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Original Intent and the Reagan Court: A New Approach to the Madisonian Dilemma?

Deborah Nelson Snow
Western Michigan University

ORIGINAL INTENT AND THE REAGAN COURT: A NEW APPROACH TO THE MADISONIAN DILEMMA?

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Deborah Nelson Snow

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Deborah Nelson Snow, M.A.

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During the Reagan years, a demand was heard for a change in the way in which the Supreme Court decides cases. Answering the call for a "jurisprudence of original intention," scholars, politicians, judges, and justices debated the use of this constitutional theory. In a review of cases decided under the religion clauses of the First Amendment in the years between 1960 and 1988, the opinions of Reagan and non-Reagan appointees to the Supreme Court are analyzed to determine the use of references to original intent by the justices. In particular, the problem raised by Bork and labeled "the Madisonian dilemma" is examined to discover the relationship between references to original intent and opinions supporting or striking down legislative enactments. There is a slight difference in the number of references by the two groups of justices, but the difference is significant when it come to striking down legislative enactments.

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CHAPTER I

INTRODUCTION

In July of 1985, Edwin Meese III, Attorney General of the United States, spoke before the American Bar Association. In that speech, Meese advised the Supreme Court to "abandon decisions based on its views of sound public policy" (p. 9) and turn instead to a jurisprudence which, "when aimed at the explication of original intention, would produce defensible principles of government that would not be tainted by ideological predilection" (p. 9). Meese's call was answered by others. Former U.S. Appellate Court Judge Robert Bork argued that "judges who do not construe the Constitution in accordance with the original intent of its Framers will, in truth, be enforcing their own morality upon the rest of us and calling it the Constitution" (1986, p. 26). William H. Rehnquist, now Chief Justice of the Supreme Court, as well as other political and judicial commentators, took up the demand for this "Jurisprudence of Original Intention."

The flurry of attention from the popular press which resulted from the Meese speech had been preceded by earlier, though less publicized efforts, both to limit the jurisdiction of the judiciary and to narrow its range of choice in the decision-making process. According to Kammen (1987), President Reagan's first Attorney General, William French Smith, had "charged the courts with 'substituting judicial judgment for legislative judgment'." Smith warned the American Bar Association in 1982 that the time had come for judges to terminate the practice of political policy-making" (Kammen, p. 392). On the legislative side, attempts were made by Senators Helms and Hatch and Representatives Crane and Ashbrook to "remove or reduce the Court's constitutional authority over certain volatile subjects: among them prayer in the schools, abortion, and school busing" (Kammen, 1987, p. 393). In 1977, Berger, a frequently quoted originalist scholar, pointed to the fact that "current indifference to the meaning attached by the framers to the words they employed in the Constitution and its Amendments is a relatively recent phenomenon" (p. 363). As Berger wrote, the question is one of value choice. "If the Court may

substitute its own meaning for that of the Framers, it may, as Story cautioned, rewrite the Constitution without limit" (p. 363).

Reliance on the intentions of those who wrote and ratified the Constitution and its amendments has been a topic for discussion in law schools and journals for years. In 1938 and 1939, tenBroek wrote a series of five articles in which he explored the use of extrinsic aids in constitutional construction. In his final article, tenBroek commented:

> Whenever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretation, it has insisted, with almost uninterrupted regularity, that the end object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it. (1939b, p. 399)

According to Levy in Original Intent and the Framers' Constitution (1988), "the term 'original intent' [or 'original intention'] stands for an old idea that the Court should interpret the Constitution according to the understanding of it by its Framers" (p. x). Levy went on to examine the Meese, Bork, and Rehnquist version as he wrote: "Until recently, original

intent had no political coloration. Both liberals and conservatives, especially among judges, have relied on original intent to add respectability to their opinions" (p. x). That political coloration, as Levy and many others believe, is what sets the new interpretation apart.

> Conservatives, political and judicial, have sought to preempt original intent as their exclusive bulwark and as the only proper foundation for constitutional interpretation. They give the impression that original intent analysis would legitimate their own constitutional views on controversial questions, and they ignore the extent to which original intent would undermine their own positions. Their assumption that the Supreme Court's versions of history are accurate seems naive. (p. xiii)

The idea of looking for guidance from the framers of the Constitution, then, is nothing new; however, the interpretation of original intent demanded by Meese and the others differs from the older versions. The question goes beyond that of judicial activism or judicial restraint: It is more ideological than that. The neo-conservatives, labeled the "New Right" by Macedo (1987),

> invoke "original intentions" in order to evade the only intentions that really count: the purposes embodied in the Constitution itself. The New Right's narrow interpretation of individual rights is supported not by the

> Constitution but by an ideology of majoritarianism and moral skepticism that is deeply at odds with the Constitution. (p. 5)

Those who adhere to this conservative political philosophy, according to Dolbeare and Medcalf (1988), "feel that courts should observe traditional limits in the scope of their decisions: They should reject liberal efforts to involve them in social engineering. The image of 'the imperial judiciary', of judges deeply involved in implementing social change, invokes invective from many neoconservatives" (p. 135).

Were this interest in the fundamentals of judicial decision-making merely theoretical, confined to the journals and classrooms of the nation's law schools, there might be little cause for public concern. That, however, is not the case. As President, Reagan made more appointments to the federal bench than any other chief executive. As of October, 1988, eight years after he promised to change the shape of the federal judiciary, fifty percent of the nation's lower court judges, 377 of 752, were his appointees (Epstein, 1988, editorial page). "Analysts generally agree that President Reagan's appointees have been named on an ideologically consistent

basis--more so than the appointees of any President since Franklin Roosevelt," according to an article entitled, "Reagan appointees and continuity in the Supreme Court," in Taylor's World of Politics (1988, p. 12). As a close friend and advisor to Reagan for many years, Meese's influence with the president extended to advice about the selection of members of the court. Public pronouncements by Meese in regard to the way in which the high Court should reach decisions give rise to questions about the views of justices whose appointments he endorsed. Markman, until recently Assistant Attorney General of the United States, took part in "Dialogue" for The Center Magazine in 1986. He commented on the judicial selection process.

> Regarding the judicial selection process, that is not a perfect process. We make mistakes. We have selected people whom we possibly should not have selected. In his first year of office, the Attorney General [Meese] made approximately seventy-five appointments to the bench. Since Ronald Reagan became President, we have made about 260 appointments. I don't think any other Administration has paid as much attention, or has been as thorough in making its judicial selection as has the Reagan administration. Every individual undergoes seven or eight interviews, during which we ask them for their ideas of jurisprudence and their view of what the proper role of the judiciary is in our government. We do not ask candidates

> for their personal views on such issues as abortion or prayer in public schools. (see Allen et al. p. 4)

With George Bush in the White House, the selection process started by Reagan may well continue. In 1989, Kamen and Marcus commented: "By 1992, as many as three-quarters of the country's 752 federal trial and appeals court judges will owe their jobs to Reagan or Bush, if the new president is able to make appointments at the same rate as his predecessor. . . . The former president also moved the Supreme Court significantly to the right" (p. 31). Reagan's conservative coalition on the Supreme Court consists of Chief Justice Rehnquist, elevated by the president to that position, and Associate Justices Kennedy, O'Connor, and Scalia. Often they are joined by Justice White in forming a majority, as was evidence in June of 1989 when major civil rights decisions demonstrated the Court's swing to the right. In "Chipping away at civil rights," Time magazine reported (1989):

> The latest decisions signal a major shift from the court's more liberal days of the 1960s and early 1970s, when civil rights rulings regularly expanded the legal avenues available to minority and women plaintiffs. "This is the first time in 30 years that the court has a

> working five-member majority saying that the goal is color blindness and gender blindness, "observes conservative court expert Bruce Fein. The Reagan majority is carrying out this transformation not by frontally assaulting liberal precedents but by chipping at the edges of the civil rights edifice. (p. 63)

According to The Washington Post National Weekly Edition in June of 1989, Justice Stevens called the decision made by the majority in a job discrimination case which abandoned an earlier decision made in 1971 in Griggs V. Duke Power, "this latest sojourn into judicial activism. . . and accused the majority of perfunctorily dismissing not merely precedent but the probative value of evidence of a racially stratified work force" (An 18-year Misunderstanding, p. 26).

Activism or restraint? Meese, Bork, Rehnquist, and the others have repeatedly called for a less active judiciary. Is the Court "active" when it seeks the goals of the majority and "restrained" when it attempts to limit actions with which it disagrees? Where in the decision-making process does the concept of original intention fit? Instead of decades of decisions based on precedent, the originalists insist on a return to

reliance on certain bedrock constitutional principles, principles envisioned by the framers.

> On a whole host of issues--affirmative action, abortion, and school prayer, among others--the conservatives seek to rescind the standing law. But they want far more than alterations in mere policy; they want a fundamental transformation of the philosophy underlying these policies, so that such reforms are impossible in the future. Thus the movement conservatives are acting to discredit established canons of judicial interpretation. (Blumenthal, 1986, p. 3)

The justification of the originalists position and the criticisms of that judicial philosophy are the bases for this research project. After reviewing the literature written about the original intent controversy, an examination of opinions written by Supreme Court Justices in the years between 1960 and 1988 follows. The opinions were penned by the justices in all of the court decisions falling under the establishment and free exercise clauses of the First Amendment during that period.

Why religion? It is one of the areas frequently mentioned by the major actors among the originalists. In his speech to the American Bar Association in 1985, Meese devoted considerable time to his criticism of the Supreme Court. His comments centered on three areas: federalism,

criminal law, and freedom of religion. In his attack on what he called the Court's "jurisprudence of idiosyncrasy," the Attorney General signaled out four cases: Aguilar v. Felton (1985), Estate of Thornton v. Caldor, Inc. (1985), Wallace v. Jaffree (1985), and Grand Rapids School District v. Ball (1985). He went on to discuss the problems of incorporation of both the free exercise and establishment clauses in the Fourteenth Amendment. Meese quoted directly from Rehnquist's dissent in Wallace v. Jaffree (1985), claiming that the Court had been building upon a mistaken understanding of constitutional history (pp. 7-8).

Rehnquist's dissent in Jaffree is of interest. Levy (1986) stated that "he [Rehnquist] claimed that the establishment clause created no wall of separation between government and religion, not even between church and state. 'The establishment Clause', Rehnquist wrote, 'did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion'" (p. 92).

Levy also mentioned that in his radio address to the nation on August 24, 1985, President Reagan stated that "the good Lord who has given our country so much should never have been expelled from our nation's classrooms" (p. 156). An additional claim by Reagan was made in regard to the Constitutional Convention. In response to a reference to Franklin's speech on the reasons that prayer should open their sessions, Levy stated,"President Ronald Reagan, who sometimes reinvents history, mistakenly declared that as a result of Franklin's motion, 'from that day on they opened all the constitutional meetings with a prayer'" (1986, p. 64).

Graglia, who is professor of Constitutional Law at the University of Texas and one of the best known of the originalist scholars, included these words about the religion issue in a 1987 law school journal:

> The Court has not only disallowed state provisions for prayer in the public schools, it has also disallowed most forms of government aid to religious schools. It has invalidated most legal distinctions on the basis of sex, alienage, and legitimacy. In short, the Court has become our primary policy-making institution with respect to issues that determine the quality of life in a society. On every one of these difficult, controversial issues, the Court has adopted and furthered left-wing policy preferences, and in many

> cases, it has done so over the strong opposition of a majority of the American people. (p. 791)

In a speech made at Calvin College in Grand Rapids, Michigan, on April 20, 1989, Bork responded to a question about original intention and the establishment and free exercise clauses. He replied that the framers had in mind nothing as severe as the modern Court has produced. According to Bork, the idea of a wall between church and state is too rigid. "The Court has seized on the most extreme version of that letter by Jefferson," he claimed.

A final reason to select the religion category as the subject of inquiry can be found in Meese's "bizarre" comment, made in his speech to the Bar Association in 1985. This statement also has been attributed to the ex-Secretary of Education, William Bennett.

> The point, of course, is that the Establishment Clause of the First Amendment was designed to prohibit Congress from establishing a national church. The belief was that the Constitution should not allow Congress to designate a particular faith or sect as politically above the rest. But to have argued, as is popular today, that the Amendment demands a strict neutrality between religion and irreligion would have struck the founding generation as bizarre. The purpose was to prohibit religious tyranny, not to undermine religion generally. (pp. 8-9)

Originalist, interpretivist, intentionalist, or, when used in conjunction with religion, non-preferentialist: All of these terms are used to describe those people who ascribe to the theory that, according to Levy (1988), "the courts should stay as closely as possible to the text of the Constitution, to original intent if ascertainable, to principles and purposes derived from the Constitution, to history, and probably to precedents and conventional rules of construction." (p. xv)

In the forward to the compilation of speeches by Meese, Bork, Brennan, Stevens, and Reagan, entitled, The Great Debate (1987), the Federalist Society's editor, P. Cassell, called the topic of original intent, "the most significant constitutional issue facing this country today" (p. vii). The question of the interpretation of the Constitution is as important today as it was in 1941 when Justice Robert Jackson wrote: "Nearly every significant decision of the Supreme Court has to do with power--power of government, power of officials--and hence, it is always concerned with the social and economic interest involved in the allocation, denial, or

recognition of power" (p. xii). The Reagan appointees to the Supreme Court, in the words of Schwartz (1987), may well "turn the clock back a half century and more in such matters as abortion, church-state separation, civil rights, criminal law and capital punishment, free speech and press, environmental and safety regulation, and a competitive economy" (p. xvii).

The two building blocks for the Reagan Court are judicial restraint and original intent. Schwartz claims that "both of these fundamental principles are often invoked by Chief Justice Rehnquist and Justice Scalia" (1987, p. xvii). As Markman pointed out in "Dialogue" (1986), it is the practice of those who screen potential judges and justices to inquire into their judicial philosophy. In addition, the confirmation process in the Senate normally includes questions about the system of judicial decision-making favored by the nominee. In 1983, Tushnet described that process.

> A ritual is enacted whenever a nominee for a federal judgeship appears before the Senate Judiciary Committee as part of the confirmation process. One Senator will ask, "Do you intend to apply the law rather than make it"? Another will ask, "Will you apply the words of the Constitution in the way that the framers intended"? Nominees, some of whom ought to

> know better, play their part in the ritual by answering "Yes" to both questions. . . . The Senators' questions evoke the two leading modern constitutional theories: neutral principles and interpretivism. (pp. 781-782)

A review of the literature relating to interpretivism, or the concept of original intention, will produce a more detailed investigation into the following points:

1. Where does this method belong in the history of judicial decision-making?

2. Why is a jurisprudence of original intention the preferred method for some of today's judges and scholars?

3. Whose intent is to govern, and how does one determine that intent?

4. What constitutes evidence of intent, and how do abstract and concrete intent differ?

5. What methods should originalists use, and are there rules for originalist interpretation?

6. What are the major criticisms of the originalist school?

The first section of the review of selected literature contains an historical overview of the judicial decision-making process.

