The Value of the Constitution

John H. Garvey

The Catholic University of America, Columbus School of Law

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THE VALUE OF THE CONSTITUTION†

John H. Garvey*

I. INTRODUCTION

September 17 of this year 1987, as you know, is the 200th anniversary of the signing of the Constitution. I thought for that reason that it would be appropriate to say something about the value of our Constitution, perhaps by way of explaining how it has lasted so long.

When I speak of the Constitution I do not mean the actual document itself. If you knew how it has been treated, you would think it a wonder that it has lasted two centuries. You can see it now under glass in the National Archives on Constitution Avenue in Washington. These quarters are certainly an improvement on those it has had during most of the last 200 years.

The day after it was signed the document was put on an 11:00 a.m. stagecoach going to New York City, where the Congress sat. It was there given to the deputy secretary of the Congress, Roger Alden. Two years later, and nearly five months after George Washington was inaugurated, it was handed on to Thomas Jefferson. The idea seems to have been that the Secretary of State would be the custodian of such curios.

The Constitution eventually got to Washington in June 1800, along with bundles of other records. Washington was at the time pretty much of a swamp, and the only building fit to house the records was the Treasury, so it went there. It was moved a few more times during the next fourteen years.

On August 22, 1814, while British troops were advancing on Washington, State Department clerks stuffed the Constitution and miscellaneous other records into coarse linen sacks. They were loaded onto a cart and hauled to a grist mill a couple of miles from Chain Bridge on the Virginia side of the Potomac. As the battle got fiercer, the bags were moved to Leesburg, 35 miles from Washington, and locked in an unoccupied house. The keys were entrusted to a Reverend Mr. Littlejohn.

The British demolished the State Department, so when they left, the Constitution had to look again for a home. It languished in the North Wing

*H. Wendell Cherry Professor of Law, University of Kentucky.
of the Treasury until after the Civil War when it was, ironically enough, put in the Washington Orphan Asylum. It got back to the State Department in 1875 but was stored in the cellar until 1921, when President Harding transferred custody of the Constitution and the Declaration of Independence to the Library of Congress. He did so at the request of Secretary Colby, because Congress refused to appropriate funds to build a fireproof case for them. President Harding unfortunately neglected to transfer custody of the amendments, though, so the Bill of Rights and the other (at that time, nine) amendments were left in an ordinary green cabinet that also held six ancient Japanese swords and the sword of Dessalene, an erstwhile emperor of Haiti.

At the Library of Congress the Constitution was better treated. It had its own bronze frame until December 26, 1941, when it was put in a hermetically sealed container and stored in the vault of the U.S. Bullion Depository at Fort Knox lest the Germans or the Japanese treat it worse then the Americans had.¹

But that’s not the subject I want to talk about. It’s rather what the Constitution means that I’m interested in. That too is something we haven’t always given enough attention. Around the time of the sesquicentennial, from 1934 to 1936, the Immigration and Naturalization Service did devote a lot of attention to the part the Constitution was playing in the naturalization process. The INS collected data from all over the country about the kinds of questions and answers that applicants typically were asked and gave. My favorite is the following exchange that occurred in Gloucester City, New Jersey:

Q. What powers does the Federal Government have over the various States?
A. Red, Blue & White.
Q. Can you be President?
A. No.
Q. Why not?
A. They only want man.
Q. Name the three branches of the U.S. Government.
A. Deduction, Reduction—I don’t know third.
Q. Ever hear of the Constitution?
A. Yes.
Q. What is it?
A. Name of ship or boat?
Q. Who was 1st Pres. of U.S.?
A. Columbus.
Q. What great written document created the Union known as the United States of America?
A. George Washington.²

¹This whole sad story is described in a delightful book by Michael Kammen entitled A MACHINE THAT WOULD GO OF ITSELF 72-73, 223-24 (1986).
²Id. at 243.
We’ve learned a lot more about the Constitution in the intervening 50 years. But I think we’re still learning. I would like to discuss two things that lawyers and academics have given serious attention to recently, and they both have a lot to do with the value of the Constitution. One is the controversy about how to interpret the Constitution. The other concerns liberalism as a constitutional value.

II. THE INTERPRETATION CONTROVERSY

A. Interpretivists

I will begin with the dispute about how we should—perhaps I should say whether we can—interpret the Constitution. It has, as you know, spilled over into political circles; you can read about it in the newspapers. Indeed, it may have originated in those environs; academics, like the Supreme Court, follow the election returns.

