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OUR CONSTITUTIONS—ALIVE AND WELL†

Sol Wachtler*

The heat in Philadelphia was once again bothering the 81-year-old Benjamin Franklin. The convention was reaching its conclusion, and he did not feel quite up to making his one last speech urging support for what was to become our Constitution. His words were read to the delegates assembled. His characterization of the product of that convention is worth repeating. He said:

[When you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does;

† The text of this Article is based upon an address given at the Chautauqua Institute on July 3, 1987.
* Chief Judge, New York Court of Appeals; Chairman of the New York State Committee to Celebrate the Bicentennial of the United States Constitution.
2 1 F. Thorpe, The Constitutional History of the United States 589 (1901). Benjamin Franklin played an instrumental role in convincing a majority of the delegates attending the convention to sign. Id. When the Constitution was read for the first time on September 17, 1787, many feared that it would be rejected by a majority. Id. "[A]t this critical moment, Franklin spoke the word[s] which strengthened the friends of the Constitution, and undoubtedly disarmed some of its opponents." Id. He said:

I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged, by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. . .

. . .

I cannot help expressing a wish that every member of the Convention who may still have objection to it, would with me, on this occasion doubt a little of his own infallibility — and to make manifest our unanimity, put his name to this instrument.

2 M. Farrand, supra note 1, at 641-43.
and I think it will astonish our enemies, who are waiting with confidence to hear that our councils are confounded like those of the Builders of Babel . . . .3

I often take pride in reflecting on the fact that it was here in New York State that the Continental Congress called for a rewriting of the Articles of Confederation to be held in Philadelphia.4 You see, the Miracle of Philadelphia began in New York. But not long after their arrival in Philadelphia it became clear that they were there to do something more than the splinting and patching of a collapsing set of Articles5—they were there to build a nation.6 And those who built it were not at all confounded like the “Builders of Babel.”

We are now celebrating the 200th anniversary of that Constitution7—of the birth of our nation—and by any standard of which I am aware, our celebration will be justified.

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3 2 M. Farrand, supra note 1, at 642.
4 On February 21, 1787, the Continental Congress, while meeting in New York, passed a resolution calling on each of the states to send delegates to a convention to meet in Philadelphia in May of 1787. See C. Bowen, supra note 1, at 4; 1 The Founders’ Constitution 188-89 (P. Kurland & R. Lerner ed. 1987) [hereinafter The Founders’ Constitution].

New York had served as the meeting place for the Continental Congress from 1785 until after the end of the Confederation. M. Jensen, The New Nation: A History of the United States During the Confederation 1781-1789 83 (1950).

5 Most important among the problems of post-revolutionary America was the deficiencies of the Articles of Confederation. For the text of the Articles of Confederation, see 1 The Founders’ Constitution, supra note 4, at 23-26. Under the Articles, “each State retained its sovereignty.” 1 D. Watson, The Constitution of the United States: Its History, Application and Construction 35 (1910). The Confederation “had no power to collect taxes, defend the country, [or] pay the public debt.” C. Bowen, supra note 1, at 5. However, the most serious weaknesses of the Articles were the Confederation’s “impotency to control the States, together with a want of general or centralized power, which would enable Congress to compel compliance with national demands which were necessary to give the United States standing and position among the nations of the world.” 1 D. Watson, supra, at 35.


7 The Constitution has been the “supreme Law of the Land,” U.S. Const. art. VI, cl. 2, since June 21, 1788. See 2 F. Thorpe, supra note 2, at 77. For a thorough account of the debates accompanying the ratification process, see 2-4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot 2d ed. 1836).
The celebration of our Constitution will not be marked by fireworks and tall ships. It will be a celebration of reflection.

Last July 4th we were reminded that we are the children of a nation of immigrants. Some of those immigrants were our own parents, or grandparents. Many spoke an alien language, most were poor and uneducated. Some came to these shores as slaves. Perhaps most significantly, they lacked both knowledge and experience with the democratic process. That they survived—and in fact thrived—is a testament not only to their own fortitude, but to the foresight of our constitutional forebears, and to the seeds of a just government which they planted so firmly. We can be rightly proud of our Constitution, for those who came before us did their work well.

Yet we would be negligent to be satisfied with a mere celebration of the past. Celebrations are also a time for examination—to consider where we are now, what the future holds in store for us, and whether that future will see the survival of this great constitutional experiment.