CHAPTER II

REVIEW OF THE SELECTED LITERATURE

An Historical Overview

The agenda of the Supreme Court has changed over the two hundred years since the Judiciary Act of 1789 set up the federal court system. In that statute, the Court was given power to hear cases brought from both the lower federal courts and the state high courts. The power of judicial review, not being explicitly granted by the Constitution, was not established until 1803 in Marbury v. Madison, and the Court was a relatively unimportant institution in its early years.

In its first decade, according to a study of the Supreme Court by Baum in 1985, of the approximately fifty cases decided, only a few were of any significance.

> The rise in the Court's fortunes following this early period was directed by John Marshall, chief justice from 1801 and 1835. . . . He used his dominance to advance the policies that he favored as well as the position of the Court itself. (p. 19)

Marshall's contribution was his support of a strong national government. He believed in restricting the power of the states if and when they interfered with the national government, especially in instances relating to commerce.

Following the Marshall years, Chief Justice Taney's Court was, according to Baum, less favorable to the national government; however, the direction set by Marshall was not altered significantly.

As Baum described it in 1985,

> In the first two decades after the Civil War, the Court was faced with several issues arising out of that conflict. . . . Gradually, however, the Court turned its attention primarily to issues of government authority to regulate private economic behavior. . . . Early in this period, the Supreme Court's position on government authority to regulate business was quite mixed. But the Court increasingly became unfriendly to regulatory policies. That position was reflected in the development of constitutional doctrines that limited government powers to control business activities. (p. 20)

The period of the New Deal brought change to the Court. Following the decisions striking down New Deal legislation, the Court-packing proposal and the resignation of conservative justices resulted in a more liberal outlook. Although the Court still accepted cases

having to do with economic regulation, Baum claimed that its emphasis had changed.

> Its emphasis in the current era is on civil liberties. More precisely, the Court has focused primarily upon the interpretation of constitutional guarantees of protection for freedom of expression and freedom of religion, for the procedural rights of criminal defendants and other persons, and for equal treatment of racial minorities and other disadvantaged groups by the government. (1985, p. 21)

Baum (1985) traced the changes in the Court's agenda over the years of the Warren and Burger Courts, noting support for civil liberties during the Warren years and the activism of that Court which began to change with the appointment of more conservative justices by Nixon and Reagan. Instead of the major changes expected by some commentators, however, "the Court became less uniform and less predictable in its tendencies" (p. 23). Baum predicted that the presidential election of 1984 might well result in a tilt in the balance of the court, and it is obvious that this prediction is the present reality.

In Spaeth's Supreme Court Policy Making, written in 1979, the author paraphrased Mr. Dooley's well-known words: "No matter whether th' constitution follows th'

flag or not, th' supreme coort follows th' iliction returns." (Bartlett, 1968, p. 890). Spaeth investigated the proposition "that the Court adjusts its policy making to conform with the objectives of the governing coalition," and he insisted that the "Framers never intended any part of the governmental system to be purely representative, least of all the federal judiciary" (p. 87). In his chapter entitled, "The Representative Character of the Supreme Court," Spaeth looked at the problem of whether or not the Court has "addressed the major controversies that have convulsed American society" (p. 87). The four Courts he picked for study were those of the Roosevelt era, and the Warren, Burger, and Taney Courts. Spaeth commented on the importance of the Roosevelt era.

> Undoubtedly the most frequently cited instance of judicial resistance to public opinion is Franklin D. Roosevelt's Court-packing proposal of 1937, which produced the "switch in time that saved nine". . . . the Four Horsemen and Roberts were clearly out of step with the general public. . . . The fact that the Court locked horns with the Roosevelt Administration made it unrepresentative in one sense: it refused to knuckle under, to place its seal of approval on the New Deal. It did, however, address the issue; it neither ignored it, nor passed the buck to other decision makers. The Court, at least, was responsive, even though it

> played a tune discordant to the ears of FDR and his supporters. (p. 89)

Spaeth's (1979) section on the Warren Court began with an over-view of the conservative/liberal make-up of that bench in the late 1950s. "All in all," he wrote, "the Court of the late 1950s was not out of sync with society at large. His Cherubic Majesty, Dwight D. Eisenhower, presided over a placid people and a quiescent government--but not for long" (p. 91). Spaeth saw 1962 as the turning point. "For the first time in history, the Court had a pro-freedom majority. A constitutional revolution, on a par with that of the late 1930s, was at hand" (p. 91). When President Johnson took office on his own in 1964, the liberal tide was pushed to flood stage. The liberals reigned supreme, especially between 1967 and 1969. Then Fortas resigned, the Chief Justice retired, and only three liberals remained. With Nixon in office, there was little chance that their numbers would increase.

With Burger as Chief, Powell and Rehnquist on the bench, and Blackmun occupying Fortas's seat, Spaeth (1979) wrote that "four persons espoused a value system that reflected that of their nominator" (p. 92). He

found that this "rapid shift in the Court's policy-making orientation arguably reflected public sensibilities reasonably well" (p. 93). When Nixon won the White House, his party did not gain control of Congress. Spaeth claimed that this division of control was reflected in the Court.

> The Liberal policies of the Warren Court have not been overturned; nor have they been expanded. Rather, the overall approach of the Burger Court is best described as moderation, or moderate conservatism. But the moderation does not result from refusal to decide the policy issues of the day [with one exception: it declined to decide on the constitutionality of the Vietnam War]. No more than its predecessors does the Burger Court shirk responsibility. (p. 93)

In writing about the Taney Court, Spaeth (1979) claimed that it, too, was responsive to public opinion. He saw that Court as one whose justices shared value systems with the vast majority of their fellow citizens.

> The major issues are interrelated and reveal a rather consistent pattern of voting: . . . Nationalistic tendencies, coupled with support for business and vested property rights, as opposed to a states' rights, antibusiness, and anti-special privilege stance. . . . Again, what is significant is that the Justices addressed themselves to resolution of the major issues that confronted society, and that they did so then, as the Justices do now, on the basis of value systems that were inherent in

> the culture, traditions, and society of which they were a part. (pp. 94-95)

Spaeth (1979) closed this section of his book by making a claim that judges are "America's professional decision makers" (p. 95). Since the two supposedly representative branches of government are often unable to cooperate and work together to make decisions, the judges will usually do so. Decision-making is their job.

Cox's The Court and the Constitution (1987) included a section in which the author discussed the background to the reasoning process by which decisions are made by independent judges.

> When the proper application of the words of the Constitution is plain, it is the Court's duty to give effect to the words. When the meaning of the words is uncertain--for example, when the Court comes to particularize the meaning of our federalism or to apply such majestic ideals as "freedom of speech," "due process of law," and "the equal protection of the laws"--the words alone may not suffice. Then a reasoned search for the "intent" of the instrument becomes important; but as history demonstrates, "intent" is itself a slippery word as applied to unforeseen future conditions and the evidence of intent is often subject to conflicting interpretations. (p. 68)

In "The Constitution in the Twentieth Century", an article by Murphy (1987), the author described the history of the Court beginning in the 1890s, "when it had

imposed its will over that of the Congress and the state legislatures by maintaining that it was simply interpreting the document in an objective way--dispensing a kind of 'mechanical jurisprudence'" (p. 45). Murphy claimed that Congress countered by seizing the initiative in terms of positive government, and that President Theodore Roosevelt saw "the concept of law as a positive instrument for problem solving" (p. 44).

> The court of the first fifteen years of the twentieth century responded. In addition it rode out the crisis despite calls for such things as an end to judicial review, the recall of judicial decisions, and a broad drum beat of criticism of its reactionary orientation. And while one could hardly call the court of those years "activist", its members did react to calls for a new "sociological jurisprudence" and found ways to condone legislation that, in a previous period, had generally been struck down. (p. 46)

The Lochner decision of 1905 resulted in the charge, according to Murphy (1987), that the "justices were substituting their private preferences and private will for the rule of law, and they were also telling the people's representatives that they could not have the kind of laws that seemed humane to the majority" (p. 47). The subsequent ruling in 1917 that the Child Labor Law was unconstitutional also incensed many citizens. Murphy

wrote that "the popular will thus became a factor in constitutional matters, and the closer government came to people's lives, the more frequently such expressions were made" (p. 47). For those who preferred the Constitution and the Court to be above public opinion, this was a persistent problem. Others, however, were bothered by the Court's refusal to interfere with the expansion of federal authority during World War I, "even though critics charged that the government was engaging in socialistic policies and repressiveness in the area of free expression" (. 47)

The war ended, and in 1921, William Howard Taft became Chief Justice. Murphy (1987) wrote:

> Taft stated publicly that "the cornerstone of our civilization is the proper maintenance of the guarantees of the 14th and 5th amendments." Translated into non-legal terms this meant, for Taft, freeing men of property and talent from ill-guided restrictions on the creative use of that property. Specifically, this entailed legal undermining of dubious attempts at public regulation and other forms of social control passed into law by the whim of capricious, socially irresponsible majorities. (p. 48)

Murphy (1987) described the legal realism school's criticism of the way in which "the constitutional system was being interpreted," and then went on to discuss the

objections raised to the "Supreme Court majority's emphasis upon rigid formulas and the application of formal rules of law" (p. 48). Paralleling the criticism brought by today's originalists, the contention was then that "judges actually decided cases according to their own political and moral tastes and then chose an appropriate legal rule as a rationalization" (p. 49).

In his evaluation of the New Deal period, Murphy (1987) observed that conservatives, upset by Roosevelt's policies,

> obviously believed that the function of making principled decisions on matters of public policy lay wholly with the court, and they tended to argue publicly that that was not only the court's prerogative but also that once the court had acted, neither the president nor Congress should have the temerity to question it or the principles on which it based its rulings. Such a view entailed a deep bow in the direction of judicial activism and the belief that the court should be the primary agent to impose principled judgements on the people. (p. 49)

Not all were in agreement. Murphy described "Justice Harlan Fiske Stone, [who] exploded in his dissent in U.S. v. Butler (1936), saying that courts are not the only agencies of government that must be assumed to have

capacity to govern" (p. 50). Murphy called Justice Stone, "the architect of a new jurisprudence" (p. 53).

> As the 1930s progressed, Stone became increasingly concerned that the court was not playing a positive and constructive role in the society of that period. He had initially strongly resisted the use of social theory as a test for the effectiveness of judicial decisions. But he came to accept the idea that in declaring law, judges must envision the social evolutionary process. Theories of social justice play a part in determining how socially useful and existing legal document is. Thus Stone came to embrace the idea that currently held beliefs are a valid part of the evidence to be used in adjudication. Judges have a responsibility to make delicate political adjustments between competing social values. Courts and judges should be capable of using a degree of creativity and be sensitive to political compromise. . . . Thus, judges have a deep obligation to search for the over-riding purposes of laws, which can be found in cases involving statutory interpretation, in the words and actions of legislators, in constitutional cases, and in the language of the Constitution itself as disclosed through judicial interpretation. (p. 53)

Murphy continued by examining Stone's footnote in a case decided in 1938, U.S. v. Carolene Products. Stone had suggested that the "presumption of constitutionality of legislation might be given a narrower scope where civil liberties interests are involved than where economic interests are infringed" (p. 53)

Over the years, the Court ruled in favor of the claims of minorities against majorities fairly consistently. Naturally, conservatives were upset. Murphy (1987) claimed that "they felt this new relativism, realism, and pragmatism was a recipe for trouble" (p. 54)

> In addition, the concept that judges should rely on their intuitive senses of fairness and justice rather than upon rigid, traditional, doctrinal rules seemed too subjective to critics for whom law was principally restrictive and a brake on irresponsible social pressures and popular demands. (p. 54)

Stone's views, of course, prevailed in the years of the Warren Court. However, according to Murphy (1987), the Warren years led to a further constitutional revolution.

> The resulting rights revolution of the 1950s and 1960s had both its champions and its critics. Liberals hailed the court for its creativity and for modernizing the Constitution and turning it into a instrument for the achievement of social justice, especially for minority Americans previously denied political, social, and economic equality. . . . Conservative charges that the court was entering areas better left to elected legislative bodies were answered by pointing to the legal realities of the time. (p. 55)

A statement by Chief Justice Earl Warren brought forth all the resentment and anger felt by those who disagreed

with his Court's policies. According to Murphy, Warren said, "a legal system is simply a mature and sophisticated attempt, never perfected, to institutionalize a sense of justice to free men from the terror and unpredictability of arbitrary force" (p. 56).

The conservative reaction continued unabated. Murphy claimed that "even Warren Burger was not conservative enough for Ronald Reagan, who specifically vowed to reverse the Court's rulings regarding prayer in the schools, busing to achieve integration, affirmative action, and abortion" (1987, p. 56). This time, the phrase-of-choice was original intent.

One final commentary on the historical background to the place of original intent, or interpretivism, in the judicial decision-making process comes from Tushnet (1983). Reaching back to the Hobbesian problem of order and the solution to that problem of transferring all authority to a powerful sovereign, Tushnet wrote:

> The American Revolution eliminated the monarch from sovereignty and thereby sharply posed the problem of legislative tyranny. The framers' solution, according to one view, was a revised version of Locke's diffused sovereignty, in which power was divided among the separate branches of government, each of which was expected to restrain the others. . . the

> framers called on the judiciary to serve a special function beyond its role in diffusing power: by commanding the judges to enforce constraints that the Constitution placed on the other branches, the framers provided a check on even the few instances of tyranny that they thought might slip through the legislative and executive processes. (p. 784)

Tushnet discussed the necessity of judges, in such a system, being perceived by the public as removed from the political world; however, as "judges no less than legislators were [seen] as political actors, motivated primarily by their own interests and values, the Hobbesian problem was then seen to recur on a higher level" (p. 784). The solution, according to Tushnet, was the development of constitutional theory which could serve as a constraint on judges by, in his words,

> providing some standard, distinct from mere disapproval of results, by which their performance could be evaluated. Interpretivism and neutral principles, as the two leading dogmas of modern constitutional theory, are thus designed to remedy a central problem of liberal theory by constraining the judiciary sufficiently to prevent judicial tyranny. (pp. 784-85)

Interpretivism, or original intention, has as its advocates judges, scholars, and politicians. There are also more than a few who disagree, sometimes strenuously, with its premises. The next section of the review of

literature is devoted to the arguments of those who favor originalism.

In Praise of Original Intent

As with definitions of many concepts, originalism has been characterized in differing ways. Neither its proponents nor its detractors agree as to exactly what it is. Simon (1985), writing in the California Law Review, had this to say:

> The originalist critique of constitutional law is not a modest one, for it argues that almost all of the constitutional decisions of the Supreme Court have been improper. For example, some originalists argue that none of the provisions of the Bill of Rights should apply to the states, and that many more Bill of Rights provisions should be interpreted more narrowly than they are today. (p. 1482)

Simon's paper began with an examination of what he called "classical" originalism. This version is often identified with Raoul Berger.