Attorney General Meese has become the leading political spokesman for what is called the “interpretivist” approach to reading the Constitution. (In the last Republican administration, when Chief Justice Rehnquist was first appointed to the Court, we would have called it “strict construction.”) Mr. Meese stated the interpretivist creed succinctly in a speech given in the summer of 1985 to the American Bar Association:

> The judges, the Founders believed, would not fail to regard the Constitution as “fundamental law” and would “regulate their decisions” by it. As the “faithful guardians of the Constitution,” the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.  

Mr. Meese believes that this “Jurisprudence of Original Intention” is the only way to carry out the Court’s proper role in our government. What exactly is its role? Think for a minute about the form of government created after the American Revolution. What the Framers of the Constitution most feared was legislative tyranny—what Alexander Hamilton called “the encroachments and oppressions of the representative body.”

The antidote for that fear was a limited constitutional democracy. To prevent the passage of “unjust and partial” laws, they set down in writing the limits on Congress’s power, to be enforced by a separate branch.

This solution puts judges in the role of guardians. But what recourse do we have if the judges run amok? Quis custodiet ipsos custodes? The leviathan

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4 THE FEDERALIST No. 78.
the Framers feared reappeared in different guise: It is not the legislature but the judiciary. This is where Mr. Meese's jurisprudence has its bite. If the Constitution has a clear meaning it can bind judges, just as the rules of arithmetic bind obstinate schoolchildren who insist that \(2 + 2 = 5\). The text and the Framers' intent hold out the hope of clear meaning.

Mr. Meese's belief has deep roots in American law. It is quite like the theory of judicial review announced in *Marbury v. Madison*.\(^5\) You remember that John Adams appointed Marbury as a justice of the peace in the waning moments of his administration. The commission was even sealed by the Secretary of State (John Marshall) but didn't get delivered before Jefferson took office. So Marbury sued the new Secretary of State (James Madison) in the Supreme Court for his commission. The statute that organized the federal court system said that Marbury could sue there; the Constitution, according to the new Chief Justice (John Marshall), said otherwise. The Court then considered whether it could reject a case thrust upon it by a law passed by Congress.

The answer, as you know, was "yes." But I want to remind you of the reason that Marshall gave. It was that the Constitution is a written law, something that the courts are to interpret like other legal documents:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . [If the] constitution . . . is on a level with ordinary legislative acts, . . . then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.\(^6\)

Marshall would doubtless have thought it mad to say that the Constitution had no determinate meaning.

This mechanical jurisprudence has the great virtue of easing what scholars call the counter-majoritarian difficulty: the problem of an unelected judiciary nullifying the acts of the politically responsible branches. Judges can represent themselves to be no more than the mouthpiece of the Constitution, giving voice to written words that we have all consented to in the charter of our government. "It is not we who disapprove of what Congress is doing," the Court can say, "but you yourselves."

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\(^5\) U.S. (1 Cranch) 137 (1803).

\(^6\) *Id.* at 176-77.
Marbury was the first, but not the only, example of the Court’s devotion to this theory. During the height of the New Deal crisis, when the nine old men were frustrating FDR’s initiatives at every turn, the Court turned to the same justification in defense of its actions. United States v. Butler\(^7\) struck down the Agricultural Adjustment Act of 1933, whose purpose was to raise farm prices by curtailing agricultural production. Justice Roberts prefaced his remarks for the Court with this apology:

There should be no misunderstanding as to the function of this court in [this] case. It is sometimes said that the court assumes a power to overrule or control the action of the people’s representatives. This is a misconception. . . . When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—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. . . . This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.\(^8\)

This way of looking at the Constitution exerts a strong pull on the Court even today, though it is more commonly advanced as a reason for upholding (rather than invalidating) legislation passed by Congress and the states. To take just one example, consider the 1986 decision in Bowers v. Hardwick.\(^9\) Hardwick violated a Georgia law forbidding sodomy by engaging in homosexual relations with another adult male in the bedroom of his home. Charges against him were dropped, but he sued to have the law held unconstitutional under the Due Process Clause. In the course of rejecting his claim, Justice White, for the Court, had this to say:

[We are not] inclined to take [an] expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.\(^10\)

B. Non-Interpretivists

These, then, are some of the reasons and authority that animate the interpretivist approach to the Constitution. It sets clear limits to the Court’s authority, and it solves the counter-majoritarian difficulties by throwing responsibility back on us when legislation is held invalid. But there have

\(^7\)297 U.S. 1 (1936).
\(^8\)Id. at 62-63.
\(^10\)Id. at 2846.
always been serious difficulties with this approach, and they are ones that a society of barristers is likely to appreciate. I shall refer to two such difficulties, which have to do with what I shall call "the world without" and "the world within."

