

# Poetic Law: A Statement on Intent

*Maxwell L. Stearns\**

## INTRODUCTION

### I.

In poetry, allegiance to the verse  
Lends power to the message in the text.<sup>1†</sup>  
Shakespeare's consistency gave his words force  
In Hamlet,<sup>2</sup> in King Lear,<sup>3</sup> and in Macbeth.<sup>4</sup>

And yet upon us, free form's presence reigns—  
Defenders claim, expands the poet's choice.<sup>5</sup>  
Removing from the poet meter's chains,  
Is likened to providing the mute, voice.<sup>6</sup>

The product of free meter's liberty  
Is rarely of the genius we'd expect;<sup>7</sup>  
When it's compared with Shakespeare's poetry,  
The power of the meter gains respect.<sup>8</sup>

And still, at times, for Shakespeare to succeed,  
Near rhyme was a device that he employed.<sup>9</sup>

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† Notes begin on page 207.

## II.

The Gettysburg Address<sup>10</sup> was not in verse.  
The start, but for one foot, though, meters well,<sup>11</sup>  
And still it benefits from being terse<sup>12</sup>—  
The power Lincoln's words to this day tell.<sup>13</sup>

Perhaps without exigency of time  
And pressing need the Civil War to end,  
Abe Lincoln could have set his speech to rhyme;  
Of course, we know he lacked the time to spend.

"The Tempting of America,"<sup>14</sup> we're told,  
By Robert Bork, L. Graglia,<sup>15</sup> and their friends,  
Is oft to elevate the jurist's role,  
To reach more quickly desired jurist's ends.<sup>16</sup>

The implication, Bork tells us, is clear:  
Supplanted democratic norms is near.<sup>17</sup>

## III.

For all, concerns this large should cause alarm.  
Our government's, we're told, of laws, not men.<sup>18</sup>  
If self-rule is removed, the Court does harm—  
Our fate to just two women, seven men.<sup>19</sup>

The lessons of the past we're told are clear,  
Though some mistakes we're told we may forgive,  
Like *Griswold*<sup>20</sup> and like *Eisenstadt v. Baird*,<sup>21</sup>  
But "sin no more" you nine!<sup>22</sup> Let freedom live.

And other errors past need not, we're told,  
Have parted from the magic of the verse.  
*Brown versus Board of Ed.*<sup>23</sup> was wrongly sold<sup>24</sup>  
By Warren, aching to change his'try's course.

Perhaps, indeed, the case could fit the rhyme;  
Perhaps, instead, its justice endured time.

## IV.

Still others claim original intent  
Is legal fiction at its worst abuse.<sup>25</sup>  
Collective words, the Framers could invent;  
Collective will, is ever so obtuse.<sup>26</sup>

A theorem we are told of “social choice,”  
A body with three options can’t decide,<sup>27</sup>  
Has caused some academics to rejoice—  
They’d rather on the bench such choice reside.<sup>28</sup>

It’s not just Arrow’s Theorem<sup>29</sup> they embrace<sup>30</sup>  
As grounds for judges’ freedom from intent.  
The sentiment, pre-Arrow, we can trace  
To advocates who’d rather circumvent.<sup>31</sup>

Collective will, the theorem may dispel,  
Especially for those it serves least well.<sup>32</sup>

## V.

And those who hoped to send our judges down  
A path, no sign the Framers meant to take,  
By claiming that intent we can’t discern,  
Have left penumbral discourse in their wake.<sup>33</sup>

Integrity of law is sacrificed,  
For those who care enough to read the text.  
Results that were achieved have not sufficed;  
Instead, they’ve left law students more perplexed.

A struggle has emerged within the law,  
Between those who see liberty’s decline,<sup>34</sup>  
And those who claim intent is but a flaw,  
Who argue for the justice courts divine.<sup>35</sup>

The fervor on both sides has reached a peak;  
Some middle ground, this author hopes to seek.

## NO RATIONALE'S REQUIRED FOR INTENT

## VI.

For Posner<sup>36</sup> and for Dworkin,<sup>37</sup> oddly paired,  
A rationale's required for intent.<sup>38</sup>  
Yet Lino Graglia's retort's unimpaired—  
For him no answer's more self-evident.<sup>39</sup>

The function of the judge is well-defined,  
To discern in disputes the rule from text.  
If unclear, then, what drafters had in mind,  
Though imperfect, at least is second best.<sup>40</sup>

"Persuasive definition"<sup>41</sup> can't evade,  
The limits he thinks judges understand.  
Without such limits law becomes judge-made,  
A practice many think is out of hand.

Are limits Graglia seeks, if well advised,  
The normative, as positive, disguised?

## VII.

Bork tells us that the issue is quite old,  
Debated first in *Calder versus Bull*,<sup>42</sup>  
And though repackaged, isn't better sold,  
To meet the prose of Justice Iredell.<sup>43</sup>

In *Calder*, Chase called natural the law,  
He thought he was empowered to impose,<sup>44</sup>  
But through this so-called nature Ir'dell saw;  
It would not bear to scrutiny up close.<sup>45</sup>

The terms debated now are sometimes changed,<sup>46</sup>  
Though Thomas, J. knew nat'ral law quite well,<sup>47</sup>  
And at his confirmation he arranged,  
His rumoured applications to dispel.<sup>48</sup>

"Conservative" or "lib'ral" won't suffice;  
Original intent, both sacrifice.

## VIII.

Perhaps the Framers at the start of time  
Knew that the text invented would expand,  
And like the critics' prose on Shakespeare's rhyme,  
Interpretations too would gain command.<sup>49</sup>

The universe, so large, we're told, was small,<sup>50</sup>  
Before the concept, time, for us began,<sup>51</sup>  
A dense infinity into a ball,<sup>52</sup>  
To reconstruct the start, no human can.<sup>53</sup>

And with the world the Constitution met.  
A synergistic process did begin.  
Interpretations read into the text  
Took some provisions out,<sup>54</sup> put others in.<sup>55</sup>

Though few can understand the universe,  
Perhaps law's better served if kept in verse.

## IX.

And yet departures from the verse endure,  
Though some are well-respected, others not;  
And other than the process, few deplore  
The goals achieved in *Brown*<sup>56</sup> that Warren sought.

And some results, though doubted at the time,  
Have grown in years to come to gain respect.  
*Miranda*<sup>57</sup> rights seem not to fit the rhyme,  
Though few seek, this departure, to correct.

Still other rights created fared less well—  
Our ever changing Court has chipped away—  
Exclusion suffered in *Stone v. Powell*;<sup>58</sup>  
Abortion rights are most unclear today.<sup>59</sup>

Although we may respect intent's refrain,  
The world in which we live, it can't explain.

## X.

Because intent as theory's incomplete  
And Arrow's Theorem spells for some demise  
Of legislature's promise to compete  
With courts to set forth policy that's wise,

Some willingly accept the jurist's role  
In hopes of favored rulings to obtain;  
Democracy, although a lofty goal,  
In practice, for them, is a worn refrain.<sup>60</sup>

Perhaps for those who willingly embrace  
The power of the courts to make the law,  
The limits of our government replace  
The greater fears we know the Framers saw.

