

How The Constitution Disappeared

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Attorney General Edwin Meese's recent statement in a speech to the American Bar Association that judges should interpret the Constitution to mean what it was originally intended to mean probably did not strike most people as controversial. Nevertheless it brought forth immediate denunciation by a sitting Supreme Court Justice as "doctrinaire," "arrogant," and the product of "facile historicism." "It is a view," Justice William J. Brennan, Jr. said in a speech at Georgetown University, "that feigns self-effacing deference to the specific judgments of those who forged our original social compact," but that "in truth . . . is little more than arrogance cloaked as humility" because it is not possible to "gauge accurately the intent of the Framers on application of principle to specific, contemporary questions."¹ The view is not only mistaken, but misguided, Justice Brennan continued, because it would require judges to "turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance."

This essay originally appeared in the February 1986 issue of *Commentary*.

What Is at Stake?

To state that judges should interpret the Constitution as intended by those who wrote and ratified it ("the Framers") is only to state the basic premise of our political-legal system that the function of judges is to apply, not to make, the law. Indeed, it would be difficult to say what interpretation of a law means if not to determine the intent of the lawmaker. Justice Brennan's angry attack on the obvious as if it were disreputable, soon joined by the attacks of his colleague Justice John Paul Stevens and a legion of media commentators, makes evident that much is at stake in this debate on a seemingly esoteric matter of constitutional interpretation. What is at stake is nothing less than the question of how the country should be governed in regard to basic issues of social policy: whether such issues should be decided by elected representatives of the people, largely on a state-by-state basis, or, as has been the case for the last three decades, primarily by a majority of the nine justices of the United States Supreme Court for the nation as a whole.

The modern era of constitutional law began with the Supreme Court's 1954 decision in *Brown v. Board of Education*, holding compulsory school racial segregation and, it soon appeared, all racial discrimination by government, unconstitutional. The undeniable rightness of the decision as a matter of social policy, in effect ending legally imposed second-class citizenship for blacks, and its eventual acceptance by the public and ratification by Congress and the president in the 1964 Civil Rights Act, gained for the Court a status and prestige unprecedented in our history. The moral superiority of decision making by judges to decision making by mere "politicians" seemed evident. The result was to enable the Court to move from its historic role as a brake on

social change to a very different role as the primary engine of such change.

In the years since *Brown*, nearly every fundamental change in domestic social policy has been brought about not by the decentralized democratic (or, more accurately, republican) process contemplated by the Constitution, but simply by the Court's decree. The Court has decided, on a national basis and often in opposition to the wishes of a majority of the American people, issues literally of life and death, as in its decisions invalidating virtually all restrictions on abortion and severely restricting the use of capital punishment. It has decided issues of public security and order, as in its decisions greatly expanding the protection of the criminally accused and limiting state power to control street demonstrations and vagrancy, and issues of public morality, as in the decisions disallowing most state controls of pornography, obscenity, and nudity. The Court has both prohibited the states from making provisions for prayer in the schools and disallowed most forms of aid, state or federal, to religious schools. It has required that children be excluded from their neighborhood public schools and bused to more distant schools in order to increase school racial integration; ordered the reapportionment of state and federal legislatures on a "one-man-one-vote" basis; invalidated most of the law of libel and slander; and disallowed nearly all legal distinctions on the basis of sex, illegitimacy, and alienage. The list could easily be extended, but it should be clear that in terms of the issues that determine the nature and quality of life in a society, the Supreme Court has become our most important institution of government.

Since his appointment to the Court by President Eisenhower in 1956, Justice Brennan has participated in all of the Court's major constitutional decisions, has consistently

voted in favor of Court intervention in the political process, and has often been a leader on the Court in reaching the decision to intervene. Indeed, he has ordinarily differed with the Court only in that he would often go even farther in disallowing political control of some issues; he would, for example, go farther than the Court has in disallowing state regulation of the distribution of pornographic material and he would prohibit capital punishment in all cases. If the Court has been our most important institution of government for the past three decades, Justice Brennan—although his name is probably unknown to the great majority of his fellow citizens—has surely been our most important government official. To argue that the Supreme Court should confine itself or be confined to interpreting the Constitution as written is to undermine the basis of this status and challenge the legitimacy of his life's work.

