ORIGINALISM: THE LESSER EVIL*

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This series of lectures is dedicated to the memory of Chief Justice William Howard Taft, an extraordinary man by any standard. A state trial judge at twenty-nine, Solicitor General of the United States at thirty-two, a United States Circuit Judge at thirty-four, Professor and Dean at the University of Cincinnati Law School, High Commissioner of the Philippines, Secretary of War, President of the United States, and Chief Justice of the United States. When a Justice of the Supreme Court is invited to give this lecture, I presume it is the great man's judicial career that is expected to be at least the jumping-off point for the discussion. That also happens to be the part of his diverse life that Taft himself most valued, judging by a statement he made at the time of his nomination to the Chief Justiceship (not only an appropriate modesty but even a fear of the Almighty gives me some pause at quoting this): "I love judges, and I love courts. They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God."[1]

Taft is generally acknowledged to have been one of the greatest Chief Justices—not so much on the basis of his opinions, perhaps because many of them ran counter to the ultimate sweep of history. One commentator observes condescendingly:

> Taft's Chief Justiceship might have been constructive, but for his haunting fear of progressivism and progressives. Had he maintained the powerful position he assumed in his commerce cases and minimum wage dissent, *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), he might have, with the backing of Holmes, Brandeis, Stone, and possibly Sanford, swung the Court along the line the great triumvirate was so eloquently staking out. Lacking in William Howard Taft was the quality Woodrow Wilson suggested as an essential requirement of statesmanship—"a large vision of things to come."[2]

This is presumably the school of history that assesses the greatness of a leader by his success in predicting where the men he is leading want to go. That is perhaps the way the world ultimately evaluates

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1. Mason, *William Howard Taft,* in 3 THE JUSTICES OF THE SUPREME COURT 1789-1978 2105 (L. Friedman and F. Israel ed. 1980).

2. *Id.* at 2120.

things—but one may think that Taft, having (as I have described) a more celestial view of the judge's function, had a quite accurate "vision of things to come," did not like them, and did his best, with consummate skill but ultimate lack of success, to alter the outcome. To demean him for not being Brandeis is to demean Lee for not being Grant.

Be that as it may, Taft's reputation as one of the greatest Chief Justices rests not primarily upon his opinions but upon his organizational and administrative skills which, together with his political acumen, immensely improved the quality of federal justice. As described by one biographer, in his very first year as Chief Justice, Taft "launched his campaign for reform, making appeals in speeches across the continent, presenting his case in legal periodicals and in testimony before the House and Senate Judiciary Committees."[3] He succeeded in obtaining passage of the Act of Sept. 14, 1922,[4] which established the Judicial Conference of the United States, and the Judiciary Act of 1925,[5] which finally brought the Supreme Court's unmanageable docket under control by rendering the vast majority of its jurisdiction discretionary. He successfully opposed (and this should be of particular interest to modern lawyers, for the issue is still with us) Senator Norris' bill to eliminate the diversity jurisdictional of the federal courts.[6] I am tangibly in his debt more than most of you, since he obtained for the Court its first (and current) home, the Supreme Court building that is now the symbol of equal justice under law.

But just as I may be forgiven for not addressing a subject related to Taft's accomplishments as President, I hope I may be pardoned as well for not addressing a subject dealing with judicial administration—for that also is not my current line of territory. Rather, what leapt to my mind as I contemplated this talk was that legal opinion of the Chief Justice which is generally regarded as his most significant one—and which he himself must have regarded as his most significant one, if his personal estimation can validly be measured by the amount of time he took to produce it, and by its sheer length. Indeed, we need not rely upon that persuasive secondary evidence, for Taft himself said of the case: "I never wrote an opinion that I felt to be so important in its effect."[7]

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3. *Id.* at 2109.

4. Act of Sept. 14, 1922, ch. 306, 42 Stat. 837 (1922).

5. Judiciary Act of 1925, ch. 229, 43 Stat. 936 (1925).

6. Mason, *supra* note 1, at 2110.

7. *Id.* at 2118.