> [This] argument for originalism rests at least implicitly on three claims. First, it argues that the framers and drafters of the original Constitution and its amendments shared a collective state of mind, called the framers' intent, and that this state of mind somehow reveals the meanings that these people as a group intended various constitutional provisions to have. Second, it claims that judges can come to reasonably reliable

> understandings about this state of mind by following the plain language of a provision and by researching the proceedings and/or the legal and social context surrounding a provision's adoption. Third, it posits that the meanings supplied by the plain language and the research into the originators' state of mind are, or ought to be, authoritative. (pp. 1483-1484)

When studying the arguments of the originalists, Simon (1985) found a variety of justifications for the claim that the intent of the framers should control constitutional interpretation. The first, which rests on the nature of constitutionalism, had two parts: "It is implicit in the concept of a written constitution that the original understanding provides the authoritative source of constitutional meanings, and that this meaning can be authoritatively changed only by amending the [document]" (p. 1484). The second argument about constitutionalism was that "there is something normatively special about the role, status, or institutions of the origination" (p. 1484). Simon claimed that both of these claims rested upon contract, social, or real, interpretations.

For the second justification for control by the intent of the framers, Simon (1985) wrote that "originalism might be defended as a claim about

democracy" (p. 1485). In this instance, the notion was that there is a proper relationship between "the court and agencies of government that are theoretically responsible to the people" (p. 1484). For his final point, Simon discussed what he called "the rule of law virtues." "It might be argued," he wrote, "that originalism best promotes the virtues of certainty, predictability, and administrative efficiency" (p. 1485). As the remainder of Simon's article was a critique of originalism, those points shall be reserved for the criticism section of the review of literature.

Berger (1977) separated the original intention question into two parts. "Whether the 'original intention' of the framers should be binding on the present generation. . . should be distinguished from the issue: what did the framers mean to accomplish, what did the words they used mean to them" (p. 8). In his discourse about the present generation, Berger used the words of James Madison to emphasize his own belief that the original intention of the framers should be binding upon today's Court. Quoting Madison, he wrote: "If the sense in which the constitution was accepted and ratified

by the Nation. . . be not the guide in expounding it, there can be no security for a faithful exercise of its powers" (pp. 363-364).

In response to those who believe in the "living Constitution" school of judicial interpretation, Berger (1977) responded: "The sole and exclusive vehicle of change the Framers provided was the amendment process" (p. 363). He quoted Jefferson, Hamilton, and Wilson in making his point:

> Jefferson: Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction.
>
> Hamilton: To avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before the.
>
> Wilson: The first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it. (pp. 364-366)

And what of the words used by the framers? Berger (1979) instructed us to look for the plain meaning of the words. As Chief Justice Marshall, once a member of the Virginia Ratifying Convention, said: "if a word 'was so understood when the Constitution was framed. . . [the] convention must have used it in that sense'" (p. 367).

Not only were the words of the framers of import, their major social and political concerns were also factors in determining their intentions. Siegan, when writing about the human condition in 1980, made a point not touched upon by Berger.

> Basically, the Constitution speaks to the general political condition of the human species--a condition that has changed little if at all since the eighteenth century. The Framers' major concerns about the distribution, excesses, and abuses of political power are as pressing today as they were two hundred years ago. Their desire to secure individual liberties remains as compelling a concern as ever.
>
> As the Constitution attests, the framers' basic perceptions and views relating to governmental roles and functions are shared to a remarkable extent in the twentieth century. Thus the Framers believed that liberty and personal security are the ultimate purposes of society; they favored limited government and dispersal of power, feared the tyranny of political majorities, and viewed lack of governmental control as a boon to the economy and social well-being. They subscribed to the belief that individuals have fundamental and inalienable rights with which government may not interfere. (p. 12)

In 1986, a group of eleven participants, led by Commager, took part in "Dialogue" for The Center Magazine. The topic was the constitution and original

intent. One of the participants, Markman, a member of Meese's staff, defended the Attorney General's doctrine.

> The Attorney General realizes that we cannot always know with certainty what was intended by the founders. But he also knows that a large body of knowledge has developed as to what the Founders thought. I think his conclusion is that, when we cannot find guidance to the Founders' intentions, the courts are not free to do anything they want to do. In fact, the direction to the courts is that states are permitted to do what they want--consistent with limitations in the Constitution--and that the federal government is not able to do anything it wants, subject to the express grants of authority contained in the Constitution. If interpretivism, or original intent, is not the appropriate standard by which we interpret the Constitution, the Attorney General wants to know what the alternative standard is. What is the value of a written Constitution in the absence of that particular standard? (Allen, 1986, p. 10)

During the discussion, Erler (1986) joined in on the side of original intent, using the words of Hamilton and marshall for evidence (see Allen, et al.).

> In The Federalist, Hamilton said: "We are not just writing a constitution to meet the exigencies of the day, we are setting up a constitution that will be directed towards remote futurity as well." Hamilton meant they were establishing the principles of a self-governing polity. John Marshall said that the adoption of the Constitution was an exercise of the original right of the people, that the principles of the Constitution must be deemed to be the fundamental and permanent principles of a self-governing people. The Constitution,

> therefore, represents both the superior will of the people and the fundamental legitimating agency of constitutional government. (Allen, 1986, pp. 12-13)

Berger (1979) summed up what many of today's originalists see as one of the central problems which their system of constitutional interpretation would solve.

> When you are talking about constitutional law, you are talking about the balance of power in the community and the question of how you find meaning boils down concretely here to who finds the meaning? May the Justices supplant the value-choices of the Framers with their own? . . . If the Court may substitute its own meaning for that of the Framers, it may, as Story cautioned, rewrite the Constitution without limit. (pp. 369-370)

Bork (1985) called the background to the resolution of this question, "the Madisonian dilemma" (p. 44). Since this nation began as one in which majorities rule in many areas of life simply because they are majorities, but also one in which individuals have some freedoms which are exempt from majority control, the dilemma "is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first could court tyranny by the majority; the second, tyranny by the minority" (p. 44).

> Over time it came to be thought that the resolution of the Madisonian problem--the definition of majority power and minority freedom--was primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority's legitimate right to govern. (p. 44)

Next Bork (1985) addressed the question of limits. While stressing that the Constitution is law and that its words are law, he declared that the words of the Constitution constrain judgment: "They control judges every bit as much as they control legislators, executives, and citizens" (p. 45). Using the Bill of Rights and the Civil War Amendments as examples, Bork claimed that they do not cover all possible or even all desirable liberties. "Freedom of speech covers speech, not sexual conduct." He continued by asking, as did Meese, if the Constitution is not law, what is? "Why should the judge's authority be superior to that of the President, the Congress, the armed forces, the departments and agencies. . ." (p. 45)?

Now Bork arrived at the heart of his argument:

> The answer that is attempted is usually that the judge must be guided by some form of moral philosophy. Not only is moral philosophy wholly inadequate to the task, but there is no reason for the rest of us, who have our own moral visions, to be governed by the judge's moral predilections. (1985, p. 45).

Bork insisted that there was only one intellectually honest conclusion. Judges would have to abandon the use of constitutional review. "The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments" (p. 45). Bork's definition of intentionalism followed:

> It is not the notion the judges may apply a constitutional provision only to circumstances specifically contemplated by the framers. In so narrow a form the philosophy is useless. Since we cannot know how the framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.
>
> In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee. Courts perform this function all of the time. (1985, p. 46)

With a rhetorical question, Bork (1985) asked if judges, therefore, would invariably decide cases in the same way the framers would if they were here today. His answer was that no, of course they would not. What intentionalism would do, however, would be to confine judges to the principles of the framers, as expressed in the Constitution. By placing entire ranges of problems off-limits, democracy would be preserved in those areas where the framers intended democratic government.

In a reply which answered Simon's (1985) point about a more narrow interpretation of the Bill of Rights, Bork (1985) insisted that "the major values in the Bill of Rights are timeless, in the sense that they must be preserved by any government we would regard as free" (p. 47). He differentiated between two dangers involved in judicial interpretation of these values, however. First, Bork demanded that judges deal with new threats to old constitutional values, and second, he stipulated that there was an opposite danger.

> Obviously, values and principles can be stated at different levels of abstraction. In stating the value that is to be protected, the judge must not state it with so much generality that he transforms it. When that happens the judge

> improperly deprives the democratic majority of its freedom. (p. 47)

It was the following example, given in this speech in order to illustrate his point about the power of extreme generalization, that drew the wrath of Senator Kennedy and others at the Senate confirmation hearings for Bork's appointment to the Supreme Court. Bork (1985) stated:

> [This power] was demonstrated by Justice William O. Douglas in Griswold v. Connecticut (1965). In that case the Court struck down that state's anti-contraception statute. Justice Douglas created a constitutional right of privacy that invalidated the state's law against the use of contraceptives. He observed that many provisions of the Bill of Rights could be viewed as protections of aspects of personal privacy. He then generalized these particulars into an overall right of privacy that applies even where no provision of the bill of Rights does. By choosing that level of abstraction, the Bill of Rights was expanded beyond the known intentions of the Framers. Since there is no constitutional text or history to define the right, privacy becomes an unstructured source of judicial power. I am not now arguing that any of the privacy cases were wrongly decided. My point is simply that the level of abstraction chosen makes a generalized right of privacy unpredictable in its application. (pp. 48-49)

The search for constitutional theory began for Bork long before the Meese publicity of the mid-1980s. In a speech delivered in the spring of 1971 and published in

the Indiana Law Journal in that year, Bork began by saying that "a persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic" (p. 1). Bork continued by attempting to establish the need for Constitutional theory. Although the emphasis in this speech was the application of neutral principles, especially to the First Amendment, Bork foreshadowed his later remarks about the Madisonian dilemma.

> But [this] resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority. (p. 3)

Although the remainder of this particular exposition of Bork's thought was devoted to neutral principles and the

free speech issue, he focused on the question of original intent in an article written much more recently.

In 1986, claiming that it was about time that national attention was centered on this issue, Bork wrote that for "a quarter of a century the debate about originalism and non-originalism has remained cloistered, raging in the law schools and in legal literature, but virtually unknown to the general public and even to many lawyers and to intellectuals interested in public policy" (p. 22). He remarked that this cloistered nature of the legal debate did not mean that it was without influence, however.

> In any complex society, much governing is necessarily done by elites acting without broad citizen participation. In America, courts, lawyers, and law professors form an especially powerful and pervasive elite. That fact is not dangerous but rather beneficial provided that the elite operates according to principles that are both known and legitimate. The teaching of non-originalism in the law schools meant that generations of lawyers were trained to believe that the philosophy was entirely respectable. Indeed, since a majority of professors engaged in the debate denigrated originalism, many students came to think that judicial power far greater than anything the Framers intended, and greater than anything hitherto practiced in the United States, is desirable and legitimate. (p. 22)

Bork continued his diatribe against law schools and their professors when he spoke at Calvin College in Grand Rapids, Michigan, in 1989. In this speech, he directed his anger at the United States Senate. He claimed that in the moral and political agenda of the left and the Democratic party, control of the federal judiciary was the best hope. Obviously upset about his own failure to gain a seat on the court, Bork contended that the Senate wants to run both the executive branch and the courts as well as gaining control of foreign policy. Insofar as the law schools were concerned, Bork believed that they were politicized, and that the opinions found there were divergent with those of the American people. He called the institutions policy-making bodies with a close relationship with federal judges. Singling out Harvard, Stanford, Northwestern, and New York University schools of law, he pointed to their radical political agenda.

In the long run, Bork advised in his 1989 speech, the left wants original intent out of the intellectual life of the law. They hope to make the center of our society shift to a more leftward position. It is, he claimed, a "war for control of the legal culture." The

new liberals, or ultra-liberals, come from the generation of the 1960s, tenured professors in law schools, the press, and those active in politics. In order to combat the threat presented by this group, it is now necessary to adopt a theoretical basis for constitutional interpretation, and original intent would result in more principled decision-making on the part of the courts. Bork has been called the theoretician for the originalists. If that is true, then Meese is the publicist.

Hints about a new approach to the process of judicial decision-making began shortly after Reagan took office in 1981, but the all-out campaign was led by Meese at a later date. His first salvo was fired when he made his speech critical of the present Supreme Court in July of 1985. Speaking to the American Bar Association, Meese's subject was a review of the 1984 term of the high Court. He began by looking backward.

> The judges, the Founders believed, would not fail to regard the Constitution as fundamental law and would regulate their decision by it. As the faithful guardians of the Constitution, the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of

> those who framed it would be the judicial standard in giving effect to the Constitution. (p. 1)

Meese criticized the Court for making policy choices instead articulating constitutional principles.

> What then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence and the charge of being either too conservative or too liberal. (pp. 8-9)

In closing his remarks, Meese (1985) threw down the gauntlet when he informed his listeners that the Reagan administration would press for a jurisprudence of original intention. "In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgement" (p. 10).

The firestorm that resulted from this speech led to a barrage of criticism from scholars, judges, justices, and the press. In 1986, Meese replied to his critics. One point made by Meese and often seized upon by those who disagree with him had to do with historical evidence.

> The period surrounding the creation of the Constitution is not a dark and mythical realm. The young America of the 1780s and 1790s was a vibrant place, alive with pamphlets, newspapers, and books chronicling and commenting upon the great issues of the day. We know how the founding Fathers lived, and much of what they read, thought, and believed. The disputes and compromises of the Constitutional Convention are carefully recorded. The minutes of the Convention are a matter of public record. Several of the most important participants--including James Madison, the "father" of the Constitution--wrote comprehensive accounts of the convention. Others, Federalists and Anti-Federalists alike, committed their arguments for and against ratification, as well as their understandings of the Constitution, to paper, so that their ideas and conclusions could be widely circulated, read, and understood. (1986, p. 32)

Thus having set the groundwork in the past, Meese (1986) turned again to the Reagan administration's approach to constitutional interpretation. He began by establishing what the approach was not. "Our approach does not view the Constitution as some kind of super-municipal code, designed to address merely the problems of a particular era--whether those of 1787, 1789, or 1868. . . . Neither, however, is it a mirror that simply reflects the thoughts and ideas of those who stand before it" (o. 32). What was their approach? It started with the document itself: a written, as opposed to

unwritten, Constitution. This, stated Meese, meant that it conveyed meaning. "We know that those who framed the Constitution chose their words carefully . . . . They proposed, they substituted, they edited, and they carefully revised" (p. 32). The Constitution is specific in places, and in other places it expresses particular principles, he claimed. Meese then insisted that the meaning could be "found, understood, and applied" (p. 32).

Since opinions written about the religion sections of the First Amendment are to be investigated later in this paper, it is of interest to note that Meese, in this speech which was published in 1986, and Chief Justice Rehnquist, writing in Wallace v. Jaffree in 1985, both insisted that Jefferson was not to be considered one of the framers. That fact, however, did not stop them from quoting him liberally, as did Berger. In 1986. the Attorney General referred to Jefferson's comment about construction.

