Bracton's Warning and Hamilton's Reassurance

by The Honorable D. Arthur Kelsey, Supreme Court of Virginia

[An edited and annotated draft of a speech given to the Portsmouth Law Day luncheon on May 1, 2017]

John, King of England, signs the Magna Carta. Color woodcut.

We gather today to celebrate what we call "Law Day" — which I take simply to mean a day to honor the law. The highest law of the land, of course, is the United States Constitution, the American Magna Carta. In honor of our Constitution, I would like to discuss a jurisprudential debate that began in 13th-century England and has continued to this day. The debate centers on a single question: What is a judge's role in the interpretation of our Constitution?

Thomas Jefferson once famously said: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."[1] What did Jefferson mean by that? How could judges construe the Constitution in a way that renders it a blank piece of paper?

You probably wouldn't think that the definitive answer to that question would come from Obi-Wan Kenobi. But he made the point as well as anyone when he said to Luke Skywalker, "Luke, you're going to find that many of the truths we cling to depend greatly on our own point of view."[2] If that is true, and I believe it is, I would invite you to examine your own point of view on this subject and question how it fits within the spectrum of competing views.

Let me begin with a point of agreement. Interpreting the Constitution is easy when its text is irrefutably clear. Article I, Section 2, Clause 2, for example, states that "[n]o person shall be a Representative who shall not have attained to the Age of twenty five Years." I assume that no one — whether liberal, conservative, libertarian, or none of the above — would read that clause to mean that a 14-year-old could be elected to the House of Representatives if he had the maturity of a 60-year-old. I also assume the inverse would be somewhat regrettably true as well — that no one would interpret the clause to forbid a 60-year-old from holding office merely because he had the maturity of a 14-year-old.

Needless to say, not every clause of the Constitution is that clear. In fact, very few

are. The trial judges as well as the lawyers practicing in our criminal courts will remember *Crawford v. Washington*. That case completely changed the way that we apply the Sixth Amendment's Confrontation Clause to hearsay offered in criminal cases. At the very beginning of the analysis section of the opinion is this unadorned admission: "The Constitution's text does not alone resolve this case."[3]

Then, What Does?

I will never forget the first time I read that provocative sentence. It raised the obvious next question: If the text alone does not resolve the case, then what does? I think there are four judicial models that best describe how judges answer this question.

The Oracle Model. Under this highly egocentric approach, the constitutional text means what the judge personally thinks it *ought* to mean. This kind of judge will see himself either as a mystical Oracle of Delphi, or, if Social Darwinism appeals to him instead of mythology, he will simply conclude that he won the survival-of-the-fittest competition and has somehow earned the right to have the last word on the Constitution's meaning. The decision-making style of this type of judge, as Jefferson might say, is often sprinkled with "metaphysical subtleties, which may make anything mean everything or nothing," depending on the sophistic skills of the judge.[4]

In *Democracy and Distrust*, John Hart Ely's seminal work on modern constitutional theory, Ely argues that the Oracle Model is often employed but "seldom endorsed in so many words."[5] It only became intellectually acceptable in some circles, Ely wryly observes, when modern legal realists "'discovered' that judges were human and therefore were likely in a variety of legal contexts consciously or unconsciously to slip their personal values into their legal reasonings. From that earth-shattering insight it has seemed to some an easy inference that that is what judges *ought* to be doing."[6]

The Platonic Guardian Model. This less egocentric approach invites the judge to look to the consensus of elites — what today's favored opinion makers think the constitutional text *ought* to mean. I grant that there is an ancient tradition for this view. Plato's Republic was governed by guardians. These philosopher-kings reigned not individually but collectively as a self-appointed, ruling class. They believed, not without cause, that their enlightened wisdom was far superior to the less-informed views of those in the lower social castes. In modern times, the guardian class includes judges with a progressive, historicist bent who see the law as a means of hastening what they believe to be the inevitable trajectory of social evolution.

