Of Meese and
At the end of the 1984 Term, the Supreme Court of the United States handed down several opinions in which it purported to apply the provisions of the religion clauses of the First Amendment. These cases immediately evoked a great deal of adverse commentary from the usual sources: editorial and television communications, law reviews, the pulpits, and the floors of various legislative bodies. Such an effect, of course, is not at all an uncommon reaction to a Supreme Court decision. These critical panjandrums always know all the proper answers to everything and not least to the issues presented to the Supreme Court for resolution. What might be considered unusual this time, however, was the reason for the challenges. Essentially the complaint was that the Court had adhered to stare decisis and followed its own precedents.

The argument of the critics was that the Court should have abandoned the heresies it had perpetrated in its earlier readings of the First Amendment and substituted what the critics claimed to be the “original intention” of the Framers. The tone of criticism was somewhat reminiscent of Martin Luther’s demands for a return to the Bible and away from perversions of truth committed by the Pope.

Much of the critics’ feelings may be explained by disappointed expectations. In earlier terms, immediately prior to 1984, the Court had been moving away from its former concept of “separation” of church and state toward a form of concordat it labeled “accommodation.” (The movement had really begun with the accession of Mr. Chief Justice Burger and had been accelerating throughout his tenure.) In these 1984 opinions, the Court had betrayed the promise implicit in earlier judgments that soon the state would be allowed to succor the churches or at least their educational branches. Ironically, this anticipation of change rested originally not so much on Mr. Meese’s call for “original intention” as on Mr. Justice Brennan’s position that “when Justices interpret the Constitution they speak for their community, not for themselves. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community’s interpretation that is sought.”

I am not sure that the good Justice appreciated that he was resounding the words of Lord Bryce in his American Commonwealth, written late in the 19th century, when he said: “By placing the Constitution above both the National and the State governments, [it] has referred the arbitration of disputes between them to an independent body, charged with the interpretation of the Constitution, a body which is to be deemed not so much a third authority in the government as the living voice of the Constitution, the unfolder of the mind of the people whose will stands expressed in that supreme instrument.”

The judiciary’s current critics may well be right when they read our society’s present values as

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1At 348.
those once etched with acid by Sinclair Lewis. For surely we live again in the milieu of the George Babbitts and the Elmer Gantrys and—I may add—the Charles Foster Kanes.

The question that the critics wanted the Court to answer in the cases that triggered the controversy was not the biblical one of what man owes to God and what to Caesar, but rather what does Caesar owe to God. And, as even the arch-disciple of the Age of Reason, Thomas Jefferson, acknowledged, this nation owes its very existence to "Nature's God". Certainly then it behooves government, at the very least, to supply the force and the funds to bring the American public to engage in religious worship. Perhaps, to follow the mood of the people, we should substitute for the motto of the Great Seal of the United States, which reads

"It was not originally intended for the Bill of Rights to be applied to the States."

Novus Ordo Seclorum, the more appropriate words from the shield of Harvard University. I do not mean Veritas, but what Learned Hand called "the other legend": Christo et Ecclesia. Never mind that all efforts to invoke the deity in the preamble and elsewhere in the Constitution met with clear and convincing rejection at the 1787 Convention and in the proposed amendments in 1789. That is a part of our history that does not interest our new historians.

I do not propose to examine the First Amendment's origins further except to say that the Meese position is certainly not devoid of substance. Particularly valid is his argument that it was not originally intended for the Bill of Rights to be applied to the States. Whether they were not to be applied to the States because the States already had their own such guarantees or because the Founders did not want the States under restraints enforceable by national courts is not so readily answered. Nor can I go into the question to what degree the principles if not the language of the First Amendment became applicable to the States through the Fourteenth Amendment. Those looking for answers to such a question will find one in Crosskey's Politics and the Constitution. Not much shorter but different responses may be discovered in the views of Black and Frankfurter and Rutledge in Adamson v. United States. But I should warn you that Black, Frankfurter, and Rutledge are already under indictment for heresy for their readings of the religion clauses, particularly in Everson v. United States.

