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ESSAYS

Original Intent, the View of the Framers, and the Role of the Ratifiers

Ronald D. Rotunda*

For much of its history, the Supreme Court has purported to engage in what is called “interpretive” judicial review. Interpretive review occurs when the Court

ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists—that is, by reference to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution.¹

Justice William Brennan, for example, engaged in interpretive review when he argued in his recent Holmes Lecture that the framers intended the eighth amendment eventually to bar capital punishment.² The legitimacy of interpretive review—as one leading advocate of *noninterpretive* review has acknowledged—is not particularly difficult to justify.³

However, in recent years more and more commentators have urged the courts to adopt frankly noninterpretive values in deciding constitu-

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1. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 10 (1982) (footnote omitted); see also Palmer, *The Federal Common Law of Crime*, 4 *LAW. & HIST. REV.* 267, 269 (1986).

2. See Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 *HARV. L. REV.* 313, 324-25 (1986).

3. M. PERRY, *supra* note 1, at 10-11. In fact: “No contemporary constitutional theorist seriously disputes the legitimacy of interpretive review.” *Id.* at 11.

tional cases. The justification for noninterpretive review is more troublesome. Proponents of noninterpretive review appear to admit cheerfully that judges should adopt values not found in, influenced by, or derived from, the constitutional text or the logic of precedent. Some have argued that the modern judiciary should act simply because it is "the voice and conscience of contemporary society."⁴ Judges should recognize correct moral and political values, and find the "right answers" in order to go "beyond the value judgments established by the framers of the written Constitution (extraconstitutional policymaking)."⁵ Noninterpretivists see the Constitution not so much as a blueprint for allocating and limiting government power but as a way for judges to forge an ideal society—or, at least, a society that they view as ideal. These commentators advocate "a more candidly creative role" for the Court because "the highest mission of the Supreme Court . . . is not to conserve judicial credibility, but in the Constitution's own phrase, 'to form a more perfect Union.'"⁶

In the continuing debate between interpretivists and noninterpretivists, the noninterpretivists recently have argued that the framers did not intend the judiciary to be bound or illuminated by the intent of the framers or ratifiers of the Constitution. One commentator, for example, is quoted as claiming that James Madison "never" intended that original intention should be the oracular guide in explaining the Constitution.⁷ Another remarked bluntly: "[T]he framers, after all, are dead, and in the contemporary world, their views are neither relevant nor morally binding."⁸

The framers and ratifiers of the Constitution are dead, but their views are hardly irrelevant. That is not to argue that the courts should interpret the Constitution as rigidly as one might interpret a municipal ordinance. No one seriously advances that argument today. Yet there is a middle ground between rejecting any role for history and unthinking reliance on history. Uncovering original intent may be helpful and useful even if a strict view of history may not be controlling when it is read in context. Not all judges and commentators who look at history—as well as the other tools of judicial review such as text, structure, logic, and precedent—will reach the same conclusions on every issue, but they

4. The quoted remarks are from a United States district court brief referred to by Justice (now Chief Justice) William Rehnquist in his article, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976); cf. G. CALABRESI, *JUDICIAL SUNSET: A COMMON LAW FOR OUR AGE OF STATUTES* (1982).

5. M. PERRY, *supra* note 1, at ix, x (emphasis in original); see also *id.* at 101-14.

6. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* iv (1978).

7. Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC MONTHLY, Dec. 1986, at 77, 79 (emphasis in original) (referring to remarks of a law professor).

8. C. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 103 (1978) (footnote omitted).

at least will start at the same base line, and that base line helps confer legitimacy on judicial review and cautions the courts in its exercise.

The issues relating to original intent and the uses of history have created almost a cottage industry in the scholarly literature. In this Essay I cannot canvas all of the arguments, but I hope to set them in proper perspective and to contribute to the more recent debate by focusing on a single question: Whether the framers actually intended that subsequent generations *not* be bound by the original intent. This Essay begins by looking at the Constitutional Convention of 1787 and the distinction the framers drew between "private" intent and "public" intent.