I refer to the Chief Justice's opinion for the Court in *Myers v. United States*,[8] which declared unconstitutional congressional attempts to restrict presidential removal of executive officers. Argument in that case was first heard on December 5, 1923. It was set for reargument and heard again the next Term, almost a year-and-a-half later, on April 13th and 14th, 1925. (In those days oral argument was, to understate the point, somewhat more protracted.) The Chief Justice's seventy page opinion for the Court, as well as a one-page dissent by Justice Holmes, a sixty-one page dissent by Justice McReynolds, and a fifty-five page dissent by Justice Brandeis, did not issue until more than a year-and-a-half after this second argument, on October 25, 1926. I have always been impressed, incidentally, by the contrast between that lengthy gestation period and the period between argument and issuance of the famous opinion, about eight-and-one-half years later, after Charles Evans Hughes had succeeded Taft as Chief Justice, in which a unanimous Supreme Court essentially overruled the analysis of *Myers* in fourteen quick pages.[9]

Humphrey's Executor v. United States,[10] which invalidated President Franklin Roosevelt's attempt to remove a member of the Federal Trade Commission who was uncongenial to his philosophy, was argued on May 1, 1935, and decided twenty-six days later—the same day the Court declared unconstitutional Roosevelt's National Industrial Recovery Act.[11] Many (including President Roosevelt) thought that the rapid switch in legal analysis between *Myers* and *Humphrey's Executor* had much to do with the Justices' antagonism towards the New Deal; but surely it must also reflect the great intellectual influence that Taft, an ex-President and hence a supporter of Executive power, had exercised over his colleagues.

Perhaps Chief Justice Taft's opinion in *Myers* came so readily to my mind as I was considering the subject of this talk because it dealt with the presidential removal power, the same issue that was before us in the most significant case we decided last term—the independent counsel case.[12] The reason I want to discuss it, however, has nothing to do with the substantive issue; I said all I intend to about that in my lonesome dissent. What attracts my attention about the *Myers* opinion is not its substance but its process. It is a prime example of what, in current scholarly discourse, is known as the "original-

8. 272 U.S. 52 (1926).
9. Humphrey's Executor v. United States, 295 U.S. 602 (1935).
10. *Id.*
11. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
12. *See* Morrison v. Olsen, 108 S. Ct. 2597 (1988).

ist" approach to constitutional interpretation. The objective of the Chief Justice's lengthy opinion was to establish the meaning of the Constitution, in 1789, regarding the presidential removal power. He sought to do so by examining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding of the President's removal power (particularly the understanding of the First Congress and of the leading participants in the Constitutional Convention), the background understanding of what "executive power" consisted of under the English constitution, and the nature of the executive's removal power under the various state constitutions in existence when the federal Constitution was adopted. It is easy to understand why this would take almost three years and seventy pages. As I shall later have occasion to describe, done perfectly it might well take thirty years and 7,000 pages.

It may surprise the layman, but it will surely not surprise the lawyers here, to learn that originalism is not, and had perhaps never been, the sole method of constitutional exegesis. It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean. That is, I suppose, the sort of behavior Chief Justice Hughes was referring to when he said the Constitution is what the judges say it is. But in the past, nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble, about what they were doing—either ignoring strong evidence of original intent that contradicted the minimal recited evidence of an original intent congenial to the court's desires, or else not discussing original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support. The latter course was adopted, to sweep away Taft's analysis, in *Humphrey's Executor,* which announced the novel concept of constitutional powers that are neither legislative, nor executive nor judicial, but "quasi-legislative" and "quasi-judicial."[13] It is only in relatively recent years, however, that nonoriginalist exegesis has, so to speak, come out of the closet, and put itself forward overtly as an intellectually legitimate device. To be sure, in support of its venerability as a legitimate interpretive theory there is often trotted out John Marshall's statement in *McCulloch v. Maryland* that "we must never forget

13. Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935).

it is *a constitution* we are expounding"[14]—as though the implication of that statement was that our interpretation must change from age to age. But that is a canard. The real implication was quite the opposite: Marshall was saying that the Constitution had to be interpreted generously because the powers conferred upon Congress under it had to be broad enough to serve not only the needs of the federal government originally discerned but also the needs that might arise in the future. If constitutional interpretation could be adjusted as changing circumstances required, a broad initial interpretation would have been unnecessary.

