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ORDERED LIBERTY: THE ORIGINAL INTENT OF THE CONSTITUTION

CHARLES McC. MATHIAS, JR.*

The Great Seal of the United States carries the inscription "Novus Ordo Seclorum," celebrating the establishment of the new order. These words trace their origin to the poet Virgil¹ and the establishment of another republic—Rome. But the phrase, inscribed in the United States Senate Chamber and printed on every dollar bill, also applies to the founding of our Republic. This year we mark the bicentennial of the drafting of the document which established that new order—the United States Constitution.

Two hundred years ago, the fifty-five delegates to the Constitutional Convention had been in Philadelphia for nearly two months debating the composition of our government. By the end of the long, hot summer of 1787, the delegates had succeeded in minimizing the parochial interests and political differences that divided them. The final document, the product of many compromises, would unite a people as one nation.

But that was two centuries ago. Then we were an agrarian nation of four million people, scattered along the edge of a seemingly limitless frontier. Today we are an urban industrial society of nearly a quarter of a billion people, connected by bonds of commerce and geopolitics to every other nation of the globe. The application of

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1. The phrase "Novus Ordo Seclorum" derives from Virgil's *Eclogue* IV, in which the poet celebrates the return of the Golden Age:

Ultima Cumaei venit iam carminis aetas;
magnus ab integro saeculorum nascitur ordo.
iam redit et Virgo, redeunt Saturnia regna;
iam nova progenies caelo demittitur alto.

VIRGIL, *ECLOGUE* IV, ll. 4-7, at p. 10 (Oxford Univ. Press 1969). Translated, these lines proclaim:

Now comes the last age of Cumaean song;
the great series of ages is born anew.
Now Justice returns, the Golden Age returns;
now a new lineage is sent down from the lofty sky.

The other Latin inscriptions appearing on the Great Seal, "Annuit Coeptis" and "E Pluribus Unum," also trace their origins to Virgil. See J. BARTLETT, *FAMILIAR QUOTATIONS* 103 nn.10 & 15, 106 n.5 (15th ed. 1980).

our two-hundred-year-old charter to the transformed conditions of our national existence is far from self-evident.

For all we can say about the Constitution's preservation of our freedom, its provisions are both luminous and obscure. Its message to our day is punctuated by ambiguous silences, which have been filled by the deafening clash of conflicting interpretations. Some of its terrain is a map without a legend; nowhere within its four corners does the document tell us how to interpret the disputes over its meaning.

Some would attempt to transcend ambiguity by fixing the meaning of the Constitution to its "original intent." According to this view, the courts and other branches of government should be bound by what we can divine of the intentions of those who wrote or ratified the document. Adherents to this position obtain solace from the supposed certainty of the "static meaning" provided in the face of changing circumstances.²

But as Justices Brennan, Stevens, and Marshall have recently pointed out,³ this position is not without its problems. Meeting in secrecy, the drafters of the Constitution left incomplete records of their proceedings. Indeed, the most comprehensive account, taken by Madison, was not available to the public until some time after his death.⁴ The first forty years of constitutional interpretation, includ-

2. Although by no means a new development, this view has received much attention recently. The characterization of "original intent" is my own. For a fuller explanation by the adherents of this position, see Bork, *The Constitution, Original Intent and Economic Rights* 23 SAN DIEGO L. REV. 23 (1986) (address before the University of San Diego Law School); Address by Attorney General Edwin Meese III before the D.C. Chapter of the Federalist Society, Lawyers Division, in Washington, D.C. (Nov. 15, 1985) (available at the *Maryland Law Review*); Speech by Justice Antonin Scalia Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986) (available at the *Maryland Law Review*).

3. See T. Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii (May 6, 1987) (available at the *Maryland Law Review*); J.P. Stevens, Address before the Federal Bar Association Luncheon Meeting in Chicago, Illinois 7-11 (Oct. 23, 1985); W. Brennan, *The Constitution of the United States: Contemporary Ratification* 4-5 (Oct. 12, 1985) (lecture delivered at Text and Teaching Symposium, Georgetown University) (available at the *Maryland Law Review*). See generally R. DWORKIN, *LAW'S EMPIRE* 359-69 (1986).