The Popular Culture Model. This approach allows the judge to interpret the Constitution in light of the meaning that most people today, employing modern moral standards and sensibilities, think the text *ought* to mean. This approach has a tincture of democratic value, but it is actually a highly condescending form of democracy. In a true democracy, the voters speak for themselves. They do not authorize judges to act as their proxies in casting votes. Even so, there are many examples in which this judicialized demos plays a role and a few examples (such as modern Eighth Amendment cases) where it presently reigns supreme.

The Historical Tradition Model. This approach requires the judge to look at the text of the Constitution, and if it is unclear, the judge tries to discover not what the text ought to mean but what it *did mean* to those who wrote the words and, more importantly, to those who voted for those words to become law. In a democratic republic, words become law only when the true sovereign elevates them to that status. The first line of the Constitution declares that "We the People of the United States, in Order to form a more perfect Union," created the federal government and granted it limited delegable powers.[7] The creator is always greater than the creation. "We the People" are sovereign — not the government.

In the Historical Tradition Model, law retains its democratic legitimacy only when judges interpret the words as they were understood at the moment of their elevation by the collective sovereign, "We the People." The constitutional text, James Madison explained, should be interpreted as "it had been understood by its friends and its foes" at the time of its adoption and ratification[8] because "[i]n that sense alone it is the legitimate Constitution."[9]

In *Federalist No. 40*, Madison reinforced this point by reminding us that the work of the Framers at the Philadelphia Constitutional Convention was "merely advisory and recommendatory"[10] because they were "mere scriveners or attorneys appointed to draw up an instrument; the instrument's true makers were the people of the United States assembled in state conventions."[11] Only when the people adopted and ratified the Constitution did the words become law.

Whatever you think of the Historical Tradition Model, let me remind you of Winston Churchill's famous quip that "democracy is the worst form of Government except all those other forms that have been tried from time to time."[12] A similar sentiment, I believe, applies here to lift the Historical Tradition Model above its three competitors. Each of them, to one degree or another, involves interpolating meaning into a legal text instead of interpreting meaning from the text. As a result, the first three models simply liberate judges to construe an ambiguous constitutional text so that it means what it *ought* to mean, what it *should* mean, what it *would* mean if they — the judges — had written it.

How is it possible to follow any of these other three models without, consciously or not, injecting politics into law? No matter which way you answer that, this much is sure: Many Americans today are deeply suspicious about the role of politics and its influence on the courts. Sometimes this suspicion is terribly unfair; at other times, it is entirely understandable.

Dred Scott: Law & Politics Converge

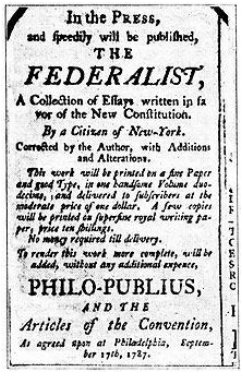
Before I survey the evolution of this debate, I want to remind you of one of the most infamous moments in our history when the merger of law and politics caused catastrophic damage to the nation. Everyone knows the case, its very name — *Dred Scott* — has an appalling stench to it. In that case, Chief Justice Taney, on behalf of a majority of other pro-slavery justices, dis-

covered a constitutional right for a slave owner to own slaves, even in free states and territories, and on that basis, struck down the Missouri Compromise.[13]

After you read the majority opinion, go to the dissent of Justice Benjamin Curtis. He clearly summed up the problem of the majority opinion and accurately described the true nature of its reasoning:

> Political reasons have not the requisite certainty to afford rules of [judicial] interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[14]

Modern critics of Justice Curtis's view acknowledge the morality of his opinions of slavery but claim that the distinction he drew between law and politics was illusory. Law is to politics what politics is to law, they say. Under this reductionist approach, the majority in *Dred Scott* simply got their politics wrong because, the viewpoints of Justice Curtis notwithstanding, there really are no "fixed rules which govern the interpretation of laws."[15] By their very nature, these critics say, words are simply too elastic, too pliable, and too indeterminate, particularly in legal codes.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PHILO-PUBLIUS,
AND THE
Articles of the Convention,
As agreed upon at Philadelphia, September 17th, 1787.