Those who have not delved into the scholarly writing on constitutional law for several years may be unaware of the explicitness with which many prominent and respected commentators reject the original meaning of the Constitution as an authoritative guide. Harvard Professor Laurence H. Tribe, for example, while generally conducting his constitutional analysis under the rubric of the open-ended textual provisions such as the Ninth Amendment, does not believe that the originally understood content of those provisions has much to do with how they are to be applied today. The Constitution, he has written, "invites us, and our judges, to expand on the . . . freedoms that are uniquely our heritage,"[15] and "invites a collaborative inquiry, involving both the Court and the country, into the contemporary content of freedom, fairness, and fraternity."[16] Stanford Dean Paul Brest, having (in his own words) "abandoned both consent and fidelity to the text and original understanding as the touchstones of constitutional decisionmaking,"[17] concludes that "the practice of constitutional decisionmaking should enforce those, but only those, values that are fundamental to our society."[18] While Brest believes that the "text," "original understanding," "custom," "social practices," "conventional morality," and "precedent" all strongly inform the determination of those values, the conclusions drawn from all these sources are "defeasible in the light of changing public values."[19] Yale Professor Owen Fiss asserts that, whatever the Constitution might originally have meant, the courts should give "concrete meaning and application" to those values that "give our society an identity and inner coherence [and] its distinctive public

14. 17 U.S. (4 Wheat.) 316, 407 (1819).

15. L. TRIBE, GOD SAVE THIS HONORABLE COURT 45 (1985).

16. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 771 (2d ed. 1988).

17. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 226 (1980).

18. *Id.* at 227.

19. *Id.* at 229.

morality."[20] Oxford Professor (and expatriate American) Ronald Dworkin calls for "a fusion of constitutional law and moral theory."[21] Harvard Professor Richard Parker urges, somewhat more specifically, that constitutional law "take seriously and work from (while no doubt revising) the classical conception of a republic, including its elements of relative equality, mobilization of citizenry, and civic virtue."[22] More specifically still, New York University Professor David Richards suggests that it would be desirable for the courts' constitutional decisions to follow the contractarian moral theory set forth in Professor John Rawls' treatise, *A Theory of Justice.*[23] And I could go on.

The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes. That power is, however, reasonably implicit because, as Marshall said in *Marbury v. Madison,* (1) "[i]t is emphatically the province and duty of the judicial department to say what the law is," (2) "[i]f two laws conflict with each other, the courts must decide on the operation of each," and (3) "the constitution is to be considered, in court, as a paramount law."[24] Central to that analysis, it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of "law" that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a "law," but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? One simply cannot say, regarding *that* sort of novel enactment, that "[i]t is emphatically the province and duty of the judicial department" to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and *its* determination that a statute is compatible with the Constitution should, as in England, prevail.

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20. Fiss, *The Supreme Court 1978 Term—Forward: The Forms of Justice,* 93 HARV. L. REV. 1, 9, 11 (1979).

21. R. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977).

22. Parker, *The Past of Constitutional Theory—And Its Future,* 42 OHIO ST. L. J. 223, 258 n.146 (1981).

23. Richards, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis,* 22 WM. & MARY L. REV. 327, 344-47 (1981).

24. 5 U.S. (1 Cranch.) 137, 177 (1803).

Apart from the frailty of its theoretical underpinning, nonoriginalism confronts a practical difficulty reminiscent of the truism of elective politics that "You can't beat somebody with nobody." It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to replace him. Just as it is not very meaningful for a voter to vote "non-Reagan," it is not very helpful to tell a judge to be a "nonoriginalist." If the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus among the nonoriginalists as to what this might be. Are the "fundamental values" that replace original meaning to be derived from the philosophy of Plato, or of Locke, or Mills, or Rawls, or perhaps from the latest Gallup poll? This is not to say that originalists are in entire agreement as to what the nature of their methodology is; as I shall mention shortly, there are some significant differences. But as its name suggests, it by and large represents a coherent approach, or at least an agreed-upon point of departure. As the name "nonoriginalism" suggests (and I know no other, more precise term by which this school of exegesis can be described), it represents agreement on nothing except what is the wrong approach.