Perhaps it's true that Churchill said it best—  
Self-rule's the worst, except for all the rest.<sup>61</sup>

OUR THEORY NEEDS MORE POWER TO EXPLAIN

## XI.

An irony, in theory, with intent,  
That isn't oft' the source of much debate,  
Is that the Framers chose not to invent  
A weapon, for free form, to obviate.

For Hamilton, the judgment of the law  
Would limit Congress' power to create.  
And fear of judges' will, although he saw,  
To judgment, he thought they'd subordinate.<sup>62</sup>

Superior to all would be the will  
Expressed within the boundaries of the text;<sup>63</sup>  
The judges' role was merely to distill,  
When from those bounds the Congress did transgress.

Though will he knew the judges may apply,  
The judges' will he still chose to supply.<sup>64</sup>

## XII.

While true that there is power to reprise,  
Against those who make policy their own,  
Impeachment<sup>65</sup> and Court-packing don't suffice;<sup>66</sup>  
Two centuries, the Court was left alone.<sup>67</sup>

Perhaps we've simply burdened the inert<sup>68</sup>  
With cases that express the views of few,<sup>69</sup>  
And lacking the incentives to subvert,<sup>70</sup>  
Society has grown accustomed to

Accepting as the law the Court's refrain  
On issues most do not have time to spend—  
To learn for most would truly be in vain—  
They hope the Justices, our rights, defend.

Perhaps most think the Justices have saved  
Our travels down the path, some claim, they've paved.

## XIII.

An issue public choice theorists debate  
Is whether it is rational to vote.<sup>71</sup>  
A change in outcome one vote can't create.<sup>72</sup>  
Yet, time, so many people still devote.<sup>73</sup>

If true that voting we cannot explain,  
Desire to learn the law is more in doubt.  
So many people know they can't obtain  
A change in rulings, few can figure out.

Yet some rulings the public knows quite well—  
Indeed, some outcomes lead to public rage—  
Abortion rights, the text does not compel!<sup>74</sup>  
The right to flag burn's nowhere on the page!<sup>75</sup>

But people simply will not spend the time  
And effort to improve on Shakespeare's rhyme.

## XIV.

And still more difficult than near rhyme's flaw  
Are cases, in free form, that rectify,  
Like *Brown v. Board of Ed.*<sup>76</sup> in fifty-four,  
Extreme injustices of time gone by.

The years of outrage finally subdued,  
Despite apparent free form by the Court.  
For some, the poetry became unglued;<sup>77</sup>  
For some, an excuse welcome to subvert.<sup>78</sup>

And Bork attempts to reconstruct the verse,  
And claims a major premise from the text,  
Applied in times that changed gained a new force<sup>79</sup>  
In hopes that verse will gain, anew, respect.

The premise, equal justice, to achieve,<sup>80</sup>  
Is one, based on intent, some don't believe.<sup>81</sup>

## XV.

And so, de jure, schools we integrate,  
A policy most base not on the text,<sup>82</sup>  
And, too, the Bill of Rights, incorporate;  
The selectivity, though, leaves some vexed.<sup>83</sup>

If based upon intent, why some, not all?  
If based upon free form, why then attempt  
To limit to the text the rights that fall  
Upon the states that hold them in contempt?<sup>84</sup>

Perhaps an insight drawn from sonnets past—  
A tool that Justice Black oft' used in verse<sup>85</sup>—  
To impose rights that for all time will last,  
Near rhyme's not best, but free form sure is worse.<sup>86</sup>

Black beat Frankfurter in the last debate,<sup>87</sup>  
And so selectively, incorporate!



## A BETTER EXPLANATION WE'LL INVENT

## XVI.

The power to amend, as often seen,  
The exercise of which is circumspect,  
Is limited, post-Bill of Rights, sixteen,<sup>88</sup>  
And, of those, only four were to correct.<sup>89</sup>

Amendments, once enacted, endure time.  
Though rare, this power's one we can't ignore.  
The Gettysburg Address still doesn't rhyme,<sup>90</sup>  
But much was set to verse, post-Civil War.<sup>91</sup>

The Thirteenth fin'ly freed the slave Dred Scott;<sup>92</sup>  
The Fourteenth and the Fifteenth did provide  
Rights Taney claimed the verse he read, did not.<sup>93</sup>  
Another stanza had to be supplied.

Advances that resulted were quite great.  
But was the poetry well worth the wait?

## XVII.

While Hamilton predicted that the Court  
Had power to invalidate the law  
That with the text, it thought, did not comport,  
It's also true he recognized a flaw.<sup>94</sup>

If Justices would exercise their will,  
Instead of judgment based upon the text,  
They may usurp, improperly, until  
The people finally demand respect.

To limit, still, the pressures on the Court,  
That on the other branches heav'ly weigh,  
The Framers chose protections to impart;  
It's no surprise the verse is mixed today.

If free form does not always cause alarm,  
Does liberty, the Court, threaten to harm?

## XVIII.

Economists will tell you there's a choice.  
Efficiency exists in abstract form.  
To redistribute wealth, some will rejoice.  
The choice is normative; they can't inform.<sup>95</sup>

Supply siders claim it is a mistake;  
Society will suffer overall  
If from those who invest we choose to take  
To give to those who will consume it all.<sup>96</sup>

We credit people's wisdom at the polls.  
We claim it's in the people to decide.  
And yet when people choose, their eyes, to close,  
Some fear it spells democracy's demise.

To analyze the law, most lack the time.  
But most are smart enough to know a rhyme.<sup>97</sup>

## XIX.

And yes, we pay a price to insulate  
The exercise of judgment over will,  
And hope the powers that we concentrate  
In few, they won't abuse, at least until

The people hear described a wondrous coat,  
Upon an emp'ror bare before their eyes,<sup>98</sup>  
And know the last opinion the Court wrote  
Was free form, valliant efforts can't disguise.

But if the answer rendered strikes a chord  
That people, Court's transgressions, will forgive,  
Although the scholar may remain untoward,  
Can he condemn the world in which we live?

The power's with the people, yes, it's true.  
The power not to act is power too.<sup>99</sup>

## XX.

The business of America, we're told,  
Is self-defined.<sup>100</sup> Indeed, that may be true.  
Its avocation, if I may be bold,  
Is to define ourselves, and rests with you.

And to the scholars we all owe our debt  
For helping us with this most awesome task.  
But more importantly, we can't forget,  
The answer's ours; all they can do is ask.

Through history we've shown more than one way,  
Our power, to assert, when we conclude,  
The Court has let us down, has gone astray,  
To bring it into line, we must intrude.

Perhaps the only thought that I can add  
Is that, when wise, free form's not always bad.

AND SADLY THIS WILL BE OUR LAST REFRAIN

## XXI.

And to the final sonnet we now go,  
And saddened, though, our poem now must end.  
Of course, we know that poetry will grow.  
In free form or in verse? It will depend.

The point of the Big Bang<sup>101</sup> was not the start.  
The middle is the world in which we live.<sup>102</sup>  
And so, a word on text, before I part;  
If guarded, growth, this Author can forgive.

That's not to say that free form I adore.  
Integrity and verse go hand in hand.  
But near rhyme's fine. I will not ask for more.  
Occasional free form, I understand.