Soon after the delegates to the Constitutional Convention began their deliberations in that hot summer in Philadelphia in 1787, they elected George Washington as the presiding officer,⁹ decided some important procedural questions,¹⁰ and then turned to the question of secrecy. That issue was high on their agenda. They quickly agreed to conduct all deliberations in secret.¹¹ So that the delegates could speak in complete candor and not be encouraged to play to the press, they also decided that yeas and nays would not be called by delegate name.¹² Votes would be recorded only by states. To make news leaks more difficult, the delegates decided that, while a member could inspect the journal of the proceedings, no one would be permitted to make a copy of any of its entries. In addition, the delegates ordered that "nothing spoken in the House be printed, or otherwise published or communicated without leave."¹³ The Convention even ordered that sentries be placed both within and outside of the meeting place in order to prevent any unauthorized person from approaching. A contemporary observer said that these sentries "appear to be very alert in the performance of their duty."¹⁴

An anecdote involving George Washington illustrates the importance the delegates attached to the secrecy of their private deliberations. Washington, we must remember, was at the zenith of his popularity. Professor Max Farrand tells us that the "feeling towards him was one of devotion, almost awe and reverence. His presence in the

9. 1 J. ELLIOTT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 120-21 (1845, republished in 1937 & 1968).

10. The delegates decided that each state would have one vote; seven states should constitute a quorum; and only a simple majority was needed to pass on all issues. *Id.* at 141; 5 J. ELLIOTT, *supra* note 9, at 124.

11. 1 J. ELLIOTT, *supra* note 9, at 42-43.

12. *Id.* at 123. Madison's unofficial notes sometimes record the names of individuals for or against certain questions.

13. *Quoted in* M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 58 (1913).

14. *Id.*

convention was felt to be essential to the success of its work."¹⁵ During the course of the Convention one of the delegates accidentally dropped a copy of some proposals. Another delegate, discovering the lost papers, brought them to Washington. Like an old school marm, Washington scolded the unknown delegate for losing the papers: "I must entreat Gentlemen to be more careful, lest our transactions get into the news papers, and disturb the public repose by premature speculations."¹⁶ Washington—held in awe by the delegates and already the de facto leader of the country—threw the papers on the table, demanded that the owner pick them up, and then left the room. The delegates reacted like scared school children: no one came forward. No one was willing to accept the responsibility for this possible breach of secrecy.

Because of the belief in the need for secrecy, it was not until many years after the Constitution had been ratified that Congress ordered that those proceedings and fragmentary minutes which were in the hands of the Government should be printed.¹⁷ The people who publicly debated and ratified the new Constitution—the generation of 1787—had no access to the Convention notes. In fact, when President Washington, in his message to Congress of March 30, 1796, referred to the unpublished *Journal of the Constitutional Convention* in support of a particular interpretation of the Constitution, various members of Congress thought that his reference had violated the Convention's rule of secrecy.¹⁸ Much of what we now know comes from one person, Madison, who took it upon himself to compile a more complete and unofficial record. Madison's notes, however, were not published until 1840.¹⁹

Nowadays we often comb with fine care the various notes taken during that Convention as if they were a magic key to unlock the Constitution's secrets. We must realize, however, that the people who ratified the Constitution following that Convention in the summer of 1787

15. *Id.* at 15.

16. Quoted in C. WARREN, *THE MAKING OF THE CONSTITUTION* 139 (1928).

17. The Resolve of Congress of March 27, 1818 ordered printed those papers in the possession of John Quincy Adams that related to the Constitutional Convention. These papers included the minutes of the *Journal of the Convention*. C. WARREN, *supra* note 16, at 797. The year 1821 saw the publication of the notes of Robert Yates, a member of the Convention. Yates, however, left the Convention on July 10, 1787, over two months before the Convention adjourned. *Id.* at 798. Madison's notes were not published until 1840. Warren notes: "It is a singular fact that it was not until fifty-three years after the Constitution was signed that the American people were afforded any adequate knowledge of the debates of the Federal Convention." *Id.* at 802.

18. See 5 *ANNALS OF CONG.* 775-76 (1796) (remarks of Rep. James Madison); *id.* at 734 (remarks of Rep. Albert Gallatin). Madison also wrote Jefferson that Washington's use of the Convention's *Journal* violated the Convention's rule of secrecy. Letter from James Madison to Thomas Jefferson (Apr. 4, 1796), quoted in C. WARREN, *supra* note 16, at 796.

19. C. WARREN, *supra* note 16, at 802.

did not have access to any of these notes or minutes. Many of these writings—which did not see the light of day until over a half century after the Convention was held—could not have influenced the ratifiers because they were hidden from them. That is not to say that the Convention notes are necessarily irrelevant as an aid in interpreting the written document. The secret Convention notes may help tell us what certain words *may* mean, how much language may be stretched or restricted.²⁰ But they cannot control what the words *must* mean. The ratifiers of the new Constitution should not be held to have approved of the hidden Convention notes any more than your incorporation of my language necessarily incorporates my hidden intent.²¹ As a logical matter, you cannot be held to adopt someone else's hidden, secret thoughts.²² As Representative Albert Gallatin noted during the congressional debates on the Jay Treaty, it is wrong to rely on "the opinions and constructions of those persons who had framed and proposed the Constitution, *opinions given in private*, constructions unknown to the people when they adopted the instrument."²³