It was not until long after I graduated from law school that I learned just how simplistic and misleading this criticism really is. Of course words are malleable. Of course words can be twisted out of context. But that does not mean that they should be. When you say anything (whether it be in a conversation or a constitution), you're not implicitly authorizing the hearers to interpret what you say in any way that they want. If I were to say from the bench, "We shall now be in recess," I am not inviting you to go outside to the playground and join me on the monkey bars.

We take this truth for granted in every area of law except constitutional law, in which it is inexplicitly sidelined by the realization that some of the language in the Constitution is rather ambiguous. That discovery, at least to some judges, is as liberating as it is intoxicating. If the text of the Constitution is ambiguous, shouldn't judges simply do what they think is best? After all, isn't that what the Framers were implying all along by using such malleable language? Any answer other than "no," I believe, would blow a gale wind into the persistent charge that our "Constitution is all sail and no anchor."[16]

All Sail & No Anchor?

The Framers were brilliant and prescient men. They were not unaware of the linguistic elasticity of words or the ambiguities inherent in all language. Revered as the Father of our Constitution, James Madison made this point clear in *Federalist No. 37*:

> All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal . . . . The use of words is to express ideas. . . . But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.[17]

Even so, it was still unthinkable to Madison that judges would take advantage of that truism as a means to expand or constrict the discernable intent behind an ambiguous constitutional text. To be sure, when the first whiff of this phenomenon arose early in the nation's history, Madison did not mince his words of disapproval:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. *In that sense alone* it is the *legitimate* Constitution. . . . If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. *What a metamorphosis* would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense! And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption.[18]

Madison acknowledged the dissenting view, which he attributed to "Colonel Hamilton," who had "deserted" him on this subject sometime after their joint publication of *The Federalist Papers*.[19] According to Madison, Hamilton thought it proper "to administer the Government . . . into what he thought it ought to be; while, on my part," Madison said, "I endeavored to make it conform to the Constitution as understood by the Convention that produced and recommended it, and particularly by the State conventions that *adopted* it."[20]

Madison's mentor, Thomas Jefferson, also thought the point equally inarguable. "On every question of construction [of the Constitution]," Jefferson said, "let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."[21]

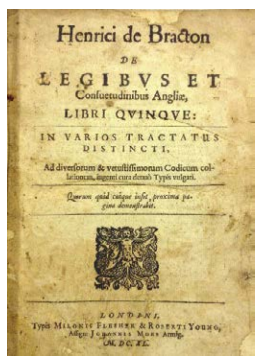
Chief Justice John Marshall, a federalist, fully agreed with Jefferson, his anti-federalist cousin and rival:

> To say that the intention of the [Constitution] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; — is to repeat what has been already said more at large, and is all that can be necessary.[22]

In short, the Father of the Constitution, the author of the Declaration of Independence, and the legendary Chief Justice (three of Virginia's favored sons) considered the point settled. To them, the only legitimate approach to interpreting a constitutional text is to ask what it meant to those who wrote it and to those who voted it into law.

Historical Orthodoxy or Modern Cult?

This view is not simply one among many jurisprudential schools of thought debated by conservative academics. Nor is it a doctrine peculiar to the members of a legal cult going by the name of "Originalists," which came to life during the Reagan era. Instead, this view has been the established legal orthodoxy for centuries[23] — accepted by all and rejected by none.