4. J. MADISON, *THE CONSTITUTIONAL CONVENTION OF 1787* (G. Hunt ed. 1908). Madison's will, drafted fourteen months before his death, contains the following passage:

Considering the peculiarity and magnitude of the occasion which produced the Convention at Philadelphia in 1787, the Characters who composed it, the Constitution which resulted from their deliberations, its effects during a trial of so many years on the prosperity of the people living under it, and the interest it has inspired among the friends of free Government, it is not an unreasonable inference that a careful and extended report of the proceedings and discussions

ing the landmark decisions of John Marshall's Supreme Court, developed without this reference point so central to today's advocates of "original intent."⁵ In addition, the original intent theory begs the question of whose intent, to the extent it is known, should command authority. To whom are we to look for guidance—the fifty-five delegates who had a hand in drafting the Constitution, the participants in the state ratifying conventions, or the popular sentiment as reflected by newspaper articles or letters of the time?

Even if we arbitrarily confine our examination to the intent of the delegates at the Convention, the question of whose intent we should heed remains. The founders spoke not with one voice, but with many. Jefferson once described the delegates as an "assemblage of demigods,"⁶ but their quarrels sometimes reached Olympian proportions. Inevitably we tend to cite those with whom we agree. Are we to look at the statements of Madison, Hamilton, Patterson, Randolph, or Mason? All of these delegates made significant contributions in shaping the Constitution, but each cherished some lasting disagreements on certain provisions—Mason and Randolph did not even sign the final document.⁷

Perhaps the most vexing question about "original intent" is why we should be bound by an interpretation of the Constitution that, if it can be said to have existed as a coherent whole two hundred years ago, is only imperfectly understood today. In a society whose governmental power derives from the consent of the governed, our consent rests on our understanding of the organic document. As Justice Brennan recently remarked, "[o]ur distance of two centuries cannot but work as a prism refracting all we perceive."⁸

Arbitrarily fixing the meaning at the intent of the founders robs modern America of the power to consent. It dismisses two centuries of our national dialogue with the Constitution. It ignores the signif-

of that body, which were with closed doors, by a member who was constant in his attendance, will be particularly gratifying to the people of the United States, and to all who take an interest in the progress of political science and the course of true liberty.

5. See P. SMITH, *THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY* 315-33 (1978); C. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1962).

6. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* S. PADOVER, *THE LIVING U.S. CONSTITUTION* 23-25 (J. Landzoski 2d ed. 1983).

7. Madison's notes are the best record of the Convention and the debates that occurred among the delegates. See *THE PAPERS OF JAMES MADISON* (W. Hutchinson & W. Paschal ed. 1962). For good discussions of the debates and the delegates who declined to sign the Constitution, see F. BARBASH, *THE FOUNDING 185-96* (1987); C. COLLIER & J. COLLIER, *DECISION IN PHILADELPHIA* (1986); P. SMITH, *supra* note 5, at 93-235.

8. W. Brennan, *supra* note 3, at 4.

icant growth in our understanding over the last two centuries of the “new order” the framers established.⁹ As Justice Marshall recently stated, “When the Founders used [the phrase “We the People”] in 1787, they did not have in mind the majority of America’s citizens.”¹⁰ A civil war, twenty-six amendments, and tremendous social, political, and technological changes have put flesh on the bones of the Constitution, thus altering our reading and relationship to it. Why should we ignore this history when we read the Constitution? Why should we who have been molded by that history not participate in the debate?

In the final analysis, it is far from clear that the founders wanted their interpretation chiseled into the document. Was it the “original intent” that “original intent” should govern? The evidence for that proposition is sparse, and the founders’ own common-law tradition held no distaste for the notion of evolving legal standards.¹¹

But if the answer provided by advocates of “original intent” is inadequate, the question to which it responds is serious. How ought we to interpret the Constitution? If “original intent” is not our only guide, do we surrender the Constitution’s meaning to any reading? Is its meaning whatever the judges say it is? Is meaning to be measured, in the epithet addressed to the old courts of equity, by the length of the chancellor’s foot? Or do we adopt the constitutional jurisprudence of the Tammany politician who in response to President Grover Cleveland’s rejection on constitutional grounds of a proposed bill, said, “What’s the Constitution among friends?”¹²