Some commentators go well beyond this logical point and appear to argue that the framers—as an historical matter—did *not* intend the Court to look at *public* intent, reflected in public sources such as *The Federalist Papers*, the historical circumstances, and the state ratifying conventions.²⁴ I do not believe that the historical evidence supports this conclusion. While Madison, for example, opposed looking at secret, subjective, "private" intent, expressed in the halls of the Philadelphia Convention, he also urged us to look "for the meaning of that instrument beyond the face of the instrument . . . not in the General Convention which proposed, but in the State Conventions which accepted and ratified it."²⁵

20. Thus Luther Martin, one of the delegates to the Constitutional Convention, presented his eyewitness account of the Convention's view of powers delegated to the United States. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 373-76 (1819).

21. Cf. *United States v. Public Util. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

22. Professor Powell's elaborate historical research supports this conclusion. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

23. 5 ANNALS OF CONG. 734 (1796) (emphasis added).

24. See *supra* text accompanying note 7. Parts of Professor Powell's study appear to present this argument. He notes that various congressmen opposed looking at "extraneous sources" such as the state ratifying conventions. Powell, *supra* note 22, at 919. He also argued that in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), it was proper for the Court to ignore "the virtually unanimous . . . response" of the federalists as expressed in *Federalist No. 81* and instead to just look at the text and interpret it without reference to such historical background. Powell, *supra* note 22, at 922-23. *Chisholm*, one should recall, was soon overturned by the enactment of the eleventh amendment. See *Hans v. Louisiana*, 134 U.S. 1, 11 (1889).

25. Quoted in C. WARREN, *supra* note 16, at 794; see also Letter from James Madison to S.H. Smith (Feb. 2, 1827); Letter from James Madison to Thomas Ritchie (Sept. 15, 1821); Letter from

When we talk popularly about the framers' intent, we really should be more precise and refer to the ratifiers' intent, what Alexander Hamilton in *The Federalist Papers* called "the intention of the people."²⁶ The early case law and constitutional authorities recognized that publicly available authorities, such as *The Federalist Papers*, offered a contemporary and very relevant explication of the meaning of the new Constitution.²⁷ In fact, turning to *The Federalist Papers* was one of Justice Story's "Rules of Interpretation."²⁸

History, of course, must be read in context. Sometimes it may tell us that a particular clause was calculated to be ambiguous, perhaps to paper over differences, to provide for flexibility, or to allow for evolutionary growth in the law.²⁹ At other times the history will not speak with a clear voice, and reasonable people will interpret the evidence differently. But these obvious facts certainly do not mean that the intent of the ratifiers is irrelevant, or that the framers and ratifiers intended for us to ignore that intent when we can discover it. Pharaoh's dreams were not easy to interpret, but Joseph did not therefore advise Pharaoh to ignore them.

A belief in the relevance of history does not entail any doctrinaire, unsophisticated, mechanical application of the views of the past.³⁰ The

James Madison to M.L. Hurlbert (May 1830), *all cited in C. WARREN, supra note 16, at 801 & n.1.*

26. THE FEDERALIST No. 78 (A. Hamilton), *reprinted in R. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES* 10 (2d ed. 1985).

27. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819); *see also McCulloch*, 17 U.S. (4 Wheat.) at 372 (Luther Martin's argument to the Court included reading extracts from *The Federalist Papers* and the Virginia and New York Conventions). *See generally* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 23.35 (1986).

28. See J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE U.S.* 134, 148 (1833, *reprinted with an Introduction by R. Rotunda & J. Nowak* 1987).

29. The authors of *The Federalist Papers* "sometimes exaggerated [the Constitution's] advantages, and spread over the objectionable features the gloss of plausible construction." State v. McBride, 24 S.C.L. (Rice) 400, 410 (1839). *See generally* G. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987); C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 17-72 (1986).