Examination begins with understanding, and we are fortunate that the bicentennial celebration has engendered the kind of constructive debate which leads to understanding.

For example, we have the proponents of original intent, rep-

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8 The United States, more so than any other country on earth, is a nation of immigrants:
The whole history of the United States during the past three and a half centuries has been molded by successive waves of immigrants who responded to the lure of the New World and whose labors, together with those of their descendants, have transformed an almost empty continent into the world’s most powerful nation. The population of the United States today, except for the Indians, consists entirely of immigrants. . . . American society, economic life, politics, religion, and thought all bear witness to the fact that the United States has been the principal beneficiary of the greatest folk-migration in human history.

M. Jones, American Immigration 1 (1960).

9 The first slaves were brought to America in 1619. After that, slavery existed here for more than 240 years. Jordon, Unthinking Decision: Enslavement of Africans in America to 1700, in Slavery in American Society 3 (1976); American Negro Slavery 9 (A. Weinstein & F. Gatell 2d ed. 1968).

10 Many immigrants came to America to escape the political oppression of their homelands; thus the American democratic process was something very new to them. See W. Smith, Americans in the Making: The Natural History of the Assimilation of Immigrants 9 (1939).

11 The doctrine of original intent is a principle of constitutional construction by which courts in deciding cases which involve constitutional issues are to ascertain and “honor the intent of the persons who framed and adopted the Constitution.” Antieau, Constitutional Construction: A Guide to the Principles and Their Application, 51 Notre Dame Law. 358,
resented by Attorney General Edwin Meese. He began this debate a year ago in an address before the American Bar Association when he said:

It has been and will continue to be the policy of this administration to press for a *jurisprudence of original intention.* In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.\(^{12}\)

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\(^{358}\) (1976).

On a few occasions in the past, a number of Supreme Court justices have indicated an inclination toward this method of constitutional construction. For example, in 1934, Justice Sutherland wrote, "[t]he whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting). Justice Goldberg, in 1964, said, "[o]ur sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purposes of the Framers." Bell v. Maryland, 378 U.S. 226, 288-89 (1964) (Goldberg, J., concurring).

Some legal scholars have also maintained that the intent of the drafters of the Constitution should be controlling. Joseph Story, in 1833, wrote, "[t]he first and fundamental rule in the interpretation of all instruments, is to construe them according to . . . the intention of the [drafters]." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 135 (rev. ed. 1987) (1st ed. 1883). Thomas Cooley, in his influential work, *Constitutional Limitations,* said, "[t]he object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." T. COOLEY, 1 CONSTITUTIONAL LIMITATIONS 124 (8th ed. 1927) (emphasis in original).


The Supreme Court itself from the beginning has taken an active role in constitutional interpretation, sometimes going beyond the perceived intent of the Framers. Illustrative of this activism is the case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, Chief Justice Marshall was faced with a legal challenge to congressional legislative action establishing a national bank. *Id.* at 322. The challenge was based on the argument that since the Constitution made no mention of a national bank, Congress was powerless to create one. *Id.* at 366. The Court rejected this argument and upheld the establishment of a national bank by finding that the Constitution not only gave Congress explicit powers, but that it also gave Congress implied powers which the Supreme Court, in its wisdom, could deduce. *Id.* at 324. See also infra note 19 and accompanying text (discussion of *Marbury v. Madison*).

For a discussion of some of the arguments against the adoption of the doctrine of original intent in constitutional construction, see infra note 12.

And in characterizing the rulings of the Supreme Court, the Attorney General in a bicentennial lecture last October noted that a constitutional decision by that court "binds the parties in a case and also the executive branch for whatever enforcement is necessary. But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore."13

The Attorney General explained his concept of a jurisprudence of original intent last year at a lecture at the University of Dallas by stating that:

At the deepest level, a jurisprudence of original intention does two things. First, it seeks to discern the meaning of the text of the Constitution by understanding the intentions of those who framed, proposed, and ratified it. The intentions of the Framers supply us with original principles. Second, a jurisprudence of original intention is not confined to the circumstances from which those original principles sprang. Rather, those principles can be applied to new circumstances, circumstances unforeseen by the Founders themselves. . .

It is a jurisprudence that takes seriously the belief that the Constitution—our written Constitution—means something, something that can be and must be discerned and applied to our modern circumstances.