First, as to the world without. Barristers who do litigation concerning documents often encounter the problem of clauses whose purpose or meaning has been completely overtaken by events. Suppose, if you do any litigation about estates, that your client would like to get her hands on a trust established by her grandfather. The stated purpose of the trust is to combat the spread of smallpox in the United States. As I discovered the last time I went abroad, smallpox is now completely under control. You stand a better chance of contracting it from the vaccination than you do walking around unvaccinated. In such a case the court will make a show of discovering grandpa's general charitable intent, apply the doctrine of cy pres, and give the money to the March of Dimes. As we all know, grandpa never thought about the March of Dimes. What the ocurt is really trying to do is make sense of the trust instrument to keep it from failing, in a world quite unlike the one grandpa lived in.

The world has changed even more since the Constitution was written, and a serious Jurisprudence of Original Intention faces the same kinds of issues. When the First Amendment was written there was no cable television. But that didn't stop the Supreme Court from holding in Los Angeles v. Preferred Communications, Inc.\(^{11}\) that cable operators were entitled to some freedom of speech. When the Fourth Amendment was written there were no airplanes either, but the Court didn't rely on that in holding that aerial surveillance of back yards\(^{12}\) and manufacturing plants\(^{13}\) was not unreasonable search.

Moreover, technology is not the only thing that has changed in the world without. Established state churches were prevalent in America throughout the late 18th and early 19th centuries.\(^{14}\) Public schools hardly existed when the Equal Protection Clause was added to the Constitution in 1868. Independent administrative agencies were virtually unknown before the end of the 19th century. Dirty movies, as the Attorney General’s Commission on Pornography pointed out, were tamer stuff a few years ago than they are today.

In short, we face problems that the Framers can’t have had any “original intentions” about, because we live in a world they could not have imagined. In these circumstances we don’t want to say that the text stands only for

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\(^{11}\) 106 S. Ct. 2034 (1986).
\(^{13}\) Dow Chemical Co. v. United States, 106 S. Ct. 1819 (1986).
the particular concepts the Framers had in mind. The Eighth Amendment ban on cruel and unusual punishment probably forbids throwing prisoners out of airplanes, or injecting them with AIDS virus, even though the Framers may have been thinking of drawing and quartering. We might say instead that rules like equal protection, due process, freedom of speech, and so on stand for general “conceptions” rather than particular “concepts.”¹⁵

This gets us away from what the Framers were really thinking about, and to that extent it’s a positive step. But it creates for us another difficulty in interpretation: How should we choose the right level of generality for stating our “conceptions?” Does the conception of equality forbid laws that discriminate against blacks, or laws that discriminate against racial minorities, or laws that discriminate against discrete and insular minorities? What about women? And white men?

The other set of problems with interpretivism concerns the world within. These difficulties too are ones with which barristers cope daily in the process of proof—they have to do with intention and meaning. First, as to intention. In the most famous insanity trial prior to M’Naghten, a man named Hadfield was charged with high treason for shooting at King George III. Hadfield said he thought the world was coming to an end and he was commissioned by God to save mankind by the sacrifice of himself. He didn’t want to commit suicide, so he decided to shoot at the King in order to be hanged. Was that his intention? Or did he want to kill the King? Or the King’s minister? Or was he just trying to create a disturbance so he could earn his living as a pickpocket?

Problems like this are more difficult in the case of the Constitution. It is hard enough to get inside the mind of a man like Hadfield who is present in court to be questioned. But getting inside the minds of the Framers presents additional difficulties along two dimensions. First, they lived two hundred years ago and can’t be cross-examined. And the record of their intentions is, like all historical records, spotty and conflicting. Second, we’re not even sure who “the Framers” were—that is to say, we’re not sure whose intention matters. Is the intention of the Fourth Amendment to be found in the minds of those who drafted it? Or those in Congress who voted for it? Or those in the states who ratified it?

