

The Insufficiently Dangerous Branch

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Running for president in 1976, Jimmy Carter would tell voters “I am not a lawyer.” Carter’s boast is my confession to this august audience on this serious occasion, the 17th annual B. Kenneth Simon Lecture in Constitutional Thought. I did, however, come close to being a lawyer.

Nearing the end of two years at Oxford, I was undecided between an academic career and a life in the law. So, temporizing, I applied for admission to a distinguished law school and to Princeton’s Ph.D. program in political philosophy. I chose to go to Princeton because it is midway between two cities with National League baseball teams. This gives you some idea of my seriousness as a scholar. Anyway, as I say, I came close to becoming a lawyer.

Now, baseball people say that close only counts in horseshoes and hand grenades. I, however, think that two ways that I prepared, away from law school, to think about American constitutional law brought me close to legal scholarship in important ways.

First, the study of American political philosophy is inextricably entwined with constitutional law. The title of my doctoral dissertation was “Beyond the Reach of Majorities.” Some of you will recognize the phrase from Justice Robert Jackson’s 1943 opinion in *West Virginia v. Barnett*, the second of the public school flag salute cases, in which Jackson wrote:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. . . . Fundamental rights may not be submitted to vote; they depend on the outcome of no election.¹

* This is a slightly revised version of the 17th annual B. Kenneth Simon Lecture in Constitutional Thought, delivered at the Cato Institute on September 17, 2018.

¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Which rights are “fundamental” and which are not? What are the rights of majorities? You see what I mean when I say that political philosophy is done regularly in the gleaming white building that William Howard Taft caused to be built. By the way, the subtitle of my dissertation was “Closed Questions in an Open Society.” I shall have more to say about this anon.

A second way that my academic career proved relevant to reasoning about constitutional law is this: My Oxford years, 1962 through 1964, were during the high tide of linguistic philosophy. Perhaps the leading practitioner was J.L. Austin, whose “ordinary language” philosophy included the concept of speech acts. Linguistic philosophy was often arid and sterile regarding social and political questions. It had and has, however, something pertinent to say about today’s skirmishing on the contested ground concerning originalism, textualism, and other rivalrous schools of thought about construing the Constitution. Austin’s point was that any “speech act”—including, of course, written speech—is a performative activity. It involves promising, requesting, warning, exhorting, and so on. The meaning of the act depends on the speaker’s intention and on the nature of the audience that the speaker intends to influence. The relevance of this to constitutional reasoning is that the original meaning of the Constitution’s language depends on the intentions of the authors of this language, which in turn depends on the audience they had in mind, and the influence they hoped to have on this audience. Linguistic philosophy’s mode of analysis is, I think, especially relevant to what Yale law professor Jack Balkin calls “living originalism.” Balkin’s phrase is not, as some might allege, an oxymoron. Rather, it denotes a defensible way to tip-toe through some intellectual mine fields.

It is paradoxical that in a nation where skepticism about government is at the core of the political philosophy bequeathed by the Founders, the elaboration and application of this political philosophy has been done largely by or through a government institution, the Supreme Court. There is a profound truth about the American polity and its history that is sometimes missed by even the most accomplished students of American history.

It is often said that ours is a nation indifferent to, even averse to, political philosophy. And it is said that this disposition is a virtue and a sign of national health. The theory is that only unhappy nations are constantly engaged in arguing about fundamental things, and

that the paucity—actually, it is merely a postulated paucity—of American political philosophy is evidence of a contented consensus about our polity's basic premises.

For example, Daniel J. Boorstin, then a University of Chicago historian and later Librarian of Congress, published a slender volume, "The Genius of American Politics," which appeared in 1953, during America's post-war introspection about the nature and meaning of our nation's sudden global preeminence. Boorstin's argument, made with his characteristic verve and erudition, aimed to explain why our success was related to "our antipathy to political theory."²

The genius of our democracy, said Boorstin, comes not from any geniuses of political thought comparable to Plato and Aristotle or Hobbes and Locke. Rather, it comes "from the unprecedented opportunities of this continent and from a peculiar and unrepeatably combination of historical circumstances." This explains "our inability to make a 'philosophy' of them," and why our nation has never produced a political philosopher of the stature of, say, Hobbes and Locke, or "a systematic theoretical work to rank with theirs."³