Meese, Address at the American Bar Association, supra, at 466 n.60 (emphasis in original).

In general, the doctrine of original intent has been attacked on a number of grounds. It has been questioned whether any court can ever "determine the intent of the framers as to the precise meaning of words written . . . 200 years ago." Antieau, supra note 11, at 358. It has also been suggested that a single, collective intent has never existed. Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 214 (1980). It should also be noted that fifty-five men participated in the Constitutional Convention and that many more took part in the ratification process. It is highly unlikely that each of these men ascribed to a single interpretation of the various provisions of the Constitution.

The Attorney General bases his characterization of the Supreme Court on what he sees as a major distinction between the Constitution and constitutional law. According to him:

The Constitution is . . . the instrument by which the consent of the governed—the fundamental requirement of any legitimate government—is transformed into a government complete with the power to act and a structure designed to make it act wisely or responsibly . . . .

Constitutional law, on the other hand, is that body of law that has resulted from the Supreme Court's adjudication involving disputes over constitutional provisions or doctrines. To put it a bit more simply, constitutional law is what the Supreme Court says about the Constitution in its decisions resolving cases and controversies that come before it.

Id. at 981-82.

The Attorney General seems to underestimate the role of the Supreme Court in constitutional construction. It must not be forgotten that the Constitution was not meant to be a clear-cut and all-inclusive document. See Simon, supra note 11, at 1491-92 (language of many provisions of Constitution is vague and ambiguous). In the words of Chief Justice John Marshall: "[t]hose who apply the rule to particular cases, must of necessity expound
Now criticism of Mr. Meese's position with respect to the Constitution and the Supreme Court's role have come from varied quarters.\textsuperscript{14} Anthony Lewis of the \textit{New York Times}, and a noted author on constitutional principles, said that our Attorney General is "making a calculated assault on the idea of law in this country: on the role of judges as the balance wheel in the American system."\textsuperscript{15}

And Benno Schmidt Jr., the president of Yale and a preeminent constitutional scholar, said Mr. Meese was on a "disastrous" course, speaking as "a man of power, not a man of law."\textsuperscript{16}

Although these characterizations appear harsh, I must confess that I too have difficulty with a concept or principle which would diminish the role of the courts in settling the law as it applies to all of us.\textsuperscript{17} I thought that had been settled as far back as \textit{Marbury v. Madison},\textsuperscript{18} which held that the judiciary was supreme in its exposition of the law of the Constitution and that the Supreme Court's decisions with respect to the federal Constitution were the su-

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and interpret that rule." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). And these interpretations are, until overturned by a later Supreme Court decision or constitutional amendment, binding on all persons and parts of government. See id. See Morgan, \textit{Professors vs. Meese: Scholars Malign the Attorney General,} L.A.D.J., June 8, 1987, at 4, col. 3. For a discussion of some of the arguments against the adoption of the doctrine of original intent in constitutional construction, see \textit{supra} note 12. Lewis, \textit{Law or Power?}, N.Y. Times, Oct. 27, 1986, at A23, col. 1. Id. at col. 2. If our system of government is going to survive, and indeed thrive, it is essential that the role of the Supreme Court, as protector and interpreter of our Constitution, not be diminished, and that an independent judiciary be maintained. Since the Constitutional Convention, the United States has evolved from an agricultural nation emerging from colonial domination into an industrial superpower. The executive and the legislative branches experienced a correspondingly dramatic increase in the breadth and scope of their activities. This enormous growth carries with it a danger, however remote, that our government may come to resemble its overbearing British ancestor against which the colonies had rebelled. The need for an independent judiciary to safeguard the rights of the people is correspondingly magnified, for governmental power carries with it always the potential for abuse. Kaufman, \textit{Maintaining Judicial Independence: A Mandate to Judges,} 66 A.B.A. J. 470, 470 (1980) (emphasis added).

When examining the role of the Supreme Court in our society one should keep in mind the words of James Madison, the Father of our Constitution: "the Federal Judiciary is truly the only defensive armor of the Federal Government, or rather for the Constitution and the laws of the United States. Strip it of that armor and the door is wide open for nullification, anarchy, and convulsion." Letter from James Madison to Joseph Cabell (Apr. 1, 1833), reprinted in 1 C. Warren, \textit{The Supreme Court in United States History} 740 (1947). 5 U.S. (1 Cranch) 137 (1803).
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As for the doctrine of original intent, I believe that we make a serious mistake to accept the belief that the past has done its work for the present, and that our liberty, which is the cornerstone of democracy, is guaranteed. The truth is that one generation can never protect the rights of another, and although all of our great documents: the Declaration of Independence, the Constitution, and the Bill of Rights, are ideal reflections of our finest aspirations, they are not self-fulfilling chariots of justice. For all their beauty, they are only words, dependent on each generation to give them a meaning and content for its own time and place.