And last, the words of Churchill,<sup>103</sup> now revised:  
No better system yet has been devised.

1. See, for example, Jack Stillinger, ed., *William Wordsworth: Selected Poems and Prefaces* 458 (Houghton Mifflin, 1965) (noting that "metre obeys certain laws, to which the Poet and Reader both willingly submit because they are certain . . . the concurring testimony of ages has shown to heighten and improve the pleasure which co-exists with it" (quoting Wordsworth's preface to the second edition of *Lyrical Ballads*)). One of the virtues of fixed poetic meter is that it provides a consistent standard with which to compare works of different poets and eras. See Timothy Steele, *Missing Measures: Modern Poetry and the Revolt Against Meter* 33 (U. of Arkansas, 1990). Steele observes:

Metric is more stable and less local [than is free verse]. It is an abstraction; it comprises a measure or measures by means of which speech can be organized into particular rhythmical patterns. Poets far apart in time can use the same meter. Shakespeare and Wordsworth, though of different eras and outlooks and idioms, both employ iambic pentameter.

Id.

2. William Shakespeare, *The Tragedy of Hamlet*.

3. William Shakespeare, *The Tragedy of King Lear*.

4. William Shakespeare, *The Tragedy of MacBeth*. In Delbert Spain, *Shakespeare Sounded Soundly: The Verse Structure & The Language* (Garland-Clarke, 1988), the author explains:

The verse of Shakespeare's play dialogue, with a few exceptions, is *iambic pentameter*, generally blank verse but occasionally rimed. The term *blank verse* refers to unrimed poetry, and it has come to mean particularly such verse with this structure. The term *pentameter* refers to the division of the line into five *feet*, and the term *iambic* to the type of foot or measure.

Id. at 10. An *iamb* is a two syllable foot in which only the latter syllable is stressed. Id. at xii. For an accessible guide that defines these and other terms related to the study of poetry, see generally Alex Preminger, ed., *Princeton Encyclopedia of Poetry and Poetics* (Princeton U., 1974).

In discussing Shakespeare's use of iambic pentameter, also referred to as heroic verse, Spain adds: "These rhythmic units of line and foot are the characters that distinguish metric verse from prose. They do not make the verse poetry, but they do make it something besides prose." Spain, *Shakespeare Sounded Soundly* at 10. While "English speech falls naturally into the iambic pattern," that tendency does not undermine the powerful poetic quality Shakespeare created through the consistent use of blank verse in his plays. Id. at xii. See also note 11; T.S. Eliot, *The Music of Poetry*, in *On Poetry and Poets* 17, 29 (Farrar, Straus, 1957) (stating that "[t]he poet who did most for the English language is Shakespeare"); Steele, *Missing Measures* at 106-07 (cited in note 1) (observing that "we admire [Dante, Shakespeare, and Dickinson] in part because they write distinctively and vitally in meter").

5. See Steele, *Missing Measures* at 30. Steele explains:

The modern movement's leaders commonly argue that theirs is a rebellion against an antiquated diction and subject matter, and is, as such, precisely the rebellion that "modernists" of all ages have had to undertake to keep poetry vitally engaged with the speech and life of its time. Free verse, according to this argument, does not signify a rejection of traditional poetic discipline, but is rather an innovation of the kind which normally accompanies changes in style and taste.

Id. See also Eliot, *Music of Poetry* at 31 (noting that "[free form] was a revolt against dead form, and a preparation for new form or for the renewal of the old; it was an insistence upon the inner unity which is unique to every poem, against the outer unity which is typical"). But compare T.S. Eliot, *Reflections on "Vers Libre"*, in *To Criticize the Critic* 183, 189 (Farrar, Straus, 1965). Eliot observed:

And as for *vers libre* [free verse], we conclude that it is not defined by absence of pattern or absence of rhyme, for other verse is without these; that it is not defined by non-existence of metre, since even the *worst* verse can be scanned; and we conclude that the di-

vision between Conservative Verse and *vers libre* does not exist, for there is only good verse, bad verse and chaos.

Id.

6. Compare Steele, *Missing Measures* at 30-31 (describing the motivations behind the free verse movement); Eliot, *Music of Poetry* at 31 (describing *vers libre* as "revolt against dead form").

7. See, for example, T.S. Eliot, *Johnson as Critic and Poet*, in *On Poetry and Poets* 184, 209 (Farrar, Straus, 1957) (describing modern poetry as a "riot of individual styles" and asserting that "originality, when it becomes the only, or the most prized virtue of poetry, may cease to be a virtue at all; and when several poets . . . cease to have in common any standards of versification, any identity of taste or of tenets of belief, criticism may decline to an advertisement of preference"); William Carlos Williams, *Selected Essays of William Carlos Williams* 339-40 (Random House, 1954) (positing that "free verse" . . . has led us astray" and that "[w]ithout measure we are lost"). But compare Eliot, *Music of Poetry* at 31 (stating that "[a]s for 'free verse[,] . . . no verse is free for the man who wants to do a good job").

8. See Williams, *Selected Essays* at 339-40. Williams observes:

[Free verse] was an idea lethal to all order, particularly to that order which has to do with the poem. . . . We have no measure by which to guide ourselves except a purely intuitive one which we feel but do not name. . . . It is all over the page at the mere whim of the man who has composed it. This will not do.

Id. See also Eliot, *Music of Poetry* at 31 (arguing that "only a bad poet could welcome free verse as a liberation from form"); Steele, *Missing Measures* at 285 (cited in note 1) (stating that "[i]t seems terribly simple-minded to say of a medium that allowed for the poems of Homer and Virgil and Dante and Shakespeare that it is a straitjacket").

9. The modern reader of Shakespeare must be cautious in identifying near rhyme, sometimes referred to as slant rhyme or half rhyme. See Preminger, ed., *Princeton Encyclopedia of Poetry and Poets* at 336, 556, 771 (cited in note 4). Thus, Spain explains:

You will note that many rimes in Shakespeare are not so in current English. For instance, *wind* (that blows) rimed with *kind*, and did so long after Shakespeare. And there are many slant rimes for us, some of which were so for the poet and others that were perfect. Examples of these are *bear-fear*, *love-move*, *feast-guest*, and *waste-hast*.

Spain, *Shakespeare Sounded Soundly* at 45 (cited in note 4). The author adds: "It may not be impossible, in some cases where rime seems essential, to wrench the vowels slightly, but generally we can do nothing more than ignore them." Id. To illustrate the problem Spain identifies, compare the following lines from Hamlet: "This must be known; which, being kept close, might move/More grief to hide than hate to utter love[,]" William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, act 2, sc. 1, ll. 118-20 (Irving Ribner and George Lyman Kittredge, eds., Ginn, 1971); with these lines from MacBeth: "And mounch'd, and mounch'd, and mounch'd. 'Give me,' quoth I./Aroint thee, witch!' the rump-fed ronyon cries[,]" William Shakespeare, *The Tragedy of MacBeth*, act 1, sc. 3, ll. 4-6 (Irving Ribner and George Lyman Kittredge, eds., Ginn, 1971).