The current call for a return to the meaning intended by those who wrote the words of the Constitution is, as the publicists have recognized, not confined to the First Amendment. The phrase "original meaning" has simply replaced "strict construction" as the rallying cry for those who want a revamping of constitutional law to bring it into closer conformity with their own political philosophy. The "strict constructionist" meant strict construction only some of the time. I never heard them argue that corporations are not protected by the due process clauses because they are not really "persons." So, too, I doubt that the "original intent" school would restrict the protections of the privileges and immunities, due process, and equal protection clauses of the Fourteenth Amendment to blacks, for whose sole benefit that amendment was clearly intended by its authors.

As Learned Hand wrote over forty years ago:

Here history is only a feeble light, for these rubrics were meant to answer future problems unimagined and unimaginable. Nothing which by the utmost liberality can be called interpretation describes the process by which they must be applied. Indeed if law be a command for specific conduct, they are not law at all; they are cautionary warnings against the intemperance of faction and the first approaches of despotism. The answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh.2

Throughout American history, since the adoption of the 1787 Constitution, one or both of the political branches of government have often been in fundamental disagreement with the judicial branch over the propriety of its exercise of the power of judicial review. The frustrations of the first two branches, whose members come and go every two, four, or six years are aggravated by the life tenure awarded the Justices of the Supreme Court for the very purpose of protecting the judges from the political machinations of the elected branches. (In our 198-year constitutional history, we have had only 102 Justices.) Perhaps it should be noted, if only incidentally, that if the Founders clearly intended to assure the independence of the judges, it is not quite so certain that they meant to confer broad powers of judicial review of the kind exercised. The language of independence that was chosen—tenure "during good behavior"—would certainly be found by a strict constructionist not to mean unconditional life tenure. A historian could readily show that the phrase was derived from an English statute pursuant to which English judges remained removable by petition of both houses of Parliament, among other devices. But ever since Jefferson tried the impeachment route with Mr. Justice Samuel Chase and failed, the political branches have been reduced to fulminating against the Court while awaiting the use of the appointment process to cure the evils it perpetuates. The present Court, even including the young lady, is older than the Nine Old Men when they were attacked by Roosevelt.

The present complaint is not different from that penned by Thomas Jefferson in his autobiography in 1821 when he proposed a solution that was never to be found acceptable. He wrote:

It is not enough that honest men are appointed judges. All know

the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the spirit of corps, of their peculiar maxim and creed that "it is the office of a good judge to enlarge his jurisdiction," and the absence of responsibility, and how can we expect impartial decision. . . . We have seen too that, contrary to all correct example, they are in the habit of going out of the question before them, to throw an anchor ahead and grapple further hold for future advances of power. . . . I repeat that I do not charge the judges with wilful and ill-intentioned error; but honest error must be arrested where its toleration leads to public ruin. As, for the safety of society, we commit honest lunatics to Bedlam, so judges should be withdrawn from the bench, whose erroneous biases are leading us to dissolution. It may indeed injure them in fame or in fortune, but it saves the republic, which is the first and supreme law.  

The behavior of the legislative and executive branches over time in trying to curb the Court may be described as volcanic. These mountains constantly rumble, but break forth in strong attacks only periodically and usually after a case or series of cases triggers the eruption. Then the Court’s detractors self-righteously wrap themselves in the Constitution and seek popular support by taking to the hustings or stating their cause through the media. The formula was stated by Professor Felix Frankfurter in a letter to President Franklin Roosevelt dated December 27, 1938, where he made some suggestions for improvement of a presidential text. Frankfurter wrote: "Be good enough to consider [the suggestions] in the light of their aim—to say everything you have said to educate the laity and (in the words of my great master Holmes) 'calculated to give the brethren pain," but at the same time give the scavenger profession nothing to feed on. . . . I also suggest . . . that throughout you should appear as the real guardian of the Constitution adequate to the needs of the nation if only judges would be obedient to the majestic powers of the Constitution." One advantage of such form of attack was that the enemy did not shoot back. The Justices themselves usually adhered to their implicit vow of silence not to speak about their functions except in the course of rendering opinions. And so the arguments on their behalf had to be made through surrogates. It is true that early in our history, during the lengthy battle waged by the Jeffersonians against the Marshall Court, two distinguished Virginian jurists, Spencer Roane and William Brockembrough, vented their spleen at length against the opinion in McCulloch v. Maryland through the good offices of friendly Virginian newspapers. But they did so under pseudonyms. And when Marshall himself undertook equally lengthy replies in the press, he, too, did so pseudonymously. Until very recent years, Justices did not reply to attacks on the Court or its product. Lately, through law school speeches and articles—of which the Brennan talk in this controversy was one—and particularly in talks at the annual American Bar Association meetings, the Justices, too, have entered the fray. But they have never lacked for apologists and defenders both in the ranks of the press and in academia. Even lower court judges have entered the fray. The great

*"M. Freedman, Roosevelt and Frankfurter 471-72 (1967)."