Well. Leave aside the fact that James Madison was a political philosopher of such stature—he was because he was also a practicing politician. And leave aside the fact, which it surely is, that *The Federalist*, although a compendium of newspaper columns written in haste in response to a practical problem (to secure ratification of the Constitution), is a theoretical work that ranks with Hobbes's *Leviathan* and Locke's *The Second Treatise on Civil Government*. Considered in the second decade of the 21st century, as we stand on the dark and bloody ground of today's political contentions, Boorstin's book remains interesting but primarily as a period piece. It is a shard of America's now shattered consensus. Or, more precisely, it is a document from the calm before the storm of the conservative counterattack against progressivism's complacent assumption that its ascendancy was secure.

The American argument about philosophic fundamentals is not only ongoing, it is thoroughly woven into the fabric of our public life. Far from being rare and of marginal importance, real political philosophy is more central to our public life than to that of any

² Daniel J. Boorstin, *The Genius of American Politics* 2 (1953).

³ *Id.* at 1–2.

other nation. It is implicated in almost all American policy debates of any consequence. Indeed, it is, like Edgar Allen Poe's purloined letter, hidden in plain sight. All American political arguments involve, at bottom, interpretations of the Declaration of Independence and of the Constitution, which was written to provide institutional architecture for governance according to the Declaration's precepts. So, Supreme Court justices and other constitutional lawyers are, whether they realize this or like this, America's principal practitioners of political philosophy.

A good starting point for constitutional reasoning informed by philosophy is with this fact: The first of the 10 sentences that comprise the Gettysburg address does *not* begin "Three score and fifteen years ago. . . ." Lincoln did not say that "our fathers" had "brought forth" a new nation by writing the Constitution. There is profound constitutional importance in the symbolic fact that the Constitutional Convention met in the room where the Declaration of Independence was debated and endorsed. Ratification of the Constitution created a new regime for a nation then 13 years old. The Declaration did not specify particulars about the proper regime for the new nation. Rather, it said that a regime is legitimate if it secures natural rights and if it governs by the recurrently expressed consent of the governed.

Chief Justice Earl Warren has defined citizenship as "the right to have rights."⁴ Actually, people have rights independent of their civic status. The Court should have said, consonant with the Declaration of Independence, that citizenship is the right to have one's natural rights recognized and their exercise protected.

The Declaration is, as Cato's Timothy Sandefur says, the "conscience" of the Constitution.⁵ As he says, the essential drama of democracy derives from the inherent tension between the natural rights of the individual and the constructed right of the community to make such laws as the majority deems necessary and proper. So, the Declaration is not just chronologically prior to the Constitution, it is logically prior. Again, Sandefur: The Declaration "sets the

⁴ See, e.g., *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

⁵ See Timothy Sandefur, *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty* (2015).

framework for reading” the Constitution.⁶ By the terms with which the Declaration articulates the Constitution’s purpose, which is to “secure” unalienable rights, the Declaration intimates the standards by which one can distinguish the proper from the improper exercises of majority rule. “Freedom” says Sandefur, “is the starting point of politics; government’s powers are secondary and derivative, and therefore limited. . . . Liberty is the goal at which democracy aims, not the other way around.”⁷

The progressive project, now in its second century, has been to reverse this, giving majority rule priority over liberty when they conflict, as they do, inevitably and frequently. The progressive project stands athwart what Madison wrote in 1792, the year after ratification of the Bill of Rights: “In Europe, charters of liberty have been granted by power. America has set the example . . . of power granted by liberty.”⁸

The Declaration, which mentions neither democracy nor majority rule, does not stipulate a particular form of government. Rather, it stipulates two criteria of a legitimate government: Such government secures the natural rights of the governed and receives their recurrently expressed consent. So, of the three prepositions in Lincoln’s Gettysburg formulation—government of, by, and for the people—it is the third that is dispositive. It is most probable that government will function for the people—will, that is, do what is most important for their happiness, secure their rights—if it is government of and by the people. So, the Declaration is only a contingently and implicitly democratic document. It implies that democracy is the form of government with the highest probability of governing for the people.