Because the "Constitution itself nowhere specifies a particular set of rules by which it is to be interpreted," the founding generation followed the interpretative principles of English common law outlined in Blackstone's *Commentaries*.[24] Without exception, Blackstone said, all of the rules of interpretation were designed solely to discover the lawgiver's "intentions at the time when the law was made."[25] While acknowledging that ambiguities are intrinsic to language, Blackstone reaffirmed that all interpretative tools were meant to uncover the original meaning of words at the time they were elevated to the status of law.[26] Going beyond that goal to satisfy an over-indulgent quest for "equity" would, Blackstone warned, ultimately "destroy all law, and leave the decision of every question entirely in the breast of the judge" and "make every judge a legislator."[27]

The question plaguing legal interpretation has always been the same: Does the will of the lawgivers or the will of the judges control? This is not a new question. It arose at the very inception of the Anglo-American common-law experiment, approximately 500 years before Blackstone penned his *Commentaries*.

In the 13th century, Judge Henry de Bracton made the first attempt to write a systematic account of the English common law in his seminal treatise, *De Legibus et Consuetudinibus Angliae*. For that effort, later generations revered him as the "Father of the Common Law,"[28] and Professor Maitland, one of the greatest English legal historians, gave Bracton's treatise the title, "crown and flower of English medieval jurisprudence."[29] Although some scholars debate how much of Bracton's treatise was actually written by him as opposed to merely edited by him, they acknowledge that the treatise "was the largest and most important institutional work . . . until Coke's *Institutes*" were published in the 17th century.[30] As Professor Winfield notes, Coke listed Bracton's treatise "as an authority in the prefaces to his *Reports*," and Blackstone also praised it.[31]

Judge Bracton stated that he wrote his treatise because something had gone terribly wrong during the opening scene of our common-law narrative:

> Since these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws and stand amid doubts and the confusion of opinions, and frequently *subverted* by the greater [judges] *who decide cases according to their own will rather than by the authority of the laws*, I, Henry de Bracton, to instruct the lesser judges, if no one else, have turned my mind to the ancient judgments of just men . . . by the aid of writing to be preserved to posterity forever.[32]

The first legal treatise written at the very inception of the common law was not written by a political pamphleteer or some discontent provocateur but, rather, by one of the most distinguished judges in the Anglo-American tradition. And his primary motivation appears to have been a warning about higher court judges who "decide cases according to *their own will* rather than by the *authority of the laws*" — which explains his criticism of lower court judges who would "ascend the judgment seat before they have learned the laws and [as a result] stand amid doubts and the confusion of opinions."[33] After all, what would be the point of learning the law if it changes with every shift in the balance of power on the higher courts? And how can we blame lower court judges for standing "amid doubts and the confusion of opinions"[34] when no one knows what the higher court judges will do in pursuit of their own will?

Nearly eight centuries ago, Judge Bracton laid his finger on the one true weakness in the common-law system. And he did so just a couple of decades after a prominent group of English barons, led by the Archbishop of Canterbury, rebelled against King John with swords drawn in the Valley of Runnymede. At the point of a spear, the barons secured the King's agreement to a provision in the Magna Carta requiring him to only appoint justices "such as know the laws of the land, and are well disposed to observe them."[35] Our ancestral patriots identified the most serious risk facing the judicial institution. It was not corruption, bribery, or laziness. The risk was judges who did not truly know the "laws of the land"[36] because their judicial philosophy presupposed that the law was a function of a protean judicial will and, thus, never truly knowable.

Fast forward 500 years to 1787. Delegates from the newly liberated American states had just attended the Philadelphia Convention where they had adopted a proposed Constitution. The delegates had returned to their home states and began a campaign to persuade their countrymen of the virtues of the newly proposed federal government. Two factions immediately arose: the federalists, who supported the Philadelphia draft and the proposed national government, and the anti-federalists, who were skeptical of it, particularly the concentration of power in the proposed United States Supreme Court.