Near rhyme is not the only deviation from pure form in Shakespearean verse. After describing others, Spain observes:

The deviations in the pattern are often regarded as licenses that the poet takes presumably because it is just too difficult to write absolutely regular verse; they are frequently thought of as little imperfections. Actually the deviations are not licenses, but variations on the verse pattern, sometimes random, usually carefully controlled.

Spain, *Shakespeare Sounded Soundly* at 11. For a discussion of rhyme usage in Shakespeare's plays, see generally Fredric W. Ness, *The Use of Rhyme in Shakespeare's Plays* Ch. 4 (Yale U., 1941). Ness explains that while Shakespeare generally wrote plays in nonrhymed blank verse, he did use rhyme at deliberate intervals to let the audience know that a change in scene was about to take place. Id.

10. The Gettysburg Address is reprinted in Garry Wills, *Lincoln at Gettysburg: The Words that Remade America* 263 (Simon & Schuster, 1992). Wills observes that the name "the Gettysburg Address" is a misnomer: "There was only one 'oration' announced or desired [at

Gettysburg]. Though we call Lincoln's text *the* Gettysburg Address, that title clearly belongs to Everett. Lincoln's contribution, labeled 'remarks,' was intended to make the dedication formal. . . ." *Id.* at 35.

11. See *id.* at 263. Adding to the first line one *iamb* converts it into iambic pentameter: "[A mere] [f]our score and seven years ago." Absent the addition, the language itself contains a powerful poetic quality. The Gettysburg Address has been the subject of close study precisely because of Lincoln's word choice and imagery, critical tools for the poet. See Wills, *Lincoln at Gettysburg* at 62. Wills observes that "Lincoln, like most writers of great prose, began by writing bad poetry. . . . He was a student of the word." *Id.* at 149. Wills adds that "[b]ecause of his early experiments, Lincoln's words acquired a flexibility of structure, a rhythmic pacing, a variation in length of words and phrases and clauses and sentences, that make his sentences move 'naturally,' for all their density and scope." *Id.* at 157-58 (footnote omitted).

In another sense, more important to the theme of these sonnets, the Gettysburg Address was deliberately not in verse in that it premised Lincoln's definition, and ultimately that of the nation, of what the United States represents not on the then-existing Constitution, which codified and thereby legitimated racial inequality, but rather on the critical concept underlying the Declaration of Independence that "all men are created equal." See *id.* at 39, 105. See also Sonnet XVI and accompanying notes; David Luban, *Difference Made Legal: The Court and Dr. King*, 87 Mich. L. Rev. 2152, 2205-06 (1989) (stating that "Lincoln . . . in the Gettysburg Address, claimed that the true meaning of America lay in Jefferson's Declaration of Independence rather than in the Constitution. . . . [W]e are inclined to read this sentence . . . without realizing that it is a powerfully heretical—because deconstitutionalized—interpretation of the meaning of American history").

It is perhaps not surprising that poetic, and specifically *iambic*, qualities pervade powerful English prose, given that the English language is uniquely conducive to *iambic* meter. See note 4. For a wonderful illustration, consider the following (slightly) edited sentence by Oliver Wendell Holmes in *Towne v. Eisner*, 245 U.S. 418, 425 (1918): "A word is not a cryst[al], transparent and unchanged, it is the skin of . . . living thought. . . ." Although not written as poetry, the sentence is, with the slight edits, perfectly *iambic*. While English is exceptionally conducive to *iambic* form, however, that does not remove the difficulty associated with consistent adherence to that form, nor does it remove the inherent tension between that form and the logical structure of the language. Consider, for example, the following line from T.S. Eliot's *The Waste Land*: "Above the antique mantel was displayed." T.S. Eliot, *The Waste Land and Other Poems* 26, 30 (Farber, 1948). While the form requires a stress on every second syllable, properly read the stresses are as follows: "Above the antique *man*tel was *dis*played," with the stresses on two syllables instead of five. The Author is indebted to Judge Richard Posner for providing the T.S. Eliot illustration of the tension between sense and form in poetry. The same tension between mechanical and strict application of rules, on the one hand, and emphasis on sense, which requires that the decisionmaker apply judgment, on the other hand, applies in efforts to abide consistently an originalist methodology in constitutional interpretation.

12. See Wills, *Lincoln at Gettysburg* at 40 (observing that "[w]ithout Lincoln's knowing it himself, all his prior literary, intellectual, and political labors had prepared him for the intellectual revolution contained in those fateful 272 words").

13. Wills contends that through Lincoln's 272-word speech, he redefined the Civil War as a battle not over secession or slavery, but rather as a battle in which the overriding principle, derived from the Declaration of Independence, that "all men are created equal" was ultimately destined to prevail. In doing so, Lincoln established that these five words defined, more so than the then-existing Constitution, what the United States ultimately represents. *Id.* at 37, 147, 175. As Wills states:

For most people now, the Declaration [of Independence] means what Lincoln told us it means, as a way of correcting the Constitution itself without overthrowing it. . . . By accepting the Gettysburg Address, its concept of a single people dedicated to a proposition, we have been changed. Because of it, we live in a different America.

*Id.* at 147. Wills adds:

[Lincoln] came to change the world, to effect an intellectual revolution. No other words could have done it. The miracle is that these words did. In his brief time before the crowd at Gettysburg he wove a spell that has not, yet, been broken—he called up a new nation out of the blood and trauma.

Id. at 175. Perhaps the most striking evidence of Lincoln's victory of principle is reflected in Will's observation:

Up to the Civil War, "the United States" was invariably a plural noun: "The United States are a free government." After Gettysburg, it became a singular: "The United States is a free government." This was the result of the whole mode of thinking Lincoln expressed in his acts as well as his words, making *union* not a mystical hope but a constitutional reality.

Id. at 145.

14. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free, 1990).

15. See generally Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 Stan. L. Rev. 1019 (1992).

16. See Bork, *The Tempting of America* at 352 (cited in note 14) (asserting that "[o]nce adherence to the original understanding is weakened or abandoned, a judge, perhaps instructed by a revisionist theorist, can reach any result, because the human mind and will, freed of the constraints of history and 'the sediment of history which is law,' can reach any result"). Similarly, Graglia observes:

The debate between Bork and his opponents is not over different techniques of reading [the Constitution], but rather over different systems of government. . . . Over the past four decades the Court has assumed an enormously important role in the American system of government. A majority of the Justices substituted their policy preferences for those that prevailed in the ordinary political process on a wide array of basic social policy issues. The debate is over the propriety of that role.

Graglia, 44 Stan. L. Rev. at 1048.

17. See Bork, *The Tempting of America* at 351. Bork explains:

We are an incredibly complex and intricate society and no power is without checks, some obvious and direct in operation, some subtle and intangible. But a major check on judicial power, perhaps the major check, is the judges' and our understanding of the proper limits to that power. *Those limits may be pressed back incrementally, case by case, until judges rule areas of life not confided to their authority by any provision of the Constitution or other law.*

Id. (emphasis supplied). But see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 77-104 (Harvard U., 1980) (positing that the Supreme Court actually can expand democratic participation of underrepresented groups through a broad reading of certain textual provisions).

18. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting Mass. Const. of 1780, Pt. 1, Art. XXX (rearranged 1919), which states that the Commonwealth of Massachusetts is "a government of laws and not of men").