The Power of the Supreme Court

Constitutional law is as a practical matter the product of the exercise of the power of judicial review, the power of judges, and ultimately of Supreme Court justices, to invalidate legislation and other acts of other officials and institutions of government as inconsistent with the Constitution. The central question presented by constitutional law—the only question the great variety of matters dealt with under that rubric have in common—is how, if at all, can such a power in the hands of national officials who are unelected and effectively hold office for life be justified in a system of government supposedly republican in form and federalist in organization? The power was not explicitly provided for in the Constitution and had no precedent in English law—where Parliament, not a court, is said to be supreme—which could well be taken as reason enough to assume that no such

power had been granted. Alexander Hamilton argued for the power in *The Federalist* No. 78, however, and Chief Justice John Marshall established it in *Marbury v. Madison* in 1803 on the ground that it is inherent in a written constitution that declares itself to be supreme law. The argument is hardly unanswerable—other nations have written constitutions without judicial review—but judicial review limited to interpretation of the Constitution in accordance with the Framers' intent does obviate the problem of policy making by judges.

Constitutional limitations on popular government are undoubtedly undemocratic, even if they were themselves democratically adopted by a supermajority, but the only function of judges in exercising judicial review on the basis of a written constitution with determinate meaning would be the entirely judicial function of enforcing the Constitution as they would any other law. The judges, Hamilton assured the ratifying states, would have neither "force nor will"; able to "take no active resolution whatever" in enforcing the Constitution, their power would be "next to nothing." "Judicial power," Marshall reiterated, "has no existence. Courts are mere instruments of the law, and can will nothing." The notion that a court has "power to overrule or control the action of the people's representatives," Justice Owen Roberts confirmed during the New Deal constitutional crisis, "is a misconception"; the Court's only function in a constitutional case is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

Even Justice Brennan purports to recognize what, as he notes, Alexander Bickel called "the counter-majoritarian difficulty" presented by judicial review. "Our commitment to self-governance in a representative democracy must be reconciled," Justice Brennan concedes, "with vesting in electorally unaccountable justices the power to invalidate the

expressed desires of representative bodies on the ground of inconsistency with higher law." Supreme Court justices, he acknowledges at the beginning of his speech, echoing Judge Learned Hand, "are not platonic guardians appointed to wield authority according to their personal moral predilections." At several points he even seems to offer the standard justification for judicial review, that the judges merely interpret the written Constitution. He states, for example, that the duty of the judge is to "draw meaning from the text" and "remain faithful to the content" of the Constitution and that "the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation." These statements are consistent with the remainder of his speech, however, only if reading or interpreting a document is considered indistinguishable from composing or rewriting it.

Unfortunately, however, the debate is not about how judges should read or interpret the text of the Constitution, but about whether that is what they should in fact confine themselves to doing in deciding constitutional cases. The view that the duty of judges is to read and interpret the Constitution—to attempt to determine what the Framers intended to say—is precisely the view that Justice Brennan seeks to rebut and derides as uninformed and misguided. The whole point of his speech is that judges should not be confined to that task, for to so confine them would be to give them much too limited a role in our system of government and leave us insufficiently protected from the dangers of majority rule.

Justifying the Exercise of Power

Justice Brennan is far from alone today in his view of the proper role of judges in exercising judicial review and of the essential irrelevance of the Constitution to constitutional law.

It is, indeed, the view taken by most contemporary constitutional law scholars, who share the political ideology of the modern-era Supreme Court and see it as their professional duty to legitimize the fruits of that ideology. Because it has become increasingly difficult—in fact, impossible—to justify the Court's controversial decisions as the result of constitutional interpretation, the bulk of modern constitutional law scholarship consists of the invention and elaboration of "noninterpretivist" or "non-originalist" theories of judicial review—justifications for a judicial review that is not confined to constitutional interpretation in any sense that would effectively restrain judicial choice. Because the product of this review is nonetheless always called "constitutional law" and attributed in some way to the Constitution, the result is the paradox of noninterpretivist constitutional interpretation, constitutional law without the Constitution.

