than for what the Framers meant to say, he draws from an extensive range of background law and other extrinsic evidence to establish “the meaning and purpose” of the provision. *Id.* One cannot read these pages on the “plain meaning” of the clause without concluding that Crosskey’s analysis was deeply influenced by his familiarity with the rest of the statute’s context, including the legislative history.

76. The Court’s efforts not only dismantled the Framers’ privileges or immunities clause, they also skewed interpretation of the other principal clauses of section 1. The substantive nature of the privileges or immunities clause cuts sharply against the doctrine of substantive due process—a construction with shaky textual and historical roots. See, e.g., J. Ely, supra note 5, at 14-21. Moreover, with the equal protection clause pressed into service to ensure the protection of basic civil rights against hostile legislation, it became virtually inconceivable that the Court would consider whether that clause was more properly read as being limited to ensuring that all citizens actually received the “protection” promised them by state law. Currie, supra note 45, at 354; Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

77. Prominent examples are Perry, supra note 7; Simon, supra note 1.
to virtually all the skeptical writings on original intent, such questions
are not all of the same order of magnitude. Particularly where basic
questions as to the essential thrust of a provision are presented by an
ambiguous text, the possibilities for discovering a determinative intent
seem quite genuine. Clearly, such issues can have significant implica-
tions for constitutional interpretation purposes. For example, it is al-
most certain and of great importance that article I's grant to Congress
of the power "[t]o declare War"78 means, when read in context, that
Congress holds the exclusive power to change the status of the nation
from peace to war in order to advance the foreign policy objectives of
the nation, as opposed to defending against sudden attack.79 Of great
consequence (at one time) for individuals, Justice Marshall's limiting
construction of the bill of rights in Barron v. Baltimore,80 was probably
the correct resolution of the ambiguity of the text in light of the total
context.

These issues do not raise the same problems for interpretation as
are presented by generally worded, vague constitutional provisions like
the free speech clause, the ban on cruel and unusual punishments, or

78. U.S. Const. art. I, § 8, cl. 11.

79. For the best summary of the alternative possible readings of the war clause and the
evidence for the reading described in text, see Van Alstyne, Congress, the President, and the
F. Wormuth & E. Firmage, To Chain the Dog of War: The War Power of Congress in
History and Law (1986). The fact that it took well into the twentieth century before any Presi-
dent ever claimed an independent war power as the commander in chief, and that judicial deci-
sions throughout the years have confirmed the above reading, indicates that the weight of extrinsic
evidence places the issue above the level of uncertainty. Interestingly, David Richards, a scholar
known for his forceful criticism of "originalism" generally, has acknowledged that the weight of
text, context, and history makes a compelling case that Congress has in recent decades abdicated
its constitutional power and duty over war. Richards, supra note 25, at 519.

Most curiously, however, there are some who generally do not feel compelled by historical
evidence of intended meaning, yet who have adopted the essential thrust of this view without
offering a word of justification beyond the evidence of historical intent and traditional understand-
ing. See e.g., L. Tribe, supra note 44, at 172–81. If the need for a living constitution is as
profound as Tribe has suggested, L. Tribe, American Constitutional Law 2 (1979 Supp.), one
wonders why thoughtful arguments about the need for executive dispatch and secrecy in our mod-
ern world are referred to only in connection with somewhat less central issues as to the precise
scope of the President's concededly somewhat vague power to repel sudden attacks, particularly in
view of the long history of executive military actions.

The lesson is that once again it is much clearer what the text requires, in light of original
context and confirming history, than what modern conditions require of constitutional "states-
men." Compare Fulbright, American Foreign Policy in the 20th Century Under an 18th-Century
Constitution, 47 Cornell L.Q. 1 (1961) (expressing his early view that Presidents must have full
responsibility for military decisions in a shrinking world; and questioning whether we can afford
the luxury of 18th-Century procedures), with F. Wormuth & E. Firmage, supra, at 267–77
(arguing that need for deliberation and consensus is even greater in the nuclear age with so much
at stake).

80. 32 U.S. (7 Pet.) 243 (1833).
the equal protection clause, as traditionally construed. While there is no guarantee that all such problems of equivocation can be clearly resolved, there is usually little doubt that evidence of original intent is relevant and, if sufficiently clear, likely to be dispositive. With this much established, I turn to some fairly abbreviated comments on the problems raised by general and vague texts.