Finally, I want to mention what is not a *defect* of nonoriginalism, but one of its supposed benefits that seems to me illusory. A bit earlier I quoted one of the most prominent nonoriginalists, Professor Tribe, to the effect that the Constitution "invites us, and our judges, to expand on the . . . freedoms that are uniquely our heritage."[25] I think it fair to say that that is a common theme of nonoriginalists in general. But why, one may reasonably ask—once the original import of the Constitution is cast aside to be replaced by the "fundamental values" of the current society—why are we invited only to "expand on" freedoms, and not to contract them as well? Last Term we decided a case, *Coy v. Iowa*,[26] in which, at the trial of a man accused of taking indecent liberties with two young girls, the girls were permitted to testify separated from the defendant by a screen which prevented them from seeing him. We held that, at least absent a specific finding that these particular witnesses needed such protection, this procedure violated that provision of the Sixth Amendment that assures a criminal defendant the right "to be confronted with the witnesses against him."[27] Let us hypothesize, how-

25. L. TRIBE, *supra* note 15, at 45.
26. 108 S. Ct. 2798 (1988).
27. *Id.* at 2800.

ever (a hypothesis that may well be true), that modern American society is much more conscious of, and averse to, the effects of "emotional trauma" than was the society of 1791, and that it is, in addition, much more concerned about the emotional frailty of children and the sensitivity of young women regarding sexual abuse. If that is so, and if the nonoriginalists are right, would it not have been possible for the Court to hold that, even though in 1791 the confrontation clause clearly would not have permitted a blanket exception for such testimony, it does so today? Such a holding, of course, could hardly be characterized as an "expansion upon" preexisting freedoms. Or let me give another example that is already history: I think it highly probable that over the past two hundred years the Supreme Court, though not avowedly under the banner of "nonoriginalist" interpretation, has in fact narrowed the contract clause of the Constitution[28] well short of its original meaning.[29] Perhaps we are all content with that development—but can it possibly be asserted that it represented an expansion, rather than a contraction, of individual liberties? Our modern society is undoubtedly not as enthusiastic about economic liberties as were the men and women of 1789; but we should not fool ourselves into believing that because we like the result the result does not represent a contraction of liberty. Nonoriginalism, in other words, is a two-way street that handles traffic both to and from individual rights.

Let me turn next to originalism, which is also not without its warts. Its greatest defect, in my view, is the difficulty of applying it correctly. Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning. They have meaning enough, as the scholarly critics themselves must surely believe when they choose to express their views in text rather than music. But what *is* true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an ear-

28. U.S. CONST. art. I, § 10, cl. 2.

29. *See, e.g.*, Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934).

lier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.

Let me provide a small example of this from Chief Justice Taft's lengthy—and on the whole admirable—effort in *Myers*. One of the issues at hand (though not the only one) was what was understood to be the inherent content of the phrase "[t]he executive Power" in Article II, sec. 1, which provides that "[t]he executive Power shall be vested in a President of the United States of America."[30] Specifically, was the phrase "the executive Power" a term of art that included the power to dismiss officers of the executive branch? Taft disposes of this question in three sentences:

> In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words "executive power" as including both. *Ex Parte Grossman,* 267 U.S. 87, 110. Unlike the power of conquest of the British Crown, considered and rejected as a precedent for us in *Fleming v. Page,* 9 How. 603, 618, the association of removal with appointment . . . is not incompatible with our republican form of Government.[31]

It will be noted that this analysis simply *assumes* that the English experience is relevant. That is seemingly a reasonable assumption. After all, the colonists of 1789 were Englishmen, and one would think that their notion of what "the executive Power" included would comport with that tradition. But in fact the point is not at all that clear. Senator George Wharton Pepper, who at the Court's request had filed an amicus brief and argued as amicus before the Court, contended that "none of the members of the Constitutional Convention who took part in the debates desired the President to wield the powers which at the time were exercisable by the King of England."[32] Worse still, Chief Justice Taney's opinion in the 1850 case of *Fleming v. Page,*[33] which Taft cited in the passage I quoted, had said the following:

> [I]n the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as re-

30. U.S. CONST. art. II, § 1.
31. Myers v. United States, 272 U.S. 52, 118 (1926).
32. *Id.* at 79.
33. 50 U.S. (9 How.) 603 (1850).