Shortly after Mr. Meese’s speech to the ABA in 1985, Justice Brennan spoke at Georgetown University and alluded to these difficulties. Here is what he said:

It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such

as records of the ratification debates provide sparse or ambiguous evidence of the original intention. 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. Indeed, it is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states?—or even 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.\textsuperscript{16}

There are also problems of meaning as well as intention. These arise when we turn our eyes to the text itself. Consider two that readers of Shakespeare know well. The first is taken from \textit{Macbeth}. In act IV, scene 1, Macbeth goes to consult his friends the three witches. The scene is a cavern, in the middle a cauldron boiling. Out of the cauldron arise several apparitions—the second, a bloody child. It says:

\textbf{Macbeth! Macbeth! Macbeth!}

\begin{verbatim}
... Be bloody, bold, and resolute; laugh to scorn
The pow'r of man, for none of woman born
Shall harm Macbeth.
\end{verbatim}

Macbeth replies:

\begin{quote}
Then live, Macduff; what need I fear of thee?
\end{quote}

This is the simple problem of ambiguity. Article II, Section 1 of the Constitution says the President must be a “natural born Citizen.” Does that mean Macduff could not be President? Does it mean only illegitimate children qualify?\textsuperscript{17}

There is a more serious problem of meaning than ambiguity that arises in the interpretation of ancient texts. It is one with which biblical scholars and historians are more familiar than lawyers. The problem is that we don’t think the way people used to, even when we use the same language.

One symptom is that the meaning of words changes. Consider this exchange between Hamlet and Guildenstern:

\begin{quote}
\textit{Ham.} [M]y uncle-father and aunt-mother are deceived.

\textit{Guil.} In what, my dear lord?

\textit{Ham.} I am but mad north-north-west; when the wind is southerly I know a hawk from a handsaw.\textsuperscript{18}
\end{quote}


\textsuperscript{17}J. Ely, \textit{Democracy and Distrust} 13 (1980).

\textsuperscript{18}W. Shakespeare, \textit{Hamlet}, act II, scene 2, lines 366-70.
By “handsaw” Hamlet did not mean a tool for cutting wood. The word in Shakespeare’s time referred to a heron—something even a sane man could more easily confuse with a hawk. It isn’t hard to identify such shifts in meaning for words that denote objects. But what if the same thing happened with “unreasonable,” or “free,” or “cruel”?

But the problem goes deeper. The Framers thought differently because the world was different, and their thoughts may not make sense in our world. Consider public school segregation, which the Supreme Court implicitly approved in *Plessy v. Ferguson* and forbade in *Brown v. Board of Education.* The historical evidence suggests that those who wrote the Fourteenth Amendment knew of segregated public schooling and did not intend the Equal Protection Clause to forbid it. But if we could go back and talk to them, we would find that they thought of public schooling as a new and rather unimportant social institution designed, perhaps, to civilize the lower classes. By contrast, they might have said that freedom to contract and buy and sell property was a central feature of their social life—the foundation of individual achievement. They certainly meant to forbid discrimination touching that institution.

But how are we to understand such a world? If you think about it, public schooling today may be the functional equivalent not of public schooling in 1868 but of freedom of contract in 1868. *Brown v. Board of Education* actually makes a move toward taking such considerations into account. The Court said:

> In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation.

Consider what is happening here. What the Framers of the Fourteenth Amendment really meant doesn’t make sense to us (though it made sense then), because the world we live in is different from theirs. In order to grasp what they thought, we have to substitute things we are familiar with for the things that were familiar to them. In that sense we *give* meaning to their words. Here is Justice Brennan speaking again:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. . . . [T]he ultimate question must

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19163 U.S. 537 (1896).
23Id.
24347 U.S. 492-93.
be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its current principles to cope with current problems and current needs.  

C. Summary

Allow me to summarize what I have said about the interpretation controversy. First, the Constitution is not, in James Russell Lowell’s phrase, “a machine that would go of itself.” Constitutional interpretation is not a mechanical process of plugging in the facts, cranking the handle, and reading off the results. This is hardly a novel observation. The legal realists made it after World War I, when they rebelled against Christopher Columbus Langdell’s view that law is a science, as physics is a science.

Second, meaning depends on values. The words of the Constitution do not, by and large, refer to objects such as hawks and handsaws. They invoke notions like commerce, reason, equality, and jurisdiction. In the Framers’ minds those notions were linked with other ideas—equal protection with freedom of contract, perhaps—in ways that may make no sense to us. The best we may be able to achieve in the way of understanding is to find correspondences in our own world. That is to say, we must grasp their meaning in light of our own values.

Third, the legitimacy of judicial review may depend more on us than on the courts. If judges are to be restrained by the Constitution, it must have some definite meaning. If its meaning depends on values, it can be definite only when we share the same values.

III. THE DECLINE OF LIBERALISM

What I have said up to this point might sound like the usual reformer’s call for keeping the Constitution in tune with the times, and all the ideological baggage that goes with that position. In keeping with my position up on this podium, I want to remain above the fray of practical politics. But I will say something about the tune of the times, which I might describe as the decline of liberalism.