Brutus Confronts Caesar

Using the pseudonym "Brutus," one anti-federalist writer voiced his worries in the most unmistakable terms:

- "I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible."[37]
- Under the proposed constitution, the United States Supreme Court "will be authori[z]ed to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it."[38]
- "And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."[39]
- "This power in the judicial, will enable them to mould the government, into almost any shape they please."[40]
- "What the principles are, which the courts will adopt, it is impossible for us to say; but . . . it is not difficult to see, that they may, and probably will, be very liberal ones."[41]

Seeking to put the fears of the anti-federalists to rest, Hamilton wrote *Federalist No. 78*. He conceded the risks that the anti-federalists pointed out but said that these risks would never be realized because of the irrefutable first premise of the judicial system. What was that premise? The difference between *will* and *judgment*:

- "It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."[42]
- "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[43]
- The courts "may truly be said to have neither FORCE nor WILL but merely judgment."[44]
- "To avoid an 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 them . . . ."[45]

Hamilton was acknowledging (apparently before he "deserted" Madison on the subject[46]) that the anti-federalists had a valid point. The judiciary would become arbitrary if the judges merely enforced their "WILL instead of JUDGMENT," words that he capitalized in the original for emphasis.[47] Hamilton described the difference between the two quite succinctly. Impermissible judicial "WILL" involves judges "substit[ing] their own pleasure" in place of the "constitutional intentions" of the law givers, which Hamilton called "arbitrary discretion in the courts."[48] When exercising "JUDGMENT," on the other hand, judges do the exact opposite by subordinating their "WILL" to the "strict rules and precedents, which serve to define and point out their duty in every particular case."[49] It is "indispensable," Hamilton argued, that the judge be "bound down" by these rules and precedents.[50]

These "strict rules and precedents"[51] were the same "fixed rules which govern the interpretation of laws" that Justice Curtis referenced,[52] which, if followed, would have saved our nation from the *Dred Scott* disaster. The first of such rules, Madison said, is that judges must always resort "to the *sense* in which the Constitution was *accepted* and *ratified* by the nation. *In that sense alone it is the legitimate Constitution.*"[53] This legitimacy, Justice Story would later say, stems from the fact that "[t]he constitution is the will, the deliberate will, of the people" and not the will of the judges.[54]

... the barons secured the King's agreement to a provision in the Magna Carta requiring him to only appoint justices "such as know the laws of the land, and are well disposed to observe them."

This is the only perspective that could explain how John Marshall, without blushing, could say that "[j]udicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing."[55] He insisted, "Judicial power is never exercised for the purpose of giving effect to the will of the Judge."[56]

The More Things Change . . .

Now, I know what some of you are thinking: "Perhaps so, Justice Kelsey, but that was then, this is now. Things have changed." I agree — things truly have changed. But that is all the more reason for judges to recommit themselves to the Historical Tradition Model.

Even if you approach this subject as an unapologetic pragmatist, surely you would have to concede that judicial lawmaking has unintended consequences. Consider how it inoculates the political branches of government from having to deal with the hard realities of governing a diverse, pluralistic society. When a polarizing social issue makes its way into the courts, you can almost audibly hear legislators let out a collective sigh of relief.

Once the courts monopolize the issue, the legislative branch of government is relieved from the responsibility of articulating public policy with any degree of specificity. Politicians can rail against the courts when they disagree with the outcomes or praise the courts when they agree. But the politicians themselves delight in not being embroiled in the career-limiting business of deciding winners and losers among competing views of public policy in a heterogeneous modern society.

Consider also the impact of judicial lawmaking on our citizens. It has the effect of anesthetizing some and alienating others. When judges take the hard issues out of the public square, we leave the ordinary citizen to believe that his or her view is no longer relevant. Worse still, we imply that our citizens are neither intellectually competent nor morally capable of working out a just resolution of these issues.

And we follow up that implication by taking incredibly delicate issues of public policy and placing them out of the reach of voters. Understand how this works. Every time we constitutionalize a new social issue, we incrementally dilute the scope of each citizen's right to vote, not all at once, of course, but topic by topic and issue by issue. Why vote for a *pro*-whatever candidate or, for that matter, an *anti*-whatever candidate if it doesn't matter in the slightest because the judiciary gets the last word on the issue anyway?