That more and more constitutional scholars, and now a Supreme Court justice, should come to recognize and acknowledge that the Supreme Court's constitutional decisions of recent decades cannot be justified on any other basis—that they are not in fact based on the Constitution—can be taken as a hopeful sign. Although the effort today in an increasing flood of books, articles, and speeches is to justify those decisions nonetheless, the inevitable failure of such efforts must, it would seem, eventually cause the enterprise to be abandoned and the fact that they cannot be justified in a system of self-government to be also generally recognized and acknowledged. Justice Brennan has performed a public service by bringing this extremely important and little understood issue to greater public attention, conveniently summarizing the standard arguments for "noninterpretivist" or "non-originalist" review—i.e., what is popularly referred to as "judicial activism"—and stating his own position with unusual, even if not total, clarity and candor.

Defenders of judicial activism face the dilemma that, on the one hand, judicial policy making cannot be defended as such in our system—the justices, even Justice Brennan must concede, are not authorized to enact their “personal moral predilections” into law and must therefore claim that their decisions derive somehow from the Constitution. On the other hand, it happens that the Constitution is most ill-suited as a basis for substantial judicial policy making by frequent judicial intervention in the political process in the name of protecting individual rights from majority rule. The central difficulty is that although the Constitution does create some individual rights, they are actually rather few, fairly well-defined, and rarely violated. The first task of the defender of judicial activism, therefore, is to dispose of the Constitution as unhelpful, inadequate, or irrelevant to contemporary needs. Reasons must be found why the Constitution cannot be taken to mean what it rather clearly is known to mean—especially when read, as all writings must be, in historical context—or, even better, to have any determinate meaning at all.

After disposing of the Constitution by depriving it of its historic meaning, the next task of defenders of judicial activism is to imagine a much more expansive, elevated, and abstract constitution that, having no specific meaning, can be made to mean anything and serve therefore as simply a mandate for judges to enact their versions of the public good. In response to the objection that the very thinly veiled system of government by judges thus achieved is obviously inconsistent with democracy, the argument is made that the value of democracy is easily overrated and its dangers many. The “very purpose of a Constitution,” as Justice Brennan states the standard argument, is to limit democracy by declaring “certain values transcendent, beyond the reach of temporary political majorities.” In any event, no real incon-

sistency with democracy is involved, the argument concludes, because the judges, though unrestrained by the actual text of the Constitution, will continue to be restrained by its principles, the adaptation of which to changing circumstances is the true and indispensable function of judges. Justice Brennan's speech can serve as a textbook illustration of each of these moves.

Justice Brennan's attack on the notion of a constitution with a determinable historic meaning could hardly be more thorough. First of all, he finds that the Court's "sources of potential enlightenment" as to the intended meaning are often "sparse or ambiguous." Even more serious, the search for meaning is likely to be futile in any event because even the Framers, he believes, usually did not know what they meant: "Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality." Then there is the question of "whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states?" Indeed, there is the most basic question of all, whether the very notion of intent makes sense, "whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states." It is almost as if the Constitution and its various provisions might have been drafted and adopted with no purpose at all. Finally, there is the problem that "our distance of two centuries cannot but work as a prism refracting all we perceive." For all these reasons, the idea that judicial review is legitimate only if faithful to the intent of the Framers can be held only by "persons who have no familiarity with the historical record."

Justice Brennan has still another, although it would seem unnecessary, nail to put in the coffin of the now de-

molished Constitution. Should any shred of constitutional meaning somehow survive the many obstacles he sees to finding it, he would accord it little or no value. The world of the Framers is "dead and gone," and it would not do, he believes, to hold the Constitution captive to the "anachronistic views of long-gone generations." "[A]ny static meaning" the Constitution "might have had" in that dead world must, therefore, be of dubious relevance today. In any event, "the genius of the Constitution rests," in his view, not in any such meaning but in "the adaptability of its great principles to cope with current problems and current needs." Strange as it may seem, a writing can be great apart from its meaning and solely by reason of its supposed ability to mean anything.

Most of Justice Brennan's objections regarding the difficulties of constitutional interpretation have some basis, but they could also be made in regard to interpretation of almost any law. For example, one can almost always wish for a clearer or more detailed legislative history, and it is always true that legislators cannot foresee and agree on every possible application of a law. If these difficulties made the effort to determine legislative intent futile, a system of written law would hardly be possible. In any event, from the premise of an unknowable or irrelevant Constitution, the conclusion should follow that judges have no basis or justification for declaring laws unconstitutional, not that they are therefore free to invalidate laws on some other basis and still claim to be interpreting the Constitution.