> gards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question.[34]

Taft's opinion adequately distinguished the holding of *Fleming* on the ground that it related to a different executive power, "incompatible with our republican form of Government;"[35] but did not at all come to grips with the contradiction that Taney, unlike Taft, did not think the English experience relevant to "*any* . . . subject where the rights and powers of the executive arm of the government are brought into question."[36] Nor did the opinion respond to the seemingly telling point made in Justice McReynolds' dissent, that Jefferson's 1783 Draft of a Fundamental Constitution for the Commonwealth of Virginia had provided:

> The executive powers shall be exercised by a Governor . . . By executive powers, we mean no reference to those powers exercised under our former government by the crown as of its prerogative, nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor.[37]

And finally, Taft's opinion offered no support whatever for the asserted proposition that the English experience was relevant, except for the citation to Taft's earlier opinion in *Ex Parte Grossman*[38]— which quoted from an 1856 case *Ex Parte Wells* to the effect that "when the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown. . . ."[39] But quite obviously, that the constitutional phrase "to grant Pardons" meant the same thing it meant in the English system is only marginally relevant to whether the phrase "[t]he executive Power" meant the same.

Having mentioned the gaps in Chief Justice Taft's analysis, let me suggest just some of the material he might have used to fill them. It is unquestionable that many in the founding generation "did not consider the Prerogatives of the British Monarch as a proper guide for defining the Executive powers" (those were the words of James Wilson, as recorded in Madison's notes of the Constitutional Convention).[40] Indeed, that sentiment was so widespread that the pro-

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34. *Id.* at 618.

35. *Myers,* 272 U.S. at 118.

36. *Fleming,* 50 U.S. (9 How.) at 618 (emphasis added).

37. 272 U.S. at 235.

38. *Id.* at 118.

39. *Ex Parte* Grossman, 267 U.S. 87, 110 (quoting *Ex Parte* Wells, 59 U.S. (18 How.) 307, 311 (1855)).

40. *See* 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 65 (1966).

ponents of the Constitution during the ratification campaign felt constrained to emphasize the important differences between British royal prerogative and the powers of the presidency.[41] That can be conceded, however, without impairing Taft's central point that a reference to "the executive Power" without further qualification would be taken as a reference to the traditional powers of the English King, except those inherently incompatible with republican government.

Research conducted years later by Professor William Winslow Crosskey would have been helpful to Taft. Referring to the royal prerogatives as described in William Blackstone's Commentaries on the Laws of England, which had been published in Philadelphia in the early 1770s, Crosskey noted that many—indeed, almost half—of Congress' enumerated powers had been considered royal prerogatives under the law of England at the time of our Constitution's adoption.[42] For example, Blackstone wrote that the king had "the sole power of raising and regulating fleets and armies,"[43] whereas, of course, these powers under our Constitution reside in Congress by virtue of article I, section 8, clauses 12 through 14. The Constitution also expressly confides in the President certain traditional royal prerogatives subject to limitations not known in the English constitution. Thus, for example, the king's absolute veto of legislation became a qualified veto subject to override by a two-thirds vote of Congress,[44] and the king's ability to conclude treaties became a presidential power to negotiate treaties, with a two-thirds vote of the Senate needed for ratification.[45]

It is apparent from all this that the traditional English understanding of executive power, or, to be more precise, royal prerogatives, was fairly well known to the founding generation, since they appear repeatedly in the text of the Constitution in formulations very similar to those found in Blackstone. It can further be argued that when those prerogatives were to be reallocated in whole or part to other branches of government, or were to be limited in some other way,

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41. *See, e.g.*, THE FEDERALIST No. 67 at 452-57 (A. Hamilton) (J. Cooke ed. 1961); 4 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107-10 (1866) (remarks of Iredell at North Carolina Convention).

42. *See* 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 428 (1953); *see also* U.S. CONST. art. 1, § 8.

43. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 262 n. 33 (Tucker ed. 1803).

44. *Compare* 2 W. BLACKSTONE, *id.* at 260, 260-61 n.30, *with* U.S. CONST. art. II, § 2, cl. 2.