For example, I cannot think of words less in need of annotation than the truth so proudly declared self-evident in our independence declaration that "all men are created equal." Yet, it is all too clear that while our founders wrote those words with hearts full of devotion to freedom and justice for mankind, they never once meant to include women or members of the black race. Every generation, from Dred Scott, where a black person could be owned, to Plessy v. Ferguson, where the Constitution was inter-

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19 See id. at 177. The Marbury decision, which marked the first time that an Act of Congress was declared unconstitutional by the Supreme Court, established the principal of judicial review. Judicial review has been defined as "the ultimate power of any court [particularly the Supreme Court] to declare unconstitutional and hence unenforceable: (1) any law; (2) any official action based upon a law; and (3) any other action by a public official that it deems to be in conflict with the Constitution." H. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 163 (6th ed. 1983).

20 "The strength of our Constitution is that it was wisely intended by [its Framers] to be a living document adaptable to changing times." Hug, The Constitution, Judges, and Changing Times, supra note 11, at 11. By this we mean that

[t]here is no such thing as a constitutional provision with a static meaning. If it stays the same while . . . society itself changes, the provision will atrophy. . . . A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society.


21 The Declaration of Independence para. 1 (U.S. 1776).

22 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The issue before the Supreme Court in the Dred Scott case was the status of a Negro slave who claimed that he was forever emancipated upon being brought by his master from a slave state into territory made free by the Missouri Compromise. Id. at 347-48. Chief Justice Taney, speaking for the Court, held that the protections of the Constitution did not extend to Negro slaves and that a Negro slave was his master's permanent property whether in free or slave territory. Id. at 404-05.

interpreted by different Supreme Court Justices to say that there must be equal treatment for blacks—but that equality could still be separate—to Brown v. Board of Education,\textsuperscript{24} where still different Justices of the Supreme Court, interpreting the same Constitution, held that there must be true equality between the races. And most recently, the Cleveland Firefighters\textsuperscript{25} case and the Santa Clara Highway Department\textsuperscript{26} case, which upheld affirmative action to achieve equality for blacks and for women. All of these progressive interpretations of our Constitution have given the simple words “all men are created equal” a meaning and content consistent with and reflecting our evolving principles, our morality and our sense of justice.\textsuperscript{27}

We have seen the same change and expansion of meaning oc-

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\textsuperscript{24} 347 U.S. 483 (1954). In Brown v. Board of Education, the question before the Supreme Court was whether the implementation of the doctrine of “separate but equal” in the nation’s public school system violated the “equal protection of the laws” clause of the fourteenth amendment. \textit{Id.} at 487-88. The Court held that this policy did violate the fourteenth amendment, stating that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” \textit{Id.} at 495.

\textsuperscript{25} Local 93, Int’l Ass’n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986). Justice Brennan, writing for the Court, noted that “courts may, in appropriate cases, provide relief . . . that benefits individuals who were not the actual victims of a defendant’s discriminatory practices.” \textit{Id.} at 3072 (citing Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986)). In this case, an organization of black and Hispanic firefighters sued the city of Cleveland, alleging discrimination based on race and national origin in hiring, assigning, and promoting firefighters. \textit{See id.} at 3066-67. Local 93 intervened, and, over its objections, Cleveland entered into a consent decree, agreeing to a specific affirmative action plan regarding promotions of minorities. \textit{See id.} at 3070. This consent decree was entered by the district court and ultimately upheld by the Court. \textit{See id.} at 3077.

\textsuperscript{26} Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442 (1987). Johnson involved a male employee who claimed that the county transportation agency had violated his civil rights by taking a female employee’s gender into account in promoting her over him in accordance with its affirmative action plan. \textit{Id.} at 1446-49. The Supreme Court held that the affirmative action plan represented “a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the . . . workforce,” and thus there had been no violation of the male employee’s civil rights. \textit{Id.} at 1457.