III. REFLECTIONS ON THE IDEA OF A LIVING CONSTITUTION

There is a conventional wisdom that the Constitution is *sui generis* and requires an entirely different interpretive method than a statute. Frequently, this view is summarized with the metaphor of the "living Constitution," or by reference to Justice Marshall's famous reminder "that it is a constitution we are expounding." 81 It is not easy to separate the senses in which these ways of speaking tell us something accurate and important, and the point at which they become dangerously misleading. For one thing, while the Constitution is obviously not a code, it unquestionably contains provisions that are as specific and unambiguous as those found in any statute. 82 If the notion of a living Constitution is to be applied to these provisions, then there is truly no written Constitution, because it has been turned it into a blank check. As we have seen, a number of questions presented by ambiguous and somewhat vague texts can be resolved with the aid of original context; to ignore what that context tells us is quite simply to amend the Constitution by construction—something that Marshall would not have countenanced.

Occasionally, even thoughtful scholars have suggested that the Constitution must change in meaning to confront technological changes—such as privacy invasions through electronic eavesdropping—that the Framers could not possibly foresee. 83 While our changing world can create difficult choices for constitutional interpreters, 84 many such examples, including new methods of invading privacy, can readily be seen as falling within the original meaning and intent of

83. Tribe, On Our Constitution, Meese Is True Radical, USA Today, Oct. 17, 1985, at 14A, col. 5 ("Madison didn't even have a telephone; why try to imagine how he would feel about wiretapping?")
84. See, e.g., Sandalow, supra note 4, at 1048–49 (commenting that changing conditions in the national economy made it virtually impossible to remain true both to the Framers' intentions to enable Congress to regulate commerce that affected more states than one, as well as to leave the bulk of economic activity outside the scope of federal regulatory power).
relevant provisions. No one has doubted that Congress' power to regulate commerce includes—and was intended to include—not only commercial shipping, but railroads and air transportation as well, although neither existed in 1787. Lon Fuller long ago pointed out that a more limiting approach to "original meaning" reflected the conceptual confusion involved in the assumption that we think in particulars rather than in general concepts—a view that he called "the pointer theory of meaning." To insist that electronically stored data receives no protection under the fourth amendment because the Framers did not know of it would make as much sense as contending that a 1920 statute dealing with "motor cars" could not be read as covering Volkswagens. But that is not how we use language.

Nor does it require a special theory of constitutional interpretation to acknowledge that the meaning of constitutional provisions are not necessarily circumscribed by the immediate purposes of the Framers. Experts on language and statutory interpretation have long recognized that meaning can outstrip intent, for "[a]n author inevitably encompasses in what he says more than he has specifically in mind and often encompasses even more than he has generally in mind." Even so, Professor Dickerson has observed that in many instances "the limiting force of context" can guide courts to recognizing boundaries to the meaning of statutory terms. Thus, courts have frequently found tacit assumptions that serve to limit the general language of a statute. A classic example in constitutional law is Justice Marshall's discussion of marriage "contracts" as being beyond the scope of article 1's contract clause. While application of this principle is not always clear, "the fact that the court can do little more than balance reasonable probabilities, does not invalidate the basic principle;" nor does it preclude that one judgment may rest on a more persuasive treatment of the relevant data than another even though we lack an instrument with which to measure precisely.

87. R. Dickerson, supra note 8, at 129.
88. Id. at 23-24; see also A. Ayer, Language, Truth and Logic 86 (2d ed. 1946); J. Kohler, Judicial Interpretation of Enacted Law, in Science of Legal Method 187, 188 (1921).
89. R. Dickerson, supra note 8, at 80.
90. Id.
91. Id. at 198-200.
93. R. Dickerson, supra note 8, at 200.
94. An example is the current debate over article III's broadly worded exceptions clause. U.S. Const. art. III, § 2, cl. 2. It appears that Gerald Gunther is correct that jurists lack the basis
Finally, there may be constitutional provisions that are sufficiently vague and general as to require supplementation and whose meaning can hardly be equated with the expectations held for them.\textsuperscript{96} This problem, too, is not unique to constitutional construction, as modern antitrust legislation demonstrates,\textsuperscript{96} although the constitutional setting, with its premise that the Constitution is intended to endure for the ages and is not lightly to be amended, may well reinforce the inference that general and vague terms were used intentionally. These clauses require constitutional decision-makers, and in particular courts, to develop the provision's contours. This is not to imply that such provisions are meaningless; but one implication is that the language, even read in relevant context, cannot resolve a large number of contemporary issues.\textsuperscript{97} In such cases, the notion that original intent provides us with the meaning of the provision is largely misconceived, and the result is that we inevitably have a living constitution (at least to some extent).