Most important, whatever the difficulties of legal interpretation, they have little or no relevance to actual constitutional decision making by the Supreme Court because no issue of interpretation, no real dispute about the intended meaning of the Constitution, is ordinarily involved. For example, the Constitution contains no provision mentioning or apparently in any way referring to the authority of the

states to regulate the practice of abortion. However one might undertake to defend the Court's abortion decisions, it does not seem possible to argue that they are the result of constitutional interpretation in any non-fanciful sense. As another example, although the Constitution does mention religion, no process that could be called interpretation permits one to go from the Constitution's protection of religious freedom from federal interference to the proposition that the states may not provide for prayer in the schools.

A constitution so devoid of ascertainable meaning or contemporary relevance would seem quite useless as a guide to the solution of any contemporary problem and certainly as a written law enforceable by judges. The judges might as well be told to enforce a document written in an unknown language or, more in keeping with Justice Brennan's view, in disappearing ink. Having effectively eliminated the actual Constitution, however, Justice Brennan proceeds to remedy the loss—judicial activism cannot proceed with no constitution at all—by imagining and substituting a much more impressive, inspiring, and usefully uncertain one.

The Constitution as Written

The constitution of Justice Brennan's vision is undoubtedly a wonderful thing, one of "great" and "overarching" principles and "majestic generalities and ennobling pronouncements [that] are both luminous and obscure." It is nothing less grand than the embodiment of "the aspiration to social justice, brotherhood, and human dignity that brought this nation into being," "a sublime oration on the dignity of man," and "a sparkling vision of the supremacy of the human dignity of every individual." Justice Brennan accurately reflects current constitutional law scholarship, here as

throughout his speech, by seeing the Constitution as simply "the lodestar for our aspirations." It is a source of constant wonderment that scholars and judges of otherwise the most secular and rationalist turn of mind can grow mystical when discussing the Constitution.

The temptation is strong, of course, to dismiss Justice Brennan's rapturous statements as mere flights of poetic fancy or utopian ecstasy, obviously not meant as serious descriptions or explanations of the Constitution. The fact remains, however, that this view of the Constitution is the only justification offered by him, or other contemporary defenders of judicial activism, for the Court's assumption and exercise of enormous government power. Fanciful as it may seem, a constitution that is simply the embodiment of "our," or at least his, aspirations accurately describes the constitution he has been enforcing for nearly three decades to override the will of the people of this country on issue after issue. It cannot be too strongly emphasized, therefore, that the Constitution we actually have bears almost no relation to, and is often clearly irreconcilable with, the constitution of Justice Brennan's vision. No more is necessary to rebut all contemporary defenses of judicial activism than that a copy of the Constitution be kept close at hand to demonstrate that the defenders of judicial activism are invariably relying on something else.

Although it may come as something of a disappointment to some, an "aspiration for social justice, brotherhood, and human dignity" happens not to have been what brought this nation, or at least the government founded on the Constitution, into being. The convention to revise the Articles of Confederation was called and the Constitution was drafted and ratified not to provide additional protections for human rights—on the contrary, the stronger national government created by the Constitution was correctly seen as a potential danger to human rights—but almost entirely for commercial

purposes. The primary motivating force for the creation of a stronger national government was the felt need of a central authority to remove State-imposed obstacles to interstate trade. How little the Constitution had to do with aspirations for brotherhood or human dignity is perhaps most clearly seen in its several provisions regarding slavery. It provides, for example, that a slave was to be counted as three-fifths of a free person for purposes of representation and that slaves escaping to free states were nonetheless to be returned to their masters. It is not, as Justice Brennan would explain this, that part of the "egalitarianism in America has been more pretension than realized fact," but that there was at the time the Constitution was adopted very little pretension to egalitarianism, as is illustrated by, for example, the widespread use of property qualifications for voting.

Given the original Constitution's limited and mundane purposes, it is not surprising that it provides judges with little to work with for the purpose of advancing their personal notions of social justice. The Constitution is, first of all, a very short document—easily printed, with all twenty-seven amendments and repealed matter, on fewer than twenty pages—and apparently quite simple and straightforward, not at all like a recondite tome in which many things may be found with sufficient study. The original Constitution is almost entirely devoted to outlining the structure of the national government and setting forth the sometimes complicated methods of selection, and the responsibilities, of members of the House of Representatives, senators, the president, and Supreme Court justices. It contains few provisions protecting individual rights from the national government—federalism, i.e., limited national power and a high degree of local autonomy, was considered the principal protection—and even fewer restrictions on the exercise of state power. As to the national government, criminal trials are to be by jury, treason is narrowly defined, the writ of habeas

corpus is protected, and bills of attainder and ex-post-facto laws are prohibited. The prohibition of bills of attainder and ex-post-facto laws is repeated as to the states, which are also prohibited from discriminating against citizens of other states. Finally and by far the most important in terms of actual challenges to state laws, the Framers, nicely illustrating their lack of egalitarian pretension, undertook to protect creditors from debtor-relief legislation by prohibiting the states from impairing contract rights.