We cannot reject the theory of “original intent” without adopting some other guiding principle for constitutional interpretation. The search for that principle is not merely a quibble among legal scholars; it has a significance for every citizen. Federal power is

9. Although no more clairvoyant than we are today, the insight of the framers is at times astounding. The Convention was divided along sectional lines over the issue of slavery. George Mason, a southerner and one of the largest slaveholders and landowners in the colonies, however, took on the South. In a statement that foreshadowed the conflagration that would engulf the Nation some eighty years later, Mason declared, “Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a country. As nations cannot be rewarded or punished in the next world, they must be in this. By an inevitable chain of causes and effects Providence punishes national sins by national calamities.” See F. BARBASH, *supra* note 7, at 156.

10. T. Marshall, *supra* note 3, at 2.

11. For a very good book on the intellectual origins of the Constitution, see F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985). See also L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 33-104 (2d ed. 1985) (discussing early American legal tradition).

12. L. FISHER, *THE CONSTITUTION BETWEEN FRIENDS* at v (1978).

predicated on constitutional authority. Our interpretation of that authority determines when government may act and when it must stay its hand. The results of that interpretation will have consequences for all of us: for warriors and for worshipers, in the Nation's boardrooms and in its bedrooms.

In searching for these principles of interpretation, we must look behind the words of the Constitution. The answer may be embedded in the underlying principles and doctrines of the document. For the founders and for us, the Constitution is not only a blueprint for government. It was and is a system of ordered liberty.¹³ As Thomas Paine wrote in *The Rights of Man*, "The American Constitutions were to Liberty what a grammar is to language: they define its parts of speech, and practically construct them into syntax."¹⁴

It is hard to believe that those who crafted the Constitution wanted to freeze the debate in the circumstances of their own time. The authors of the Constitution saw both the value and necessity of robust debate. This view was grounded in a respect for individual differences and the reality that there was no way to squelch those differences without destroying the precious liberty the founders sought to preserve. Thus, the founders looked to a framework within which debate would continue; they sought the ordered liberty of a republic. The founders were well aware that differences of opinion might have consequences that could manifest themselves in either the reasoned or the arbitrary use of power.¹⁵

Not surprisingly, the central issue confronting the Convention was how much authority the new government should have and how that authority should be controlled. As Madison stated in *The Feder-*

13. The term "ordered liberty" is not my own invention. I do not know its precise origins. It does appear, however, as a description of our constitutional government in some Supreme Court decisions. In applying the fifth amendment prohibition against double jeopardy to the states, Justice Cardozo in his opinion for the majority in *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), wrote that rights "implicit in the concept of ordered liberty" must be "absorbed" by the fourteenth amendment. Justice Clark in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), used the term in a similar way in applying the fourth amendment's exclusionary rule—the rule which ensures that unreasonable searches do not take place by suppressing evidence that is illegally obtained—to the states. See also G. FEINER, *ORDERED LIBERTY* (1983).

14. T. PAINE, *THE RIGHTS OF MAN* pt. 1, reprinted in *THE SELECTED WORK OF TOM PAINE* 143 (H. Fast ed. 1945).

15. It would not be an understatement to say that the founders were acutely aware of the ramifications of differing opinions. They recognized that the free expression of those opinions was both necessary and potentially damaging to any republic, for if left undisturbed, republics could splinter into factions. Madison initially discusses the problem of conflicting rival parties in *The Federalist* No. 10; his description of the Constitution's solution to this problem waits until *The Federalist* No. 51.

alist No. 51, "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself."¹⁶ The founders were faced with a dilemma. They had to navigate the troubled waters between Scylla and Charybdis, avoiding the anarchy that could develop from too weak a central government and the tyranny that could spring from a monarchy. To chart this difficult course the men who wrote the Constitution consulted a priceless chart—the lessons of history.