On September 17, 1787, the last day of the Constitutional Convention, George Washington, the Convention’s president, distilled into two sentences the essence of natural rights theory and of the unending debate about rights, unenumerated yet retained. Washington said: “Individuals entering to society, must give up a share of liberty to preserve the rest. . . . It is at all times difficult to draw with

⁶ *Id.* at 2.

⁷ *Id.*

⁸ For the *National Gazette*, Jan. 18, 1792, in *The Papers of James Madison*, vol. 14, Apr. 6, 1791–Mar. 16, 1793, 191–192 (Robert A. Rutland & Thomas A. Mason, eds., 1983).

precision the line between those rights which must be surrendered, and those which may be reserved.”⁹

Drawing this line is the fundamental task of the judicial branch, which is tertiary in order but not in importance. This branch is the constitutional culmination: The legislative branch writes laws and the head of the executive branch takes care that the laws are faithfully executed, at which point the judiciary is perpetually poised to scrutinize the content and application of the laws. This makes the judiciary, charged with the supervision of democracy, the epicenter of constitutional government.

The idea that the federal judiciary wielding judicial review is an anomaly grafted onto popular government is mistaken. The judiciary is a republican institution in that it is connected to the people—but indirectly. Its members are nominated by the president and confirmed by the Senate.

America’s judiciary also is a republican institution because it stands not in opposition to, but in constructive tension with, the principle of majority rule. Democracy and distrust usually are, and always should be, entwined. American constitutionalism, with its necessary component of judicial review amounts to institutionalized distrust. It is not true that, as Dr. Stockmann declares in Henrik Ibsen’s *An Enemy of the People*, “the majority is always wrong.” It is true, however, that the majority often is wrong, and that the majority often has a right to work its mistaken will anyway. The challenge is to determine the borders of that right and to have those borders policed by a non-majoritarian institution—the judiciary.

Alexander Hamilton said that because the judiciary “may truly be said to have neither force nor will, but merely judgment” it will always be the branch “least dangerous to the political rights of the Constitution.”¹⁰ But Alexander Bickel considered judicial review philosophically and morally problematic because it makes the Supreme Court a “deviant institution” in American democracy.¹¹ The power to declare null and void laws that have been enacted by

⁹ Letter to the President of Congress, Sept. 17, 1787, in *The Papers of George Washington, Confederation Series*, vol. 5, Feb. 1, 1787–Dec. 31, 1787, 104–108 (W. W. Abbot, ed., 1997).

¹⁰ *The Federalist* No. 78 (Hamilton).

¹¹ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–17 (1962).

elected representatives of the people poses what Bickel called the “counter-majoritarian difficulty.”¹² This is, however, a grave difficulty only if the sole, or overriding, goal of the Constitution is simply to establish democracy and if the distilled essence of democracy is that majorities shall rule in whatever sphere of life where majorities wish to rule. Were that true, the Court would indeed be a “deviant institution.” But such a reductionist understanding of American constitutionalism is peculiar.

It is excessive to say, as often has been and still is said, that the Constitution is “undemocratic” or “anti-democratic” or “anti-majoritarian.” It is, however, accurate to say that the Constitution regards majority rule as but one component of a system of liberty. The most important political office is filled not by simple majority rule expressed directly but by the Electoral College. Supreme Court justices and all other members of the federal judiciary are nominated by presidents but must be confirmed by the Senate, whose members were, until the Seventeenth Amendment was ratified in 1913, elected indirectly by state legislatures. Of the major institutions created by the Constitution—Congress, the presidency, the Supreme Court—only one half of one of them, the House of Representatives, was, in the Framers’ original design, directly elected by the people. Furthermore, the Constitution has 11 supermajority provisions pertaining to amendments, ratification of treaties, impeachments, and other matters. All such supermajority requirements empower minorities.

One reason to empower minorities is that majority opinion often is not in any meaningful sense a judgment, meaning a conclusion reached on the basis of information and reflection. The processes of democracy are supposed to refine and elevate public opinion, not merely reflect it. But woe betide the political candidate who suggests that the public’s opinion needs to be refined and elevated, or even informed.

When Supreme Court Justice Antonin Scalia died in February 2016, Senate Republicans argued that his successor should not be confirmed until “the people” had spoken in that year’s presidential elections. It was, however, risible to assert that more than a negligible portion of the electorate had opinions about, say, constitutional originalism, or due fidelity to *stare decisis*, or the proper scope of

¹² *Id.* at 16.