30. Nor does considering the relevance of original intent require rejection of all modern precedents, as some have feared. Attorney General Edwin Meese, for example, strongly espouses the relevance of original intent and also embraces the modern view of the commerce clause and Brown v. Board of Education, 347 U.S. 483 (1954). *See Meese, Speech of Nov. 15, 1985, Before the D.C. Chapter of the Federalist Society Lawyers Division November 15, 1985, Washington, D.C., reprinted in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 31 (The Federalist Society 1986). The Attorney General stated:

When the Supreme Court, in *Brown v. Board of Education*, [347 U.S. 483 (1954),] sounded the death knell of official segregation in the country, it earned all the plaudits it received. But the Supreme Court in that case was not giving new life to old words, or adapting a "living," "flexible" Constitution to new reality. It was restoring the original principle of the Constitution to constitutional law. The *Brown* Court was correcting the damage done 50 years earlier, when in *Plessy v. Ferguson*, [163 U.S. 537 (1896),] an earlier Supreme Court had disregarded

framers and ratifiers of the Constitution intended a flexible document, a document that would endure for ages. In fact, both private and public intent demonstrate this point.

Thomas Jefferson furnishes us with evidence of public intent. He proposed that the new Constitution should expire automatically by 1823 at the latest because each new generation, he thought, should have to come to terms with its own Constitution. Jefferson selected that number because thirty-four years was the average remaining life expectancy of people who had reached the age of majority (twenty-one years) in 1789, the year the new Government began. The generation of 1787 rejected this sunset proposal.³¹ The Constitution should have a longer life than that. As John Marshall later concluded: "[W]e must never forget . . . that it is *a constitution* we are expounding."³² Our Constitution should not be interpreted with the strictness of a municipal code, because that would be contrary to the original intent.

The private debates also support this conclusion. Madison and Roger Sherman at one point proposed a particular change to allow more flexibility and to take into account future growth in the new country. One delegate objected: "It is not to be supposed that the government will last so long as to produce this effect. Can it be supposed that this vast country, including the western territory, will, one hundred and fifty years hence, remain one nation?"³³ The delegates apparently thought so; they opted for Madison's change.³⁴

Some who attack any use of original intent argue that a modern day judge should not be required to apply a constitutional provision

the clear intent of the Framers of the civil war amendments to eliminate the legal degradation of blacks, and had contrived a theory of the Constitution to support the charade of "separate but equal" discrimination.

Similarly, the decisions of the New Deal and beyond that freed Congress to regulate commerce and enact a plethora of social legislation were not judicial adaptations of the Constitution to new realities. They were in fact removals of encrustations of earlier courts that had strayed from the original intent of the Framers regarding the power of the legislature to make policy.

Id. at 37-38. Some commentators argue that *Brown* was not true to historical intent because many members of the Congress that proposed the fourteenth amendment also supported school segregation. M. PERRY, *supra* note 1, at 2, 68. However, we must look at the intent of the public, the ratifiers, not merely the opinion of certain members of Congress. While the intent of the ratifiers and framers may not be entirely clear, it is true that after the Civil War, many people did intend to eliminate all vestiges of slavery. The fact that Congress enacted the broad protection of the Civil Rights Act of 1875 is proof of that. The Supreme Court invalidated this law in *The Civil Rights Cases*, 109 U.S. 3 (1883).

31. Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 937.

32. *McCulloch*, 17 U.S. (4 Wheat.) at 407 (emphasis in original). Marshall, by the way, believed that this conclusion was what the framers had "entertained." *Id.*

33. Quoted in 5 J. ELLIOTT, *supra* note 9, at 392.

34. *Id.*

only to the precise situations envisioned two hundred years ago. That argument is a strawman. History must be read in context. We cannot pretend to discern how the framers or ratifiers would vote on a specific case today, a world very different from the one they knew.³⁵ Looking at the Constitution's text, history, structure, and precedent³⁶ helps supply the judge with a "core value," a major premise; the judge then supplies the minor premise in the circumstances of a particular case "in order to protect the constitutional freedom in circumstances the framers could not foresee."³⁷

Similarly, when the Constitution grants powers to Congress, it often speaks in broad outlines in order to provide for the future. The framers, said Marshall, understood this point. That is why they drafted the flexible "necessary and proper" clause, a "provision, made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. . . . [and to] exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur."³⁸ They certainly did not believe that the Constitution should be a "dead" document but a "living" one.

Obviously, not all judges using tools such as text, history, structure, logic, and precedent will agree on every issue. We expect reasonable people to have reasonable disagreements. That is why human judges, rather than computers, interpret the law. This approach, while it yields no easy answers, helps confer legitimacy on judicial review, and is still poles apart from the view of those who argue that the Court in constitutional cases should derive and exercise broad discretionary authority simply because it is "the voice and conscience of contemporary society."³⁹ Those who propose a dramatic "fusion of constitutional law and

35. Bork, in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION*, *supra* note 30, at 46 (speech before the University of San Diego Law School, Nov. 18, 1985); *see also*, Levinson, *On Interpretation: The Adultery Clause of the Ten Commandments*, 58 S. CAL. L. REV. 719 (1985).

36. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 394 (1985); *see also* Rotunda, *The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C.L. REV. 917, 920-21 (1987).

37. Bork, *supra* note 35, at 46. *See also* *Maryland v. McCulloch*, in which Chief Justice Marshall made a similar point; he argued that a "constitution," by its very nature, only marks "its great outlines . . . , its important objects [are] designated, and the minor ingredients which compose those objects [are to] be deduced from the nature of the objects themselves." 17 U.S. (4 Wheat.) at 407.

38. *McCulloch*, 17 U.S. (4 Wheat.) at 415 (emphasis omitted). This point is discussed more thoroughly in W. BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 207-09 (1987).

39. Rehnquist, *supra* note 4, at 695; *see, e.g.*, Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 258 & n.146 (1981) (stating that "we need to deepen our critique of orthodox theory . . . to ensure that we . . . do not . . . slip back into the easy argot of the past My approach is to take seriously and work from (while, no doubt revising) the classical conception of a republic, including its elements of relative equality, mobilization of the citizenry, and civic virtue").

moral theory" even express surprise that "incredibly," that fusion "has yet to take place."⁴⁰ Why have a written constitution if the writing does not limit the judges?⁴¹ The Constitution contains no provision that makes the courts a roving commission to find and correct perceived unfairness as measured by the latest political theory.

Others opposed to any use of original intent concede this point, but argue that there is no reason why we should be bound by the intentions of men who died nearly two centuries ago. Moreover, the argument continues, the fact that the franchise was so restricted two centuries ago—typically to adult, white, male, freeholders—furnishes an additional reason why today we should *not* feel bound by original intent.⁴²

I frankly do not understand that argument. We certainly feel bound by the original intention when the framers and ratifiers have spoken with crystal clarity—for example, that two persons must witness the same overt act of treason,⁴³ or that the presidential term is limited to four years.⁴⁴ In some cases we may be unable to decipher the original intention—and apply it in light of modern conditions—but that is hardly an argument to reject the relevance of historical intent as an aid to interpretation when we do have evidence of what that intent is. History may be helpful, even when it is not controlling. "We do not confine the judges, we caution them."⁴⁵

40. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1977) (proposing "a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place").

41. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.). "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. 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?" *Id.* As Justice Brennan stated in a 1985 speech: "Justices are not Platonic guardians appointed to wield authority according to their personal moral predilections." *N.Y. Times*, Oct. 13, 1985, at 36, col. 2.

42. See *supra* text accompanying note 8. Professor Larry Simon calculates that only about 2.5% of the population voted in favor of the ratification of the Constitution. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 *CALIF. L. REV.* 1482, 1498 n.44 (1985). Professor Simon notes:

The Constitution was adopted by propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then, much less those of us alive today who hold conceptions of our interests and selves very different from the ones held by those in the original clique. These are hardly small or overly theoretical problems for a theory that proposes to bind us to the clique's intent for reasons that, if coherent, must ultimately be rooted in our own autonomy and welfare. They are thus fatal criticisms for any contract-based claim for originalism as the exclusive method of constitutional interpretation.

Id. at 1499-1500 (footnote omitted).

43. U.S. CONST. art. III, § 3, cl. 1.

44. U.S. CONST. art. II, § 1, cl. 1.

45. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 177 (1970).

The actual words used in the Constitution can be very illuminating. For example, § 1 of the fourteenth amendment refers to "persons." In fact, it says: "[a]ll persons." U.S. CONST. amend.

History does not support the position of those noninterpretivists who claim that the framers and ratifiers did not intend the judiciary to look at original intent. Looking at original intent both helps legitimate judicial review and cautions the judges in its exercise. In *The Federalist Papers* Hamilton explained that if there is a conflict between a statute passed by Congress and the written Constitution, then "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."⁴⁶ The Constitution "is, in fact, and must be regarded by the judges as a fundamental law."⁴⁷ Yet he also cautioned the judges to exercise "judgment" and not uncabined "will."⁴⁸ Judges have been trying to do that for most of our last two hundred years; their legacy has been a Constitution that has brought us stability without dictatorship, freedom without license.

XIV, § 1. "Persons" have to include women as well as men. Indeed, § 2 of the fourteenth amendment specifically refers to "male inhabitants." U.S. CONST. amend. XIV, § 2. The framers knew how to say "male" when they meant "male." In § 1, they did not say "male." They said "all persons." Thus, § 1 must include all persons. To argue the contrary is to ignore the text.

46. THE FEDERALIST No. 78 (A. Hamilton), *supra* note 26.

47. *Id.*

48. *Id.*