The genius of the authors of the Constitution was not invention, but the application of historical lessons to a rational, coordinated, and successful system. In fact, it was their grasp of history and their knowledge of political thought that enabled the founders to transcend the moment and craft a document that was, as the preamble states, "for ourselves and our posterity."¹⁷

We know that the founders drew on the experience of the Greek city-states, the Roman Republic, and other ancient civilizations.¹⁸ But the key to the problem of limiting arbitrary state power was closer at hand: the struggle carried on in England since the days of the Magna Carta.

In 1215 King John, cornered at Runnymede, was forced by the feudal barons to sign the Great Charter. The barons were determined to check the power of the Crown, particularly the King's power to demand money or services, or to confiscate property arbitrarily. The Great Charter proclaimed that "no freeman shall be seized, or imprisoned, or possessed, or outlawed, or in any way destroyed . . . except . . . by the lawful judgment of his peers, or by the laws of the land."¹⁹ Here we see in embryonic form the "due process of law" embodied in our fifth and fourteenth amendments.

But the framers also found a limitation on the power of the sov-

16. THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

17. U.S. CONST. preamble.

18. Madison's notes on the debates at the Convention as well as the personal papers of many delegates at the Convention substantiate this point. Madison, for example, made an extensive study of the "record" of other republics just before the Convention. In addition, *The Federalist Papers*, written by Hamilton, Madison, and Jay, often cite examples from ancient republics or English history to make their points. For example, Madison cites the Republic of Venice as an example of the tyranny that can result if all power is concentrated in the hands of one individual or one branch of government. See THE FEDERALIST No. 48, at 335-36 (J. Madison) (J. Cooke ed. 1961). Even the pseudonym chosen by the authors of *The Federalist Papers* is of classical origin—"Publius," whom Plutarch portrays as the great defender of the Roman Republic.

19. MAGNA CARTA ch. 39, reprinted in R. STRINGHAM, MAGNA CARTA FOUNTAINHEAD OF FREEDOM (1966).

ereign in the Magna Carta, which placed the law higher than the King. Further, the founders must have understood that history transformed the Great Charter into something far more than its drafters could possibly have originally intended. Envisioned as a narrow protection of feudal privilege, it became a statement of principle, a reference point for those imperiled by the arbitrary actions of government.

Other elaborations of the principle followed. In 1629 Parliament issued its Petition of Right²⁰ in response to the attempt by Charles I to bypass Parliament's taxing authority. The final result was a civil war and the beheading of a King: a graphic reminder to future sovereigns that the legislature could not be ignored. In 1679 the Habeas Corpus Act²¹ further restrained the sovereign, and the English Bill of Rights²² issued by William and Mary in 1689 established the claims of petition.²³ Although all of these limitations were the product of specific political crises, their meaning evolved in response to changing conditions.²⁴

This history, which was closely studied by many of the founders, demonstrated the need to check authority and to assure the supremacy of law over arbitrary will. But if British history cautioned against unlimited powers held by the King or even a national government, life under the Articles of Confederation showed the dangers of the opposite extreme.

Before 1776 there was no central colonial government. Each colony had its own government that was answerable to the Crown. Within the framework of some general laws established by the

20. 3 Car., ch. 1, § 10 (1628). On June 7, 1628, Charles I assented to the Petition of Right, thereby making it a statute. The statute provided that "no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without comment consent by act of parliament." 1 J. DE LOLME, *THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION* 377 (1978).

21. 31 Car. 2, ch. 2 (1679). Even though the common law and the Petition of Right prohibited arbitrary imprisonment, systemic corruption permitted the power of granting the writ of habeas corpus to lie solely within the discretion of judges. The Habeas Corpus Act stripped this absolute discretion away from judges by requiring judges to receive bail in all bailable offenses. See J. DE LOLME, *supra* note 20, at 454-55.

22. 1 W. & M., ch. 2 (1689).

23. This clause of the Bill of Rights gave subjects of the kingdom the right to petition the King to remedy grievances. This law also prohibited the King and his bench from prejudging a petition or prosecuting the petitioners for raising a grievance.