It would be to our detriment if the great debates of our times are banished from the vast marketplace of ideas that we call America and restocked on the shelves of a single shop — owned, operated, and self-regulated by the judiciary. The egalitarian traditions of our people and their virtuous distrust of elites make these undemocratic consequences wholly unacceptable to me — and, I hope, to you as well.[57]

If you are still unpersuaded at least acknowledge that, even if the courts had plenary authority to make law, they are certainly ill equipped to do it. The institution of the judiciary is not at all nimble enough to engage in the kind of social experimentation necessary to make good law. Once a court issues a ruling, the doctrine of stare decisis immediately encamps around it to stifle any later change or repudiation. That is not at all the situation with legislation, which can come and go as political power migrates from one set of interest groups to another. The systemic capacity for inertia that characterizes the judicial system makes it a poor laboratory for improvising on social policy. This lack of flexibility means that even the best of social engineers, if he or she sits on the bench, cannot respond quickly to evolving societal trends and the vicissitudes of the public will.

Finally, there is the issue of intellectual integrity. When we become tolerant of judges injecting their own personal or political philosophies into judicial decisions — a tolerance, by the way, that we conveniently embrace only when we think the judges got the answer right — we thereby compromise our ability to make a principled objection to this same exercise of power when we think the judges got the answer wrong. Think about *Dred Scott* and, for that matter, *Korematsu* as well.[58] How can we criticize these obviously politicized decisions with any credibility at all if we then turn around and endorse equally political decisions that, by pure happenstance, square with our own personal sensibilities?

Implicit in what I am saying is that we judges must avoid the seduction of thinking that we are too wise. We are not mystical sages, Platonic Guardians, high priests, or philosopher-kings. We are simply ordinary lawyers upon whose shoulders has been placed an extraordinary responsibility. Humility and self-restraint, I think, are the proper responses to the grave nature of our public calling. In the end, only these judicial virtues will guard us against the risks of which Judge Bracton warned nearly eight centuries ago.[59]

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Endnotes:
(Hyperlinked version available online):

1 Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), *in* 10 The Writings of Thomas Jefferson 417, 419 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).
2 Star Wars: Episode VI Return of the Jedi (Lucasfilm Ltd. 1983).
3 *Crawford v. Washington*, 541 U.S. 36, 42 (2004).
4 Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), *in* 15 The Writings of Thomas Jefferson, *supra* note 1, at 450; *see also* 2 John Locke, An Essay Concerning Human Understanding 131 (Alexander C. Fraser ed., 1894) ("And, as I remarked before, doth it not often happen that a man of an ordinary capacity very well understands a text, or a law, that he reads, till he consults an expositor, or goes to counsel; who, by that time he hath done explaining them, makes the words signify either nothing at all, or what he pleases.")
5 John Hart Ely, Democracy and Distrust 44 (1980).
6 *Id.*
7 U.S. Const. pmbl.
8 1 Annals of Cong. 1945 (1791) (Joseph Gales ed., 1834).
9 Letter from James Madison to Henry Lee (June 25, 1824), *in* 3 Letters and Other Writings of James Madison 441, 442 (1867); *see also* Draft Letter from James Madison to Andrew Stephenson (March 25, 1826), *in* 5 Documentary History of the Constitution of the United States of America 332, 334 (1905) ("If the [Constitution] be interpreted by criticisms which lose sight of the intention of the parties to it, in the fascinating pursuit of objects of public advantage or conveniency, the purest motives can be no security against innovations materially changing the features of the Government.")
10 The Federalist No. 40, at 252 (James Madison) (Clinton Rossiter ed., 1961).
11 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 907 (1985).
12 444 Parl Deb HC (5th ser.) (1947) cols. 206–07 (UK).
13 So strong was the majority's will to make this ruling that it defiantly denied that its ruling on the constitutionality of the Missouri Compromise was dicta despite the majority's view that Scott was not a citizen for purposes of Article III jurisdiction. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 427–28 (1857).
14 *Id.* at 620–21 (Curtis, J., dissenting). In making this point, Justice Curtis was merely restating the conventional view of his age:

> The constitution cannot be made to mean different things at different times. Its interpretation should not fluctuate according to the changes in public sentiment or the supposed desirability of adjusting the fundamental rules to varying conditions or exigencies. The meaning of the constitution is fixed when it is adopted, and afterwards, when the courts are called upon to interpret it, they cannot assume that it bears any different meaning. "The policy of one age may ill

> suit the wishes or the policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever."
>
> Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws § 9, at 22 (2d ed. 1911) (footnote omitted) (quoting 1 Joseph Story, Commentaries on the Constitution of the United States § 426, at 315 (Thomas M. Cooley ed., 4th ed. 1873)).

15 *Scott*, 60 U.S. at 621.

16 Letter from T.B. Macaulay, British parliamentarian and historian, to Henry S. Randall, author of *The Life of Thomas Jefferson* (May 23, 1857), *in* 30 S. Literary Messenger 226, 227 (1860).

17 The Federalist No. 37, *supra* note 10, at 229 (James Madison).

18 Letter from James Madison to Henry Lee, *supra* note 9, at 442 (emphases added); *see also* Draft Letter from James Madison to Andrew Stephenson, *supra* note 9, at 334.

19 Memorandum by Nicholas P. Trist of Conversation with James Madison (Sept. 27, 1834), *in* 3 The Records of the Federal Convention of 1787, at 533, 534 (Max Farrand ed., 1937).

20 *Id.*; *see also* Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *in* 3 The Records of the Federal Convention of 1787, *supra* note 19, at 447 ("As a guide in expounding and applying the provisions of the Constitution, . . . [t]he legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be . . . in the sense attached to it by the people in their respective State Conventions where it rec[eived] all the authority which it possesses.").

21 Letter from Thomas Jefferson to Judge William Johnson, *supra* note 4, at 449.

22 Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting).

23 *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 54–55 (1868) ("A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. . . . What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." (footnote omitted)); *see also supra* note 14. Law professors John McGinnis and Michael Rappaport show that this "intentionalist approach . . . was widely followed in England and America in the years leading up to the Constitution." John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution 135-36 (2013) (citing 4 Matthew Bacon, A New Abridgment of the Law 647–48 (1759); James Wilson, Of the Study of the Law in the United States, *in* 1 The Works of the Honourable James Wilson, L.L.D. 3, 14 (Bird Wilson ed., 1804)).

24 Christopher Wolfe, The Rise of Modern Judicial Review 17–18 (rev. ed. 1994).

25 1 William Blackstone, Commentaries *59.

26 McGinnis and Rappaport aptly describe this approach as "original methods originalism," which posits that "word meanings and grammatical rules do not exhaust the historical material relevant to constitutional interpretation. There are also interpretive rules, defined as rules that provide guidance on how to interpret the language in a document." McGinnis & Rappaport, *supra* note 23, at 119. Thus, "originalism requires modern interpreters to follow the original interpretive rules used by the enactors of the Constitution as much as the original word meanings or grammar rules." *Id.*

27 1 Blackstone, *supra* note 25, at *62.

28 John C.H. Wu, Fountain of Justice: A Study in the Natural Law 71 (1955). English historian William Holdsworth confirms this title for Bracton by noting that "it is ultimately to Bracton and to Bracton alone that we must look for an account . . . of the vigorous growth of the common law" because "[i]n his works it is summed up and passed on to future generations." 2 W.S. Holdsworth, A History of English Law 286 (3d ed. 1923).

29 1 Frederick Pollock & Frederic W. Maitland, The History of English Law 185 (1895).

30 Percy H. Winfield, The Chief Sources of English Legal History 259 (1925).

31 *Id.* at 260.