Even so, two further points must be emphasized. The first is that the living Constitution metaphor can easily become so intoxicating as to blind commentators to occasions in which meaning is ascertainable. For example, the due process clause is simply not terribly vague or "open-textured," despite claims to the contrary.\textsuperscript{98} John Ely has argued that the text is manifestly opposed to the substantive reading of the clause that undergirds the right of privacy.\textsuperscript{99} While his textual point seems quite sound, Laurence Tribe has responded that Ely's focus on the term "due process" has failed to recognize that the textual point of departure for the doctrine is the explication of the concept of "law" that is required prior to substantive deprivations.\textsuperscript{100} Tribe also stresses that the doctrine incorporates theories about separation of powers and individual expectations at common law.\textsuperscript{101}

While Tribe's argument is intriguing, it establishes at most an apparent ambiguity that is more plausibly resolved in favor of Ely's construction. For one thing, given the described construction of "law," an

\textsuperscript{95} For a brief treatment, see McAfee, \textit{supra} note 4, at 268–71.
\textsuperscript{96} R. Dickerson, \textit{supra} note 8, at 240.
\textsuperscript{97} Schauer, \textit{supra} note 14, at 801, 806–07.
\textsuperscript{98} \textit{E.g.}, Richards, \textit{supra} note 25, at 546.
\textsuperscript{99} J. Ely, \textit{supra} note 5, at 18–19.
\textsuperscript{100} Tribe, \textit{The Puzzling Persistence of Process-Based Constitutional Theories}, 89 \textit{Yale L.J.} 1063, 1066 n.9 (1980).
\textsuperscript{101} \textit{Id.}
individual does not even need a substantive due process doctrine to invalidate the attempted deprivation. Instead, the individual could use her procedural due process right (that which all agree is the core protection) and persuade the court on the merits of the action that no applicable "law" authorized or justified the challenged deprivation. A related point is Corwin's historical thesis, as yet unchallenged, that substantive due process grew out of an effort to domesticate the vested-rights doctrine that was rooted in natural law.102 In general, the historical evidence supports the thesis that substantive due process was a judicial invention that informally amended the meaning of the text.103 Perhaps this evidence can be refuted, but it is noteworthy that while Tribe supports his readings of the privileges or immunities clause and congressional war power with evidence as to their intended meaning, he is content with a bare conclusion that the substantive due process doctrine has plausible textual and doctrinal underpinnings. Even Justice Miller's construction of the privileges or immunities clause relied on a plausible reading of the text and appropriate doctrinal concerns about federalism and the scope of judicial power.

Even if we were persuaded by the argument for a substantive reading of the due process clause, no one has made the case for how the underlying logic leads to the judicial creation of specially-protected fundamental rights as a matter of due process of law. The classic hypothetical in support of substantive content for the due process clause is the law that simply transfers A's property to B without any attempted justification.104 While the move is problematic, it is perhaps not completely farfetched to argue that such a law is the equivalent of an executive seizure without any legal basis and is properly viewed as a simple attempt to bypass adjudicatory procedures that must precede deprivations of property.105

The next step is to move from the "A to B" hypothetical to recognizing a judicial duty to look behind asserted justifications for enacted rules to determine whether they are so arbitrary as to amount in substance to a similar evasion of the right to adjudication. A subtle, but important, shift has already occurred in the recognition of a requirement that applicable rules rest on an adequate public purpose. This move is questionable in its assumption that legislative determinations

105. This theory of due process rests, as Professor Tribe observes, on a view of separation of powers that assumes that legislatures must act through general enactments rather than by a process that essentially substitutes for the individualized treatment involved in adjudication.
do not resolve the question, but that courts are intended to play a special role in scrutinizing laws to determine whether they are sufficiently connected to a public purpose. But however dubious the move to the rationality test is historically, it can at least be linked (however tenuously) to the initial concern that some substantive "rules" or "laws" might be characterized as mere shams that in effect bypass adjudicatory safeguards.

On the other hand, when courts take the final step of purporting to determine that some rights are so "fundamental" that a weighty justification (rather than lack of arbitrariness) is required before such rights may be adversely affected, the logical link to preserving the right to adjudication has dropped out altogether. The problem with the "fundamental rights" due process doctrine is not merely that it creates implied rights, but that it does so by reference to a text (and a theory of the text) that does nothing through its terms to create the ability to trump other public interests that fundamental rights are deemed to have.

The second point to emphasize is that even when clauses are found that fit the description of vague, open-textured provisions, there remains the issue as to the meaning to be ascribed to them. This issue is what constitutional scholar Reed Dickerson refers to as the creative function. Yet simply because constitutional language, read in context, is not dispositive, it does not follow that the Supreme Court is free to go directly to moral theory or societal consensus to supplement the provision's meaning.