19. Ruth Bader Ginsburg was sworn in as the 107th Justice and the second woman to serve on the Supreme Court on August 10, 1993. See Joan Biskupic, *Ginsburg Sworn in as 107th Justice and 2nd Woman on Supreme Court*, Wash. Post A6 (Aug. 11, 1993).

20. *Griswold v. Connecticut*, 381 U.S. 479 (1965). See Bork, *The Tempting of America* at 159 (cited in note 14) (stating that "there may be no real point in overturning the decision in *Griswold v. Connecticut*").

21. 405 U.S. 438 (1972). Bork does not explicitly state whether this case should be overruled, but suggests that its real significance is that it provided a stronger underpinning for *Roe v. Wade*, 410 U.S. 113 (1973), which he believes should be overruled, than did *Griswold*. Bork, *The Tempting of America* at 159, 263.

22. See Bork, *The Tempting of America* at 159 (noting that "[t]here are times when we cannot recover the transgressions of the past, when the best we can do is say to the Court, 'Go and sin no more'").

23. *Brown v. Board of Education*, 347 U.S. 483 (1954).

24. See Bork, *The Tempting of America* at 83 (cited in note 14) (observing: "Perhaps constitutional theory would be in a far happier state today if *Brown* had been written, as it could have been, in terms of the original understanding").

25. See, for example, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 222 (1980) (arguing that "the originalist constitutional historian may be questing after a chimera"). But see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226, 236-59 (1988) (defending intent-based constitutional jurisprudence against arguments that it is either impossible or too difficult).

26. See, for example, Brest, 60 B.U. L. Rev. at 222; Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 497 (1981) (arguing that in certain circumstances discerning the Framers' intent is conceptually impossible).

27. Arrow's Theorem proves that no collective decision-making body can simultaneously satisfy five generally accepted conditions required for fair voting and guarantee the ability to transform individually rational, or transitive, preferences into transitive group orderings. For a more detailed explanation of the theorem and an analysis of its implications for decisionmaking in the Supreme Court and in Congress, see generally Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L. J. 1219 (1994). See also Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 38-62 (U. of Chicago, 1991).

28. See Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 Georgetown L. J. 1787, 1789 (1992) (observing: "Unfortunately, Arrow's Theorem demonstrates that any legislature governed by majority voting may produce suboptimal decisions if voting fails to account for the intensity of voters' preferences: a statute that harms a dissenting minority more than it benefits an approving majority reduces net well-being [thus, presumably justifying judicial intervention]"). See also *id.* at 1790 (noting that "[a]n independent judiciary that strictly scrutinizes . . . statutes can protect against the welfare losses that flow from legislative failure"). For this Author's critic of Professor Stout's thesis, see Stearns, 103 Yale L. J. at 1257-86 (demonstrating that Arrow's Theorem poses unique aggregation problems for courts that may render them less well equipped than legislatures to achieve rational collective decisions in the absence of Condorcet-winning preferences and further demonstrating that legislatures are relatively superior to appellate courts in taking intensity of preferences into account in aggregating preferences). See also Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 831 (1982) (demonstrating that Arrow's Theorem applies to the Supreme Court and positing that "[a]ny general criticism of the Court, as an institution, for rendering inconsistent decisions is untenable. At least some inconsistency, and probably a great deal of inconsistency, is inevitable"). Compare Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873, 901 (1987) (cautioning against excessive reliance on interest group theories that lack empirical support and advising that "[a]ny judicial response should insure that genuine legislative policy decisions are respected, while attempting to mitigate undue interest group influence").

For an interesting application that demonstrates the problem Arrow's Theorem poses for judicial decisionmaking, consider *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981). In *Kassel*, the Supreme Court issued three opinions: a plurality, a concurrence, and a dissent. To simplify the analysis, it helps to treat the case as if there are only three relevant votes, two of which were necessary to achieve a victory; in fact, any two-opinion combination contained the requisite five votes for a majority.

In *Kassel*, the Supreme Court held that an Iowa statute that prohibited, with exceptions, the use of 65 foot twin trailers, violated the dormant Commerce Clause. *Id.* at 669. To resolve this case, the Court had to consider two separate questions: (1) whether to apply the balancing test first announced in *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), or instead to apply a rational basis test; and (2) whether to allow the district court to consider only that evidence used in support of the statute by the state legislature or instead to allow it to consider evidence in support of the statute admitted at trial by the state's attorneys. *Kassel*, 450 U.S. at



671-76. In his plurality opinion, which, because it was the narrowest basis for decision, became the rule of the case, Justice Powell held that the appropriate test was the *Raymond* balancing test, and that the Court could consider evidence admitted at trial. *Id.* at 678-79. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (noting that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'").

Aggregating the three separate votes on each issue, however, yields a startling result. Both Justice Brennan in concurrence and Justice Rehnquist in dissent voted to apply the rational basis test rather than the *Raymond* balancing test. *Kassel*, 450 U.S. at 680-81 (Brennan, J., concurring); *id.* at 689-92 (Rehnquist, J., dissenting). While Justice Brennan voted to consider only evidence that the legislature considered when enacting the statute, however, Justice Rehnquist agreed with Justice Powell that the Court could consider trial evidence. *Id.* at 681-82 (Brennan, J., concurring); *id.* at 702 (Rehnquist, J., dissenting). Now consider the following separate votes on each issue outlined above: (1) Justices Brennan and Rehnquist prevail two-to-one over Justice Powell in concluding that the appropriate test is the rational basis test; and (2) Justices Powell and Rehnquist prevail two-to-one over Justice Brennan in concluding that the Court may consider trial evidence. The end result, a rational basis test with trial evidence, cannot be correct, however, because that is Rehnquist's position *in dissent*.

This case illustrates a postulate of Arrow's Theorem that it is sometimes impossible to meaningfully aggregate preferences among collective decisionmakers faced with more than two options when no single option carries simple majority support. For a more detailed discussion of the aggregation problems that Arrow's Theorem poses for the Supreme Court, see Stearns, 103 Yale L. J. at 1269-71 (applying Arrow's Theorem to *Kassel*); *id.* at 1262-69 (demonstrating, based upon *Crawford v. Board of Ed. of Los Angeles*, 458 U.S. 527 (1982), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), that Arrow's Theorem aggregation problems apply even across cases for which there is majority support).

29. See generally Farber and Frickey, *Law and Public Choice* at 38-62 (cited in note 27).

30. See generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L. J. 31, 33 (1991) (listing numerous legal scholars who have applied a wide range of public and social choice insights to argue in favor of expansive judicial review).

31. See, for example, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-89 (1798) (Chase, J.) (advocating natural law as a proper source in invalidating state legislation that does not necessarily violate any express constitutional provision, but that is unsound as a matter of policy).

32. Compare Graglia, 44 Stan. L. Rev. at 1049 (cited in note 15) (stating that "[t]here is no doubt, of course, that policymaking by judges serves the interests of many people; it provides a means by which persons whose views were rejected in the political process may nonetheless prevail"); Elhauge, 101 Yale L. J. at 109 (cited in note 30) (observing that "many modern legal scholars . . . have naively assumed that, because they have found defects in the political process, expanding the scope of judicial lawmaking and (perhaps) the private ordering would improve the situation, but they have not critically examined whether the latter processes can be expected to produce better results than the processes they would replace").