24. See generally W. EVERDELL, *THE END OF KINGS: A HISTORY OF REPUBLICS AND REPUBLICANS* (1983); W. CHURCHILL, *HISTORY OF THE ENGLISH-SPEAKING PEOPLES* (H. Commanger ed. 1965); W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (W. Lewis ed. 1898); E. COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND IN FOUR PARTS* (15th ed. 1794).

mother country, each colony acted with autonomy from others. The signing of the Declaration of Independence augmented this autonomy by making the colonies separate and independent states. But to fight a common war against a great power, more than an assertion of independence was needed. The Articles of Confederation provided a loose arrangement for cooperation among the sovereign states.²⁵

Under the Articles there was a legislature, a unicameral Congress in which each state, regardless of its population, wielded only one vote. The sole Executive merely presided over meetings, without exercising any other independent authority.²⁶

In fact, what little power the Articles delegated to the national legislature was virtually unenforceable. Congressional requisitions on the states for taxes or military supplies could be and, at times, were ignored. In addition, several important areas were completely beyond the authority of the national legislature. The Articles of Confederation provided for no legislative control over foreign or interstate commerce,²⁷ and although the legislature could make treaties, it had no means of enforcing them.²⁸

When peace finally arrived after eight years of revolutionary war, the situation deteriorated. Without the unifying threat of the British invasion, rallying even minimal cooperation was difficult. Foreign powers encroached on American soil, while Barbary pirates preyed on American shipping overseas.²⁹

Added to these foreign problems were the domestic disputes over interstate commerce among the independent states. My own state of Maryland almost came to blows with Virginia over fishing rights on the Potomac River and shipping rights on the Chesapeake Bay. A hapless government floundered in the face of many serious challenges. The promising beginning, symbolized by the bold words of freedom in the Declaration of Independence, seemed condemned to failure by the weaknesses of the Articles of Confederation.

While history provided lessons on the dangers of too much or too little governmental authority, political philosophy held the key

25. See C. COLLIER & J. COLLIER, *supra* note 7, at 1-14; P. SMITH, *supra* note 5, at 71-92.

26. See Articles of Confederation, art. 5, cl. 4 (U.S. 1777), *reprinted in* A. JENSON, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 264 (1940). The Executive's lack of independent power is evident from the silence of the Articles of Confederation on this matter.

27. See *id.* at art. 9, cl. 4.

28. See *id.* at art. 9, cl. 1.

29. C. COLLIER & J. COLLIER, *supra* note 7, at 5-6.

to finding a middle ground. Fortunately, those who drafted the Constitution were familiar with and able to draw from a rich tradition in political thought, from the classical writings of Plato, Aristotle, Plutarch, and Cicero, to more modern sources such as Blackstone, Montesquieu, and Locke.³⁰ In 1787 classical republicanism, the idea of elected government based on popular support, was in the mainstream of American thought.

Aristotle had categorized government into three ideal forms—monarchy, aristocracy, and democracy. The defining aspect of all three was derived from the number of rulers in each—one, few, or all of the people. Unfortunately, as Aristotle noted, each moved toward a perverted form that abused power. Monarchy was reduced to tyranny; aristocracy became oligarchy; and democracy eroded into anarchy. The fundamental flaw in each of these degraded forms of government was the concentration of all power into the hands of the ruler.³¹

To correct this deficiency, a new model was needed. The framers found it in the doctrine of the separation of powers. As Madison said, "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu."³² Appropriately, the 300th anniversary of Montesquieu's birthday will coincide with the bicentennial of our national government under the Constitution.

Montesquieu attempted to find the rational basis for law by examining actual legal systems. According to Montesquieu, only the separation of authority into three distinct branches—judicial, executive, and legislative—could avoid the tendency of government toward abusing power. While there are differences between his plan and the one the founders adopted, there are many similarities. In Montesquieu's plan, for example, the legislative branch, divided into two chambers, had among its powers the impeachment of the Executive and the power of the purse.³³

It was with these theoretical and historical lessons in mind that the founders approached the Convention in May of 1787. To be sure, they were not all of one mind—economic, political, and sec-

30. An examination of Madison's notes on the debates at the Convention and the personal papers of the delegates reveals their familiarity with history. It also reveals the delegates' knowledge of political theory. *The Federalist Papers*, for example, cite numerous references to Western political thought. Madison's discussion of Montesquieu's ideas in *The Federalist* No. 47 is just one example.

