political rights of the Constitution; because it will be least in a capacity to annoy or injure them...." So Hamilton wrote in Number LXXVIII. "The judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

As for interpretation of the Constitution--why, the Federalists argued, how could judges ignore the plain details of a written constitution? It would be Congress and the state legislatures that would make the laws; the judges of the federal system would be restricted to applying the statutes passed by the Congress.

Constitution is Fundamental Law. Presently I will return to this argument. Just now I remark that in 1787 and 1788 no political faction denied that a constitution must possess ascertainable original intentions: for a constitution is the fundamental law of a land. (In no country are the decisions and rulings of courts of law themselves the fundamental law of the land; rather, they are interpretations and applications of the law.) Clearly the Articles of Confederation had been intended for certain specified purposes, and had been interpreted literally. A principal purpose of the Constitutional Convention in 1787 was to define and clarify the purposes, the intentions, of the Union of the thirteen original states. Madison, Hamilton, and Jay published *The Federalist Papers* as a systematic explanation and definition of the original intent of the Framers at Philadelphia.

Yet nowadays, as I wander over the face of the land talking about the Constitution, sometimes a professor or a lawyer inquires of me, "Why need the United States be bound by this 'original intent' of the Framers? Why aren't we free to choose today--to make the Constitution mean whatever we think it should mean?"

Social Compact. To people unfamiliar with the concept of political and historical continuity, it may not be easy to explain the necessity for a permanent fundamental law--susceptible of change, indeed, but enduring in essence. A country's constitution is a pattern for the maintenance of order in a society. In the case of the Constitution of the United States, it is a written compact, a formal agreement among the people of the United States to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." It is a binding social compact--not the fanciful contract or compact of Locke or Rousseau, derived from a human "state of nature" which never did exist; no, a practical, realistic instrument of government resulting from genuine consensus. (It is perfectly true, of course, as Max Farrand and others have remarked, that the Constitution is a bundle of compromises; that is why the Framers achieved consensus.)

In other words, the Constitution is a solemn agreement on a national scale as to how the American people shall live together in peace. The purpose of law is to keep the peace, we cannot too often remind ourselves. If this solemn pact that we

call the Constitution should come to be regarded as a mere formula of words, to be set aside for present seeming convenience whenever a temporary majority or a strong-willed minority may choose--why, the peace soon would be breached. For in such circumstances, the terms of the pact called the Constitution would fall null and void; the fundamental law would crumble for lack of an enduring consensus; and every faction or interest would feel free, or perhaps obliged, to pursue its own objects in disregard of the federal public interest. That condition of society is called anarchy.

People assume that there exists a fundamental body of law in the United States which does not change very much from year to year, and by which they are protected. If they cease so to assume, every man's hand is against every other man's, and habitual obedience to the rule of law ceases. Then we can be kept from one another's possessions and one another's throats only by force. Yet as Talleyrand instructs us, "You can do everything with bayonets--except sit upon them." If a generally accepted basic law, a constitution, dissolves in confusion, even an arbitrary master with troops at his disposal cannot long maintain order.

Where Original Intent Can Be Found. The American people believe that some original intent may be found within the seven Articles of the original Constitution and the amendments of the Bill of Rights. They are right in so believing; for without such a web of intentions, the public is at the mercy of the whims of the hour's dominant faction of politicians, intellectuals, or ideologues.

Men and women in a tolerable society ought to be able to feel confident that the body of rules which we call the law will be much the same tomorrow as it was yesterday. It becomes difficult to obey the law if the law is changed greatly from time to time, and changed almost unpredictably. People like to live by rules, to have the assurance that if they behave comformably to certain rules called the law, mischief will not be done to them. Permanence and continuity in the law are virtually essential to a society's material success. Take commercial contracts: if the laws concerning such contracts vary swiftly and unpredictably under various changes of political regime, commerce will dwindle and much of a population may be imnpoverished. (The Framers, in 1787, were especially concerned for the enforcement of contracts.) If this need for constancy and enduring precedent is of very high importance in all laws, it is of supreme importance in basic constitutions. Men and women give implicit assent to living by a nation's constitution because they take it for granted that they live under a basic body of law that makes possible certain agreed-upon intentions of general benefit.

That is the case for recognizing and respecting, so far as possible, the original intent of the Framers of the Constitution.

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Yet is is no easy business to ascertain precisely the intentions of the Framers in this or that particular. Large differences of opinion existed among factions and individual delegates at the Constitutional Convention; these were bridged over by large and small compromises; but the language of the compromises sometimes

remains ambiguous--and perhaps sometimes intentionally so, lest awkward inquiries be raised at state ratifying conventions.