In the analogous field of statutory interpretation, it is usually

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106. The text speaks to the cogency of the rationale for the rational basis test in substantive due process cases. The application of the same test under the equal protection clause would be a quite separate issue.

107. The theory that substantive due process can yield specially-weighted individual rights that are capable of trumping otherwise valid public purposes for legislation is illustrated in the modern Court's treatment of first amendment rights applied through the fourteenth amendment as well as its development of the right of privacy since the mid-1960's. While critics of substantive due process have voiced disapproval of this tendency to give "cherished status" to certain rights or interests, their focus has tended to be on the implications of such doctrine for the role of courts in a democratic system. See, e.g., G. GUNThER, CONSTITUTIONAL LAW 458 (11th ed. 1985).

The point here is that the move to recognizing fundamental rights by means of the due process clause is not even plausibly linked to that test, quite apart from whether any substantive reading of it can be justified. Whether these developments might be justified on the basis of other theories—incorporation theory, ninth amendment analysis, the privileges or immunities clause, stare decisis—is another question.

108. R. Dickerson, supra note 8, at 238.

109. For varying approaches as to the role of courts in performing this role, see M. Perry, supra note 85; Moral Reasoning, supra note 5; Easterbrook, Legal Interpretation and the Power of the Judiciary, 7 Harv. J. L. & Pub. Pol. 87 (1984); Brest, Who Decides, 58 S. Cal. L. Rev. 661 (1985).
thought that the court should create a rule that is at least not inconsistent with what extrinsic evidence reliably shows were the purposes and intentions of the legislature.\footnote{110} Lacking any such clear evidence, courts are thought to have a duty to make their decision cohere with what is already settled by the legal order.\footnote{111} It seems clear that even if these basic assumptions were transferred to the constitutional arena, the debate over basic values would to some extent remain simply because the history is frequently quite unclear and the vague text invites consideration of whether contemporary problems are sufficiently like those confronting the Framers to warrant their inclusion within the scope of the provision.

The larger issue is whether we ought to seek authoritative guidance from the reasonably knowable intentions and purposes of the Framers in these circumstances. This question presents a fertile ground for debate and may well require resort to political and institutional theory. Such a debate will include discussion of the nature of our constitutional system and the appropriate role of courts. Many contend that changing conditions and moral conceptions make it appropriate and inevitable that we will basically "go it alone" in filling out the meaning of the Constitution's open-textured provisions, with due regard for continuity and the lessons of history.\footnote{112} There is certainly reason to doubt whether we ought to feel compelled by the "original understanding" of broadly worded provisions to the extent that it appears that the relevant individuals were essentially involved in the same process we are now, namely imputing meaning to the instrument by attempting to determine the appropriate implications of the principle being invoked.\footnote{113}

There are, on the other hand, valid concerns as to whether untethered creativity in developing the potentially open-ended constitutional principles suggested by some texts does justice to the Constitution or would lead to the optimum balance of decision-making power in our democratic society. Such open-ended power is especially troubling for those of us who are inclined to believe that, however ill-defined the scope of the provisions in question are, no one set out to issue the judiciary a totally blank check.\footnote{114} Dean Sandalow has suggested that judges are clearly institutionally and professionally suited to protect in-

\footnote{110}{R. Dickerson, supra note 8, at 243, 246–47.}
\footnote{111}{Id. at 247. For theories of interpretation that begin with this general sort of duty as its initial premise, see R. Dworkin, supra note 7, at 119–80; Richards, supra note 68.}
\footnote{112}{See Sandalow, supra note 4.}
\footnote{113}{A good example is Madison's flip-flop on the constitutionality of legislative prayer. See Marsh v. Chambers, 463 U.S. 783, 795 (1983) (Brennan, J., dissenting). It is difficult to believe his original position represented a view of the "meaning" of the establishment clause so much as a position on the appropriate scope and application of a principle whose contours awaited defining.}
\footnote{114}{A good summary is Monaghan, supra note 1.}
individuals and minority groups by dispassionately applying law despite competing pressures, that it is much less clear that they are specially suited to discern or generate society’s fundamental values.115 These are issues to be pursued elsewhere. For present purposes, the matter of greatest concern to me is that the expansive doctrine of judicial creativity, and the arguments used to support it, seem to be having an acid-like effect on the fundamental duty of courts to seek first to ascertain the meaning of the text, with the aid of relevant context, before turning to any creative function at all. To do that is to make a nullity of a binding legal document.