The first eight of the first ten amendments to the Constitution, the Bill of Rights adopted in 1791, provide additional protections of individual rights, but only against the federal government, not the states, and these, too, are fewer than seems to be generally imagined and certainly fewer than is typical of later declarations of rights, such as in the United Nations Charter. In terms of substantive rights, the First Amendment prohibits Congress from establishing or restricting the free exercise of religion—the main purpose of which was to leave matters of religion to the states—and from abridging the freedom of speech, press, or assembly. In addition, a clause of the Fifth Amendment prohibits the taking of private property without just compensation; the Second Amendment, rarely mentioned by rights enthusiasts, grants a right to bear arms; and the Third Amendment, of little apparent contemporary significance, protects against the forced quartering of troops in private homes. The Seventh Amendment, requiring jury trials in civil cases involving more than twenty dollars, is hard to see today as other than an unnecessary inconvenience. The remaining provisions (search and seizure, grand-jury indictment, double jeopardy, privilege against self-incrimination, due process, jury trial, right to counsel and to confront adverse witnesses, and cruel and unusual punishment) are related to criminal procedure.

Additional protections of individual rights are provided by the post-Civil War Amendments. The Thirteenth Amend-

ment prohibits slavery and the Fifteenth prohibits denial of the right to vote on grounds of race. The great bulk of constitutional litigation concerns state laws and nearly all of that litigation purports to be based on a single sentence of the Fourteenth Amendment and, indeed, on one or the other of two pairs of words, "due process" and "equal protection." If the Constitution is the embodiment of our aspirations, it must have become so largely because of those four words. The clear historic purpose of the Fourteenth Amendment, however, was to provide federal protection against certain state discriminations on the basis of race, historically our uniquely intractable problem, but not otherwise to change fundamentally the constitutional scheme. Finally, the Nineteenth Amendment protects the right to vote from denial on grounds of sex, and the Twenty-seventh from denial on grounds of age for persons over eighteen.

The Constitution's protections of individual rights are not only few but also, when read in historical context, fairly clear and definite. State and federal legislators, all of whom are American citizens living in America and generally at least as devoted as judges to American values, have, therefore, little occasion or desire to violate the Constitution. The result is that the enactment of a clearly unconstitutional law is an extremely rare occurrence: the clearest example in our history perhaps is a 1933 Minnesota debtor-relief statute plainly prohibited by the contract clause, although, as it happens, the Supreme Court upheld it by a five-to-four decision. If judicial review were actually confined to enforcing the Constitution as written, it would be a much less potent force than the judicial review argued for and practiced by Justice Brennan.

The Constitution is undoubtedly a great document, the foundation of one of the freest and most prosperous nations in history. It does not detract from that greatness to point out that it is not, however, what Justice Brennan would make of it, a compendium of majestic generalities and ennobling pro-

nouncements luminous and obscure; indeed, its greatness and durability surely derive in large part from the fact that the Framers' aims were much more specific and limited. Far from intending to compose an oration to human dignity, the Framers would have considered that they had failed in their effort to specify and limit the power of the national government if the effect of the Constitution should be to transfer the focus of human-rights concerns from the state to the national level. The Framers' solution to the problem of protecting human freedom and dignity was to preserve as much as possible, consistent with national commerce and defense requirements, a system of decentralized democratic decision making, with the regulation of social conditions and personal relations left to the states. Justice Brennan's solution means virtually unlimited Supreme Court power to decide basic social issues for the nation as a whole, effectively disenfranchising the people of each state as to those issues, and is directly contrary to the constitutional scheme.