\textsuperscript{27} As our principles of justice and morality have evolved, so have the Supreme Court’s interpretations of our Constitution. In 1787, it may have been acceptable to some to consider some races inferior people. Today, however, such a belief would be universally condemned, and thus all races are entitled to the same constitutional protections. This is an example of what we mean when we say our Constitution is a “living Constitution.”
cur with virtually all of our constitutional principles,\textsuperscript{28} and as the pace of our lives has quickened, so too has the pace of change.

I do not believe that any one of us is surprised that, despite Attorney General Meese's statement that no ideological test would be applied in choosing a replacement for Justice Powell,\textsuperscript{29} the person originally chosen has said that "original intent is the only legitimate basis for constitutional decisionmaking."\textsuperscript{30} Judge Bork has qualified that observation by saying that "[w]e are able to apply the first amendment's Free Press Clause to the electronic media . . . . [and] the fourth amendment's prohibition on unreasonable searches and seizures to electronic surveillance . . . ."\textsuperscript{31} But we do not know, and he can not know, how the Framers' intent would apply to the problems of pollution in the Hudson River or whether a terminally ill patient should be removed from a life support system—problems which are different in kind rather than in degree.\textsuperscript{32}

There is a need for judicial respect for the prerogatives of the executive and legislative branches under our separation doctrine. There is a place for judicial restraint. But the protection of such things as individual and privacy freedoms is a uniquely judicial obligation and responsibility. Judicial restraint should not be confused with judicial abdication.\textsuperscript{33}

\textsuperscript{28} For example, individual privacy rights, rights which are taken for granted today, have undergone dramatic changes since the inception of our Constitution. See generally A. Breckenridge, \textit{The Right to Privacy} (1970).


For a discussion of some of the reasons why the Supreme Court should take an active role in the area of constitutional interpretation, see supra note 17.

\textsuperscript{31} Bork, \textit{supra} note 30, at 826.

\textsuperscript{32} "It would be preposterous for us to assume and act today as if the Framers envisioned solutions for problems that did not even exist when the Constitution was adopted and ratified." Gangi, \textit{Judicial Expansionism: An Evaluation of the Ongoing Debate}, 8 Ohio N.U.L. Rev. 1, 18 (1981). "The United States was barely populated, comparatively homogeneous, basically rural and largely agricultural at the time of the Constitution's adoption. We live today in radically different circumstances." \textit{Id.} Thus, it would be foolish for us to try to determine the intent of the Framers with respect to many of the issues that arise in today's society, simply because the Framers could not have had any intent with respect to these issues.

\textsuperscript{33} In our democratic system of government it is up to the judiciary to take an active role in the protection of individual and privacy rights. It must not be forgotten that

[d]emocratic theory presumes constant shifting of minorities seeking to form
And I do not think for a moment that our Founding Fathers intended for us to interpret the Constitution according to their divined intent, divorced somehow from contemporary understanding. As Thomas Jefferson phrased it, in a free society "nothing is unchangeable but the inherent and unchangeable rights of man." And John Marshall, a member of the Virginia Ratifying Convention and later Chief Justice of the United States, spoke to this very point when he said that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

a majority coalition. The theory, however, is unable to provide protection to those minorities that find themselves at an inherent disadvantage when forming political alliances. Racial minorities and criminal defendants constitute such groups, and they often find themselves permanently in a minority status before the legislature. Such permanent minorities could easily be treated unjustly by an "ill-spirited" majority. Hence, the usual democratic process provides insufficient protection because elected officials are too susceptible and responsive to organized interest groups and popular prejudices. Legislators and executives, urged by inflamed or prejudicial constituents, may ignore the long term consequences of a selective denial of rights and restrict the liberties of those particularly feared or hated. Unlike the judiciary the political branches are constrained by their constituents. These aforementioned democratic shortcomings, first "led the Constitution's framers to embed protection for fundamental personal liberties and scrupulously fair criminal procedures in the Bill of Rights." Second, with equal foresight, the Framers realized that the Supreme Court was the best suited to protect those rights. The justices have life tenure, can be "bold against popular feelings and opposition" as well as "demand the respect and obedience of an unwilling majority." Chief Justice Warren put it well when he stated: "we have no constituency. We serve no majority. We serve no minority. We serve only the public interest as we see it, guided only by the Constitution and our own consciences."