31. See *THE POLITICS OF ARISTOTLE* 110-37, 160-88, 214-35, 255-78 (E. Barker ed. & trans. 1946).

32. *THE FEDERALIST* No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

33. See B. MONTESQUIEU, *THE SPIRIT OF LAWS* (T. Nugent trans. 1959).

tional differences divided them. Nor were all fifty-five delegates convinced of the necessity for major revisions to the Articles of Confederation. Indeed, only thirty-eight signed the final product.

As history guided the founders away from yielding too little power to the government, so too would they check the increased authority by incorporating much of Montesquieu's plan. An examination of the constitutional debates and *The Federalist Papers* reveals part of their reasoning.

The drafters of the Constitution understood that republics had a propensity to develop divisive groups that would press their claims, and if allowed, exceed the legitimate bounds of their authority. But the framers were wise enough to recognize that factions were a product as well as the price of liberty. Indeed, the very freedom promised by the new system encouraged division and faction. As Madison wrote, "Liberty is to faction what air is to fire . . . [but liberty is also] essential to political life."³⁴

The best way to provide internal safeguards against the abuse of power was to incorporate Montesquieu's separation of powers. Madison expressed this well in *The Federalist* No. 47: "The accumulation of all powers[,] legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."³⁵

Yet more than a simple separation of powers was necessary to check abusive actions that could flow from the self-interested interpretation of the law. Once again, Madison thoughtfully observed: "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment With equal, nay with greater reason, a body of men, are unfit to be both judges and parties"³⁶

Particularly destructive in this regard was the legislative branch, which, because of its popular support, could draw all power into what *The Federalist Papers* described as its "impetuous vortex."³⁷ As Madison noted, "parchment barriers" alone would be insufficient to protect against encroachments of power.³⁸ To augment the separa-

34. THE FEDERALIST No. 10, at 58 (J. Madison) (J. Cooke ed. 1961). Extending the analogy, Madison further wrote that "it could not be a less folly to abolish liberty, which is essential to political life; because it nourishes faction, than it would be to wish the annihilation of air, which is essential to human life, because it imparts to fire its destructive agency." *Id.*

35. *Id.*, No. 47, at 324.

36. *Id.*, No. 10, at 59.

37. *Id.*, No. 48, at 333.

38. *See id.*

tion of powers, the authors of the Constitution put in place a system of checks and balances. The system of separated yet shared power allows each branch both to act and to defend itself against encroachment by the other branches.

The powers of the Presidency are illustrative. The main roles are executive: to enforce the laws and command the armed forces, for example. But Presidential veto power is distinctly legislative, while the power to pardon is judicial. Similarly, the power of appointment to high office is shared between the President, who nominates, and the Senate, which must confirm.

Nothing in the text of the Constitution tells us which of its provisions will function smoothly through the centuries, and which will erupt into controversy. The founders were farseeing, but no more clairvoyant than we are today. In the field of foreign policy, they were careful to specify Congress' power, now an antiquarian oddity, to "grant Letters of Marque and Reprisal."³⁹ But the founders could not have anticipated the recurring conflicts between the branches over the power to make war. Under the Constitution the Congress has the power "[t]o declare War, grant Letters of Marque and Reprisal, and make rules concerning Captures on Land and Water."⁴⁰ Yet the Constitution also makes the President Commander-in-Chief of the armed forces and delegates to the President the power to receive envoys.⁴¹ Treaty powers and the appointment of ambassadors are shared between the Executive and the Senate.⁴²

One of the early disputes is surprisingly topical today. It arose in 1854 during the administration of Franklin Pierce, a President most of us would consider conspicuously absent from the parade of history. In response to a minor dispute and in the name of protecting American commercial interests, Pierce sent the U.S.S. Cyane to Greytown, Nicaragua, to obtain an apology and reparations. Receiving neither, the ship opened fire on the unarmed town, completely destroying it.⁴³

When news of the incident reached the United States, a furious

39. U.S. CONST. art. 1, § 8, cl. 11.

40. *Id.*

41. U.S. CONST. art. 2, § 2, cl. 1.

42. *Id.* at cl. 2.