I must caution you against associating the phrase “the decline of liberalism” with happenings in current events: the popularity of Ronald Reagan, the appointment of Rehnquist as Chief Justice, Scalia as Associate Justice, and so on. (Those are tied to my subject but in ways that are sometimes remote and confusing.) My subject is rather a philosophical movement that had its

25THE GREAT DEBATE, supra, note 3 at 17.
26M. KAMMEN, supra, note 1 at 125.
origins in the Enlightenment, and that we associate with people like Thomas Hobbes, John Locke, and John Stuart Mill—or nowadays Ronald Dworkin and John Rawls.28

A. Liberalism in Constitutional Law

The philosophers' names may sound vaguely familiar to you, but you may not have been reading their stuff in paperback. I suspect you are far better acquainted with the ideas they made popular, though. I will mention just two. One is the primacy of the individual. The other is the priority of the right over the good.

First, as to the primacy of the individual. Reason is something we have in common, but my desires are my own. I smoke, you don't. I like Bach, you like Bachrach. I like Karl Marx, you like Groucho Marx. And there's no way we're going to agree on any of these things. They're just brute psychological facts. What's more, reason is the servant of desire, not the other way around. As Hobbes said:

For the Thoughts are to the Desires, as Scouts, and Spies, to range abroad, and find the way to the things desired: All Stedinesse of the mind's motion, and all quickness of the same, proceeding from thence.29

The result is that we think of ourselves first not as members of a society that believes in the same things, but as isolated individuals with our own desires.

Even if you voted for Ronald Reagan you might be saying at this point, "If that's what liberals believe, then I'm a liberal too." Well, in many ways you are; we all are. This has been the prevailing American ideology for a long time. It was Ralph Waldo Emerson, not Jane Fonda, who first said "do your thing, and I shall know you."30

This idea—the primacy of the individual—is one you meet in the Supreme Court Reports, not just in Emerson. In Regents of the University of California v. Bakke31 the Court held unconstitutional the special admissions program at the University of California at Davis Medical School because it set aside 16 seats in each class of 100 for minority students. In Justice Powell's opinion it was the failure to "treat[] each applicant as an individual" that was fatal:

28It has been suggested that there is a connection between interpretivism and liberalism—that they are at least "regularly associated" if not "mutually entailed." Tushnet, supra, note 22 at 783 n.7. This is consistent with what I have to say, which is that they came in together, and seem to be on their way out together.
The denial to [Bakke] of this right to individualized consideration without regard to his race is the principal evil of petitioner’s special admissions program.\(^3^2\)

What Powell found offensive was the idea of reducing Bakke to what he had in common with other applicants for the 84 nonminority seats—his race.

There are, of course, two sides to that argument. Ronald Dworkin has argued that the Fourteenth Amendment guaranteed Bakke not equal treatment but treatment as an equal—something he finds consistent with setting aside sixteen seats for minorities.\(^3^3\) But the important point is that the debate has been carried out by both sides on liberal premises about the primacy of the individual.

Second, as to the priority of the right over the good. Our Constitution has a Bill of Rights, not a Bill of Goods. It is not a set of rules for getting to heaven or making everyone happy. The reason is that we’re all different. We do not all agree on any particular vision of the good. Mark Twain captured our feelings in his usual ironic fashion. Pudd’nhead Wilson, the hero of the book by that name, says in his diary, “When I reflect upon the number of disagreeable people who I know have gone to a better world, I am moved to lead a different life.”

This is a fact that is not true of all societies. Much of Western Europe in the middle ages shared a view of the ends of life that derived from a belief in the God of Christianity. Many of the Soviet Union today share a view of the good that derives from belief in the progress of history toward a classless state.

Several features of our Constitution, by contrast, reflect Mark Twain’s outlook. Everyone agrees, for example, that the Establishment Clause of the First Amendment forbids us to make religion a part of our national legal order. Even more important, in this connection, are the freedoms protected by the First and Fourteenth Amendments.

 Freedoms are different from other rights in two ways. First, they guarantee a right to engage in action of a certain kind—they let people do certain things. The First Amendment lets people speak and worship; the Due Process Clause lets people move freely about, marry, have children, etc. In general, other rights just assure us that the government won’t do certain things to us: It can’t extract confessions from prisoners, search homes without a warrant, try people without a jury, and so on.