> On every question of construction [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it,

> conform to the probable one, in which it was passed. (p. 34)

Meese followed by becoming more precise in his description of his jurisprudence:

> Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself. (p. 34)

The critics next answered by Meese (1986) were those who accused him and other originalists of seeking to perpetuate their conservative agenda. Saying that "at issue here is not an agenda of issues or a menu of results. . . at issue is a way of government" (p. 35), Meese claimed that a jurisprudence of original intention was neither conservative nor liberal, "neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of government the proper ambit of its responsibilities. It is a jurisprudence faithful to our Constitution" (p. 35).

Our newest Chief Justice has not provided us with the same kind of material from which to gather evidence

of his dedication to original intent as has Bork or Meese; however, we do have Rehnquist's dissent in Wallace v. Jaffree (1985), an article written by him for the Texas Law Review in 1976, a brief summation of his decision-making in the Court's 1987 term by Rohde and Spaeth, Powell's "The Compleat Jeffersonian: Justice Rehnquist and Federalism", published in the Yale Law Journal in 1982, and, finally, his dissent in Trimble v. Gordon in 1977.

Looking first at the two cases, in Wallace v. Jaffree (1985), Rehnquist wrote only for himself, joined by no other justice. His dissent was an ode to original intent in that it contained pages of references to the framers and the history of the establishment clause. He analyzed the debate on the religion clause, Madison's point of view, the mention of the teaching of religion in the Northwest Ordinance, and Washington's Thanksgiving Proclamation. Rehnquist declared that the "wall of separation between Church and State is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned" (p. 76). Attacking the Lemon test, he wrote:

"If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it" (p. 79). Continuing in this vein, Rehnquist stated: "History must judge whether it was the Father of his Country in 1787 or a majority of the Court today which has strayed from the meaning of the Establishment Clause" (p. 80).

Trimble v. Gordon (1977) had nothing to do with religion. This case was concerned with the question of illegitimacy and inheritance, but then-Justice Rehnquist (1977) relied upon original intent in his dissent relative to the Fourteenth Amendment.

> If, during the period of more than a century since its adoption, this Court had developed a consistent body of doctrine which could reasonable be said to expound the intent of those who drafted and adopted that Clause of the Amendment, there would be no cause for judicial complaint, however unwise or incapable of effective administration one might find those intentions. If, on the other hand, recognizing that those who drafted and adopted this language had rather imprecise notions about what it meant, the Court had evolved a body of doctrine which was both consistent and served some arguably useful purpose, there would likewise be little cause for great dissatisfaction with the existing state of the law. (pp. 43-44)

In Rehnquist's 1976 article, "The Notion of a Living Constitution," based upon one of his speeches, he pointed to two differing meanings of the phrase, "living Constitution." In the first instance, which he described as one with which almost no one would disagree, Rehnquist quoted Justice Holmes in Missouri v. Holland (1920).

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. (p. 694)

The second connotation of phrase was the one with which he had trouble. Using as an example a brief that had been filed in a United States District Court on behalf of prisoners "asserting that the conditions of their confinement offended the United States Constitution, Rehnquist quoted:

> We are asking a great deal of the Court because other branches of government have abdicated their responsibility. . . . Prisoners are like other "discrete and insular" minorities for whom the Court must spread its protective umbrella because no other branch of government will do so. . . . This Court, as the voice and conscience of contemporary society, as the

> measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of the United States and will not be tolerated. (p. 695)

Rehnquist's comments demonstrated his belief that with this version, almost no one would agree. The problem, of course, revolved around having "nonelected members of the federal judiciary" (1976) addressing themselves "to a social problem simply because other branches of government have failed or refused to do so" (p. 695). Like Bork, Rehnquist emphasized that "the ideal of judicial review has basically antidemocratic and antimajoritarian facets that require some justification in this Nation, which prides itself on being a self-governing representative democracy" (pp. 695-696).

Quoting John Marshall and his justification for judicial review, Rehnquist (1976) arrived at the core of his conception of the place of the judiciary:

> Since the judges will be merely interpreting an instrument framed by the people, they should be detached and objective. A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the constitution. A merely temporary majoritarian groundswell should not abrogate some individual liberty truly protected by the Constitution. (pp. 696-697)

Were judges not to follow this advice, Rehnquist wrote, their role in our society would be quite unacceptable.

> Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country. Surely there is no justification for a third legislative branch in the federal government, and there is even less justification for a federal legislative branch's reviewing on a policy basis the laws enacted by the legislatures of the fifty states. (p. 698)

Rehnquist (1976) identified three major problems with the second version of a living Constitution.

> First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the time. Second, the brief writers' version ignores the Supreme Court's disastrous experiences when in the past it embraced contemporary, fashionable notions of what a living Constitution should contain. Third, however socially desirable the goals sought to be advanced by the brief writer's version, advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society. (p. 699)

It is obvious that Rehnquist did not share Spaeth's (1979) concern with the ability of the Court to keep in tune with the times. In his analysis of his three

points, Rehnquist spent most of his time discussing the second point, that of disastrous historical experiences.

For this endeavor, he turned to the Dred Scott (1857) case. Another example used by Justice Rehnquist was the decision made in Lochner v. New York (1905). In both of these cases, Rehnquist found that "prior experimentation with the brief writer's expansive notion of a living constitution has done the Court little credit" (p. 703). The version of a living Constitution belonging to the brief writer, he claimed, "is a formula for an end run around popular government" (p. 706).

The secondary source material for information about Rehnquist failed to provide additional evidence of his contributions to a jurisprudence of original intention. In the systematic study by Rohde and Spaeth (1989), their conclusion was that he did not change the pattern of his voting after being appointed Chief Justice. In the Powell (1982) article, the author found that "although Justice Rehnquist's work is consistent with the Jeffersonian theory of federalism, [his] attempt to transform this federalism into an objective constitutional first principle must fail, because it

cannot be established that the Framers intended to embody the theory in the Constitution" (p. 1320).

On July 3, 1989, the Supreme Court announced its decision in the abortion case, Webster v. Reproductive Health Services. Chief Justice Rehnquist, writing for the majority, included the following words in his decision.

> In the first place, the rigid Roe framework is hardly consistent with the notion of a constitutional case. . . . The key elements of the Roe framework--trimesters and viability--are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. (p. 8A)

President Reagan, who appointed Rehnquist as Chief Justice and placed O'Connor, Scalia, and Kennedy on the bench, reminded us in 1986 "of Jefferson's warning that the written Constitution must not be turned into a blank slate through interpretation." In his speech on the occasion of the investiture of Rehnquist and Scalia, Reagan spoke of the "least dangerous branch." His emphasis was upon judicial restraint, and he quoted Justice Frankfurter's statement: "The highest exercise of judicial duty is to subordinate one's personal will and one's private views to the law" (p. 55).

Other politicians have given their views about the value of relying upon the original intentions of the framers. Senator Orrin Hatch wrote of civic virtue in 1984. His concern was with religion and morality, and he quoted Washington, Adams, and Story in his essay. Using the words of the Declaration of Independence, Hatch stated that "the Nation's first official act sprang from the Judeo-Christian faith that the creator endowed men with inalienable rights, the defense of which was the purpose of government" (p. 36).

> In the minds of the Framers and early leaders of this nation, the American experiment in self-government would work because the people were virtuous; they were virtuous because they were moral; and they were moral because they were religious. (p. 36)

Hatch (1984) reviewed the pertinent provision of the Northwest Ordinance of 1787, Madison's initial draft of the First Amendment, as well as Story's understanding of that Amendment as background to his statement that the original intentions of the framers contrasted with modern interpretations of constitutional protections. By citing examples from three religion cases, Everson v. Board of Education (1947), Engle v. Vitale (1962), and Abington Township v. Schempp (1963), Hatch returned to the wall.

> Advocates of this recent interpretation of the establishment clause generally rely on Thomas Jefferson's statement about the "wall of separation." Although the Founders were ambivalent concerning the appropriate relationship between government and religion, historical inquiry supports the thesis that these great leaders did not mean the First Amendment to erect an impenetrable wall between church and state. . . . The controversial Supreme Court rulings on the first Amendment have spawned concerted efforts in recent Congresses to restore the historic meaning of the establishment clause. During the Ninety-Eighth Congress, a constitutional amendment restoring the right of states and localities to authorize voluntary school prayer garnered fifty-six votes in the Senate--a solid majority, but still short of the two-thirds necessary for approval. This majority vote will certainly perpetuate the effort to reverse the Supreme Court's rulings by constitutional amendment. (p. 37)

When the amendment process failed, a new approach became necessary. Hatch (1984) wrote that "the wall of separation doctrine continues to bar or threaten to bar many important expressions of religious values from public life. The original intent of the establishment clause--that Congress must remain neutral between competing religious views--has been transformed into the notion of neutrality between religion and irreligion" (p. 37). Closing by referring to the Bicentennial commemoration as an opportunity to "reinvigorate our

national commitment to these basic principles" (p. 37), Hatch made it clear that the debate over the issue of religion and the original intent of the framers was far from over.

In another article in The National Forum in 1984, Berns answered the question, "do we have a living constitution"? Berns, a staff member at the American Enterprise Institute, is a member of the original intent school. He associated terms and phrases such as "flexible," "adaptable," and "judicial power" with those who profess belief in the idea of a living Constitution. Quoting California appellate judge Lynn D. Compton, Berns summed up what he perceived to be the philosophy of this group.

> Let's be honest with the public. Those courts are policy-making bodies. The policies they set have the effect of law because of the power those courts are given by the Constitution. The so-called "landmark decisions" of both the U.S. Supreme Court and the California Supreme Court were not compelled by legal precedent. Those decisions are the law and are considered "right" simply because the court had the power to decree the result. The result in any of those cases could have been exactly the opposite and by the same criteria been correct and binding precedent. In short, these precedent-setting policy decisions were the product of the social, economic and political philosophy of the majority of the justices who

> made up the court at a given time in history. (p. 29)

Berns (1984) agreed with other originalists that the formal amendment process, not legislative action or judicial construction would repair any imperfections in the Constitution; however, he stated, "as to the specific prohibitions listed in the Bill of Rights, their role in limiting the national government is grossly exaggerated" (p. 32). Blaming the incorporation doctrine, which began with Gitlow v. New York (1925), Berns emphasized the relatively few number of Bill of Rights cases before 1925 and Gitlow. Berns, like so many interpretivists, used the words of the framers as evidence for adoption of a jurisprudence of original intention. The final contributor to that school had a different approach.

Graglia wrote in 1987 about contemporary constitutional theory and the Supreme Court's liberal political program. The theory relied upon in the past three decades has been used to justify the Court's decisions which are, Graglia insisted, without any constitutional warrant.

> The current proliferation of constitutional theories arises from a heightened recognition of two crucial facts that increasingly

> challenge the legitimacy of constitutional law. First, the Supreme Court's rulings of unconstitutionality are not, as represented, based upon or derived from the Constitution. Second, these rulings have not been random in their political impact, but uniformly have served to advance a single political point of view. The essence of what it is necessary to know about modern constitutional law is that it has almost nothing to do with the Constitution and is simply a cover for the Supreme Court's enactment of the political agenda of the American left. (p. 789)

Like Bork, Graglia viewed certain elements within the American academic community, along with members of the American Civil Liberties Union, as sharing the political preferences of the modern Supreme Court. This community, then, could hardly be called disinterested or open-minded.

The decision reached in Brown v. Board of Education in 1954, according to Graglia (1987),

> led to a widespread belief that judicial decision making was morally superior to legislative decision making. The Court, traditionally an obstacle to basic social change--as Hamilton no doubt expected--came to be seen as the essential vehicle of such change, as an institution through which American society could be remade in accordance with a particular political vision without having to undertake the onerous task of obtaining the consent of a majority of the American people. If, after all, the Court could end racial segregation in the South, what

> other great and difficult things could it not do? (p. 790)

Graglia chastised the present-day Court for writing new constitutional provisions as their preferences required, and insisted upon rejecting contemporary constitutional theory, returning instead to a determination of the intent of the framers. Since the Constitution is a short document whose purpose was to create a stronger central government, it was not, according to Graglia, intended to do all that modern constitutional theorists insist upon. Agreeing with Berns about the application of the Bill of Rights protections to the states, he commented:

> The fact that the bulk of constitutional law purports to be based on the fourteenth amendment should sufficiently demonstrate that constitutional decisions have little to do with the Constitution and, therefore, rarely turn on issues of constitutional interpretation. No serious observer, much less a professional constitutional scholar, can really believe that the Supreme Court arrives at its decisions invalidating state laws by studying and determining the meaning of the four words "due process" and "equal protection." The work of constitutional theorists, nonetheless, largely consists of attempts to show that these four words somehow contain what the Court has purported to find in them. (p. 794)

Refusing to even contemplate the possibility that the modern Court has used the Constitution as the basis

for its decision-making, Graglia (1987) turned to Justice Douglas' opinion in Griswold v. Connecticut (1965), in which the justice wrote of "penumbras, formed by emanations" (p. 797) from several provisions of the Bill of Rights as the basis for the constitutional right to use contraceptives. Graglia's final words summed up not only his but the beliefs of other originalists as well.

> Some people, of course, may prefer government by unelected, life-tenured judges to decentralized democratic government; neither democracy nor federalism is mandated by the stars, and Plato undertook to defend government by philosopher-kings. Our system of government by lawyer-kings in judicial robes, however, is openly defended by no one. It is in fact indefensible in the American context, in which notions of local autonomy and government by the consent of the governed retain strong appeal. And that is why we have a cottage industry of constitutional lawyer-scholars manufacturing theories to explain that what the Supreme Court is really doing, if only properly understood, is interpreting the Constitution. (p. 798)

Methods for Discovering Original Intent

TenBroek's five article series on the use of extrinsic aids in constitutional construction described in depth the position of those who sought a decision-making framework based upon the original intentions of the framers. In his first article (1938a) tenBroek

investigated the system of seeking answers in the plain language of the document.

> The reasons commonly assigned in support of this proposition are that the framers said what they meant, that in any event the intent can almost never be exactly ascertained by admitting collateral materials, and that the Constitution as a standard becomes too undertain when thus grounded on mere conjecture. (p. 291)

In his second article on the same subject (1938b), tenBroek's interest was in studying the debates and proceedings of both the constitutional and ratifying conventions. By carefully reading five categories of cases in which the Court relied upon such evidence, tenBroek tried to find proof that the Court's actions followed its rhetoric.

For his third study, tenBroek's concern was with the history of the times of the convention.

> The question might reasonably be raised whether a more accurate method of ferreting out intent would not be to examine the ideas which must have been present in the minds of the Constitution makers because they were a part of the prevailing climate of opinion at the time of the Convention. . . The mode of operation universally employed in this matter, and that which the United States Supreme Court has adopted, is to resort to the history of the times of the Convention, the causes for its having been called, and the events leading up to it as a basis for deductions and

> generalizations which are then by inference held to have been present in the minds of the framers. (1938c, p. 665)

TenBroek's fourth article (1939a) completed his survey of the methods espoused by the Court as the basis for its judicial reasoning process. The final technique was that of resort to "contemporary exposition by commentators, early congresses, and Supreme Court justices who had attended the Federal Convention" (p. 400). The four methods of determining intent, taken together, provide the basis for the theory. However, tenBroek claimed that the theory, as applied by the Court, contained two corollaries "which proceed from it with logical inevitability and which reveal its fundamental nature" (p. 152).