43. Accounts of the Greytown incident can be found in most American history books. For a sharper focus on the President's constitutional power to activate the armed forces, see F. FRIENDLY & M. ELLIOTT, *THE CONSTITUTION—THAT DELICATE BALANCE* 275-81 (1984); J. JAVITZ & D. KELLERMAN, *WHO MAKES WAR: THE PRESIDENT VERSUS CONGRESS* 104-15 (1973); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 50-54 (1972).

Congress demanded to know why it had not been consulted concerning an obvious act of war, contrary to the precedents established by other Chief Executives such as Jefferson and Polk. Congress eventually lost interest in the dispute, but this controversy, like so many others, ended up in the courts.⁴⁴ An American property owner in Greytown sued the captain of the *Cyane*. The court found in favor of the captain on the theory that he was acting for President Pierce who, as Commander-in-Chief, had the authority to protect American citizens.⁴⁵

It is odd how history repeats itself. Other Presidents have taken similar actions, claiming foreign policy as a special prerogative of the Executive.⁴⁶ In fact, it was not until 1973 that Congress began to reassert itself with the passage, over President Nixon's veto, of the War Powers Act.⁴⁷ As Senator Javits stated, "The doctrine of Executive war powers has been erected for nearly two hundred years. [With the War Powers Act] we are breaking that thread of history."⁴⁸

Another area of conflict is found in the seemingly straightforward provision of article II, section 2, describing the mechanisms which may be used to appoint various federal officials.⁴⁹ But this provision says nothing about the circumstances under which these officials may be removed from office and who is empowered to fire them. The courts have wrestled with these questions in a variety of factual settings since the seminal case of *Myers v. United States*.⁵⁰ But recently they have cropped up again, with dramatic results. While the "power of the purse" has been no stranger to disputes between the executive and legislative branches, the deficit reduction method, known by the shorthand of Gramm-Rudman-Hollings,⁵¹ provided

44. *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4,186).

45. *Id.* at 112.

46. These actions have occasionally been contested in the courts. *See, e.g.*, *Chicago & So. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (President's power over foreign air transportation); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (President's power to prohibit the sale of arms to foreign nations).

47. 50 U.S.C. §§ 1541-1548 (1982 & Supp. III 1985).

48. *See* F. FRIENDLY & M. ELLIOTT, *supra* note 42, at 279.

49. U.S. CONST. art. II, § 2.

50. 272 U.S. 52 (1926) (removal of the Postmaster General). *See also* *Shurtleff v. United States*, 189 U.S. 311 (1903) (Presidential power to remove Customs Department official). *But see* *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935) (Presidential power not extended to those who do not occupy a "place in the executive department and who [exercise] no part of the executive power vested by the Constitution in the President.").

51. 2 U.S.C. §§ 901-922 (Supp. III 1985) (formally entitled the Balanced Budget and Emergency Deficit Control Act).

the unlikely setting for a challenge concerning appointment and removal power.

I opposed Gramm-Rudman-Hollings from the outset, and I have few misgivings about its partial demise at the hands of the Supreme Court in the case of *Bowsher v. Synar*.⁵² There are two reasons why I believe the legislation was the wrong path to the essential goal of deficit reduction. The first has less to do with the Constitution than with the fiscal facts of life. Gramm-Rudman-Hollings, like too many of Congress' deficit-cutting nostrums, took too narrow a view of our deficit problem. Its automatic deficit reduction mechanism looked to only one side of the ledger: cutting spending. It ignored the fact that we will never be able to reduce the deficit and still maintain essential programs that are in the vital national interest if we keep the other side of the ledger, increasing revenues, out of bounds.