The Right of Self-Government

Judicial review on the basis of a constitution divorced from historical meaning and viewed, instead, as simply "the lode-star for our aspirations" is obviously a prescription for policy making by judges. It should therefore be defended, if at all, as such, free of obfuscating references to "interpretation" of the Constitution. The only real question it presents is, why should the American people prefer to have important social-policy issues decided for the whole nation by the Supreme Court—a committee of nine lawyers unelected to and essentially unremovable from office—rather than by the decentralized democratic process? Justice Brennan's answer to this question is, in essence, why not? The argument that judicial interpretation of the Constitution in accordance with

the Framers' intent is essential for "depoliticization of the judiciary," he points out, has its own "political underpinnings"; it "in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right," which involves "a choice no less political than any other."

Justice Brennan is certainly correct that the presumption of constitutionality accorded to challenged acts of government officials has a political basis, but it is surprising that he should find "far from clear what justifies such a presumption." What justifies it is the basic premise of democratic government that public-policy issues are ordinarily to be decided through the electoral process, not by unelected judges; that constitutional restrictions on representative government—even if, unlike judge-made restrictions, they were once democratically adopted—are the exception, not the rule. To refuse to assume the validity of the acts of the electorally responsible officials and institutions of government is to refuse to assume the validity of representative self-government. It has, therefore, from the beginning been considered the bedrock of constitutional litigation that one who would have a court invalidate an act of the political branches must assume the burden of showing its inconsistency with the Constitution, ordinarily a most difficult task. By reversing the presumption of constitutionality, Justice Brennan would simply reject political decision making as the norm and require elected representatives to justify their policy choices to the satisfaction of Supreme Court justices, presumably by showing that those choices contribute to the justices' notion of social progress.

Justice Brennan would justify the judicial supremacy he favors on the not entirely consistent grounds that, on the one hand, the justices are the true voice of the people and, on the other, that the people are in any event not always to be trusted. "When justices interpret the Constitution," Justice

Brennan assures us, "they speak for their community, not for themselves alone" and "with full consciousness that it is, in a very real sense, the community's interpretation that is sought." Apart from the fact that no question of constitutional interpretation is in fact involved in most "constitutional" cases—the judges do not really decide cases by studying the words "due process" or "equal protection"—the community is, of course, fully capable of speaking for itself through the representatives it elects and maintains in office for that purpose. Justice Brennan does not explain why he thinks the community needs or wants unelected judges to speak for it instead or why the judges can be expected better to reflect or express the community's views.

The actual effect of most judicial rulings of unconstitutionality is, of course, not to implement, but to frustrate the community's views. For example, Justice Brennan would disallow capital punishment as constitutionally prohibited despite not only the fact that it is repeatedly provided for in the Constitution, but also the fact that it is favored by a large majority of the American people. In some cases, however, he explains, a justice may perceive the community's "interpretation of the text to have departed so far from its essential meaning" that he "is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path." On capital punishment, Justice Brennan hopes to "embody a community striving for human dignity for all, although perhaps not yet arrived." Interpreting an aspirational constitution apparently requires prescience as well as a high degree of self-confidence.

The foundation of all defenses of judicial activism, however, is not any fanciful notion that the judges are the true voice of the people, but on the contrary, the conviction that the people and their elected representatives, should not be permitted to have the last word. Rarely has this conviction,

common among our intellectual elite, been expressed with more certainty than in Justice Brennan's speech. Judicial acceptance of the "predominant contemporary authority of the elected branches of government" must be rejected, he argues, for the same reason he rejects judicial acceptance of the "transcendent historical authority of the Framers." That reason, it now appears, is not so much that original intent is unknowable or irrelevant as that its acceptance as authoritative would be inconsistent with his notion of "proper judicial interpretation" of the Constitution because it would leave judges with too little to do. "Faith in the majoritarian process," like fidelity to original intent, is objectionable, he is frank to admit, simply because it "counsels restraint." It would, he points out, lead the Court generally to "stay its hand" where "invalidation of a legislature's substantive policy choice" is involved. Justice Brennan's confidence that his university audience shared his suspicion of democracy and distrust of his fellow citizens was such as to put beyond need of argument the unacceptability of a counsel of restraint by Supreme Court Justices in deciding basic issues of social policy.