33. See *Griswold*, 381 U.S. at 484 (asserting that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

34. See Bork, *The Tempting of America* at 352 (cited in note 14); Graglia, 44 Stan. L. Rev. at 1049 (cited in note 15).

35. See Stout, 80 Georgetown L. J. at 1789 (cited in note 28); Dworkin, 56 N.Y.U. L. Rev. at 516 (cited in note 26) (positing that "[m]y own view is that the Court should make decisions of principle rather than policy—decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted—and that it should make these decisions by elaborating and applying the substantive theory of representation taken from the root principle that government must treat people as equals").

36. See Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365, 1369 (1990) (explaining that "a major and . . . telling omission" in *The Tempting of America* is the absence of

a chapter on "why the judiciary should embrace originalism"). See also *id.* at 1368 (stating: "Bork fails to produce convincing *reasons* why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases").

37. See Dworkin, 56 N.Y.U. L. Rev. at 496 (cited in note 26) (indicating that "[s]ome part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular").

38. See Posner, 42 Stan. L. Rev. at 1368 (cited in note 36); Dworkin, 56 N.Y.U. L. Rev. at 496.

39. Professor Graglia, responding to Judge Posner's position set out in note 36, states: This is like saying that one should provide convincing reasons for the assertion that a bachelor is an unmarried male. An entirely sufficient reason for originalism, is that interpreting a document *means* to attempt to discern the intent of the author; there is no other "interpretive methodology" properly so called.

Graglia, 44 Stan. L. Rev. at 1024 (cited in note 15).

40. See Graglia, 44 Stan. L. Rev. at 1023-24. Ely concedes that the effort to discern the Framers' intent in essence defines the proper judicial role in constitutional cases, stating:

Interpretivism does seem to retain the substantial virtue of fitting better our ordinary notion of how law works: if your job is to enforce the Constitution then the Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time. Thus stated, the conclusion possesses the unassailability of a truism, and if *that* were all it took to make someone an interpretivist, no sane person could be anything else.

Ely, *Democracy and Distrust* at 12 (cited in note 17).

41. See Graglia, 44 Stan. L. Rev. at 1023 (arguing that "[o]ne should not attempt to win arguments by 'persuasive definition,' as Posner has frequently pointed out, but argument, indeed communication, is impossible if we do not accept that words can have and are used to convey meaning").

42. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). See also Bork, *The Tempting of America* at 19-20 (cited in note 14).

43. See *Calder*, 3 U.S. at 398-99 (Iredell, J., concurring) (refuting the notion that courts can invalidate legislative enactments based on natural law). See also Bork, *The Tempting of America* at 20 (observing: "It is somewhat disheartening, indeed, that, while the debate has grown increasingly complex, in almost two centuries the fundamental ideas have not been improved upon").

44. See *Calder*, 3 U.S. at 387-89 (Chase, J.).

45. See *id.* at 398-99 (Iredell, J., concurring). See also Mortimer Adler, *Robert Bork: The Lessons to be Learned*, 84 Nw. U. L. Rev. 1121, 1128 (1990). Adler states:

[T]he most fundamental issue in the philosophy of law and justice . . . is the issue between the positivists and the naturalists—between: (1) those who hold that positive or man-made laws determine what is deemed to be just and unjust in any community at any time and place and who, accordingly, also hold that what is deemed just and unjust changes with changes in the positive laws and government of a given community; and (2) those who hold that there are principles of natural law, criteria of justice, and natural rights that enable us to determine whether laws and constitutions are just or unjust, and if unjust, in need of rectification and amendment.

*Id.*

46. See Bork, *The Tempting of America* at 20 (cited in note 14).

47. See Ronald R. Garet, *Creation and Commitment: Lincoln, Thomas, and The Declaration of Independence*, 65 S. Cal. L. Rev. 1477, 1478 n.2 (1992) (collecting writings and speeches in which Clarence Thomas discusses the role of natural law).

48. See *id.* at 1493 (observing that in his "short speech . . . at the opening of his [Supreme Court] confirmation hearings . . . Judge Thomas renounced natural law—not once but three times . . . and failed to explain how he expects values to serve him as a judge").

49. Compare Wills, *Lincoln at Gettysburg* at 147 (cited in note 10) (positing that Lincoln's interpretation of the Declaration of Independence, and ultimately of the Constitution, in the Gettysburg Address, forever informed and thereby altered any subsequent reading of those documents).

50. See Stephen Hawking, *A Brief History of Time: From the Big Bang to Black Holes* 46 (Bantam, 1990). Hawking states:

All of the Friedmann solutions [to creating an equilibrium model for the universe] have the feature that at some time in the past (between ten and twenty thousand million years ago) the distance between neighboring galaxies must have been zero. At that time, which we call the big bang, the density of the universe and the curvature of space-time would have been infinite.

Id.

51. See generally id. Hawking observes:

[E]ven if there were events before the big bang, one could not use them to determine what would happen afterward, because predictability would break down at the big bang. Correspondingly, if, as is the case, we know only what has happened since the big bang, we could not determine what happened beforehand. As far as we are concerned, events before the big bang can have no consequences, so they should not form part of a scientific model of the universe. We should therefore cut them out of the model and say that *time had a beginning at the big bang*.

Id. at 46 (emphasis supplied).

52. See id. (discussing infinite density and curvature of space-time at the moment of the Big Bang).

53. Hawking states: "In fact, all our theories of science are formulated on the assumption that space-time is smooth and nearly flat, so they break down at the big bang singularity, where the curvature of space-time is infinite." Id. at 46.

54. See, for example, *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that the Tenth Amendment bars Congress from imposing maximum hour and minimum wage restrictions that affect state and local employees). But see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *Usery*). See also Donald A. Dripps, *Delegation and Due Process*, 1988 Duke L. J. 657, 680 n.96 (noting that "[t]he guarantee clause . . . remains unenforceable under the political question doctrine"); Gay A. Crosthwait, Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 Colum. L. Rev. 1065, 1105 n.201 (1983) (observing that the Guarantee Clause of Article IV, Section 4 remains judicially unenforced).

55. See Graglia, 44 Stan. L. Rev. at 1047 (cited in note 15) (observing: "The vast bulk of constitutional litigation involves state law, not federal law, and nearly all of that purports to turn on the Due Process or Equal Protection clauses of the Fourteenth Amendment. No jurisprudential sophistication is required to understand that Supreme Court justices do not decide some of the most difficult and controversial issues of social policy by studying those four words").

56. *Brown v. Board of Education*, 347 U.S. 483 (1954).

57. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring that police inform individuals of specified constitutional rights upon arrest, including the right to remain silent and the right to assistance of an attorney).

58. *Stone v. Powell*, 428 U.S. 465, 494 (1976) (holding that if a state "has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial").

59. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) (holding that state regulations of abortion are subject to the as yet undefined "undue burden" test).

60. See Stout, 80 Georgetown L. J. at 1822 (cited in note 28) (stating: "Some of those who argue against substantive judicial review of legislative judgments believe democratic rule is inherently desirable. Arrow's Theorem cautions otherwise"). For this Author's critique of the Stout thesis, see Stearns, 103 Yale L. J. at 1225-26 n.18, 1246 n.91, 1272 n.92 (cited in note 27).