Congress's power to regulate interstate commerce. The problem is not that translating public opinion directly into public policy would be imprudent, which it certainly would be. Rather, the problem is that public opinion, in any meaningful sense, hardly exists about many, even most, public policies.

Those whom Edmund Burke delicately called "the less inquiring" might be as large a portion of the population today as they were when Burke wrote in the late 18th century. Then, very few could vote, so the many had small incentive to be inquiring about politics and government. Today, everyone can vote but no one can believe that his or her vote is apt to matter, and few have the time or incentive to become conversant with the complexities of the policies administered by the gargantuan and opaque administrative state. As Madison said in his analysis of ancient democracies, the larger the group engaged in determining the government's composition and behavior, the larger will be the portion who are "of limited information and of weak capacities."¹³

There are two reasons why we should not be greatly concerned about the counter-majoritarian difficulty. First, much of what majoritarian institutions do is done not to satisfy a demand or even a desire of a majority; a vast majority is completely oblivious of most of what today's government does. Most voters most of the time are ignorant—rationally so—of the government's processes and activities. The second reason to not lose sleep over the counter-majoritarian difficulty is that majority rule is not the point of the American project.

Sentimentalists about democracy generally insist that its defects result because voters' views are sensible but ignored. It is, however, at least as often the case that democracy produces unfortunate results because voters' views are foolish but honored. Often the problem is not that government is unresponsive but that it is too responsive. The political class is prudently reticent about the subject of the electorate's competence at rendering judgments, and democracies generate an ethos of contentment about their premises. So there rarely is heard a discouraging word about voters' political knowledge. It was, therefore, bracing, if naughty, for Winston Churchill to say—if he actually did so, sources differ—that "the best argument against democracy is a five-minute conversation with the average voter."

¹³ The Federalist No. 58 (Madison).

Nevertheless, many voters' lack of information about politics and government is undeniable. It also often is rational. And it raises awkward questions about concepts central to democratic theory, including consent, representation, public opinion, electoral mandates and—this is perhaps the fundamental function of modern democracy—the ability of voters to hold elected officials accountable.

Scalia Law's Ilya Somin argues that, in general, an individual's ignorance of public affairs is essentially rational because the likelihood of his or her vote being decisive in an election is vanishingly small.¹⁴ But if choosing to remain ignorant—to not invest the time and effort necessary to become knowledgeable—is rational individual behavior, this can and often does have destructive collective outcomes. The quantity of political ignorance matters because voting is not merely an act of individual choice. It also is the exercise of power over others. And, says Somin, "the reality that most voters are often ignorant of even very basic political information is one of the better-established findings of social science."¹⁵

In the Cold War year 1964, two years after the Cuban Missile Crisis, only 38 percent of Americans knew the Soviet Union was not a member of NATO.¹⁶ In 2003, about 70 percent were unaware of enactment of the prescription drug entitlement, then the largest welfare state expansion since Medicare arrived in 1965.¹⁷ In a 2006 Zogby poll, only 42 percent could name the three branches of the federal government.¹⁸ Such voters cannot hold officials responsible because they cannot know what the government is doing, or which parts of government are doing what. So political ignorance is, as Somin says, "an obstacle to its own alleviation."¹⁹ Given that more than 20 percent of Americans think the sun revolves around the Earth, it is unsurprising that only 30 percent can name their two senators, and, even at the peak of a campaign, a majority cannot name any congressional candidate

¹⁴ See Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (2013).

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 20.

¹⁷ *Id.* at 187.

¹⁸ *Id.* at 239.

¹⁹ *Id.* at 220.

in their district.²⁰ According to a 2002 Columbia University study, 35 percent then believed that Karl Marx's "From each according to his ability, to each according to his needs" is in the U.S. Constitution.²¹

Many people acquire political knowledge for the reason many people acquire sports knowledge—because it interests and entertains them, not because it will alter the outcome of any contest. And with "confirmation bias," many people seek political information to reinforce their pre-existing views. Committed partisans are generally the most knowledgeable voters, independents the least. And the more political knowledge people have, the more apt they are to discuss politics with people who agree with them. A normal citizen learns about the politics of the day in the same way that a child first learns a language—by a blend of observation and osmosis of the conversation of society going on around the child.