45. *Compare* 2 W. BLACKSTONE, *id.* at 257, 257 n.21, *with* U.S. CONST. art. II, § 2, cl. 2.

the Constitution generally did so expressly. One could reasonably infer, therefore, that what was not expressly reassigned would—at least absent patent incompatibility with republican principles—remain with the executive. And far from refuting this, Jefferson's draft constitution for Virginia, alluded to earlier, could be said to support it. Why, Taft might have argued, would Jefferson have felt it necessary to specify that "[b]y executive powers, we mean no reference to those powers exercised under our former government by the crown" unless, without that specification, such reference would reasonably be assumed?[46]

I am not setting forth all of this as necessarily the correct historical analysis, but as an example of how an expansion of Taft's three brief sentences might have at least begun. I should note, moreover, that those three sentences bore the burden of establishing not only (what we have just discussed) that the phrase "the executive Power" referred to the king's powers, *but also* that the king's powers in fact included the power to remove executive officials. Taft's opinion contains nothing to support that point, except the unsubstantiated assertion that "[i]n the British system, the Crown . . . had the power of appointment and removal of executive officers. . . ."[47] That is probably so, but the nature of the relationship between the Crown and the government in England during the relevant period was a sufficiently complicated and changing one, that something more than an ipse dixit was called for.[48]

Well, I leave it to the listener's imagination how many pages would have had to have been added to Taft's seventy-page opinion, and how many months to his almost three years of intermittent labor, to flesh out this relatively minor point in a fashion that a serious historian would consider minimally adequate. And this is just one of many points that could have used elaboration. Nowadays, of course, the Supreme Court does not give itself as much time to decide cases as was customary in Taft's time. Except in those very rare instances in which a case is set for reargument, the case will be decided in the same Term in which it is first argued—allowing at best the period between the beginning of October and the end of June, and at worst the period between the end of April and the end of June. The independent counsel case last Term[49]—involving precisely the historical materials *Myers* had to consider, and then some—was argued on April 26, and the thirty-eight-page opinion and thirty-eight-page

46. Myers v. United States, 272 U.S. at 235.
47. *Id.* at 118.
48. *See* F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 387-400 (1908).
49. Morrison v. Olsen, 108 S. Ct. 2597 (1988).

dissent (I believe in equal time) issued on June 29. Do you have any doubt that this system does not present the ideal environment for entirely accurate historical inquiry? Nor, speaking for myself at least, does it employ the ideal personnel.

I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong. (Of course recognizing *stare decisis* is seemingly even more incompatible with nonoriginalist theory: If the most solemnly and democratically adopted text of the Constitution and its Amendments can be ignored on the basis of current values, what possible basis could there be for enforced adherence to a legal decision of the Supreme Court?) But *stare decisis* alone is not enough to prevent originalism from being what many would consider too bitter a pill. What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge. It may well be, as Professor Henry Monaghan persuasively argues, that this cannot legitimately be reconciled with originalist philosophy—that it represents the unrealistic view of the Constitution as a document intended to create a perfect society for all ages to come, whereas in fact it was a political compromise that did not pretend to create a perfect society even for its own age (as its toleration of slavery, which a majority of the founding generation recognized as an evil, well enough demonstrates).[50] Even so, I am confident that public flogging and hand-branding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality.

One way of doing so, of course, would be to say that it was originally intended that the cruel and unusual punishment clause would have an evolving content—that "cruel and unusual" originally meant "cruel and unusual for the age in question" and not "cruel and unusual in 1791." But to be faithful to originalist philosophy,

50. *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

one must not only *say* this but demonstrate it to be so on the basis of some textual or historical evidence. Perhaps the mere words "cruel and unusual" suggest an evolutionary intent more than other provisions of the Constitution, but that is far from clear; and I know of no historical evidence for that meaning. And if the faint-hearted originalist is willing simply to posit such an intent for the "cruel and unusual punishment" clause, why not for the due process clause, the equal protection clause, the privileges and immunity clause, etc.? When one goes down that road, there is really no difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous. It is, I think, the fact that most originalists are faint-hearted and most nonoriginalists are moderate (that is, would not ascribe evolving content to such clear provisions as the requirement that the President be no less than thirty-five years of age) which accounts for the fact that the sharp divergence between the two philosophies does not produce an equivalently sharp divergence in judicial opinions.