Ambiguous Language. Does the power to coin money, conferred upon the Congress in Article I, Section 7, include the power to print paper money? Does the power to "establish Post Offices and post Roads" imply the power to construct turnpikes and canals at the general expense--or, later, to subsidize railroads and then airlines? What are the limits, if any, to the authorization "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers?"

In Article II, the President is empowered to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices...." Has he no greater authority over members of the cabinet than this? Has the President power to undertake military actions short of a declaration of war? No such power is specified in Article II.

As for Article III, concerning the judicial power, what is meant, for instance, by its granting to federal courts appellate jurisdiction in actions "between a State and Citizens of another State"? (I will comment presently on that provision.) What about judicial review of acts of the Congress or of actions by the Executive? Such powers of the judiciary are not specified.

Not Always Clear. In other instances as well, the original intent of the Constitution is not crystal clear. What, for example, is comprehended in the term "general welfare"? It does not follow that the original intent is quite impossible to ascertain; but search must be undertaken, and differences of opinion are conceivable.

Some light may be obtained through study of Madison's and Yates's notes on the Convention's proceedings, and other fragmentary accounts by delegates. *The Federalist Papers* are a principle source of information about intent--although in part those newspaper articles were special pleading. The correspondence of the men who were Convention delegates provides some clues. Story's and Kent's respective commentaries on the Constitution are of great value here; more of them later. It may be said that in general the intentions of the Framers may be ascertained by study; but that some points always have been in dispute.

Different Circumstances. Also considerable latitude as to original intent must be indulged when courts endeavor to apply provisions of the Constitution to cases that involve circumstances very different from the circumstances of 1787. For the United States do not stand still, and occasionally *stare decisis* must give ground to accommodate technological change. Consider the power of Congress "to regulate Commerce...among the several States," which eventually produced the multitudinous activities of the Interstate Commerce Commission. Did the Framers intend to establish the present jurisdiction of that body? I offer you a simple illustration of how powers are expanded.

On a warm day late in August 1787, many members of the Constitutional Convention went down to the banks of Delaware River to observe the

demonstration of John Fitch's new contraption, an oared boat propelled by steam. (The Convention had recessed that day so that a committee might discuss proposals to empower Congress to pass navigation acts.) Edmund Randolph, governor of Virginia, and Dr. William Samuel Johnson, the learned delegate from Connecticut, were among the spectators; both gave to Fitch certificates attesting his experiment's success. It is doubtful whether Randolph, or Johnson, or any other delegate present on the the banks of the Delaware then foresaw that steamboats would become the subject of an action at law that would greatly affect interpretations of the Constitution they were drawing up that August.

"Steamboat Case." Yet by 1824, Chief Justice Marshall and his colleagues of the Supreme Court would be deliberating over *Gibbons v. Ogden*, the "Steamboat Case," concerning a monopoly granted to Livingstone and Fulton by New York's legislature for commercial navigation of the Hudson River by steamboats. In his opinion, John Marshall expounded the doctrine that the Constitution should be liberally construed, not confined to strict limits, as against a previous decision by Chancellor James Kent in the same litigation that the general government's powers, originating with the sovereign states, ought to be hedged. Marshall's doctrine has prevailed. Incidentally, in this case Marshall ruled that Congress's power extended to vessels propelled by steam as well as to those propelled by wind--even though no practicable commercial steamboats had existed when the Constitution was drawn up.

In such concerns, as the complexity of American life increased, not only the judicial branch, but the legislative and the executive branches of government, would find it necessary or convenient to resort to the doctrines of implied powers and liberal construction. Some extensions of federal jurisdiction or activity seemed extravagant and pernicious to many people in the first half of the nineteenth century; other such enlargements have seemed yet more baneful to many citizens in the closing half of the 20th century. As a specimen of protest against liberal construction of the Constitution, take a passage from the long speech of Representative John Randolph of Roanoke in the House of Representatives on January 31, 1824--only a few days before *Gibbons v. Ogden* was taken up by the Supreme Court.

Regulating Commerce. The Framers of the Constitution had intended to grant Congress only a minimum power over the economy, Randolph declared; indeed, if when submitted for ratification the Constitution had included a specific provision for laying a duty of 10 percent *ad valorem* on imports, the Constitution never would have been adopted. Here are Randolph's sardonic words:

> But, sir, it is said...we have a right to regulate commerce between the several states, and it is argued that 'to regulate' commerce is to prescribe the way in which it shall be carried on--which gives, by a *liberal* construction, the power to *construct* the way, that is, the roads and canals on which it is to be carried: Sir, since the days of that unfortunate man, of the German coast, whose name was originally Fyerstein, Anglicized to Firestone, but got, by translation, from that to Flint, from Flint to Pierre-a-Fusil, and from Pierre-a-Fusil to Peter Gun--never was greater violence done to the English language, than by the construction, that, under the power to prescribe the way in which commerce shall be carried on, we have the right to construct the way on

> which it is to be carried. Are gentlemen aware of the colossal power they are giving to the general government?...Sir, there is no end to the purposes that may be effected under such constructions of power.