The average American expends more time becoming informed about choosing a car or appliance than choosing a candidate. But then, the consequences of the former choices are immediate and discernible; the consequences of choosing a candidate often are neither. "The single hardest thing for a practicing politician to understand," said an experienced and successful politician, Britain's Tony Blair, "is that most people, most of the time, don't give politics a first thought all day long. Or if they do, it is with a sigh."²²

All of this should inform our thinking about how troubled one should be about the supposed "counter-majoritarian difficulty" that troubled the distinguished scholar who coined that phrase, Alexander Bickel. How troubled should we be? Not very.

The Constitution, which is replete with proscriptions, tells Americans a number of things they cannot do even if a majority of them want them done. Nevertheless, there is a recurring impulse to argue that courts should have a somewhat majoritarian mentality, or that they should be directly subjected to majoritarian supervision. In his 1912 campaign, Theodore Roosevelt argued that "when a judge decides a constitutional question, when he decides what the people as a whole can and cannot do, the people should have the right to

²⁰ *Id.* at 91.

²¹ *Id.* at 20.

²² See Fareed Zakaria, *The Convert*, N.Y. Times (Oct. 8, 2010), available at <https://nyti.ms/2H5NT2C>.

recall the decision if they think it wrong." In Hillary Clinton's 2016 presidential campaign she said, "The Supreme Court should represent all of us." Actually, it should "represent" no one. Not if we understand representation to mean serving as a mirror to the public. "Reflecting" what, exactly? Or weighing "the people's" or a faction's "interests." Interests in what, exactly?

Abraham Lincoln spoke more judiciously about the sometimes ambiguous role of the Supreme Court in America's democracy. In his first Inaugural Address, he asserted that "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."²³ This is true, but note the adverb "irrevocably." Lincoln understood as well as any politician before or since that in a democracy everything depends, ultimately, on public opinion, and public opinion is shiftable sand.

So, too, is opinion among that small sliver of the public that thinks about how to responsibly apply the Constitution to the constantly changing circumstances of this dynamic Republic's ever-churning society.

In a recent column suggesting questions that senators might usefully ask in confirmation hearings for Supreme Court nominees, I included this one: Can you cite an important constitutional provision the meaning of which today is the same as the public meaning of the provision's text when it was written and ratified? And I said: The nominee certainly could not cite the regulation of interstate commerce. Or the establishment of religion. Or abridgments of freedom of speech. Or government takings of private property for public use. Or the prohibition of cruel and unusual punishments.

In a supposed refutation of the point I was making, a critic wrote: "I certainly consider the fact that all members of the House are elected every two years important."²⁴ To which, I would reply: That provision is important, perhaps, but uninteresting. It is so because this

²³ Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), available at <https://bit.ly/1jKQbSw>.

²⁴ Ramesh Ponnuru, A Reply to George Will's Questions for Kavanaugh, National Review, Sept. 4, 2018, <https://bit.ly/2IWK4OS>.

provision has never occasioned—it could not occasion—a controversy concerning constitutional reasoning (as distinct from policy reasoning). The same is true of the requirement that members of the House and Senate must be at least 25 and 30 years old, respectively. Or that presidents must be at least 35. What is interesting, however, is how little of the Constitution consists of such technical and unambiguous provisions. There is no scholarship seeking to establish the original public meaning of the phrase “have attained to the Age of twenty five Years.” The stuff of constitutional law are what former Justice David Souter calls the Constitution’s many “deliberately open-ended guarantees.”²⁵

When in a 1958 case Chief Justice Earl Warren said that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,”²⁶ he referred to a fact: Standards of decency do evolve. Which is not to say that they invariably become better; “evolving” is not a synonym for “improving.” Still, it would be peculiar to insist that a conscientious originalist in the 21st century must construe the Eighth Amendment’s proscription of “cruel” punishments with reference to the 18th-century public understanding of cruelty. Surely an originalist analysis should say: The Eighth Amendment’s meaning is that the Framers intended a society in which government would not practice cruelty, and it falls to every generation to guarantee that its practices conform to this original meaning.