Having described what I consider the principal difficulties with the originalist and nonoriginalist approaches, I suppose I owe it to the listener to say which of the two evils I prefer. It is originalism. I take the need for theoretical legitimacy seriously, and even if one assumes (as many nonoriginalists do not even bother to do) that the Constitution was originally *meant* to expound evolving rather than permanent values, as I discussed earlier I see no basis for believing that supervision of the evolution would have been committed to the courts. At an even more general theoretical level, originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system. A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect "current values." Elections take care of that quite well. The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.

I also think that the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once

that is abandoned. The practical defects of originalism, on the other hand, while genuine enough, seem to me less severe. While it may indeed be unrealistic to have substantial confidence that judges and lawyers will find the correct historical answer to such refined questions of original intent as the precise content of "the executive Power," for the vast majority of questions the answer is clear. The death penalty, for example, was not cruel and unusual punishment because it is referred to in the Constitution itself; and the right of confrontation by its plain language meant, at least, being face-to-face with the person testifying against one at trial. For the nonoriginalist, even these are open questions. As for the fact that originalism is strong medicine, and that one cannot realistically expect judges (probably myself included) to apply it without a trace of constitutional perfectionism: I suppose I must respond that this is a world in which nothing is flawless, and fall back upon G.K. Chesterton's observation that a thing worth doing is worth doing badly.

It seems to me, moreover, that the practical defects of originalism are defects more appropriate for the task at hand—that is, less likely to aggravate the most significant weakness of the system of judicial review and more likely to produce results acceptable to all. If one is hiring a reference-room librarian, and has two applicants, between whom the only substantial difference is that the one's normal conversational tone tends to be too loud and the other's too soft, it is pretty clear which of the imperfections should be preferred. Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely. Nonoriginalism, which under one or another formulation invokes "fundamental values" as the touchstone of constitutionality, plays precisely to this weakness. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are "fundamental to our society." Thus, by the adoption of such a criterion judicial personalization of the law is enormously facilitated. (One might reduce this danger by insisting that the new "fundamental values" invoked to replace original meaning be clearly and objectively manifested in the laws of the society. But among all the varying tests suggested by nonoriginalist theoreticians, I am unaware that that one ever appears. Most if not all nonoriginalists, for example, would strike down the death penalty, though it continues to be widely adopted in both state and federal legislation.)

Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself. And the principal defect of that approach—that historical research is always difficult and sometimes inconclusive—will, unlike nonoriginalism, lead to a more moderate rather than a more extreme result. The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values—so that as applied, even as applied in the best of faith, originalism will (as the historical record shows) end up as something of a compromise. Perhaps not a bad characteristic for a constitutional theory. Thus, nonoriginalists can say, concerning the principal defect of originalism, "Oh happy fault." Originalism is, it seems to me, the librarian who talks too softly.

Having made that endorsement, I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging. But then I cannot imagine such a case's arising either. In any event, in deciding the cases before me I expect I will rarely be confronted with making the stark choice between giving evolutionary content (not yet required by *stare decisis*) and not giving evolutionary content to particular constitutional provisions. The vast majority of my dissents from nonoriginalist thinking (and I hope at least some of those dissents will be majorities) will, I am sure, be able to be framed in the terms that, even if the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.[51] That—to conclude this largely theoretical talk on a note of reality—is the real dispute that appears in the case: not between nonoriginalists on the one hand and pure originalists on the other, concerning the validity of looking at all to current values; but rather between, on the one hand, nonoriginalists, fainthearted originalists and pure-originalists-accepting-for-the-sake-of-argument-evolutionary-content, and, on the other hand, other adherents of *the same three approaches,* concerning the nature and degree of evidence necessary to demonstrate that constitutional evolution has occurred.

I am left with a sense of dissatisfaction, as I am sure you are, that a discourse concerning what one would suppose to be a rather fundamental—indeed, *the* most fundamental—aspect of constitutional

51. *See, e.g.,* Thompson v. Oklahoma, 108 S. Ct. 2687, 2711 (1988) (Scalia, J., dissenting).

theory and practice should end so inconclusively. But it should come as no surprise. We do not yet have an agreed-upon theory for interpreting statutes, either. I find it perhaps too laudatory to say that this is the genius of the common law system; but it is at least its nature.