The corollaries are important. In the first, tenBroek claimed that by accepting the intent theory, one also must accept the idea that the intent is to be determined not from a contemporary point of view, but in light of the situation which existed when the document was conceived. The second idea was that the meaning of the Constitution never changes. TenBroek additionally remarked that one must discover if the theory actually

describes what it is that the Court does. Tenbroek concluded his in-depth study with a critique of all four sources for discovering original intent. The points he made can be found in the next section of the review of literature.

Brest (1980) divided his analysis of original intent methodology into two main sections. In the first, he considered "strict textualism" and "strict intentionalism."

> A strict textualist purports to construe words and phrases very narrowly and precisely. For the strict intentionalist, "the whole aim of construction, is. . . to ascertain and give effect to the intent of its framers and the people who adopted it." (quotation from Home Bldg. & Loan Association v. Blaisdell (1934). (p. 204)

Claiming that much of American jurispurdence rejects the strict versions, Brest next evaluated what he called, "moderate originalism."

When delving into the concepts and methods of originalism, Brest (1980) examined its three fundamental methods: "interpretation of the text of the Constitution, interpretation of the intentions of its adopters, and inference from the structure and relationships of

government institutions" (p. 205). The first method, textualism,

> takes the language of a legal provision as the primary or exclusive source of law (a) because of some definitional or supralegal principle that only a written text can impose constitutional obligations, or (b) because the adopters intended that the Constitution be interpreted according to a textualist canon, or (c) because the text of a provision is the surest guide to the adopters' intentions. (p. 205)

An analysis (Brest, 1980, p. 206) of Chief Justice Marshall's statements about the plain meaning of the text followed. When in McCulloch v. Maryland (1819), Marshall responded to the state's argument that "necessary and proper" implied "indispensable", he observed that the word "necessary" as used "in the common affairs of the world, or in approved authors. . . frequently imports no more than that one thing is convenient, or useful, or essential to another" (p. 206).

Turning to intentionalism, Brest (1980) wrote that although the text of a provision is often used as a guide to intentions, it does not occupy a favored position over other sources. One must ask who the adopters were, how they intended their provisions to be interpreted, and how specific the provision was intended to be. He described

the interpreter-historian's task as falling into three stages:

> First, she must immerse herself in the word of the adopters to try to understand constitutional concepts and values from their perspective. Second, at least the intentionalist must ascertain the adopters' interpretive intent and the intended scope of the provision in question. Third, she must often "translate" the adopters' concepts and intentions into our time and apply them to situations that the adopters did not foresee. (p. 218)

Brest (1980) next differentiated between strict and moderate originalism. Claiming that strict originalism cannot tolerate most modern decisions which are made in cases having to do with the Bill of Rights or the Fourteenth Amendment, he turned to the work of the moderates. A moderate intentionalist might be able to accept all of the more recent interpretations of equal protection and might be able to believe it protected "discrete and insular minorities" (p. 224) besides blacks.

> On the other hand, a moderate originalist, whether of textualist or intentionalist persuasion, would have serious difficulties justifying (1) the incorporation of the principle of equal protection into the fifth amendment, (2) the incorporation of provisions of the Bill of Rights into the fourteenth amendment, (3) the more general notion of

> substantive due process. . . and (4) the practice of judicial review of congressional legislation established by Marbury v. Madison (1803). (p. 224)

Brest closed by evaluating originalism, and his comments are included in the final section of this chapter.

Schlag (1985) wrote of reasons for reliance on the framers' intent for the interpretation of constitutional provisions.

> First, the act of imbuing grand constitutional provisions with specific content is an enterprise stalked by the spectre of arbitrariness. Reference to the framers intent seems an attractive option because it gives the appearance of reducing the arbitrariness of the interpretive act both substantively and methodologically. On the plane of method, framers' intent seems to prescribe a fixed procedure for determining the meaning of constitutional provisions--one that is susceptible to independent verification. The search for the framers' intent also seems to place substantive limits on the interpretation of constitutional provisions. The scope and content of substantive interpretations are limited by the available evidence of framers' intent: there is a fixed quantum of data to examine and the interpretive act is restricted to the understanding of that limited portion of historical data. (p. 285)

Schlag explained that this method of interpretation provides the judiciary with political and psychological comfort. It grant them a pardon, or at least a reprieve, from the collective anger of those who disagree with

their decisions. His final reason for supporting intentionalist analysis was that it fits neatly with social contract theory. His arguments were echoed in the next and final commentary about originalist methodology.

In 1987, Powell wrote an article entitled, "Rules for Originalists." In writing about the original intention debate, he stress that "given all the uproar, and the reams of paper consumed in its creation, one essential part of the debate seems missing: a sustained presentation of how the originalist interpreter would go about ascertaining the historical 'original intent'" (p. 659). To correct this omission, Powell wrote the following:

> The exercise of antimajoritarian judicial review is legitimate only when it can be shown to rest not on judicial choice but on the preferences associated with an earlier [super-] majority through the ratification or amendment processes. It is therefore intrinsic to the argument for originalism that the interpreter is obligated to determine, using the methods and data of history, what that intent objectively was before he can address what the Constitution now means. (p. 660)

For this endeavor, Powell (1987) organized a set of reflections into fourteen rules for the intellectually responsible interpreter. "My specific concern is to

argue that the turn to history does not obviate the personal responsibility of the originalist interpreter for the positions he takes, because historical research itself, when undertaken responsibly, requires of the interpreter the constant exercise of judgment" (p. 660). Describing history as the disciplined interpretation of past thought and action, Powell set down the following rules, described at length due to their importance in the debate.

> Rule 1: History itself will not prove anything nonhistorical. . . .
>
> The questions of "ought" or "should" belong to political theory or philosophy. Therefore, by reading history, one cannot know whether modern Americans ought to obey the intentions of the framers.
>
> Rule 2: History is the servant, not the master, of constitutional interpretation. . . .
>
> The second rule warns the interpreter that the pursuit of historical knowledge must not become an end in itself rather than a means.
>
> Rule 3: History answers--and declines to answer--its own issues, rather than the concerns of the interpreter. . . .
>
> Because the originalist desires to use history in order to address present concerns, he faces a problem. He may slip into the fundamental historical error of ignoring the past's essential autonomy. The first and most obvious limit is that on some issues of interpretation

the founders said nothing at all useful. The most notorious and troubling example of this is the Bill of Rights, about much of which practically no contemporaneous discussion is recorded.

Rule 4: Arguments from silence are unreliable and often completely ahistorical. . . .

This rule is a corollary of the third one. It asserts that since the founders did not endorse a position they must have rejected it. [Powell uses the case INS v. Chadha (1983) as an example. Neither the legislative veto itself, nor its context of governmental complexity and the modern administrative agency, was remotely within the founders' purview.]

Rule 5: To converse with the founders, you need a translator. . . .

The 1787 Constitution and the first twelve amendments were written and ratified by people whose intellectual universe was distant from ours in deeply significant ways. The founders. . . . must be translated before they can contribute to our conversation.

Rule 6: The founders comments on constitutional issues always are parts of a larger historical and intellectual whole. . . .

We must, in order to translate their thoughts, locate the cultural context that gave their constitutional views meaning and urgency.

Rule 7: The original understanding of constitutional provisions cannot be neatly separated from their later use. . . .

This rule addresses the desire to distinguish original from later meanings. The original/subsequent dichotomy consists. . . of two quite different distinctions, one required

by history, the other a nonhistorical policy choice, or rather wish, of the intentionalist school of originalism. . . .even the most complex forms of historical analysis have to respect the sequential and unidirectional manner by which we live out our individual and communal lives.

The second (nonhistorical) distinction is a product of the contemporary concerns of some originalists. As Justice White recently observed, the founders were not writing a deed but "announcing fundamental principles in value-laden terms," and many of them recognized and intended that this meant that the Constitution as they conceived it was necessarily incomplete. The original understanding, in such cases, was that later interpreters would fill in the meaning of the Constitution.

Rule 8: If your history uniformly confirms your predilections, it is probably bad history.

Despite its obviousness, the rule is often disregarded by interpreters who use originalist arguments. Justices Hugo Black and William Rehnquist, perhaps the two most consistent originalists in the Supreme Court's history, have been equally consistent in their claims that the founders' views coincided with their own, despite historical evidence to the contrary.

It is essential that the conscientious originalist recall that the founders were neither Republicans nor Democrats, liberals nor conservatives, in the modern American sense. They had their own concerns and their own world-view.

Rule 9: At best, history yields probabilities, not certainties. . . .

It is sad but true that constitutional lawyers sometimes preface assertions about history with some variant of the words "History proves that."

All such sentences are intellectually ungrammatical.

Rule 10: History yields interpretations, not uninterpreted facts. . . .

This rule is the twin of the preceding one. Just as the best the historian can do with the types of complex information the originalist wants from the past is to offer his probabilities, not certainties, so the historian is equally unable to provide uninterpreted ["bare"] facts.

Rule 11: Consensus or even broad agreement among the founders is a historical assertion to be justified, not assumed. . . .

Originalists sometimes write as if the goal of their historical investigations were to uncover an understanding of the constitutional text held by all of the relevant framers and adopters. At other times, it seems that they are looking for the views of the majority of the founders.

Rule 12: History sometimes justifies plausible but opposing interpretations. . . .

The originalist's task would be somewhat simpler if historical inquiry, probabilistic and interpretative as it is, at least produced a most likely claim or a most plausible explanation. History, unfortunately, does not always oblige.

Rule 13: History sometimes reveals a range of "original understandings. . . ."

> This rule follows from several earlier ones, and suggests that the degree of "focus" a valid historical assertion has varies, depending on the type of question asked and the state of the evidence.
>
> Rule 14: History never obviates the necessity of choice. . . .
>
> This final rule summarizes all the others. It is apparently the hope of some originalists that history can serve as a way out of the realm of personal choice. They think that if we accord authority to the opinions of the founders, we can preclude judges, and ourselves, from importing into constitutional interpretation our own values, preferences, individual viewpoints, and subjective and societal blindness and prejudice. (pp. 662-691)

Powell's fourteen rules represent a bridge between the arguments and methods of the originalists and the criticisms of that theory of constitutional interpretation. Since the members of the originalist school must necessarily rely on history to prove their points, the way in which they use history is of import. In the final section of the review of selected literature, the critics have their day in court.

"Original Intent: Stale, irrelevant, rhetorically absurd, and historically unsound." *

Not all of the critics of a jurisprudence of original intention are as outspoken as Rossiter but in sheer numbers and volume of material produced, the faultfinders far exceed the true believers. The challenge of reviewing their objections lies in the classification system to be used. Most criticize on the basis of a variety of legal and practical points of view: The difficulty of knowing what the framers actually intended; the problem of removing the judge from the decision-making process; the use of history as a controlling force; the need to accommodate change; and the assumption that the framers were representative of the population at the time the Constitution was written. whoever first implied that Meese's speech to the American Bar Association opened a veritable Pandora's box was correct. From Jaffa's insistence that his fellow conservatives, originalists all, fail to go back to the Declaration of Independence as the spring from which the original intention of the framers flowed to Levy's

*Rossiter, 1966, p. 333.

comprehensive and damaging judgment of this judicial theory, historians, scholars, and political commentators have had a field day. In this, the final section of the review of literature, their viewpoints will be examined.

It is first necessary, however, to remind the reader that what is of fundamental importance is the process by which the Justices arrive at their decisions. Vehemently abusive critiques of this jurisprudence matter little, if it actually is the process by which the majority on the Court determines the course of judicial history.

The thorough study by Levy (1988), entitled Original Intent and the Framers' Constitution, echoed points made by many others. He dismissed as "silly" the use of the terms, "interpretivist" and "noninterpretivist," often used to describe the contending sides in the controversy. Levy used instead "intentionalist" and "originalist" as these terms were more precise. When looking at the problems faced by judges when using original intent, Levy turned to tenBroek.

> Original intent analysis involves what Jacobus tenBroek called "fundamental misconceptions of the nature of the judicial process." It makes the judge a mindless robot whose task is the utterly mechanical function of using original intent as a measure of constitutionality. In

> the entire history of the Supreme Court, as tenBroek should have added, no Justice employing the intent theory has ever written a convincing and reliable study. (p. 388)

Levy's (1988) "mindless robot" was Posner's (1987) "potted plant." Viewing the judge as simply an intermediary for communicating the wishes of the framers was rejected in Posner's article. Posner, a judge on the U. S. Court of Appeals, wrote in response to Berns (1984), who believed that "issues of the 'public good' can 'be decided legitimately only with the consent of the governed', and that judges have no legitimate say about these issues." (Posner, p. 23).

> Everyone professionally connected with law knows that, in Oliver Wendell Holmes's famous expression, judges legislate "interstitially," which is to say they make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators. The attempt to deny this truism entangles "strict constructionists" in contradictions. Berns says both the judges can enforce only "clearly articulated principles" and that they may invalidate unconstitutional laws. But the power to do this is not "articulated" in the Constitution; it is merely implicit in it. (p. 25)

According to Levy (1988), Posner "repudiated the belief that in constitutional law judges should speak the Framers' mind, that judicial review and democracy are

incompatible, and that no place exists for judicial creativity or policymaking" (p. 376).

After Meese made his 1985 speech, justices, too, answered his attack on the Court. Justices Brennan and Stevens both spoke and wrote in response to Meese's call for his new jurisprudence. Brennan delivered an address at a symposium at Georgetown University which was published in Liberty magazine in 1986. In it, he wrote:

> 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. (p. 10)

Brennan (1986) looked at the differences among the framers as to proper interpretation and at the problem of the time factor. He felt that it would be most difficult to relate events which occurred two centuries apart. He made an especially strong point about the political nature of interpretation and the resolution of policy through the majoritarian process: "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" (p. 10).

Addressing the Federal Bar Association in 1985, Justice Stevens also attacked the Meese position. Speaking about the Meese interpretation of the application of the Bill of Rights to the states, Stevens insisted that the Meese argument was somewhat incomplete,

> because its concentration on the original intention of the Framers of the Bill of Rights overlooks the importance of subsequent events in the development of our law. In particular, it overlooks the profound importance of the Civil War and the post-war amendments on the structure of our government, and particularly upon the relationship between the Federal Government and the separate States. Moreover, the Attorney General fails to mention the fact that no Justice who has sat on the Supreme Court during the past sixty years has questioned the proposition that the prohibitions against state action that are incorporated in the fourteenth Amendment include the prohibitions against federal action that are found in the First Amendment. (p. 28)

Murphy (1987) quoted an 1881 statement by Oliver Wendell Holmes, in which the justice made a statement about public policy and public law.