Few Strict Constructionists. Too true, then and now. Yet it may be said that at least the centralizers of 1824, John Marshall among them, endeavored to produce a constitutional warrant for their decisions and politics, purportedly derived from some clause of the Constitution; while in 1987 at least one justice of the Supreme Court professes that he sees no need to justify any decision of the Supreme Court by reference to the text of the Constitution: any plausible decision, founded upon expediency or moral impulses, will serve perfectly well. As an earlier justice of the Supreme Court remarked informally, "The Constitution is what the judges say it is."

There remain today in the law schools, the courts, and the Congress no "strict constructionists," strictly defined. The defense of "original intent" is carried on in our time by the juristic heirs of Chief Justice Marshall and Justice Story, the early advocates on the Supreme Court of "liberal construction" of the Constitution. In certain academic departments of literature, in this bent world of ours, the school of thought styled "deconstructive criticism" prevails. On the Supreme Court, certain justices now represent what we may call the deconstructive school of jurisprudence. To their minds, what does "original intent" matter? Construe or deconstrue, as fits your ideology and prejudices--so we are advised by certain judges and certain professors of law.

One reason why the doctrine of original intent has fallen into disuse is that considerable historical knowledge and reading of dusty law commentaries are necessary if one tries to find what a particular provision or phrase of the Constitution signified to the Framers or (more difficult yet) to the delegates at the state ratifying conventions. I have mentioned already the provision in Article III, Section 2, that "the judicial Power shall extend to Controversies--between a State and Citizens of another State...." On the face of this clause, surely it appears that the Constitution assigns to the Supreme Court an appellate jurisdiction over suits by citizens of one state against another state, "both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." A literal reading of this provision of Article III would seem to guarantee that a state government might be sued, against its wish, by citizens of some other state.

What Did Framers Think? And yet in truth it appears that this clause probably was not so understood by many of the fifty-five delegates to the Constitutional Convention; and certainly not so understood by the people who elected delegates to the state ratifying conventions, or by most of the delegates to those state conventions. The several states owed huge debts; their governors and legislatures had been insistent that they must not be sued for these debts, against their will, in federal courts. That federal courts might assume jurisdiction over such suits was one of the principal arguments against ratification of the Constitution, in several states, New York among them.

Thus Hamilton, eager to persuade citizens of New York to approve the Constitution, wrote in *The Federalist* Number LXXXI, "It has been suggested that an assignment of the public securities of one State to the citizens of another, would

enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation." Hamiltion went on to declare "that there is no color to pretend that the State governments would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force....To what purpose would it be to authorize suits against States for the debts they owe? How could recovery be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

That passage from a high Federalist is clear denial of what the offending clause in Article III seems to imply. It appears to have been the understanding of the state ratifying conventions that states could not, under the new Constitution, be sued by citizens of other states.

This notwithstanding, in the case of *Chisholm v. Georgia* (1793), the Supreme Court ruled that the state of Georgia might be sued by a citizen of another state. The decision was written by Justice James Wilson, a centralizer and an advocate of democratic political theories, who in his opinion asserted vigorously that the American people formed a nation, transcending state boundaries.

Rapid Amendment. Although this Supreme Court decision might pretend to be a literal interpretation of the pertinent provision in Article III of the Constitution, the ruling in *Chisholm v. Georgia* was received with fury in Georgia and with apprehension in other states. So when Congress convened, the Eleventh Amendment was passed by overwhelming majorities in both the Senate and the House almost immediately and speedily ratified by the several states. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," the amendment read; and so it has stood, unchallenged, to the present day.

I have digressed here to show how "literal interpretation" and "original intent" may not always coincide. Much knowledge is required for plumbing the well where original intent lies. Incidentally, constitutional amendment is one method, obviously, for overturning a Supreme Court decision believed to contravene the original intent of a constitutional provision; but ordinarily the amendment process is an awkward tool, and only in this undoing of *Chisholm v. Georgia* has retribution been so swift.

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So far this day I have said that the doctrine of original intent is necessary, but that often it becomes snared in difficulties. We turn now to the question of how provisions of the Constitution have been adapted to changed American circumstances without abandoning the doctrine of original intent.