 The other unique feature of freedoms is that they are bilateral—that is, they protect choices. Freedom of speech lets me salute the flag or not;

\(^{32}\textit{Id. at 318 n.52.}\)

\(^{33}\textit{R. Dworkin, supra, note 15 at 227.}\)
freedom of religion lets me worship or not; Due Process freedom lets women have children or not.

If you take these two features together (choices about action) you can see that the Constitution commits the government to taking no official position on many of the important decisions in life—marriage, worship, politics. It leaves individuals free to do what they want. This is what I mean by the priority of the right over the good.

Let me give a few examples of these points. Consider first the freedom of speech. *Cohen v. California*\textsuperscript{34} illustrates the priority of individual choice over social views of the good. Paul Cohen was arrested in 1968 for wearing, in a Los Angeles courthouse, a jacket decorated with the statement, “Fuck the Draft.” He was convicted of disturbing the peace and sentenced to 30 days’ imprisonment. The Supreme Court overturned his conviction, and had this to say about it:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

... 

[W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric.\textsuperscript{35}

Recently the Court offered a good example of what I have called the bilateral character of freedoms—the protection of choices to do or not to do a particular act. In *Pacific Gas & Elec. v. Public Utilities Commission*,\textsuperscript{36} the Court reviewed a California decision that allowed a consumer protection group to put messages in the billing envelopes sent out by a privately owned utility company. The state Public Utility Commission saw no harm in the practice, since it did not prevent the utility from sending any messages it wanted. The Court disagreed. According to Justice Powell’s plurality opinion,

> Since all speech inherently involves choices of what to say and what to leave unsaid, this [rule is] impermissible. As we stated last Term, “The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas.”

\textsuperscript{34} 403 U.S. 15 (1971).
\textsuperscript{35} Id. at 24-25 (citation omitted).
\textsuperscript{36} 106 S. Ct. 903 (1986).
THE VALUE OF THE CONSTITUTION

necessarily . . . a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”

Allow me to give just one more recent example, this time from a case about the liberty mentioned in the Due Process Clause. In Thornburgh v. American College of Obstetricians the Court struck down a number of provisions in Pennsylvania’s 1982 Abortion Control Act. The case drew some attention in the newspapers because the Solicitor General of the United States, though not a party, filed an amicus curiae brief asking the Court to overrule Roe v. Wade. The Court declined to do so. Justice Blackmun, who wrote the Court’s opinions in both cases, concluded his opinion in Thornburgh by saying:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. . . . That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy. A woman’s right to make that choice freely is fundamental.

B. Difficulties with the Liberal View

You’ve heard and read this kind of thing so many times that I suspect it has begun to seem self-evident. But it isn’t, and recently this liberal view of the world has come under attack from both the left and the right. The criticism has been aimed at both of the liberal premises I mentioned: the primacy of the individual, and the priority of the right over the good. And this controversy over liberalism is linked in an important way to the controversy about interpretation that I discussed earlier.

1. The Strength of Liberty. One kind of problem with liberalism that you are all familiar with is illustrated by the Court’s 1986 decision in Goldman v. Weinberger. Simcha Goldman was a clinical psychologist serving as a commissioned officer at March Air Force Base in California. He was also an ordained rabbi and wore a yarmulke while on duty at the base. This violated Air Force regulations about proper uniform attire, however, and Goldman eventually got in trouble with his commander for doing so. He

38106 S. Ct. 2169 (1986).
39410 U.S. 113 (1973).
40106 S. Ct. at 2184-85.
41106 S. Ct. 1310 (1986).
sued the Secretary of Defense, claiming that the regulations violated his First Amendment right of religious liberty.

The Supreme Court held that Goldman's freedom was indeed being limited, but that it had to yield to the Air Force's desire for uniformity of dress. The whole point of uniforms, Justice Rehnquist stated, was to "encourage[] the subordination of personal preferences and identities in favor of the overall group mission," to foster "a sense of hierarchical unity," and to develop "necessary habits of discipline . . . in advance of trouble." Since the dispute arose in the military, the Court declined to apply the strict scrutiny it typically uses in free exercise cases.

The outcome in Goldman's case was close (5-4), but even the dissenters seemed to concede that religious liberty had to take a back seat to some kinds of social interests. This should not be surprising. Unlike other kinds of constitutional rights, freedoms, in their nature, can't be absolute. Remember what I said earlier is distinctive about freedoms: They protect actions, and they are bilateral (i.e., they protect choices). As a result, people will do unpredictable things with their freedom: contract bigamous marriages, forge prescriptions for valium, make kiddie-porn movies, turn off grandma's iron lung, etc. It is impossible to anticipate all the possibilities, and it would be unwise—by making any absolute rule—to consent to them all in advance.