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than

> syllogism in determining the rules by which men should be governed. (p. 44)

Murphy also described the beliefs of Chief Justice Earl Warren, saying that to Warren, the Constitution embodied an ethical structure.

> His job was to apply the standards. This meant discovering applicable principles in the Constitution and turning them into instruments for the immediate achievement of social justice, especially passing on a better Bill of Rights, "burnished by growing use." (p. 56)

The monolith approach of grouping all of the framers together and then seeking their collective intent was criticized by the Dean of Northwestern University's School of Law, Robert Bennett (1986). He questioned just whose intent should govern, and how one is able to collectivize the minds of the framers in order to come up with that intent. Simplifying by assuming that the holder of the original intent was Madison, Bennett examined Madison's beliefs about the original intent process. In doing so, he speculated about using Madison's intentions by trying to answer a contemporary question as Madison would have answered it had he been charged with the decision-making authority in the intermediate years and all the way up to the present.

> Transporting Madison to today does not foreclose any decision where the constitutional language leaves room. For James Madison was a wise, not a stubborn man. He presumably would have learned from experience and adapted to changing circumstances. As he confronted novel problems over time, he would have reasoned by analogy. The chain of analogies over time could have led him quite far from the original problems with which he had been preoccupied. (p. 222)

Bennett closed by saying "the majesty of judicial decisionmaking lies in the accommodation of change within a framework of stability. Our society requires both, and asks of judges a sensitive accommodation of the two" (p. 223).

Members of the so-called "living constitution school" believe that the constant reinvention of that document by the judiciary is the force that breathes life into it and makes it a charter of government for each generation of Americans. Commager spoke in an address for the bicentennial of the Constitution as one of a series of lectures sponsored by The Center Magazine in 1986. He made reference to Meese's "seductive and extraordinary phrase" and contrasted the Meese call for original intent with Holmes' assurance that "the life of

the law has not been logic, it has been experience" (Commager, 1986, p. 4). Commager contributed this:

> For their writing of the Constitution, the Framers were instructed--in a brief statement from the declining Congress of the Confederacy and authorizations from the states--to take adequate steps "to meet the exigencies of union." The members of the Constitutional Convention were mandated to meet those exigencies, and they did. We, too, must continue to meet the exigencies of union. The Constitution has always proved adequate straightjacket. (p. 5)

Commager stressed the term, "adapted," in his lecture, considering it the key word for interpretation of the Constitution. His argument was that the framers foresaw the great changes which would come in the future, and that they

> had confidence in posterity, and because they knew, as John Marshall, said, that the "Constitution was intended to endure for ages to come and be adapted to the various crises of human affairs," they accepted the key word "adapted" as a natural term for the interpretation of the Constitution. (p. 6)

Clinton Rossiter and Commager were in agreement. Rossiter (1966, pp. 333-334) wrote the following:

> No one, surely, can read the records of the Grand Convention at Philadelphia (and also of the ratifying conventions at Boston, Poughkeepsie, and Richmond) and not come to this. . . conclusion. . . . The one clear intent of the Framers was that each generation

> of Americans should pursue its destiny as a community of free men.

Critics of the doctrine of original intent often focus on the fact that not only did the framers not agree with one another, but neither were they representative of the people living in this country at the time of the writing and ratification of the Constitution. Certainly Beard's economic interpretation pointed to the fact that the economic class of the framers was not shared by the majority of Americans. One can assume that many of them were interested in the continued well-being of their own social or economic position.

The disagreements which existed amongst the framers continued after ratification. Levy (1988, p. 323) wrote:

> And we must keep reminding ourselves that the Framers who remained active in national politics divided intensely on one constitutional issue after another--the removal power, the power to charter a corporation, the power to declare neutrality, the executive power, the power to enact excise and use taxes without apportioning them on population. . . This list is not exhaustive; it is a point of departure. The Framers, who did not agree on their own constitutional issues, would not likely speak to us about ours with a single loud, clear voice.

Commager (1986, p. 7) concurred:

> Presidents and Congresses, Presidents and Supreme Court Justices, Presidents and attorney generals have often differed in their interpretations of what might seem to be simple and elementary features of the Constitution itself. The elementary conclusion is that there is no single, authoritative original intention. Justices Learned Hand, Oliver Wendell Holmes, and Louis Brandeis all disagreed on interpretations of the Constitution. Chief Justice Earl Warren and his associate justices were consistently astigmatic in their reading of the Constitution, whereas ex-Chief Justice Warren Burger and his associate justices always seemed to have had twenty-twenty vision in their reading of the Constitution.

Two professors, Dworkin and Varat, have the final word about the possibility of determining original intent. Dworkin (1985) insisted that while all constitutional theories are to some extent interpretive, it is important to find out more about the intentions of the framers. Varat (1986), on the other hand, questioned the validity of relying upon the interpretations provided by historians.

Dworkin:

> It is often problematical what a particular congressman or delegate to a constitutional convention intended in voting for a particular constitutional provision, especially one of the vaguer provisions, like the equal protection or due process clause. A particular delegate

> might have had no intention at all on a certain issue, or his intention might have been indeterminate. The difficulties obviously increase when we try to identify the intention of Congress of a constitutional convention as a whole, because that is a matter of combining individual intentions into some overall group intention. Even when each congressman or delegate has a determinate and ascertainable intention, the intention of the group might still be indeterminate, because there may not be enough delegates holding any particular intention to make it the intention of the institution as a whole. (p. 38)

Varat:

> It is fine to say that we can use original intent as a guide to the meaning of the Constitution, but then we must accept a historian's, not a judge's, interpretation of what a group of people meant two hundred years ago. The debate would then be one of whether a historical or a judicial interpretation of original intent is legitimate. We will never get away from the fact that when dealing with current problems, people will have to make some interpretation of the Constitution. (see Allen, et al., p. 12)

According to Levy (1988), "a constitutional jurisprudence of original intent would be a sham and an illusion if it lacked historical foundation" (p. 286). With tongue in cheek, Levy suggested that Congress create the Office of Historian to the Supreme Court in order to answer questions of history for that body. Other than

the need for accurate history Levy wrote of additional difficulties.

> Whether Supreme Court cases ought to be decided on the basis of historical evidence of original intent, even if that intent is discernible, is a different question. The extent to which the past should govern the present constitutes a separate issue from the question of whether the opinions of the past can be determined. Whether the records are ample enough to warrant a judgment about original intent forms still another question. (p. 286)

In "The Original Understanding of Original Intent," an article by Powell (1985) which is widely quoted by others writing on the topic, the author examined the historical validity of the claim that the framers expected future interpreters to seek their original intentions. He concluded (p. 885) "that modern resort to the 'intent of the framers' can gain no support from the assertion that such was the framers' expectation, for the framers themselves did not believe such an interpretive strategy to be appropriate." By studying the hermeneutic traditions of the time of the writing of the Constitution, Powell concluded that the most apparent sources of interpretation at the time were the "anti-interpretive tradition of Anglo-American Protestantism and the accumulated interpretive techniques of the common

law" (p. 889). Protestants rejected the medieval tradition of interpretation and refused to accept the Pope as authoritative; however, the newly independent Americans had a rich tradition of common law. "The concept central to the common law's hermeneutic, and to later American discussion of constitutional interpretation, was the notion of the 'intention' or 'intent' underlying a text" (p. 894). By studying the history of the evolution of the common law tradition, Powell arrived at his conclusion that those Americans influential in the framing and ratification of the Constitution knew it well.

> The Philadelphia framers' primary expectation regarding constitutional interpretation was that the constitution, like any other legal document, would be interpreted in accord with its express language. . . .Debates over the language of the document were abundant, yet in none of them did any delegate suggest that future interpreters could avoid misconstruing the text by consulting evidence of the intentions articulated at the convention. . . . The framers shared the traditional common law view--so foreign to much hermeneutical thought in more recent years--that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretion. (Powell, 1985, pp. 903-904)

Next Powell (1985) turned to the struggle for ratification. The Anti-Federalists consistently warned that the Constitution would be open to interpretation, but the Federalists responded by insisting that "the Anti-Federalists' fears were misguided. . . because whatever the private sentiments of the Philadelphia delegates had been, those sentiments would not be the legally significant 'intent' of the Constitution" (pp. 906-907). Powell proved his points in an in-depth analysis of the writings of Brutus and of the authors of The Federalist. Jefferson's arguments also were examined as were Washington's. In his conclusion, Powell spoke to the modern-day intentionalists.

> It is commonly assumed that the "interpretive intention" of the Constitution's framers was that the Constitution would be construed in accordance with what future interpreters could gather of the framers' own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect. Of the numerous hermeneutical options that were available in the framers' day--among them the renunciation of construction altogether--none corresponds to the modern notion of intentionalism. . . . When a consensus eventually emerged on a proper theory of constitutional interpretation, it indeed centered on "original intent." But at the time, that term referred to the "intentions" of the sovereign parties to the constitutional compact, as evidenced in the Constitution's

> language and discerned through structural methods of interpretations; it did not refer to the personal intentions of the framers or of anyone else. The relationship of modern intentionalism to this early interpretive theory is purely rhetorical. (p. 948)

Powell's 1987 law journal article, "Rules for Originalists" was examined in the methods section of the review of literature. In this, the critical analysis of intentionalism, Powell is cited again. When writing about "truth" and "history, " Powell referred to the relativist historians of the mid-1900s who attacked traditional history. He commented, too, about Marxist historiography and the newer emphasis placed upon the freedom of the historian.

> It is readily apparent, however, the contemporary originalists do not enjoy the luxury of choosing among these views of history. The very point of their turn to history is to escape from interpretive freedom. Theories of history that deny the empirical nature of historical research or the objective quality of historical fact do not provide an exit from subjectivity; their use by the originalist would merely substitute one form of interpretive discretion for another. The originalist's most fundamental goal requires him to adopt a strongly objective view of the historical endeavor. (pp. 698-699)

Lofgren's 1988 article expanded upon some of the points made by Powell in "Original Understanding. . . ."

Lofgren, however, approached from a different direction. Noting that the framers at Philadelphia were silent about how they expected the Constitution to be interpreted, Lofgren turned to the intentions of the ratifiers. Whereas the originalists of our day occasionally include, rather off-handedly, the views of those who ratified the document, it was the focus of Lofgren's research. He looked at the role played by Madison, not as a framer or the author of the Notes, but as a participant in the ratification controversy. Lofgren claimed (p. 107) that "at minimum, Madison explicitly rejected modification of the Constitution's meaning through new constructions, lamenting that 'some of the terms of the Federal Constitution have already undergone perceptible deviations from their original import.'"

Brest's (1980) classification by type of intentionalism strict or moderate, also was examined in the methods section. Toward the end of his discourse, Brest evaluated originalism (pp. 229-230).

> Even if the adopters were extraordinarily wise and public spirited, they were also self-interested: The Constitution reflects a pragmatic and not always principled compromise among a variety of regional, economic, and political interests. . . . the fact that a

> provision was drafted by an unrepresentative and self-interested portion of the adopters' society weakens its moral claim on a different society one or two hundred years later.

This evaluation of strict intentionalism by Brest did not stop his from claiming that the more moderate version was a "perfectly sensible strategy of constitutional decisionmaking. But its constraints are illusory and counterproductive. Contrary to the moderate originalist's faith, the text and original understanding have contributed little to the development of many doctrines she accepts as legitimate" (p. 231). Closing by comparing moderate originalism and nonoriginalism, Brest wrote (p. 237) that "the moderate originalist knows that the text and history are often indeterminate and that adjudication must often rest upon 'precedent, public values, and the like.'" On the other hand, the nonoriginalist "treats the text and original history as presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional decisionmaking" (p. 230).

tenBroek's (1938-1939) five part appraisal of the intent theory contained, by way of review, four methods for its attainment (1939a, pp. 399-400):

> First, it has used the language of the document itself as evidence of the formulative or effectuative intent; second, the debates of proceedings of the framing and ratifying conventions have been utilized for the same purpose; in the third place, the history of the times of the Philadelphia meeting, the causes, controversies, and events leading up to its calling, and the circumstances surrounding the adoption have all seen duty as indicators of the original will; and finally, contemporary exposition by commentators, early congresses, and Supreme Court justices who had attended the Federal Convention have been freely resorted to as a means of accomplishing the same object.

What tenBroek put together, he next destroyed. Point by point, throughout his series, he used actual Court cases to discredit the intentionalists. Finally, he summed up his conclusions, claiming that the theory inverts the judicial process as it actually occurs (pp. 404-410).

> . . . it describes a decision of the Court as being determined by the outcome of a judicial search for the formulative intent, whereas, in fact, the intent discovered by the Court is most likely to be determined by the conclusion the Court wishes to reach. . . .
>
> In the second place, even if the original intent when discovered was controlling, this assumption does not obviate the practical impossibility of finding out with certainty what that intent was. . . .
>
> Any theory which characterizes the Constitution of the United States as changeless in meaning is flying in the fact or recent cases showing that the meaning of the Constitution varies, even in the absence of formal amendment. . . .

> We must conclude that any theory which describes the meaning of the Constitution as changeless, which understands that constitutionality is decided by the outcome of a judicial search for the original intent, which makes of a constitutional issue only an historical question, which denies the proper influence of the altering factual world upon the meaning of the document--any theory which does all these things--is an utterly false portrayal of what the Supreme Court actually does.

Levy (1988) and others have insisted that even if one wanted to base constitutional theory on the intentions of the framers and ratifiers of the Constitution, such a task would be impossible, as the evidence simply does not exist. Apart from the document itself, "the determination of that intent depends entirely upon Madison's Notes, first published in 1840" (p. 256). Although some other sketchy records do exist, Levy claimed, they are unreliable. Meese's insistence on the availability of historical evidence failed to impress Levy. He stated (p. 287), "the reliability of the records degenerates with a shift of focus from Philadelphia to the state ratifying conventions."

> This history of the framing and ratification of the Bill of Rights, which must be considered as if part of the original Constitution, adds no dimension of solidity to a jurisprudence of

> original intent. The principle sources for an inquiry into the meaning of the various provisions of the first ten amendments should be the records of the First Congress, which framed and submitted them for ratification to the states, and the records of the state legislatures that engaged in the process of ratification. But the records of the state legislatures do not exist, leaving an enormous gap in our knowledge of the ways the Framers' generation understood the Bill of Rights. Moreover, the sources for a study of the congressional history of its framing are incomplete and yield few definite answers. (pp. 291-292)

Levy mentioned the fact that the framers did not have a collective mind, that a problem exists as to the identity of all the framers, and that one would have to determine if all of their intentions were equal in weight. As far as the identity of the men who wrote the Constitution and those who ratified it are concerned, does one count the fifty-five delegates in Philadelphia or the thirty-nine men who signed? "About 1,600 men attended the various state ratifying conventions, for which the surviving records are so inadequate. No way exists to determine their intent as a guide for judicial decisions; we surely cannot fathom the intent of the members of eight states for which no state convention records exist" (p. 295).