Gangi, supra note 32, at 27-28 (footnotes omitted) (quoting the retirement address of Chief Justice Warren before the Supreme Court of the United States (June 23, 1969), reprinted in 395 U.S. vii, xi (1969)).

During the Constitutional Convention of 1787 and the subsequent ratification conventions, 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. Although the Philadelphia framers certainly wished to embody in the text the most "distinctive form of collecting the mind" of the convention, there is no indication that they expected or intended future interpreters to refer to any extratextual intentions revealed in the convention's secretly conducted debates. The framers shared the traditional common law view . . . 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 interpretation.


McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original). Our Constitution is not a detailed code, but a structure, a fundamental charter for
That Constitution, written in ninety days, has survived for two hundred years; that Constitution, written with a quill pen, has survived to this era of the microchip, precisely because we have recognized that the Framers of the Constitution were not so arrogant as to suppose that they could anticipate the future.\(^\text{38}\)

And this nation has survived because there has been a recognition of our obligation to enact laws and to adapt the law to the "crises of human affairs."

The original document was not perfect.\(^\text{37}\) Supreme Court Justice Thurgood Marshall, as a part of our celebration of examination and reflection, has said that the Constitution was "defective."\(^\text{38}\) He correctly noted that the document written in Philadelphia two hundred years ago condoned slavery by evading the issue.\(^\text{39}\)

This was part of the imperfection to which Benjamin Franklin

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alluded.\textsuperscript{40} The abhorrence of slavery, today a closed question, at least in our wiser corner of civilization, was very much an open one at the time of the Constitutional Convention and, indeed, for almost three quarters of a century thereafter. Slavery at that time was an established institution, although some of the delegates to the convention, such as George Mason\textsuperscript{41} of Virginia and Gouverneur Morris\textsuperscript{42} of Pennsylvania, urged abolition. They were not to prevail, however, and the best that could be done at that time without sacrificing the Constitution itself was to prohibit the importation of slaves after 1808.\textsuperscript{43}

The omission in the original Constitution of an express prohibition of slavery does not indicate that the document, or the work of the Framers, was "defective." The defect lay in prevailing social values of the time, and when these progressed to a higher level, the mechanisms of amendment,\textsuperscript{44} provided for by the Framers, and ju-
dicial review, as I have already outlined in the progression of cases dealing with civil liberties, were able to conform our governing law to them. But the inherently human fallibility of the people, of their institutions and their very instrumentalities of governance still persist. So the pursuit of perfection and by that pursuit incremental improvement continues as provided for in the Constitution.

The Constitution we celebrate is really two constitutions: an arrangement for strong government which was the original document written at that convention in Philadelphia, and the subsequent charter for personal liberties embodied in the Bill of Rights. The further addition of the thirteenth, fourteenth and fifteenth amendments in the aftermath of the bloody Civil War

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal Suffrage in the Senate.

Id.

See supra notes 17-19 (development of judicial review); notes 22-27 (case law on civil liberties protection).

The Bill of Rights is the name commonly given to the first ten amendments to the Constitution, drafted by the first Congress. These amendments, containing a broad guarantee of individual rights, were submitted to the states in September 1789, and were ratified by December 15, 1791. Legislators originally proposed twelve amendments, ten of which were accepted for submission to the states. See 1 R. Rotunda, J. Nowak & J. Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 3.1, at 202-03 (1986).

The thirteenth amendment, ratified on December 6, 1865. It provides: “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.” U.S. Const. amend. XIII, §§ 1, 2.

The fourteenth amendment was ratified on July 9, 1868. It provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The fifteenth amendment was ratified on February 3, 1870. It provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.” U.S. Const. amend. XV,
strengthened our commitment to liberty and equal protection under the law. September 17, 1787 was the beginning. It started there, but as our values became progressively enlightened, the Constitution, by amendment and judicial interpretation, also became progressively enlightened. Any attempt to freeze the Constitution at some arbitrary starting point that supports the exercise of executive authority while ignoring the obligation to protect civil liberty is to ignore how far our nation has come over the last two hundred years. To fault the Framers for having failed to anticipate this in all its particulars is not only to expect of them the impossible, but to demean their considerable achievement in creating a flexible document which was intended and has been made to reflect societal progress.

There is yet another component which should be discussed during our bicentennial celebration. I believe the most important contribution to come out of the Constitutional Convention—namely, the principle of federalism—has become the most misunderstood feature of the American constitutional system today.