Yale Law School’s Jack Balkin calls for fidelity to the original meaning of the Constitution’s text as this meaning is derived with reference to the rules, standards, and principles explicitly or implicitly in the text.²⁷ The Constitution, he says, is basically “a plan for politics.”²⁸ Its practical initial purpose was to ignite American politics. Its long-term purpose was, and remains, to make politics safe, meaning not dangerous to liberty. Balkin does not recommend just this or that doctrine of constitutional construction. Rather, he recommends

²⁵ David Souter, Justice, U.S. Supreme Court, Remarks at Harvard Commencement Ceremony (May 27, 2010), <https://bit.ly/2HjCuLI>.

²⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁷ Jack M. Balkin, “Must We Be Faithful to Original Meaning?,” 7 *Jerusalem Rev. of Legal Stud.*, No. 1 57–86 (2013).

²⁸ *Id.* at 61.

“using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent.”²⁹

Advocates of “originalism”—adhering to the original public meaning of the words of the text—should not simply favor what Balkin terms “the original expected application” of the text.³⁰ Rather, they should discern and apply to contemporary circumstances the original intent of the Framers. Balkin terms this idea “living originalism”: “In every generation, We the People of the United States make the Constitution our own by calling upon its text and its principles and arguing about what they mean in our own time.”³¹

It took time, meaning historical learning, for the nation to come, a century after ratification of the Fourteenth Amendment’s affirmation of equal national citizenship, to the conclusion that this required equal rights for women. The doctrine of “original expected applications” could not countenance this just outcome. The fact that the Framers adopted “general and abstract” concepts meant that subsequent generations would have no alternative to working out the scope and application of the abstractions to changing concrete circumstances. Hence, as Balkin says, the Constitution commits the country to “the tradition of continuous arguments.”³²

This guarantees the perpetual frustration of all those who hanker for a theory of constitutional construction that will deliver the serenity of finality. It also consigns all generations to endless arguing. The fact that ratification of the Constitution meant a contentious American future was, Balkin notes, immediately demonstrated by the heated argument that erupted—and provoked the emergence of political parties, which the Framers neither desired nor anticipated—about whether the Constitution’s enumeration of Congress’s powers authorized Congress to charter a national bank. In this argument, Hamilton and Madison, who wrote 80 of the 85 Federalist Papers, were at daggers drawn.

It is not quite right to say, as Justice Scalia did, that the Constitution’s “whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take

²⁹ Jack M. Balkin, *Living Originalism* 4 (2011).

³⁰ *Id.* at 107.

³¹ *Id.* at 11.

³² *Id.* at 16.

them away.”³³ Rather, the government’s Madisonian architecture was designed to refine and elevate opinion so that future generations would not want to take away important rights. Strong desires that majorities have over time are probably going to be satisfied eventually, so attention must be paid to the shaping and moderating of those desires.

Be that as it may, those of us who believe that courts have been too permissive in discerning and deferring to a merely “rational basis” for this or that legislative action advocate a more engaged judiciary. The principle of judicial restraint, distilled to its essence, is that an act of the government should be presumed constitutional, and that the party disputing the act’s constitutionality bears the heavy burden of demonstrating unconstitutionality beyond a reasonable doubt. The contrary principle, the principle of judicial engagement, is that the judiciary’s primary duty is to defend liberty, and that the government, when it is challenged for an action that limits the liberty of the individual, or of two or more individuals engaged in consensual collaborative undertakings, bears the burden of demonstrating that its action is in conformity with the Constitution’s architecture, the purpose of which is to protect liberty.

The government dispatches this burden by demonstrating that its action is both necessary and proper for the exercise of an enumerated power. A state or local government dispatches the burden by demonstrating that its act is within the constitutionally proscribed limits of its police power.

Does judicial engagement make the judicial branch dangerous to the current scope of what is called, with much imprecision, majority rule? The one-word answer is: Yes. A three-word answer is: Not nearly enough.

How much would be enough? It is impossible to stipulate using precise guiding principles. We can, however, say this: When the Constitution’s Framers wrote its text, they committed speech acts that derive their meaning from their overarching intent in producing a document to create institutions consonant with America’s purpose as stated in the Declaration of Independence.

³³ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 40 (Amy Gutmann ed., 1997).