32 1 Henry de Bracton, On the Laws and Customs of England 19 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (alteration in original) (emphases added) (footnotes omitted) (translating original Latin into English). Professor Thorne's English translation is considered the "definitive edition of the text" of Bracton's treatise. Morris S. Arnold, Book Review, 91 Harv. L. Rev. 517, 517 (1977).

33 1 Bracton, *supra* note 32, at 19 (emphases added).

34 *Id.*

35 Magna Carta, ch. 45, *reprinted in* Boyd C. Barrington, The Magna Carta and Other Great Charters of England 228, 241 (2d ed. 1900).

36 *Id.*

37 *Essays of Brutus XV*, *in* 2 The Complete Anti-Federalist 437, 438 (Herbert J. Storing ed., 1981).

38 *Id.* at 440 (second alteration in original).

39 *Essays of Brutus XI*, *in* 2 The Complete Anti-Federalist, *supra* note 37, at 420.

40 *Id.* at 422.

41 *Essays of Brutus XII*, *in* 2 The Complete Anti-Federalist, *supra* note 37, at 424.

42 The Federalist No. 78, *supra* note 10, at 468–69 (Alexander Hamilton).

43 *Id.* at 469.

44 *Id.* at 465.

45 *Id.* at 471.

46 Memorandum by Nicholas P. Trist of Conversation with James Madison, *supra* note 19, at 534.

47 The Federalist No. 78, *supra* note 10, at 469 (Alexander Hamilton).

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*; *see also* Letter from Alexander Hamilton, Secretary of the Treasury, to President George Washington (Feb. 23, 1791), *in* 3 The Works of Alexander Hamilton 445, 463 (Henry Cabot Lodge ed., 1904) (observing that the intent of a constitutional text should be discerned from "the instrument itself, according to the usual and established rules of construction").

52 *Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting).

53 Letter from James Madison to Henry Lee, *supra* note 9, at 442 (emphases added).

54 3 Joseph Story, Commentaries on the Constitution of the United States § 1609, at 473 (1833); *see also* 1 James Kent, Commentaries on American Law 275–76 (1826) (observing that courts, exercising their "impartial interpretation," are "bound to regard the constitution as the paramount law, and the highest evidence of the will of the people").

55 *Osborn v. President*, Dirs., & Co. of the Bank of the U.S., 22 U.S. (9 Wheat.) 738, 866 (1824).

56 *Id*.

57 *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 82–83 (2012) ("Originalism is the *only* approach to [a] text that is compatible with democracy. When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of the first two branches of government — elected legislators and (in the case of authorized prescriptions by the executive branch) elected executive officials and their delegates. Allowing laws to be rewritten by judges is a radical departure from our democratic system.").

58 *See Korematsu v. United States*, 323 U.S. 214, 219–20, 223–24 (1944) (upholding the constitutionality of a conviction for remaining in a Military Area in violation of a Civilian Exclusion Order upon the basis of military necessity); *see also Stenberg v. Carhart*, 530 U.S. 914, 953–56 (2000) (Scalia, J., dissenting) (treating "*Korematsu* and *Dred Scott*" as equally flawed jurisprudential anomalies).

59 Many of the themes of this speech were taken from D. Arthur Kelsey, *The Commonwealth's Common Law*, 40 VBA J., no. 3, Winter 2013–2014, at 26; D. Arthur Kelsey, *The Resurgent Role of Legal History in Modern U.S. Supreme Court Cases*, 37 VBA News J., no. 3, Fall 2010, at 10; D. Arthur Kelsey, *The Architecture of Judicial Power: Appellate Review and Stare Decisis*, 53 Va. Law., no. 3, Oct. 2004, at 13, *reprinted in* 45 Judges J., no. 2, Spring 2006, at 6. The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach" and otherwise participate in extrajudicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Supreme Court of Virginia or my opinion as a Justice in the context of any specific case.