Legislative supremacy in policy making is derided by Justice Brennan as the "unabashed enshrinement of majority will." "Faith in democracy is one thing," he warns, but "blind faith quite another." "The view that all matters of substantive policy should be resolved through the majoritarian process has appeal," he concedes, but only "under some circumstances," and even as so qualified "it ultimately will not do." It will not do because the majority is simply not to be trusted: to accept the mere approval of "a majority of the legislative body, fairly elected," as superior in public-policy issues would be to "permit the imposition of a social-caste system or wholesale confiscation of property," a situation "our Constitution could not abide." How a people so

bereft of good sense, toleration, and foresight as to adopt such policies could have adopted the Constitution in the first place is not explained. Justice Brennan seems to forget that if the Constitution prohibits such things—indeed, if it is an oration to human dignity, as he maintains—it must be because the American people have made it so and therefore, it would seem, can be trusted. It cannot be Justice Brennan's position that political wisdom died with the Framers and that we are therefore fortunate to have their policy judgments to restrain us; he rejects those judgments as unknowable or irrelevant. Like other defenders of judicial activism, however, he seems to view the Constitution not as an actual document produced by actual people but as a metaphysical entity from an extraterrestrial source of greater authority than the mere wishes of a majority of the American people, which source, fortunately, is in effective communication with Supreme Court Justices.

The social-caste system feared by Justice Brennan would probably be prohibited by the post-Civil War amendments, without undue stretching, and confiscation of property by the national government—though not by the states—would be prohibited by the just-compensation clause of the Fifth Amendment. (These constitutional provisions, it may be noted in passing, would operate as impediments to such policies, providing grounds for opposing arguments, even if they were not judicially enforceable.) The real protection against such fears, however—and columnist Anthony Lewis's similar fear that without activist judicial review Oregon might establish the Reverend Sun Myung Moon's Unification Church as the official state religion—is simply the good sense of the American people. No extraordinary degree of confidence in that good sense is necessary in order to believe that these and similarly outrageous policies that are invariably offered as providing an unanswerable justification

for judicial activism are so unlikely to be adopted as not to be a matter of serious concern. If they should be a matter of concern nonetheless—if, for example, it is truly feared that the people of some state might establish a church and believed that no state should be free to do so—the appropriate response would be the adoption of a constitutional amendment further limiting self-government in the relevant respects. To grant judges an unlimited power to rewrite the Constitution, Justice Brennan's recommended response would be to avoid largely imaginary dangers of democratic misgovernment by creating a situation in which judicial misgovernment is guaranteed.

Judicial activism is not necessary to protect us from state-established churches, favored by almost no one, but it does operate to deprive the people of each state of the right to decide for themselves such real issues as whether provision should be made for prayer in the public schools. In any event, the issue presented by contemporary judicial activism is not whether majority rule is entirely trustworthy—all government power is obviously dangerous—or even whether certain specific constitutional limitations on majority rule might not be justifiable; the issue is whether freewheeling policy making by Supreme Court justices, totally centralized and undemocratic, is more trustworthy than majority rule.

Defenders of judicial activism invariably match their skepticism about democratic policy making with a firm belief in the possibility and desirability of policy making on the basis of principle. To free judicial review from the constraint of a constitution with a determinate meaning is not to permit unrestrained judicial policy making in constitutional cases, it is argued, for the judges will continue to be constrained by the Constitution's principles, which, like the smile of the Cheshire cat, somehow survive the disappearance of the Constitution's text. According to this argument, judicial

activism amounts to nothing more than the adaptation and application of these basic principles to changing circumstances, a necessary task if the Constitution is to remain a "living document" and a contributor rather than an obstacle to the national welfare. Thus, judicial activism is necessary in Justice Brennan's view, as already noted, if we are not to "turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance" and because the genius of the Constitution rests not in what, if anything, the Framers actually intended to provide, but in the "adaptability of its great principles to cope with current problems and current needs."

The argument that judges are constrained by constitutional principles, even though not by the constitutional text, bears no relation to reality. In the first place, it is not possible to formulate useful constitutional principles apart from or beyond the Constitution's actual provisions. The Constitution protects certain interests to a certain extent, from which fact the only principle to be derived is that the Constitution does just that. An even more basic fallacy is the argument's assumption that the solution of social problems lies in the discovery, adaptation, and application of pre-existing principles to new situations. Difficult problems of social choice arise, however, not because of some failure to discern or adapt an applicable principle, but only because we have many principles, many interests we regard as legitimate, and they inevitably come into conflict. Some interests have to be sacrificed or compromised if other interests are to be protected—for example, public demonstrations will have to be regulated at some point in the interest of maintaining public order—and there is no authoritatively established principle, rule, or generality that resolves the conflict. If there were such a principle, the conflict would not present a serious problem, but would be a matter that has already been

decided or that anyone can decide who can read and reason. Value judgments have to be made to solve real policy issues, and the meaning of self-government is that they are to be made in accordance with the collective judgment of those who will have to live with the results.