Today there is a quest for something that has proved, and always will prove, elusive—a single approach, distilled into a concise doctrine, for construing the Constitution, with means for applying it to concrete cases and controversies. So, I regret to say, there is today a similarity between the intensity of doctrinal hairsplitting among constitutional scholars in their quest for decisive certainty and final clarity and the factionalism within the American Communist Party in the 1920s and 1930s—when the number of ideological schisms was more impressive than the number of the party’s members. At one point, a faction that was loyal to Jay Lovestone was denounced by protestors wielding signs that read: “Lovestone is a Lovestonite.” This accusation was true, but not clarifying.

Neither was Justice Clarence Thomas very clarifying when, in a 1996 speech, he said, “The Constitution means not what the Court says it does but what the delegates at Philadelphia and at the state ratifying conventions understood it to mean. . . . We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change.”³⁴

The meaning, however, is not fixed only by how the delegates and the conventions understood the immediate applications of what they were doing. If they understood their handiwork as providing institutional means to the Declaration’s ends, then the fixed meaning of the Constitution is to be found in its mission to protect natural rights and liberty in changing—unfixed—circumstances. Fidelity to the text requires fidelity to some things that were, in a sense, prior to the text: the political and social principles and goals for which the text was written. It was written to be instrumental to goals served by the principles.

With an asperity born of exasperation, Scalia once wrote, “If you want aspirations, you can read the Declaration of Independence,” but “there is no such philosophizing in our Constitution,” which is “a practical and pragmatic charter of government.”³⁵ Oh? Are we to conclude that philosophy is impractical and unpragmatic? There is no philosophizing in the Constitution—until we put it there by construing it as a charter of government for a nation that is,

³⁴ See Myron Magnet, “The Founders’ Grandson, Part II,” *City Journal* (Winter 2018), <https://bit.ly/2Hjvyy6>.

³⁵ See Scalia, *supra* note 33, at 143.

in Lincoln's formulation, dedicated to a proposition that Scalia dismissed as "philosophizing," the proposition that all men are created equal in possession of natural rights.

In the words of constitutional scholar Walter Berns, the Constitution is related to the Declaration "as effect is related to cause."³⁶ Or as Lincoln said in his "House Divided" speech, the Constitution is the "frame of silver" for the "apple of gold," which is the Declaration.³⁷ Silver is valuable and frames serve an important function, but gold is more valuable and frames are of subsidiary importance to what they frame. Today, the apple nourishes those of us who believe that the judiciary has been much too accommodating to legislatures that are too responsive to majorities, or to make-believe majorities, that are too indifferent to individual rights.

About all this there are, always have been, and always will be, strong differences of opinion. So, if you do not like constant high-stakes arguments about fundamental things, you should try another country. If, however, controversy is for you, as it is for me, life-sustaining oxygen, step inside conservatism's big tent.

Four decades have passed since an intellectual Democrat who became my best friend, Daniel Patrick Moynihan, said, with a mixture of admiration and regret, that the Republican Party had become the party of ideas. Recently the party has worked hard to refute that description. This much, however, remains true: The most interesting American political arguments today are not between progressives and conservatives but rather are intramural arguments among conservatives. It also is true that arguments within a family sometimes have a particularly serrated edge.

Never mind. Human beings are, as Aristotle said, language-using creatures. More precisely—forgive my audacity in presuming to improve Aristotle—human beings are persuading and persuadable creatures. Which is why things like the Cato Institute exist, and why we are here today, and why constitutional argument is such

³⁶ See Steven Hayward, *Patriotism Is Not Enough: Harry Jaffa, Walter Berns, and the Arguments that Redefined American Conservatism* 145, 168 (2017).

³⁷ Abraham Lincoln, *Fragment on the Constitution and the Union* (c. Jan., 1861), in 4 *The Collected Works of Abraham Lincoln* 168, 169 (Roy P. Brasler ed., 1953). Compare with Proverbs 25:11 (King James) ("A word fitly spoken is like apples of gold in a pictures of silver").

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exhilarating fun, and why I am grateful to Roger Pilon for the privilege of participating in today's episode in America's unending argument about fundamental things.

But speaking of fun, I am acutely aware that I am standing between this audience and good food and adult beverages. So, I shall now subside, serenely confident that what I have said will ignite arguments that will begin as I say to you: Thank you for allowing this non-lawyer to step onto your turf.