You can see the point more clearly if you think about some constitutional rights that are absolute. My privilege against self-incrimination is not something that can be outweighed. Neither is my right to a jury trial, or my protection against cruel and unusual punishment. But these are not blank checks: Society doesn't have to wait to see what I'll write on them. Since only the government’s own actions are at issue, we can know in advance whether we have sufficient funds to cover the expense.

If freedom of religion is not absolute, that means that some social values are more important than the value choices of individuals like Goldman. We decide which social values are more important than which individual choices by using balancing tests. Typically we say that only an “important” or “compelling” social interest will tip the scale.

But the important point is that the Court, and society, make judgments about values. This contradicts both premises of liberalism. First, the individual (Goldman) loses out to society. Second, we put some social good—like the security that the military provides—ahead of Goldman’s right.

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42Id. at 1313.
43Id. at 1312-13.
44See id. at 1324-26 (O'Connor, J., dissenting).
45The Court's attack on liberalism in Goldman was from the right. Prof. Michelman, discussing Goldman's case, makes an attack from the left in Foreword: Traces of Self-Government, 100 HARV. L. REV. 4 (1986).
short, one problem we’ve always had with liberalism is that there are things we value more than liberty.

2. The Scope of Liberty. A second difficulty is that there are some freedoms we value more than others. Bowers v. Hardwick, the homosexual sodomy case I mentioned earlier, provides a perfect example. The argument for allowing sexual freedom was eloquently made by Justice Blackmun’s dissent:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.46

That statement contains the usual liberal premises: the importance of individual choice, and the idea that rights and liberties take priority over rights and wrongs.

The Court did not reject Hardwick’s claim, as it did Goldman’s, by saying that homosexual freedom was outweighed by social interests. It said instead that there was no such thing as a constitutional right to homosexual freedom. The case never got to the balancing stage. So far as the Due Process Clause is concerned, homosexual freedom is on a par with freedom to work as an optician, hunt and fish, smoke cigarettes, and drink whiskey. Those activities are constitutionally less important than writing political speeches, going to church, or having (or not having) a baby.

Hardwick’s case was controversial, but the other examples I’ve given are not. We all think that there are more and less important liberties. The Constitution itself contains a hierarchy of freedoms. The First Amendment mentions only speech and religion. Our interpretation of the Constitution has produced other hierarchies. We’ve decided to protect child rearing and education, family relationships, procreation, marriage, contraception, and abortion. At the same time we’ve decided not to protect freedom of contract, freedom to work in a job of one’s choosing, homosexual freedom, etc.

46106 S. Ct. at 2851.
53West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
That creates a problem for liberal theory, though, because it means that our society values some kinds of action more than others. A liberal society is supposed to leave those judgments to individuals, some of whom may think that being an optician is more important than raising a family. How can we square the value judgment implicit in our hierarchy of freedoms with the liberal idea that the right is prior to the good?

The explanation the Court gave in *Bowers v. Hardwick* was that some liberties are more “fundamental” because they are “‘deeply rooted in this Nation’s history and tradition.’”\(^5\) It is easy to understand the impulse that leads the Court to say that. The Court wants to disclaim responsibility for the choice of values that it is relying on: “We don’t know whether homosexuality is right or wrong. But you have historically put a low value on it, so it can’t be a fundamental liberty.” The point I want to emphasize, though, is that whoever is making the judgment, it is clearly a decision that there are values more important than this kind of liberty.

3. Who Can Claim a Right to Liberty? Liberalism is problematic in a third respect: Not everyone is entitled to exercise the freedoms that we do value. That point was made in *Bethel School District No. 403 v. Fraser*.\(^6\) Matthew Fraser, a high school student in Bethel, Washington, was suspended from school after he gave a nominating speech in favor of one of his classmates, who was a candidate for student government office. Fraser’s speech referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. After being suspended he sued the school district for violating his First Amendment rights and got an injunction and about $13,000 in damages and attorney’s fees.

The Supreme Court reversed. It recognized that Paul Cohen had been allowed to say even worse things. But Fraser was different because he was younger:

> It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school. . . .
>
> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . . . [C]ertain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the “work of the schools.”\(^7\)

That sounds like the kind of thing parents tell their children. As parents we all raise our children to hold certain values and not others: work hard,

\(^{5}\) 106 S. Ct. at 2844 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

\(^{6}\) 106 S. Ct. 3159 (1986).