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Father Tammany's Almanack, For the year 1783.

"C. E. Hughes, Addresses and Papers 139 (1908).
*Marbury v. Madison, 1 Cranch 137, 177 (1803)."
ton. For they earn their keep by the exercise of judgment. Constitutional law is also politics, in the best sense of the word, when it means making policy. Alas, at times, constitutional law also means politics in a lower sense of the word, a partisanship reflecting the interests of what Madison disdained as factions. Constitutional law is a rule of decision; the Constitution is a frame of government.

The rules of decision have often had a deleterious effect on the frame of government. In the beginning, for example, was the great contest between national and state power that the Court helped ultimately to resolve in favor of centralism, negating the fundamental concept of federalism that was surely one of the principal objectives of the framers of the Constitution. The Court was less successful in its efforts to preserve slavery, an issue that the original Constitution refused to face, because to do so in the Convention of 1787 would have made the formation of the United States an impossibility. It took a civil war, the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, and a century of judicial effort thereafter to eliminate slavery and its incidents as lawful elements of constitutional government. But if the Court led the way for the nation to conform to the Constitution in 1954, progress toward that goal was almost wholly dependent on the efforts of the legislative and executive branches which really did not begin until the second Johnson's presidency. The words of the original document and its twenty-six formal amendments provide only some, not all of the answers to the questions that are posed for judicial resolution. Even so, they are only what Madison called "parchment barriers" unless and until given life by the three branches and endorsed by the people. The basic function of the Supreme Court has been and continues to be the maintenance of the rule of law in our society; the rejection of arbitrariness of governmental action; the prevention of agglomeration of power in any governmental functionary or institution; the avoidance of the kind of "corruption of the constitution" that called forth the American Revolution. The constitutional demand for reasoned and justifiable assertions of authority by government is not to be found in any particular words of the Constitution, unless it be the due process clauses. The meaning of these clauses has been left largely to the Court to determine and the Court has left it indeterminate. The Court's deficiency is to be seen in its persistent and recurrent failure to apply the same demands to itself that it purports to apply to other parts of government. It is a failure to recognize that its principal role is a judicial one, that is, the resolution of a particular case or controversy on the basis of the facts adduced. It is not supposed to be a legislature establishing general rules of behavior for the people of the nation. Even less is it supposed to be issuing a new Decalogue or another Sermon on the Mount. It is supposed to be a judicial body determining, according to law, whether A is to prevail over B, or vice versa, in a particular litigation. And in resolving that controversy, it is supposed to state cogent reasons for its choice. Those reasons may, indeed, be based on constitutional principles or text, on precedents, even on pragmatic considerations and personal predilections. And those reasons ought to be stated in its opinions, not only cogently, but fully and openly and honestly. The Court ought not to be a huckster of causes or a "great communicator." When it fails in its capacity to persuade rather than to command—the distinction drawn by Mr. Justice Brandeis—it fails its commitments to the maintenance of the rule of law which is its constitutional obligation. And the remedy is not for it to shift from espousing one set of political creeds in order to embrace another.

Perhaps these remarks are but the mauderings of one academic lawyer which can be of no interest to the real world of law and government. Certainly, they seem to have no appeal to most of my academic colleagues who, like the Justices of the Supreme Court and the Attorney General, have seen "the Truth" and are prepared to share it or impose it on those not equally blessed. But I think that I ask for very little when I ask that the Court confine itself to its function and say only what it means and mean only what it says. Nor do I suggest that such behavior is easy of accomplishment. I do think that it would prove a better endeavor than chasing the will-o'-the-wisp of "original intention," as the Attorney General would have us do, or than becoming the transmitter of the public will, as Mr. Justice Brennan suggests.

"The Justices . . . make lousy historians."