61. Winston Churchill's actual quote is as follows: "Many forms of government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." Winston Churchill, Speech Before the House of Commons (Nov. 11, 1947), reprinted in *The Oxford Dictionary of Quotations* 150 (Oxford U., 3d ed. 1979).

62. See Federalist 78 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 464, 469 (Mentor, 1961).

63. See Alexander M. Bickel, *The Least Dangerous Branch* 16 (Bobbs-Merrill, 1962). Bickel states that in *Marbury v. Madison*:

Marshall himself followed Hamilton, who in the 78th *Federalist* denied that judicial review implied a superiority of the judicial over the legislative power—denied, in other words, that judicial review constituted control by an unrepresentative minority of an elected majority. "It only supposes," Hamilton went on, "that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."

Id.

64. See Federalist 78 (Hamilton) at 469 (cited in note 62).

65. See Geoffrey R. Stone, et al., *Constitutional Law* 76 (Little, Brown, 2d ed. 1991) (observing that "[n]o Supreme Court justice has been removed from office in the nation's history"; although Salmon Chase was impeached but not convicted, the attempt to impeach William O. Douglas failed).

66. See Joseph S. Larisa, Jr., Book Review, *A Supreme Court Primer for the Public*, 1988 Duke L. J. 203, 209 (reviewing William H. Rehnquist, *The Supreme Court: How it Was, How it Is* (William Morrow & Co., 1987), and describing Justice Owen J. Roberts's "switch in time [that] saved Nine" from President Franklin Delano Roosevelt's Court-packing plan in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld a state minimum wage law and overruled a fourteen-year-old precedent, thus clearing the way for Supreme Court approval of New Deal legislation).

67. See Ely, *Democracy and Distrust* at 46 (cited in note 17) (stating that "[t]he formal checks on the Court have surely not proved to be of much consequence").

68. See Farber and Frickey, *Law and Public Choice* at 141-42 (cited in note 27) (discussing the effect of Supreme Court decisions as shifting the burden of inertia).

69. For an analysis demonstrating that the Supreme Court and other appellate courts, in contrast with Congress and other legislatures, are relatively ill-equipped to identify and to act upon Condorcet winners, see Stearns, 103 Yale L. J. at 1258-71 (cited in note 27). A Condorcet winner is an option that, although not favored by a majority, prevails against any other option in a pairwise contest. Id. See also H.P. Young, *Condorcet's Theory of Voting*, 82 Am. Pol. Sci. Rev. 1231, 1239 (1988) (explaining that "Condorcet proposed that whenever a [nonmajority] candidate obtains a simple majority over every other candidate, then that candidate is presumptively the 'best.' This decisional rule is now known as 'Condorcet's criterion'"); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971, 989 n.55 (1989) (explaining that "[a] Condorcet winner is an alternative which beats all alternatives in one-on-one comparisons"). The ability of a collective decisionmaking institution to act upon available Condorcet winners is almost universally considered a basic test of institutional competence among social choice theorists. See Stearns, 103 Yale L. J. at 1255 n.128. Unlike legislative bodies which have voting rules that are fairly well equipped to act upon available Condorcet winners, Supreme Court voting procedures are not capable of guaranteeing that available Condorcet winners prevail. Id. Supreme Court voting rules miss Condorcet winners because, in the absence of a Condorcet winner, Condorcet-producing voting rules lead collective decisionmaking institutions to cycle. See id. at 1264-65 n.171. Like other appellate courts, the Supreme Court is generally obligated to resolve the cases properly before it. As a result, the Court uses a non-Condorcet voting rule, namely voting in the (most often) binary choice to affirm or reverse:

Because appellate courts must act collectively in each case, and because Condorcet-producing rules would not allow them to satisfy that requirement, appellate courts employ voting procedures that do not satisfy the Condorcet criterion. A motion-and-amendment procedure [while capable of satisfying the Condorcet criterion when a Condorcet winner is present] will not allow the Court to meet its obligation to collectively decide each case, while an alternative rule allowing each Justice to vote on the binary choice of outcome in each case does, albeit inconsistently.

Id.

70. See Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 Wash. & Lee L. Rev. 385, 403-04 (1992) (discussing the effects of the hold out phenomenon, also known as the free rider problem, on legislative procurement and collecting authorities).

71. See Farber and Frickey, *Law and Public Choice* at 24 (cited in note 27) (stating that "public choice ignores some . . . common sense observations about politics. Some crucial features of the political world do not fit the economic model. . . . Most notably, it does not account for popular voting").

72. See id. (stating: "Elections provide a classic example of the incentives to free ride. Given the number of voters, the chance that an individual vote will change the outcome is virtually nil").

73. See id. at 24-25 (observing: "Yet, millions of people do in fact vote") (footnote omitted).

74. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 933-39 (1973). The author observes: "The Constitution has little to say about contract, less about abortion, and those who would speculate about which the framers would have been more likely to protect may not be pleased with the answer." Id. at 939. See also John H. Garvey and T. Alexander Aleinikoff, *Modern Constitutional Theory: A Reader* 503 (1991) (noting that "[n]othing in the text or the framers' thinking identifies the woman's action as special").

75. See *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag burning is protected activity under the First Amendment).

76. *Brown v. Board of Education*, 347 U.S. 483 (1954).

77. See Bork, *The Tempting of America* at 77 (cited in note 14) (noting that "[*Brown*] was accepted by law professors as inconsistent with the original understanding of the Equal Protection Clause").

78. See id. (stating: "[T]hose who wish to be free of the restraints of original understanding in the hope that courts will further a particular policy agenda regularly seek to discredit that philosophy by claiming that it could not have produced the outcome in *Brown*").

79. See id. at 82 (explaining that by the time of *Brown*, the premise underlying the adoption of the Fourteenth Amendment, "equality before the law," could no longer be squared with the result achieved in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which had held that separate but equal facilities did not violate the Equal Protection Clause).

80. See id. (arguing that "[t]he text [of the Fourteenth Amendment Equal Protection Clause] itself demonstrates that the equality under law was the primary goal").

81. See Graglia, 44 Stan. L. Rev. at 1037-38 (cited in note 15) (arguing that the later need to adopt the Fifteenth Amendment to guarantee blacks the right to vote undermines Bork's claimed major premise drawn from the Equal Protection Clause).

82. See Bork, *The Tempting of America* at 77 (cited in note 14) (referring to *Brown v. Board of Education* as "a ruling based on nothing in the historic Constitution").

83. Compare Graglia, 44 Stan. L. Rev. at 1034 (cited in note 15) (observing: "Even today, the Bill of Rights is only selectively incorporated, which permits escape from such embarrassments as subjecting the states to the Seventh Amendment's requirement of a jury trial in all civil cases involving more than twenty dollars, and the Second Amendment's restriction of legislative authority to experiment with gun control").

84. Compare James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 806-07 (1992). Gardner states:

[Following *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816),] [w]hile we no longer expect state courts to resist rulings that the Supreme Court is entitled to make

and enforce, we might well expect state courts to continue to protect state sovereignty and independence where it is possible to do so. Had state courts in the middle decades of this century been animated by such a spirit, there was certainly nothing stopping them from staving off the federal dominance in constitutional rights brought about by the Supreme Court's incorporation decisions.