\(^{7}\) *id.* at 3164-65 (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969)).
be honest, be polite, don’t swear. Here it’s the government—in the person of the school district—that’s being paternal. But there is nothing extraordinary about that either. Public schools teach children that democracy is good and communism bad, that evolution is a fact and creationism a fiction, that service of one’s country is a virtue and selfishness a vice, that sex is bad for kids, and so on. In other words, we socialize our children to believe that there are values more important than the unimpeded right to choose.

C. Is There an Alternative to Liberalism?

The uneasiness that many people feel about liberal ideology stems from the fact that we can and do make social judgments about values. We have to in order to interpret the Constitution, as I said at the outset. We think that some values (security, perhaps) are more important than liberty. We think that some liberties (marriage) are more important than other liberties (homosexual freedom, perhaps). We think that children should learn to exercise their liberties in certain ways and not others.

Nearly everyone agrees with these general propositions. Disagreement occurs when we come to particulars: Which values are more important than others? Which freedoms are the most important? Let me reemphasize here a caution I gave earlier. You no doubt noticed that in each of the cases I mentioned—uniform dress in the military, homosexual sodomy, and free speech in high schools—the side that the newspapers would label “conservative” won. This is not what I mean by the decline of liberalism. I am referring to a more general ideology that holds that individual freedom should take priority over other values, whether the values are held by the left or by the right. At the moment the right wing of the Supreme Court is in a better position to enforce its values because it has the votes. But if the left had the votes, it would probably give us values favored by the left, not return us to “liberalism.”

One of the most noteworthy developments in constitutional scholarship during the last few years has been the revival of the “civic” or “republican” tradition in political thought. The tradition is not well-defined. It has different versions that appeal to the left and the right in politics. But I think the interest in both has been stirred by the difficulties I have mentioned with the liberal tradition.

What exactly do I mean by the civic or republican tradition? It’s an apt way of concluding a bicentennial lecture like this, because the first American strains appear in the thought of the antifederalists—those who opposed adoption of the Constitution:

Antifederalist thought derived in large measure from classical republicanism, a theory of government that influenced, among others, Mon-
tesquieu and Rousseau. The animating principle of the republican and antifederalist case was that of civic virtue—the willingness of citizens to subordinate their private interests to the general good. Politics thus consisted of self-rule; but it was self-rule of a particular sort. Self-rule was not a matter of pursuing self-interest but instead of selecting the values that ought to control public and private life.\(^{58}\)

These two central ideas, civic virtue and general good,\(^{59}\) led the antifederalists to fear several features of the proposed Constitution. One was the great expansion of the powers of the national government. In such a state it would, they thought, be harder to sustain the kind of homogeneity and closeness that made it possible for people to be unselfish and public-spirited.\(^{60}\) Another was the interest in commercial development that led to dissatisfaction with the Articles of Confederation. According to one version of the antifederalist view, commerce “gave rise to ambition and avarice and thus to the dissolution of communal bonds.”\(^{61}\)

On those two counts, of course, the antifederalists lost the war. They lost it when the Constitution was adopted, and in the ensuing 200 years we have become far more large, centralized, and commercial. On the other hand I’m not sure that we have rejected their more fundamental concern—the need for citizens to debate and decide in an unselfish way what values society should pursue.

### IV. CONCLUSION

You are probably unaware of it, but we have just finished celebrating another important centennial. It was in 1886 that the Supreme Court first adopted a rule forbidding cameras in its courtroom. The reason was that someone took a photograph of Justice Horace Gray sleeping on the bench. The Chicago Tribune ran this account of the incident:

Unfortunately for Mr. Justice Gray, he is more given to “nodding on the bench” than any of his associates, and when he takes a nap his head falls low upon his breast, his mouth hangs open, and he could not truthfully be called a “sleeping beauty.” It was during one of his naps that the kodak fiend got in his work.\(^{62}\)

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\(^{59}\)Michaelman, supra, note 45 at 18.

\(^{60}\)G. Stone, L. Seidman, C. Sunstein, M. Tushnet, supra, note 58 at 5-6.

\(^{61}\)Ibid. at 6.

\(^{62}\)M. Kammen, supra, note 1 at 195.
Someone even immortalized Gray’s naps in a poem:

There was an old Justice named Gray
Who slept & who snored every day—
His lunch he would eat
Then nap on his seat
And wake up with: “What did you say?”

It may be lucky for me that I spoke to you before lunch. I hope I have not left you feeling like Justice Gray.

\[63\text{Id.}\]