But the more fundamental problem with Gramm-Rudman-Hollings is constitutional. Legislative decisions about where to spend, where to cut, and where to tax are for the Congress to make—and Congress alone—subject, of course, to Presidential veto. If spending cuts are needed, Congress must decide where the ax should fall and which programs should be spared the blow. Then members of Congress must answer to the people for the choices that they make. The delegation of these decisions to a number-crunching functionary of any branch of government violates the spirit of our constitutional system. In my view, the fatal flaw of Gramm-Rudman-Hollings was its attempt to replace the constitutional system of accountability with a mechanical scheme of budget-balancing by "anonymous consent."⁵³

I wish I could say that the courts agreed with me that deficit reduction is a legislative responsibility that Congress has no power to delegate to anyone else. In the Supreme Court, Justices Stevens and Marshall voted to strike down the statute on grounds similar to those I have outlined here.⁵⁴ But the majority found a different flaw in Gramm-Rudman-Hollings. This bold initiative to tackle the deficit problem foundered on a rock barely visible in the shoals of the Constitution: the removal power.

The majority reasoned that the job of administering the across-

52. 106 S. Ct. 3171 (1986).

53. Floor Speech of Senator Charles McC. Mathias, Jr. on the Gramm-Rudman-Hollings Deficit Reduction Amendment, Chamber of the United States Senate (Nov. 6, 1985).

54. See *Bowsher*, 106 S. Ct. at 3205 (Stevens, J., and Marshall, J., concurring).

the-board spending cuts was an executive function.⁵⁵ It observed that Congress had entrusted the ultimate responsibility for imposing those cuts to the Comptroller General, an official removable by Congress.⁵⁶ This fact led to the conclusion that the Comptroller General was an officer of the legislative branch whose exercise of executive functions violated the separation of powers principle.⁵⁷

This seems a curious route for the Court to take in striking down legislation as important as Gramm-Rudman-Hollings. But there is a deeper significance to the *Synar* decision. The lower court summarized it aptly when it suggested that Congress' decision to let automatic cuts substitute for making the hard choices itself exemplified "[t]he human propensity to leave difficult questions to somebody else."⁵⁸ But the court continued, "The instances are probably innumerable in which Congress has chosen to decide a difficult issue itself because of its reluctance to leave the decision . . . to an officer under the control of the executive branch."⁵⁹

Consider how the founders would have viewed this dilemma. They anticipated that the branches of government would occasionally attempt to encroach on each other's power. But the founders may not have contemplated the abdication of responsibility by both the legislative and executive branches that has contributed to our budget deficit crisis. In spite of this, the Constitution has measured up to the challenge, even though our government has not.

A fuller understanding of the principles embedded in the text of the Constitution—principles such as the separation of powers—underscores the shortcomings of the obsessive focus on the narrow concept of "original intent." A contract, the common law tells us, must be interpreted with the goal of carrying out the intent of the contracting parties. The Constitution is, in a sense, a contract. But unlike the Articles of Confederation, which created a contract among the sovereign states, the Constitution is the means by which "We the People" establish a new order—a system of ordered liberty. The establishment of this system was the original intent of the people who wrote, ratified, and implemented the Constitution. We are faithful to that intent to the extent that we measure governmental acts and omissions against the principles underlying that system.

Today that system continues to perform the tasks for which it

55. *Id.* at 3191.

56. *Id.*

57. *Id.*

58. 626 F. Supp. 1374, 1404 (D.D.C. 1986).

59. *Id.* at 1404.

was designed. It was designed to prevent tyranny, rather than promote efficiency; so it does not concentrate power, but rather disperses it among the branches and levels of government. It was designed to focus governmental power on its legitimate objectives; so government remains fenced out of our houses of worship, our newsrooms, and the private precincts of our families. It was designed to enfranchise the people; so the electoral process opens to an ever-expanding circle of Americans entitled to exercise their sovereignty.

The Constitution succeeded in solving the pressing problems the young Nation faced in 1787. With necessary amendments and the application of its underlying principles to changing conditions, it has continued to provide a means for a nation grown ever more powerful, prosperous, and complex to grapple with the problems presented to it by a dangerous and interdependent world.

The Constitution's bicentennial invites us to celebrate our charter's past and reflect on its vital present. But it also provides an occasion to dream about its future. The continued success of the American experiment in ordered liberty will not depend on some newly discovered shred of historical evidence that sheds a flickering light on the elusive touchstone of "original intent." As in the past, the Constitution's future will depend on the ability of a self-governing nation of free men and women to find within this rich and living charter the means to confront the challenges of the centuries ahead.