History as a guide to original constitutional meaning can, at best, afford the perimeters within which choices can be made. It can describe the controversies that gave rise to the language—often vague language of compromise—and the arguments on the different sides of the question. Seldom can we discover a specific intent; we are more likely to learn about connotations than denotations. And if the past decisions of the Court are any guide, the Justices, like the lawyers and law clerks on whom they primarily depend for their history, make lousy historians. They tend to use history the way they use precedents, selecting the bits and pieces that support their conclusions. The capacity to read into history what they want to read out of history is no better demonstrated than in the most catastrophic decision the Court ever rendered: Dred Scott v.
Sanford. Or, if you want a more recent example, with perhaps more congenial effects, look at the Court’s deconstruction of constitutional history in the “one person-one vote” cases. Of course history can and ought to be an important element in reading the Constitution’s meaning, but only when it is not law-office history, when it is an honest search for what the authors were debating and resolving and not merely another tool of partisan advocacy. And it is to be remembered that, at best, history is no more scientific than law.

On the other hand, the Supreme Court as the reader of current constitutional commands of the American people—as distinguished from those encapsulated in the text—is an even less reliable guide to decision. If the Court believes that it is engaged in reflecting the will of the populace, it is deluded. If it is bemused by the compliments it once received for being the “conscience of the nation,” it is simply on an ego trip. The glass into which it looks for such answers is in fact neither a microscope nor a telescope but only a mirror. Here, even more than with the case of history, it will find what it wants to find.

Neither the Attorney General nor Mr. Justice Brennan affords a formula for resolving the ambiguities inherent in the cases that are to be governed by the periphery of the Constitution. It must be remembered that the cases brought to the Court for adjudication are not those where a constitutional mandate is plain and clear. Those cases are readily disposed of by mem-

orandum decisions. The ones that must be decided by the High Court are almost always those with solid arguments on both sides of the issue which the Court must choose between on the basis of legal reasoning. That it frequently has not afforded reasons for its conclusions in the past is not justification for failing to do so now or in the future. Certainly the answers are not likely to be found in any formula, such as Roosevelt’s “back to the Constitution,” or Nixon’s “strict construction,” or Meese’s “original intent,” or Brennan’s “will of the people.” Judges, too, should recognize the constitutional limits of the judicial function and perhaps take note that the Constitution, in specifying what constituted the “supreme Law of the Land,” did not include judicial decisions, but only “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States. . . .” If they are to be true to the spirit of 1787, they will recognize that ideally judicial controversies ought to be resolved by articulable reasons, of which history may be one and the findings of current market surveys none.

It was almost ten years ago, as we were celebrating the bicentennial of the Declaration of Independence, that Paul Freund came to the Law School to speak under the auspices of the Department of Justice. The Attorney General at that time was our close friend and mentor, Edward H. Levi. The title of Freund’s lecture was: “The Constitution: Newtonian or Darwi-

nian?” Times have certainly changed. We are now on the eve of celebrating another bicentennial, that of the Constitution itself. But the question that Freund addressed remains the same as it was then. He said then:

Is the Constitution a mechanism or an organism? Does it furnish for the American community a structure or a process? You will doubtless not be surprised to hear my answer—it is both. This geniality exposes me to the kind of treatment meted out by Professor T. R. Powell to the Honorable James M. Beck in a famous review of Beck’s book on the Constitution. “It makes you see,” Powell said, “how marvelous the Supreme Court really is when it can be a balance wheel at the beginning of a chapter and a light-house at the end.” But after all, if light can be viewed as both wave and particles, depending on which analysis is the more serviceable for a given problem, why cannot the Constitution be seen as both a mechanism and an organism, a structure and a process?

But I risk here entering the debate over creationism and evolution, which is one of the issues of church and state that was at the root of the current imbroglio in the first place. There certainly can be no reason for going around that course again.

**The Ninth PILLAR erected!**

“The Ratification of the Conventions of nine States, shall be sufficient for the establishment of this Constitution, between the States for ratifying the same.” Art. vii.

**INCIPIENT MAGNI PROCEDURE MENSES.**

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If it is not up, it will rise. The Attraction must be irresistible.

*From The Independent Chronicle and Universal Advertiser, Boston, June 26, 1788.*