....

For example, state courts could have utilized their state constitutions before the Supreme Court began its string of incorporation decisions, thereby preventing the Court from gaining the impression that states would not protect the fundamental rights of U.S. citizens unless forced to do so by the imposition of federal constitutional standards.

Id. at 806-07.

85. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 31 (Oxford U., 1982). Bobbitt explains:

Black developed the textual argument, and a set of supporting doctrines, with a simplicity and power they never before had. His view was that the Constitution has a certain number of significant prohibitions which, when phrased without qualification, bar any extension of governmental power into the prohibited areas. A judge need not decide whether such an extension is wise or prudent; and as such a non-decider, he is a mere conduit for the prohibitions of the Constitution.

Id.

86. Compare id. at 31. Bobbitt states:

Moreover, [Justice Black] is doing so on a basis readily apprehendable by the people at large, namely, giving the common-language meanings to constitutional provisions. This allowed Black to restore to judicial review the popular perception of legitimacy which the New Deal crisis had jeopardized.

Id.

87. See Paul Bender, *Is the Burger Court Really Like the Warren Court?*, 82 Mich. L. Rev. 635, 639 (1984) (reviewing Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't* (Yale U., 1983)). Bender explains:

[M]ost of [the] criminal procedure cases [discussed in the reviewed book] were manifestations of the Court's ultimate adoption of the doctrine of selective "incorporation" of Bill of Rights guarantees into the fourteenth amendment, a slowly developing approach that Justice Frankfurter had staunchly opposed, with decreasing success, throughout his career on the bench, but that had been consistently urged in dissent for many years by Justices Black and Douglas. The Goldberg appointment tipped the balance here, and once tipped, a solid "incorporationist" majority emerged.

Id. at 639. See also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1260 (1992) (describing generally Justice Black's total incorporation, Justice Frankfurter's fundamental rights, and Justice Brennan's compromise selective incorporation approaches to imposing on states obligations drawn from the Bill of Rights).

88. Whether Michigan's ratification on May 7, 1992 of the Twenty-seventh Amendment—originally proposed by James Madison, "requiring that congressional pay raises take effect only after an election has intervened"—renders that amendment valid is beyond the scope of these Sonnets. See Geoffrey R. Stone, et al., *Constitutional Law* 22 (Little, Brown, Supp. 1994) (discussing the controversy surrounding the validity of the amendment).

89. See U.S. Const., Amend. XI (limiting jurisdiction of federal courts to hear suits brought against states); Amend. XIV (providing that African-Americans are citizens of the United States); Amend. XVI (broadening Congress's taxing power); Amend. XXVI (establishing a uniform voting age).

90. See Sonnet II and accompanying notes.

91. For a discussion on the impact of Lincoln's address on the interpretation of the Civil War amendments, see Wills, *Lincoln at Gettysburg* at 146-47 (cited in note 10).

92. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court, per Chief Justice Taney, held unconstitutional a federal statute that prohibited slavery in the Louisiana Territory. Id. at 451-52. This ruling prevented Dred Scott, a former slave, from claiming that,

having traveled through the Louisiana Territory, he was a citizen for purposes of diversity jurisdiction. *Id.* at 427. The Court further held that Dred Scott's travels did not divest his prior owner's property interest in him after he returned to Missouri, where slavery was legal (although reaching this decision was improper given that the Court had already determined that it lacked diversity jurisdiction). *Id.* at 452-53.

The Thirteenth Amendment, which prohibits slavery, superseded *Dred Scott*. See U.S. Const., Amend. XIII. Section 1 of the Fourteenth Amendment formally overturned *Dred Scott*. See U.S. Const., Amend. XIV. See also Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* 297 (West, 1990) (noting that "[t]he Fourteenth Amendment consists of five sections. Section 1 overturns the *Dred Scott* decision by making all persons born in the United States . . . citizens").

93. But see Bork, *The Tempting of America* at 28 (cited in note 14) (characterizing *Dred Scott* as the "worst constitutional decision of the nineteenth century" both in terms of its morality and its constitutional legitimacy); Graglia, 44 *Stan. L. Rev.* at 1035 (cited in note 15) (observing: "Nothing better illustrates [the] danger [of allowing courts to make policy decisions in the name of interpreting the Constitution] than the *Dred Scott* decision, which, by denying national political power to deal with the slavery issue, seemed to make the Civil War inevitable").

94. See generally Federalist 78 (Hamilton) (cited in note 62).

95. See Armen A. Alchian and William R. Allen, *Exchange & Production: Competition, Coordination, & Control* 9 (Wadsworth, 3d ed. 1983). Alchian and Allen observe:

Although scientists (including economists) offer all sorts of ethical assessments, what economic theory says must be distinguished from what an individual economist may prefer. The former is what counts, not the latter. Though the economist may be better able than the noneconomist to discern the consequences of some proposed act, the economist is not superior in evaluating the propriety of that consequence.

*Id.* See also Milton Friedman, *Essays in Positive Economics* 3-7 (U. of Chicago, 1953) (describing the relationship between positive and normative economic analysis).

96. See Robert Kuttner, *America is Saving More Now, Not Less—If You Count it Right*, *Business Week* 18 (April 13, 1992). Kuttner explains:

As everybody knows, rich people own a disproportionate share of the nation's total savings supply—since the poor consume most of what they earn. Only the well-off save and invest a large fraction of their incomes: That's the justification for supply-side tax incentives, which are often criticized as rewarding the wealthy.

*Id.*

97. Compare Bobbitt, *Constitutional Fate* at 31 (cited in note 85).

98. See Hans Christian Andersen, *The Emperor's New Clothes*, in *The Complete Fairy Tales and Stories: Hans Christian Andersen, 1805-1875* 77-81 (Doubleday, 1974). For another recent adaptation of this story, see Laurence J. Kotlikoff, *Generational Accounting* 1 (Free, 1992) (describing political efforts to ascribe economic meaning to the federal deficit as analogous to the Hans Christian Andersen fairy tale).

99. Compare Stearns, 103 *Yale L. J.* at 1258-71 (cited in note 27) (discussing the difference in institutional structures that allow legislative inaction in response to proposals that lack both majority support and a Condorcet winner but that disallow judicial inaction in response to a proper case).

100. See B. Bergen Evans, ed., *Dictionary of Quotations* 83 (Delacorte, 1968) (quoting President Calvin Coolidge as stating that "[t]he business of America is business").

101. See generally Hawking, *A Brief History of Time* (cited in note 50) (describing the Big Bang theory).

102. Compare *id.* at 174. Hawking states:

Einstein once asked the question: "How much choice did God have in constructing the universe?" If the no boundary proposal is correct, he had no freedom at all to choose initial conditions. He would, of course, still have had the freedom to choose the laws that the universe obeyed. This, however, may not really have been all that much of a choice; there may well be only one, or a small number of complete unified theories . . .

that are self-consistent and allow the existence of structures as complicated as human beings who can investigate the laws of the universe and ask about the nature of God.

Id.

103. See note 61 and accompanying verse.