"Change is the means of our preservation," Edmund Burke said--meaning that social institutions, like the human body, must experience change and renewal, or else perish. Responding to great social alterations, the law too must change--but gradually, with high regard for continuity, and not "unfixing old interests at once." Why cannot the executive or the legislative branch of a representative government work out necessary change by statute or executive order? Why, either can: but such abrupt changes on a grand scale may be too sudden and sweeping, or on the other hand, may be effected too tardily. It seems preferable usually to permit judges to modify laws by degrees than to take the risk of damaging the whole frame and spirit of law by frequent legislative or executive intervention.

Powerful Judges. Therefore in every civilized society the judges have enjoyed some degree of latitude in administering and interpreting the laws of the land. Just how far judges rightfully may go in changing the organic law through reinterpretation--why, that has become a much debated question nowadays, in Britain as in the United States. In America, judges have been given a larger share in power than in any other country, ever. A good many people now accuse them of judicial usurpation.

Judges' thirst for power seemed highly improbable in 1787-1788: Alexander Hamilton, James Madison, James Monroe, and other gentlemen politicians remarked the feebleness of the judicial branch, assuring the public that judges never could be a menace to the separation of powers or to public liberties. Yet only fifteen years after the Constitution's ratification, the executive and legislative branches of the American government were at war with the judicial branch, which had begun to assert its independent authority most forcefully. President Jefferson privately urged the House of Representatives, dominated then by Democratic Republicans, to impeach the Federalist Justice Samuel Chase (formerly a radical); John Randolph, leader of the House, passionately did so, winning a large majority for impeachment. But Chase was acquitted in 1805, on his trial by the Senate. Never since then has a justice of the Supreme Court been impeached, although during President Lyndon Johnson's Administration, Justice Abe Fortas resigned from the Court, rather than face possible impeachment.

"Good Behaviour." The Framers, in 1787, has created a very powerful Supreme Court. It appears probable that most of the delegates at the Great Convention expected the Court to be able to rule in some fashion on the constitutionality of federal or state statutes. Beginning about 1801, the Supreme Court would assert successfully its power to decide whether or not an act of Congress should conform to the Constitution of the United States. President Jefferson, infuriated at this, hoped at the time of the trial of Aaron Burr for treason that he might succeed in having Chief Justice Marshall impeached and convicted for failing to maintain "good Behaviour"--for Article III of the Constitution permits impeachment of a judge on grounds far less serious than the "Treason, Bribery, or other high Crimes and Misdemeanors" required for the impeachment of President, Vice President, and all civil Officers of the United States. But Marshall, a shrewd and humorous man, foiled the President in this.

Until the second administration of Jefferson, it had been thought by many leading Americans that the power of impeachment might serve to confine federal

judges to the limits of "original intent." Alexander Hamilton, in Number LXXXI of *The Federalist Papers*, had assured New Yorkers that the judiciary could not conceivably usurp any powers, a principle "greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body [the legislature] upon the members of the judicial department. This is alone a complete security."

Judicial Review. But this fancied "complete security" was undone by the boldness and strength of mind of Chief Justice John Marshall, who was convinced that the Constitution conveyed to the Supreme Court the implied power of judicial review of legislation and of executive orders. Mr. Justice Marshall had his own concept of original intent; he had known many of the Framers, and had been appointed Chief Justice by the sometime presiding officer of the Constitutional Convention, General George Washington. A Supreme Court dominated by Federalists interpreted the Constitution throughout the control of the executive force by the Virginia dynasty of Democratic Republicans.

Liberal construction of the Constitution during those years, however, and for long thereafter, did not signify repudiation of the doctrine of original intent. After the death of Chief Justice Marshall, after the death of his learned colleague Justice Joseph Story, still the Supreme Court adhered, by and large, to the concept that there could be discerned an original intent, in most matters, of the Framers and the ratifiers of the Constitution.

Learned Sources. How were those intentions to be known? At first, through the *Federalist Papers* and St. George Tucker's American edition of *Blackstone's Commentaries on the Laws of England*; somewhat later, through two learned works, Joseph Story's *Commentaries on the Constitution of the United States*, and James Kent's *Commentaries on American Law*. In both federal and state courts, throughout most of the 19th century, the analyses of Story and Kent of constitutional points were cited with high respect; and both writers on jurisprudence were studied in American law schools. The dispassionate writings of these two scholars in the law strongly affected interpretation of the Constitution for decade upon decade, imparting an attachment to the intentions of the Framers. Story's *Commentaries* were carefully edited and enlarged by Professor Thomas Cooley in 1873, and the revised version of Story went through various large printings, remaining a major influence in courts and law schools down to the early years of the twentieth century.