There are those who have claimed that we should seek, not the concrete and specific intentions of the framers but should search instead for their abstract and general purposes. Simon (1985) pursued this approach when he reviewed recent monographs by Tushnet and other scholars. Simon found (p. 1510) that "abstract-intention theories cannot supply constitutional interpretations rooted in either the original understanding or the framers' intent." This kind of knowledge could only be gained by entering into the minds of the founders in order to see the world as they saw it. Simon also reviewed the work of Rawls (social contract) and Dworkin (abstract-intention). He concluded by stating his goals for legal scholars:

> To the extent that legal scholars can influence the future at all, it is by clarifying basic constitutional concepts, arguing about the good and just society, and discussing how best to produce that society through constitutional interpretation. Scholars should also engage in criticism and, if necessary, political action to curb judicial abuses, and should teach the next generation of Justices to beware of easy answers and to concern themselves with what is good and just. Bad decisions of the Court need to be branded as such. Most of all, no future law student should be led to believe that "originalism" casts the slightest shadow on the legitimacy of decisions like Brown v. Board of Education (1954). (p. 1539)

And what of Robert Bork's Madisonian dilemma? Does the power of judicial review and the actions of an activist Court interfere with the democratic process? Should the Court stand back, restrain itself, and allow the majoritarian process to flourish? Bork claimed that in our representative democracy, the power to make public policy rightfully belonged to the elected officials, not to unelected, tenured judges. Wright (1968) wrote that the emphasis in this argument was on the debilitating side effects an active judiciary would have on the other branches of government. Others argue that the political ability of the people is dwarfed and their sense of moral responsibility is deadened when they have taken from them the ability to make decisions through the political process (p. 7). Some scholars, according to Wright, disagree, claiming that (p. 7) "when the Court upholds a statute's constitutionality, it 'legitimates' it." Wright continued, responding to Bork in the following manner:

> The syllogism [Bork's] goes something like this: ours is an essentially democratic society. The Supreme Court, in its reviewing capacity, is an undemocratic, "inherently oligarchic," and "deviant institution in the

> American democracy." Therefore, except in the most compelling situations, it should allow the representative bodies to act, nor not act, as they choose. (Dennis v. U. S., 341 U. S. 494, 555-56 (1951). (Frankfurter, J., concurring). (p. 9)

Wright (1968) was persuaded that both premises lacked credibility. First, he asked, what is a democratic society? His definition follows:

> [A] democratic political system is one in which public policies are made, on a majority basis, by representatives subject to effective popular control at periodic elections which are conducted on the principle of political equality and under conditions of political freedom. (p. 9)

The imperial judiciary envisioned by Bork and other originalists certainly does not meet this definition. Neither, said Wright, do other of our governmental institutions.

If policy-making should be responsive to the public will, how does the United States Senate rate? The votes of citizens from California certainly count less than those from Wyoming, and until Wesberry v. Sanders (1964), the House of Representatives was far from representative. As far as the internal rules of the two chambers are concerned, they are light years away from majority control. Wright (1968, p. 10) stated: "The enormous

power of the committee chairman stems from seniority which is often more the product of the disenfranchisement of the opposition than of ability or even popularity." Another example mentioned by Wright was the power of the filibuster in the Senate. After his review of the anti-majoritarian features of our national legislative branch, Wright turned to the administrative agencies, bodies not responsible to any electorate.

> Finally, and most important of all, a throughgoing majoritarianism is inconsistent with the very idea of limited--that is to say constitutional--government. For the Constitution itself sets out certain areas as simply beyond the reach of the present majority. Is the Constitution itself then a deviant document in our democracy? (p. 10)

Wright (1968) examined the representative character of the Court. Reminding us that Justices are appointed by one elected official and confirmed by others, he mentioned that Dahl estimated that a new appointment is made every twenty-two months. The Court possesses no force to back up its decisions, and the constitutional amendment process is in place when popular sentiment goes against the justices.

> Even more important, however, is the fact that the legitimacy of a particular institution in our society depends not on its intrinsic

> representational structure, but rather on its institutional authorization from, and acceptance by, the community. (p. 11)

Wright followed by quoting Rostow:

> Whatever the intentions of the Framers, judicial review has been exercised by the Court from the beginning. . . . And it stands now. . . . as an integral feature of the living constitution, long since established as a working part of the democratic political life of the nation.
>
> The weight of . . . history is evidence that the people do expect the courts to interpret, declare, adapt and apply these constitutional provisions, as one of their main protections against the possibility of abuse by Presidents and legislatures. (p. 11)

Comments by Blumenthal (1986), Jaffa (1987), and Macedo (1987) conclude this section of the review of literature. Blumenthal wrote about the history of the conservative movement, especially the post-1945 ideas which shaped the Reagan revolution. "These ideas. . . . are aggressively promoted by the foundations and think tanks of the Washington conservative establishment especially devoted to law" (p. 13). After summarizing the Meese arguments, Blumenthal turned to the history of the controversy. Like Jaffa, he found that the source of many of the ideas espoused by Meese and his fellow originalists can be located in a heritage which began

with the founders, travelling next to Jefferson Davis and the Confederacy. From there, the ideas went (p. 14) "from the nostalgic twentieth-century Southern Agrarians such as Richard Weaver to the early 'movement' intellectuals like Willmoore Kendall, and at last to the ideological bastions of contemporary Washington." Kendall, according to Blumenthal, was the Yale political scientist who influenced, among others, William Buckley.

> Kendall taught the modern liberals were the "legitimate offspring" of Lincoln, where the problem really started. This "strong" president injected a "cancer" into the American system that threatened its "very survival." And this "cancer" was the clauses of the Fourteenth Amendment guaranteeing the right to "due process" and "equal protection" under the law. Kendall, however, was not an "original intention" advocate. Instead, he urged conservatives to "get busy and amend the Fourteenth Amendment," from which flowed many of the innovations of the Warren Court. (p. 15)

According to Blumenthal (1986), movement conservatism, a term also used by Stephen Macedo, was erected on the ruins of Lincoln Republicanism. "Inside the GOP, at the height of the civil-rights controversy, the conservatives gained control of the 1964 convention by relying on a broad Southern strategy. This has since become the base of their general election strategy" (p.

15). In more recent days, these conservatives "have seized upon other divisive social issues in the effort to effect a more sweeping and lasting realignment" (p. 15). For the past few years, their attention has been centered upon the constitutional legitimacy of modern jurisprudence. It is necessary for them to "overthrow the larger legacy of Lincoln, a legacy of civil rights and strong national government, that has long become part of the country's bone and fiber" (p. 15).

President Reagan's role in this conservative agenda was seldom seen.

> Reagan has succeeded in cloaking conservatism with his geniality. And yet even he has occasionally slipped. In his first inaugural, he said: "The states created the federal government," flatly contradicting Lincoln, who said: "The Union is older than any of the states and, in fact, it created them as states." In the conservatives' siege of the judicial citadel, Meese has unfurled an unadorned ideology, exposing it to an examination from which Reagan has mostly protected it. (Blumenthal, 1986, p. 15)

Blumenthal surveyed the current conservative camp in Washington, mentioning such establishments as Benchmark magazine, The Center for Judicial Studies, the American Enterprise Institute, and the Heritage Foundation. Influential conservatives included McClellan, McDowell,

Kristol, Popeo, and of special importance to Meese, Fein. According to Blumenthal, Meese's American Bar Association speech "followed Fein's speech [to the American Enterprise Institute] concept by concept and, often, phrase by phrase" (p. 15).

The intention of the movement conservatives is to "entrench conservatism in the courts, insulated even from the electoral tides" (Blumenthal, 1986, p. 15). What is older is better, in their view. Blumenthal wrote that since the founders are not here, "the conservatives must act as their proxies" (p. 15).

Jaffa (1987), one of the leading intellectual spokesman of conservative thought, was critical of the Meese, Bork, and Rehnquist brand of originalism. Writing for a special issue of the University of Puget Sound Law Review honoring the bicentennial of the Constitution, Jaffa and other conservatives debated the question of framers' intent. In the Editor's Preface, one finds the following statement:

> Professor Jaffa asserts that the fundamental principle of equality and other tenets of natural law expressed in the Declaration of Independence were originally intended by the Framers to be incorporated in the Constitution of 1787. According to Professor Jaffa, we

> learn of this original intention through the writings of Thomas Jefferson and of James Madison, Father of the Convention. Abraham Lincoln, in the struggle over slavery, understood these original intentions of the Framers and applied the principle of equality as a moral imperative consistent with the Constitution. But, maintains Jaffa, it is John C. Calhoun, Father of the Confederacy and antagonist of the principle of equality, that most contemporary conservatives follow. (Schaeffer, 1987, p. ix.)

Jaffa began by finding fault with Meese's arguments, and asking the Attorney General how he would defend the doctrine of original intent as the basis for interpreting the Constitution. What, he asked, were those "original" intentions? Since the Constitution is a bundle of compromises, Jaffa concluded that it was the Declaration of Independence which was the "fundamental act of Union of these states" (Jaffa, 1987, p. 363). By calling John C. Calhoun the prominent shaper of American conservative legal thought, Jaffa (p. 365) stated:

> At the center of Calhoun's constitutionalism was his doctrine of state sovereignty and state's rights. The essence of the doctrine of state sovereignty was no more an affirmation of the legal rights and powers of the states, vis-a-vis the federal government, than it was a denial of the "fundamental principles of the Revolution"--as Madison called them in the 39th Federalist. That is, the doctrine of the natural rights of individuals as the source of

> the authority of the state of civil society as such.

Jaffa (1987) claimed that Calhoun's doctrine "rests upon the denial of any. . . antecedent natural rights. No rights to life, liberty, or property have any existence independent of society" (p. 366). Comparing a statement of Bork's with one of Lincoln's (pp. 373-374), Jaffa returned to his main point.

> Recently, Judge Robert Bork has written that, "[o]ur constitutional liberties arose out of historical experience. . . . <u>They do not rest upon any general theory.</u> Compare this with Abraham Lincoln: "Public opinion on any subject always has a 'central idea,' from which all its minor thoughts radiate. . . .[t]he 'central idea' in our political public opinion at the beginning was, and until recently has continued to be 'the equality of men'.

Devoting one appendix to "Attorney General Meese, the Declaration, and the Constitution", Jaffa dedicated another to "Original Intent and Justice Rehnquist." In the second appendix, he turned to the question of moral skepticism (Jaffa, 1987, p. 424).

> It is. . . discouraging to learn that the new Chief Justice--in opposition to Attorney General Meese, who, however, appears to be completely unaware of this opposition--does not, in the least, believe in the principles of the Declaration of Independence either as myth or as reality. He does not believe that we can say that free government and the rule of law

> are intrinsically good. All he can say about the former, e.g., is that Hitler's regime is in accordance with Nazi value judgments, just as Bolshevik government is in accordance with Bolshevik value judgments. In saying that Justice Rehnquist "retreats to the search for an unobtainable, objective analysis of the 'original intention' of the framers of the Constitution, [Professor Ledewitz] is imputing to Justice Rehnquist an impossibility. No one can at one and the same time be a legal positivist and an adherent of the original intentions of the Framers. For the Framers were very far from being either moral skeptics or legal positivists. Their commitment to the natural rights and natural law doctrine of the Declaration of Independence represented the most profound of their original intentions.

For the remainder of this appendix, Jaffa continued to examine Rehnquist's moral skepticism by discussing the justice's refusal to make moral judgements. The same skepticism seen by Jaffa in Rehnquist is found in Bork by Macedo.

Macedo (1987) believed that the New Right, the same conservatives attacked by Jaffa, had departed from the ideas of the founders and from what is best in the American political tradition. His discussion centered on the jurisprudence of Bork because of the judge's notoriety and his intellectual stature. In order to clarify his definition of the beliefs of the New Rights,

Macedo listed (pp. 3-4) the "strongest and most often used weapons in the conservative armory."

> First, partisans of the New Right profess a reverence for the "historical constitution" and argue that judges should adhere not simply to the text of the Constitution, but to the text interpreted in light of the specific intentions of its Framers.
>
> Second, to circumscribe judicial power, conservatives argue that democracy is the basic constitutional value.
>
> Third, the New Right claims that "abstract philosophical principles," which are often invoked to support rights claims, should have no authority in politics.
>
> Fourth, the New Right asserts that requiring majority respect for minority rights privatizes morality, imposes moral relativism on society, and prevents the formation of a real community.

Determining that all four points were faulty, Macedo (p. 5) wrote: "Bork's moral skepticism is wholly unconvincing and deeply at odds with the constitutional text and our political traditions: these sources support an active judicial defense of a broad sphere of individual liberties." Most of Macedo's arguments have been given, although in piecemeal fashion, throughout this section. He has proposed that the Constitution should be read and interpreted, "in terms of the aspirations set out in the

preamble" (p. 94). Macedo closed by writing the following:

> Rejecting the constitutional vision of the New Right should not be confused with a wholesale rejection of conservative sentiments or of patriotism. Only a blind conservatism is without reasons for valuing what it seeks to preserve. Only an unreflective and uncritical patriotism ["my country, right or wrong"] forgets that it is in aspiring to worthy principles and ideals that government, Constitution, and country become worthy of loyalty, allegiance, and self-sacrifice. Instead of the unreflective traditionalism of the New Right, we would do far better to aspire to Lincoln's eulogistic remembrance of Henry Clay, who, Lincoln said, "loved his country partly because it was a free country; and he burned with a zeal for its advancement. . . because he saw in such, the advancement. . . of human liberty, human right, and human nature" (1987, p. 96).

As the contributors to the review of literature have demonstrated, the theory of original intent, in one form or another, has been with us for some time. Fifty years ago, Jacobus tenBroek sought to analyze it, law school journals are filled with commentaries about it, and members of the judiciary speak and write about it with regularity. Historically, the theory fits well with the swings of the high Court as justices have sought rationale for their decisions. How important and how

often is this jurisprudence of original intention used today?

CHAPTER III

SUMMARY AND HYPOTHESIS

In the review of literature, the following topics were examined: the history of Supreme Court decision-making, the arguments of the advocates of a jurisprudence of original intention, the methods used by originalists, and the criticisms of the theory. The next step was to determine the frequency of references to original intent by the thirteen justices who used framers' intent in their opinions over the twenty-eight year period studied. Specifically, the literature led to the following hypothesis concerning the success of the Reagan administration in implementing this constitutional theory:

There is a difference in the average number of references to the original intentions of the framers of the Constitution in the opinions authored by the Reagan appointees and those written by other justices of the Supreme Court in those cases decided on the basis of the religion clauses of the First Amendment.

CHAPTER IV

DEFINITION OF THE CONCEPTS

Jurisprudence of original intention, original intent, interpretivism, intentionalism, or originalism. A judicial reasoning process in which Justices decide constitutional questions in accordance with the intentions of the framers or ratifiers of the Constitution.