In textbook terms, “federalism” has to do with the distribution and sharing of political power between national and state governments. In human terms, federalism is like a marriage partner-

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§§ 1, 2.

50 See supra note 27 (discussion of “living Constitution”).

51 The American system of federalism, as designed by the Framers, was considered unique among contemporary political systems. As Alexis de Tocqueville noted “[t]his Constitution, which may at first sight be confused with the federal constitutions that have preceded it, rests in truth upon a wholly novel theory, which may be considered as a great discovery in modern political science.” 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 162 (P. Bradley ed. 1945).

52 The new Constitution outlined this distribution and sharing of power. Professor Wechsler identified three devices used by the Founding Fathers to implement our federal system:

They preserved the states as separate sources of authority and organs of administration—a point on which they hardly had a choice.

They gave the states a role of great importance in the composition and selection of the central government.

They undertook to formulate a distribution of authority between the nation and the states, in terms which gave some scope at least to legal processes for its enforcement.

Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 543-44 (1954). Further, spheres of power not specifically enumerated in the federal Constitution were reserved for the states in the Bill of Rights. The tenth amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are
ship. A federal relationship begins when two previously independent parties agree to come together and form an indissoluble union. In that union the parties become partners in the truest sense of that term, retaining a certain amount of individual integrity and autonomy, while at the same time giving up an equal measure of their independence for the good of the relationship. The very word “federal” comes from the Latin fides, meaning “faith.”

When he was writing *The Federalist Papers*, James Madison referred to this system as a “compound republic,” which he noted, “is, in strictness, neither a national nor a federal Constitution, but a composition of both.”

Most of the Framers left the Philadelphia Convention with a growing commitment to this “compound republic”—a system of dual federalism which, while establishing a federal Constitution, left intact that great body of state powers concerning the state’s ability to regulate public health, safety, education, community affairs and family relations.

State constitutions, therefore, comprise a significant portion of the American constitutional system. They authorize state power and, with the United States Constitution, also limit it. The United States Constitution of 1787 thus did not create the Ameri-

reserved to the States respectively, or to the people.” U.S. Const. amend X. James Madison described the powers delegated to the federal government as “few and defined,” *The Federalist* No. 45, at 311 (J. Madison) (J. Cooke ed. 1961), and those delegated to the states as “numerous and indefinite.” *Id.*

*The Federalist Papers* are a collection of eighty-five essays which were published in newspapers and directed at the citizens of New York. The writers, including Hamilton, Madison and Jay, wrote in support of ratification of the Constitution of 1787. First published in 1788, the essays are a valuable aid in discerning the intentions of the Founding Fathers; however, *The Federalist Papers* are, and should be recognized as, persuasive writings. See generally *The American Constitution: For and Against*, supra note 37, at 22-23 (*The Federalist Papers* viewed as political propagand, not theory).

*The Federalist No. 51, at 351 (J. Madison) (J. Cooke ed. 1961).*

*The Federalist No. 39, at 287 (J. Madison) (J. Cooke ed. 1961).*

*The Federalist No. 45, at 313 (J. Madison) (J. Cooke ed. 1961).*

See generally *The American Constitution: For and Against*, supra note 37, at 22-23 (*The Federalist Papers* viewed as political propagand, not theory).

See, e.g., Ill. Const. art. I, § 18 (“equal protection of the laws shall not be denied or abridged on account of sex by the State”); Mich. Const. art. IX, § 6 (limitations on imposition of ad valorem taxes); N.Y. Const. art. I, § 8 (“no law shall be passed to restrain or abridge the liberty of speech or of the press”).
can constitutional system; rather, it completed that system. 68

Consider the Supremacy Clause of the United States Constitution, 69 which provides that it and laws and treaties pursuant to it “shall be the supreme Law of the Land,” binding “the Judges in every State.” 70 That is why state court judges must swear to uphold both the Constitution of the United States and the constitution of their state. If the Framers had intended the United States Constitution to replace state constitutions, they would undoubtedly have made their Constitution the “only,” rather than the “supreme,” law of the land. 71

Indeed, the United States Constitution was, in large part, modeled after state constitutions. 62 I proudly digress to note that it

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68 State constitutions assume responsibility for dealing, and claim authority to deal, with the whole gamut of problems cast up out of the flux of every day life in the state, save only in the particular respects in which the Federal Constitution or statutes deprive the states of any competence whatever or provide for an overriding or displacing federal law. Hart, The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 491 (1954). Each of the fifty states has adopted a written constitution. The Council of State Governments, The Book of the States 1984-1985 221 (1984). Most state constitutions exceed the federal Constitution in length and detail. See Developments in the Law—The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1355 (1982). State constitutions can be amended easily, usually by popular referendum. Id. at 1354. Fourteen states hold periodic constitutional conventions to consider major revisions. Id. The New York Constitution provides for regular constitutional conventions. Article XIX, section 2 provides:

At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question ‘Shall there be a convention to revise the constitution and amend the same?’ shall be submitted to and decided by the electors of the state.