I lack the time to touch upon the rise of the schools of jurisprudence known as legal positivism and legal realism, here in the United States. Gradually those innovative doctrines of law carried the day in American courts and law schools, despite stubborn resistance. Yet until some forty years ago the Supreme Court of the United States continued conservative in its decisions for the most part; exercised judicial restraint; and (whatever the eccentricity of some decisions) did not advance the theory that the Court is entitled to do as it likes with the text of the Constitution--although Justice Holmes and some others broadly hinted at that notion.

The doctrine of original intent did not perish utterly when Story and Kent went out of fashion; and today there is being carried on a strong endeavor to

restore an understanding of the Constitution in the light of what the Framers and their generation were trying to achieve. Perhaps the best argument in favor of such a restoration is the bleak prospect of what is liable to occur if recent tendencies of the federal judiciary are much prolonged.

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Constitution Must Be the Standard. If a reasonable attachment to the written text of the Constitution---which does not mean a blinkered literalism at all times--is not retained or restored as the standard for interpretation of the basic law of the United States, we will be left with a most unpromising alternative.

That alternative mode would be the domination of American public policy and much of American private life, by the impulses, prejudices, and ideological dogmata of the nine justices of the Supreme Court. Those justices having received no systematic preparation for serving as a kind of oligarchy or council of ephors, they would make many blunders, some disastrous. They have made a good many grave blunders already over the past forty years and more. Their power to do mischief would become almost infinite; their ability to rule prudently would be improbable. In any event, such a scheme would abolish the American democracy and enfeeble both Congress and the presidency--if the justices were permitted to perpetuate their assumption of haughty authority, power that courts of law never were intended to exercise.

But presumably the Supreme Court would not be permitted to continue in this usurping of power. The Congress and the executive force, if pushed to the wall, have means for repelling this judicial insolence.

Extreme Medicine. The executive branch could undo the Supreme Court simply by refusing to enforce its writs: extreme medicine, that, but it has been swallowed down as a bitter dose in other countries and times, for good or ill.

The Congress could much curb and chasten the Supreme Court, did it decide to do so, in two ways: first, by greatly reducing the categories of cases over which the Supreme Court exercises appellate jurisdiction, as is authorized in Article III of the Constitution. (Senator Sam Ervin, of North Carolina, a considerable constitutional authority, urged Congress to do just this with respect to compulsory "busing" of school pupils.) Such contraction of appellate jurisdiction, in effect leaving whole classes of actions at law within the jurisdiction of state courts only, or at least outside the sphere of federal courts, has happened before in the history of American law.

Second, the Congress could resort to its power of impeaching justices, whose tenure of office depends on "good behavior." Deliberately ignoring constitutional texts and confessedly substituting one's own judicial notions is not good behavior in a justice of the Supreme Court; it might be called subversive of the spirit of laws.

It would be a melancholy day if either of these remedies had to be applied: for it would mean some interruption of the usual rule of law, or at least of accustomed processes. But if the Court should be thoroughly dominated by a

majority of justices who do not think themselves confined in the least by respect for the terms of the Constitution itself--why, for every action there is an equal and opposite reaction.

Public Opinion. The temper of public opinion nowadays will not abide much more eccentricity or perversity of Supreme Court decisions. The odder or more arbitrary those rulings become, the more swiftly does the public's respect for the federal judiciary decline. The Court's decisions in recent years have invaded some of the more intimate concerns and interests of the American democracy; and resentments have accumulated. As Edmund Burke said of the governmental notion that the people ought to accept a rational explanation of why their interests are being damaged by public policy, "No man will be argued into slavery."

In recent years the tone of the Supreme Court has been improved by two sound appointments of justices--commonsensical jurists who, to judge from their performance thus far, do not think that justice was born yesterday, or that the Constitution of 1787 is altogether obsolete. One is surprised and pleased to find that some such judges still have been graduated from our law schools and have survived the deluge of mingled positivism and sentimentality. that has left awash many courtrooms, both federal and state.

Whether a replacement of personnel will redeem the judicial branch of the federal government, we have yet to learn. Clearly a great many honorable members of the Senate of the United States do not wish to confirm scholars in the law as justices and judges; they would prefer to seat servile ideologues. The original intent of the Framers of the Constitution was to give the American people a Republic of elevated views and hopes. The present intent of certain leaders of faction seems to be to reduce political policy to the lowest common denominator. As John Randolph of Roanoke observed, with reference to certain tendencies of the federal courts in his own day, "I can never forget that the Book of Judges is followed by the Book of Kings."

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