Opinions. Majority, concurring, and dissenting opinions in First Amendment establishment and free exercises clause cases written in the period between 1960 and 1988.

Justices appointed by President Reagan. Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy. Also included was Chief Justice William Rehnquist.

Justices appointed by other Presidents. Hugo L. Black, Harry A. Blackmun, William J. Brennan, Warren E. Burger, Tom C. Clark, William O, Douglas, Abe Fortas, Felix Frankfurter, Arthur J. Goldburg, John M. Harlan, Thurgood Marshall, Lewis F. Powell, John P. Stevens,

Potter Stewart, Earl Warren, Byron R. White, and Charles E. Whittaker.

References to the original intention of the framers. Actual references by Supreme Court Justices to the ideas and words of those men who wrote the Constitution, to Thomas Jefferson, to the authors of The Federalist, and to the members of the state ratifying conventions.

CHAPTER V

SPECIFICATION OF THE UNDERLYING DESIGN OF THE RESEARCH

The purpose of the research was to compare the number of references to the original intentions of the framers of the Constitution made by justices appointed or elevated by President Reagan and justices appointed by other presidents. The sixty-six religion cases used in this study were decided between 1960 and 1988. All opinions were read in order to determine each justice's use of original intent in his or her opinion writing, and those references were noted for the validity check.

The level of measurement, counting, was nominal. The null hypothesis postulated that the average number of references in opinions issued by Reagan appointees would be equal to the average number of references by non-Reagan appointees. Validity was established through a post-external validity process in which a list of the terms used as evidence was checked by two experts. Since there was perfect agreement between them, the terms were accepted. If the two had failed to agree, a third person

would have been consulted in order to resolve the disagreement. One problem with this method was the possible omission of references. Care was taken to include only examples which mentioned the framers, the ratifiers, or excerpts from The Federalist. There were no citations from the Anti-Federalists, but several comments about early colonial history were not used when they might have been. In almost all of the historical analogies found in the justices' opinions, references were made in conjunction with the terms, "framers" or "founders", or by use of proper names. In two instances, Justice Brennan's concurring opinion in Abington Township v. Schempp, written in 1963, and in Justice Rehnquist's 1985 dissent in Wallace v. Jaffree the exact number of references to the intentions of the framers was very difficult to count. There were so many examples given in each case that determining where one ended and the next began was undoubtedly not accomplished with perfect accuracy.

As a non-experimental project, the data collection procedures were relatively simple. Reading all of the opinions while seeking references to original intent was accomplished easily with access to U.S. Reports and The

Constitution of the United States: Analysis and Interpretation. The total population of opinions decided in the given category was used; therefore, no sampling procedure was necessary. The end product was numerical: the average number of references to original intent found in each opinion and the average number of references made by each justice.

The cases studied were not classified according to type: free exercise and establishment clause cases were often combined by the Court, making it difficult to separate them. Because of the emphasis placed by some of the originalists, notably Judge Bork, upon what he called the "Madisonian dilemma," the problem of majority rule and minority protection, the cases were further analyzed in order to see if the references to intent followed or departed from the majoritarian, or legislative, position. In other words, did the justices use original intent to justify or depart from deference to legislative enactments?

Coding consisted of records of references for each justice and for each opinion studied. Since the purpose was to seek a difference in the frequency of references to

original intent in the opinions written by two groups of justices as a way to test the null hypothesis, the chi-square test was the statistical tool used when appropriate.

CHAPTER VI

FINDINGS

The justices who included references to the intentions of the framers or ratifiers in their opinions did not make up the entire population the those who sat on the Supreme Court during the twenty-eight year period studied. Of the Reagan appointees, Scalia did not write an opinion in a religion case. Kennedy wrote none with references to the framers. Of the non-Reagan appointees, Whittaker and Goldburg wrote no opinions in this class of cases, and Blackmun, Harlan, Marshall, and White wrote none with mention of original intent.

When including all of the justices sitting on the bench during the years 1960-1988 and writing in religion cases, the average number of references to intent is, therefore, much lower than when one includes only those who used intent in their opinions. For the Reagan appointees, Rehnquist, O'Connor, and Kennedy, the average number of references per case was 5.96 and per opinion was 5.14. For the non-Reagan appointees; Black,

Blackmun, Brennan, Burger, Clark, Douglas, Fortas, Frankfurter, Harlan, Marshall, Powell, Stevens, Stewart, Warren, and White, the average number of references per case was 2.45 and per opinion was 1.92.

All of the figures given in the remainder of this chapter apply only to those justices who used original intent when writing their opinions. Table 1 shows the average number of references per case and per opinion for these justices.

Table 1

Average Number of References from Reagan and non-Reagan Appointees

	Reagan Appointees	Non-Reagan Appointees
References per case	7.00	6.75
References per opinion	5.83	4.26

In Table 2, it is interesting to note that less than half of the cases written in this field included references to original intent. In addition, less than

half of the opinions written by the justices included references to the framers' intentions. Table 2 shows that only Black, Brennan, Burger, Douglas, Powell, Rehnquist, and Stevens made ten or more references. Of these justices, only Black, Brennan, Burger, and Douglas could be identified as frequent users of original intent as justification for their decisions. Stevens mentioned intent in one case. Rehnquist's thirty-one referrals came in four of his seventeen opinions, and Powell used citations to intent in just two of his opinions.

Table 3 gives a breakdown of the number of opinions written by each justice, with the number of opinions with references to original intent and the total number of references to intent indicated. Table 4 is used to show the differences between the Reagan and non-Reagan appointees to the Court.

In nine cases, the intentions of the framers were invoked in order to give credence to the opinions of justices who held opposite points of view. Table 5 includes the figures for intent when used in both majority and dissenting opinions.

Table 2

Religion Cases Decided between 1960 and 1988

Number of cases	73
Cases with written opinions (per curiam decisions not included)	66
Cases which included references to original intent	27
Majority, concurring, and dissenting opinions written in religion cases	91
Opinions which included references to original intent	44
Opinions with no references to original intent	47
Total number of references to original intent in the 27 cases which included them	197
Average number of references in all 66 cases	2.98
Average number of references in the 27 cases which included them	7.29
Average number of references per opinion in the 91 opinions written	2.19
Average number of references per opinion in the 44 opinions in which references were made	4.46

Table 3

Justices Writing Opinions with References to Original Intent

Justice	Number of Opinions	Opinions with References to Original Intent	Number of References to Original Intent
Black	4	3	10
Brennan	30	12	78
Burger	21	6	20
Clark	2	1	4
Douglas	16	7	25
Fortas	1	1	1
Frankfurter	2	1	7
O'Connor	9	2	12
Powell	11	2	12
Rehnquist	17	4	31
Stevens	12	1	1
Stewart	11	2	2
Warren	3	2	2

Table 4

References by Reagan and Non-Reagan Appointees

Total number of references to original intent	
Reagan appointees	35
Non-Reagan appointees	162
Total number of cases with references	
Reagan appointees	5
Non-Reagan appointees	24
Total number of opinions with references	
Reagan appointees	6
Non-Reagan appointees	38
Total number of opinions in religion cases	
Reagan appointees	7
Non-Reagan appointees	84

Table 5

Original Intent Use in both Majority and Dissenting Opinions

Case	Year	Majority References	Dissenting References
McGowan v. Maryland	1961	9	1
Engle v. Vitale	1962	8	1
Walz v. Tax Commission of City of New York	1970	10	14
Lemon v. Kurtzman	1971	2	3
Meek v. Pittenger	1975	1	1
Larkin v. Grendel's Den	1982	1	1
Valley Forge College v. American United	1982	1	6
Marsh v. Chambers	1983	7	11
Lynch v. Donnelly	1984	3	5

Tables 6 and 7 are used to show support for legislative enactment. Table 6 presents the numbers for cases where laws were upheld or struck down and shows the

number of references to original intent cited in these cases. Table 7 breaks down opinions supporting or striking down these laws by both Reagan and non-Reagan appointees who used framer intent. The data in Table 7 were used for a chi-square test (Siegel, 1956, p. 249). The averages for the two groups of justices were as follows: The Reagan appointees used references to original intent in support of laws being challenged in 42.8% of the total number of references. The non-Reagan appointees' references to intent made up 57.1% of those cited in support of legislative enactment. When the justices used references to original intent in opinions which struck down such laws, the Reagan appointees' use of references totaled 2.5%, and the non-Reagan justices quoted the framers in 97.5% of such citations.

There is a discrepancy in the figures for total number of references to original intent. In Table 1, that figure is given as 197 whereas in Tables 6 and 7, the figures for number of references total 189. The difference is caused by the fact that the eight opinions

which dissented in part and concurred in part were not included in the later Tables.

Table 6

Legislative Enactment Upheld or Struck Down

Cases where laws were upheld	12
Cases where laws were struck down	15
References to original intent in support of laws	70
References to original intent when laws were struck down	119

Table 7

References by Reagan and non-Reagan justices in supporting or striking down laws

	Reagan Appointees	Non-Reagan Appointees	Totals
In Support	30	40	70
Voting to Strike down	3	116	119
	33	156	189

CHAPTER VII

CONCLUSION

Comparing the opinions written by the Reagan appointees with those of the other justices on the Supreme Court in the twenty-eight year period studied presented problems not originally considered. Since only two Reagan appointees contributed to the pool of opinions as contrasted with eleven other justices who used original intent, it would be inaccurate to draw definitive conclusions about the comparative use of original intent by the two groups. Even when one examines the averages, as shown in Table 1, the difference between the two groups, although present, is slight. When including the entire population of justices writing in religion cases on the Court during the defined time period, there is more of a difference, of course, since the total number of non-Reagan appointees far exceeds that of Reagan appointees: fifteen to three.

Some justices never refer to the framers. Some do so frequently. Justice Brennan, who strongly criticized

the Meese proposal, is one of those who often quotes those who wrote the Constitution. As can be seen in Table 5, original intent was used in one-third of the cases in which it was invoked to give credence to opposing points of view. If there is an honest expectation on the part of the advocates of a jurisprudence of original intention to use this constitutional theory as the basis for decision-making on the part of the Court in the future, many more opinions will have to include references to the beliefs and words of the framers, and far fewer will be decided on the basis of precedent as is now the case, at least in cases relating to religion. It may be, however, that original intent serves a different purpose.

If the members of the Reagan administration and other conservatives in American political life are anxious to reverse the tide of liberalism which they claim has engulfed the judiciary over the past several decades, using belief in original intent as a litmus test for new judges and justices would allow them to screen candidates without resorting to questions about specific issues. If what the originalists really want, on the

other hand, is their theory enshrined in our constitutional jurisprudence, why does it only pertain to certain classes of cases?

The critics of this constitutional theory have examined inconsistencies on the part of the advocates. As Levy (1988, p. 393) wrote in the conclusion to his book, "Rehnquist and Bork have not disparaged juries of less than twelve or nonunanimous verdicts as departures from original intent."

> Meese also campaigned against the Boland Amendment, which prohibited the expenditure of funds on behalf of the Contras in Nicaragua, and he offered as his explanation that the amendment inhibited the President's inherent powers in the field of foreign affairs; Meese showed no appreciation of the fact that the Framers believed that Congress controls appropriations and expenditures. (p. 393)

Levy continued in this vein, commenting upon the originalists in Reagan's Justice Department who "insisted on a return to the pristine meanings of 1789, but never with respect to executive powers" (p. 394).

When one considers the evidence, the lack of sharp division between the two groups, the number of justices who never refer to the framers, and the fact that justices have frequently referred to the intentions of

the framers in majority and dissenting opinions in the same cases, it seems difficult to believe that the use of this theory as a viable principle for decision-making is possible.

The one area in which clear differences appeared between the Reagan and non-Reagan appointees was found in relation to Bork's "Madisonian dilemma." When it came to striking down legislative enactments and supporting the position of the minority, the number of references to the intentions of the framers from the Reagan appointees totaled less than three percent. On the other hand, the non-Reagan appointees used references to intent in striking down laws in more than ninety-seven percent of their citations.

With four Reagan appointees now sitting on the bench and with Justice White, a staunch conservative, often joining to form a majority, court-watchers are predicting a changed direction for the high Court. Both Meese and Bork emphasized the necessity of reliance on legislative majorities when making major decisions for this nation, and the Reagan appointees, especially the Chief Justice, seem to agree. Returning the responsibility for

decisions about abortion to the state legislatures is but one example of what may be the newest trend in the history of the Court. Support of legislative enactments instead of individual protections in areas other than religion is a field ripe for exploration. The test used to analyze the data in Table 7 follows:

$$(1, N = 189) = 47.00, p < .001$$

In computing the measure of degree of association, a phi statistic was used. The results were that there is a moderate degree of association between the Reagan appointees in support of legislative enactments and the non-Reagan appointees desiring to strike down such laws as determined by their use of framer intent. The phi statistical test was appropriate, because Table 7 was a 2 x 2 table and the hypothesis was a linear one. A different hypothesis could have resulted in finding a stronger relationship between the Reagan appointees' support and the non-Reagan appointees' desire to strike down actions of legislative majorities.

The findings, of course, are consistent with the expressed beliefs of the originalists that the representative branches of government should make the

major decisions in our society. If this Court, like so many others in our history, is attempting to be in tune with the times, the conservative agenda is in good hands. The originalists assume that the state and national legislatures are peopled with men and women who were chosen by citizens with whom they share common values.

This assumption may or may not be true. Many originalsits also surmise that liberal positions would be abandoned if courts retreated and allowed elected officials to reign supreme. This, too, is questionable. The decision handed down by the Court on July 3, 1989, in Webster v. Reproductive Health Services failed to deliver a guide for future conduct. Instead, it spawned a new period of confusion and animosity between segments of American society. If the majority on the Court felt that their decision would be a first step in the rejection of Roe v. Wade (1973), they may have been very wrong. Recent polls offer evidence that the nation's legislators may not have correctly read the beliefs of their constituents, and that those constituents do not necessarily follow the conservative line.

There is little doubt that the Reagan appointees to the Court will change the direction of that body. The area of church-state relations has already been muddied by a confusing decision in which the constitutionality of the use of religious symbols on public property depends upon the setting in which they are placed. A more uncertain aspect of this Court, however, has to do with the use of original intent.

The hypothesis, that there was a difference in the number of references to the original intentions of the framers in opinions written by Reagan appointees and those authored by other justices in religion cases, was proven. There was a difference, although not much of a difference. Of much more interest is the fact that the Reagan justices are urging a return to reliance on the elected branches of government in order to solve the divisive problems which face this nation. The Constitution, wrote Levy (1988), "is our national covenant, and the Supreme Court is its special keeper" (p. 394). The relationship between the Court and members of minorities has changed over the judicial history of this country. Is it the duty of the justices to protect

the individual, the member of the minority, from the excesses of the majority? Abdicating the responsibility to decide, shunting it aside to someone else, seems to be the legacy of the Reagan administration's judicial appointment process. The Madisonian dilemma may well be solved by the Reagan Court's emphasis on a diminished judiciary.

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