N.Y. Const. art. XIX, § 2.

Twelve state constitutions antedated the Constitutional Convention of 1787. The Council of State Governments, supra, at 221.

69 See U.S. Const. art. VI, cl. 2. It provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

70 See id. Hamilton wrote of the Supremacy Clause that “it will not follow from this doctrine that acts of [the federal government] which are not pursuant to its constitutional powers but which are invasions of the residuary authorities of the [states] will become the supreme law of the land.” The Federalist No. 33, at 207 (A. Hamilton) (J. Cooke ed. 1961).

71 See Hart, supra note 58, at 516.

72 See Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 501-02 (1977). “[T]he drafters of the federal Bill of Rights drew upon corre-
was our New York State Constitution of 1777 which first called for the three separate branches of government and spawned the constitutional guarantees of our liberties—guarantees later framed in the United States Constitution's Bill of Rights—which were first made public here in New York. And the United States Constitution was never intended to displace those state constitutions. Alexander Hamilton, another author of The Federalist Papers, contemplated that the state would remain the principal protector of individual rights—"the immediate and visible guardian of life and property."85

Although some national law schools appear reluctant to teach constitutional decisions of state courts of last resort, omitting them from their Constitutional Law courses, casebooks and texts, the fact remains that state courts, relying on state constitutions, have admirably fulfilled Hamilton's prediction since before the establishment of the United States Supreme Court. Justice William Brennan applauds this trend, calling its recent resurgence "an important and highly significant development for our constitutional jurisprudence" today.86 Between 1970 and 1984, state courts have handed down over 350 published opinions holding that the minimal requirements under the United States Constitution established by the Supreme Court were insufficient to satisfy their own constitutional requirements.87
These decisions, and similar ones of state courts of last resort throughout the nation, indicate, in Justice Brennan's words, that "the Brandeis state laboratories are once again open for business." What this means is that dual federalism, contemplated by the Framers yet ignored in recent years, is no longer a moribund theory, but once again a vital governmental concept and tool, an elegantly balanced machine of government by both state and national governments under state and national constitutions.

And so the celebration of our Constitution continues. We will hear some describe the Framers as exemplars of a revolutionary idealism the likes of which we will never see again—and others will see them more as politicians than statesmen, who struck pragmatic deals out of self-interest. There will be those who will speak of "defects" and others will insist on "original intent," but in the final analysis there will be the inevitable realization that we were given a Constitution which is nothing short of miraculous—as Benjamin Franklin said: "so near to perfection."

But, as I noted initially, this celebration must also be a time for resolve, and that must include a recognition that the primary predicate for the Constitution was the expressed need to create a society free from governmental oppression—to guarantee the individual's liberty under the law.

So long as we remain constant to that objective; so long as we recognize that we bear the burden not to appease the majority, but to protect the rights of the individual; so long as we are willing to defend in our courts those basic freedoms which are cherished by all of our citizens—even if that protection is unpopular—then we will have done our part in our time in seeing to it that the future of our Constitution is secure.

Time moves quickly, and while the present may seem eternal, all too soon future generations will be here to appraise us as we now appraise the work of our forebears. When they do, we hope they will conclude: This was our nation—still in its youth—and we too did our work well.

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state constitution which can provide greater protection than federal Constitution); People v. Class, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (warrantless search violative of state constitution but not of federal); Commonwealth v. Triplett, 462 Pa. 244, 249, 341 A.2d 62, 64 (1975) (court must indicate that decision is premised on state constitution).

8 W. Brennan, Jr., Remarks at the Lawyers for the Library Dinner (Apr. 16, 1987).

9 See supra notes 37-45 and accompanying text.

10 See supra notes 11-20 and accompanying text.

71 2 M. Farrand, supra note 1, at 642.