There is also very little basis for Justice Brennan's apparent belief that judicial review confined to the Constitution as written would somehow be incompatible with social progress—unless social progress is simply defined as the enactment of his views. The Constitution does contain several provisions that we would probably be better off without, for example, the Seventh Amendment's requirement of a jury trial in federal civil cases involving more than twenty dollars and the Twenty-second Amendment's limitation of presidents to two terms. Apart from the fact, however, that the Constitution, of course, provides procedures for its amendment—it can be updated if necessary without the Court's help—judicial activism has not generally served to alleviate the undesirable effects of such provisions. In any event, the Constitution's restrictions on self-government are, as already noted, relatively few and rarely such as a legislature might seek to avoid. Rarely if ever will adaptation of the Constitution's overarching principles, if any, be necessary in order to permit a legislature to implement its views of social progress.

Indeed, on the basis of our actual constitutional history—which includes the Supreme Court's disastrous decision that Congress could not prohibit the extension of slavery, helping after the Civil War bring on the decision that Congress could not prohibit racial segregation in public places—it is possible to believe that social progress might go more smoothly without the Court's supposed adaptations of principles. If the Constitution can be said to have an overarching principle, the principle of federalism, of decision

making on most social-policy issues at the state level, is surely the best candidate, and that principle is not adapted or updated but violated by the Court's assertion of power to decide such issues. Far from keeping the Constitution a "living document," judicial activism threatens its demise.

Whatever merit Justice Brennan's justifications for judicial activism might have in theory, they do not seem relevant to the judicial activism actually practiced by the Supreme Court for the past three decades. It would be very difficult to justify the Court's major constitutional decisions during this period, and particularly its most controversial decisions, on any of the grounds Justice Brennan suggests. It would not seem possible to argue, for example, that the justices spoke for the community, not for themselves, in reaching their decisions on abortion, busing, criminal procedure, and prayer in the schools. Nor does it seem that any of those decisions can be justified as providing a needed protection from a possible excess of democracy, as merely delaying effectuation of the aberrational enthusiasm of "temporary political majorities" until they could return to their senses. Judicial review may, as Chief Justice Harlan Fiske Stone put this standard rationalization, provide the people with an opportunity for a "sober second thought," but no amount of thought or experience is likely to change the view of the vast majority of the American people that, for example, their children should not be excluded from their neighborhood public schools because of their race or that no new protections of the criminally accused should be invented with the effect of preventing the conviction and punishment of the clearly guilty.

Finally, the contribution of most of the Court's constitutional decisions of recent decades to social progress—for example, its decision that California may not prohibit the parading of vulgarity in its courthouses or that Oklahoma

may not impose a higher minimum drinking age on men than on women—is at best debatable. Very few of these decisions, it seems, could be used to illustrate the adaptation of overarching constitutional principles or transcendent constitutional values to changing circumstances. They could probably more easily be used to illustrate that, rather than helping us to cope with current problems and current needs, the Court's constitutional decisions have often been the cause of those problems and needs.

Whatever the merits of the Supreme Court's constitutional decisions of the past three decades, they have, as to the issues decided, deprived us of perhaps the most essential element of the human dignity Justice Brennan is concerned to protect, the right of self-government, which necessarily includes the right to make what others might consider mistakes. It is not the critics of judicial activism but the activist judges who can more properly be charged with being doctrinaire and arrogant, for it is they who presume to know the answers to difficult questions of social policy and to believe that they provide a needed protection from government by the misguided or ignorant. An opponent of judicial activism need not claim to know the answer to so difficult a question of social policy as, say, the extent if any, to which abortion should be restricted to know that it is shameful in a supposedly democratic country that such a question should be answered for all of us by unelected and unaccountable government officials who have no special competence to do so.

Note

1. "The Constitution of the United States: Contemporary Ratification," delivered at a "Text and Teaching Symposium," October 12, 1985. All other quotations from Justice Brennan are taken from this source unless otherwise indicated.