THEORIES OF CONSTITUTIONAL INTERPRETATION: PART I

The following excerpts from Supreme Court opinions illustrate a variety of approaches to interpreting the Constitution in terms of the sources of guidance relied on. The examples are not by any means exhaustive, but represent forms of argument that have been used often enough by individual justices over the Court's history to be regarded as at least minimally acceptable techniques for judicial self-explanation. In any event we will encounter all of them, among some others, throughout the course.

Whether any one of these forms of argument proves to be persuasive to a majority in any one case is an entirely different matter, of course. There may be disagreement about the meaning of the particular source even among those who consider it legitimate for judges to consider it; and many scholars and judges have developed theories of interpretation which either give priority to one source over others when they conflict, or dismiss one or more as inappropriate for judicial use.

The Court collectively has never committed itself to a particular theory of interpretation. One can perhaps make at least two cautious generalizations. First, among all the acknowledgments that a judge's personal preferences and value system inevitably influence her decisions, one so seldom sees an opinion explicitly relying on them that we can assume that they are not considered legitimate authority for any decision. Second, the source of authority most **frequently** relied on is and has been precedent, the Court's (or particular justices') own prior opinions.

1. **TEXT AND PLAIN MEANING**: *CHISHOLM V. GEORGIA*, 2 U.S. 419 (1793) (opinion of Wilson, J.)
2. **INTENT OF THE FRAMERS AND ADOPTION HISTORY**: *HANS V. LOUISIANA*, 134 U.S. 1 (1890)
3. **PRECEDENT AND INTERPRETIVE TRADITION**: *POE V. ULLMAN*, 367 U.S. 497 (1961) (dissenting opinion of Harlan, J.)
4. **STRUCTURE AND EFFECTIVE FUNCTIONING OF INSTITUTIONS**: *STATE OF MISSOURI V. HOLLAND*, 252 U.S. 416 (1920)
5. **EXTRATEXTUAL VALUES**: NATURAL LAW: *CALDER V. BULL*, 3 U.S 386 (1798) (Opinion of Chase, J.)
6. **EXTRATEXTUAL VALUES:** CONTEMPORARY PUBLIC OPINION: *HARPER V. VIRGINIA BOARD OF ELECTIONS*, 383 U.S. 663 (1966) (dissenting opinion of Harlan, J.)

TEXT AND PLAIN MEANING

CHISHOLM V. GEORGIA

2 U.S. 419 (1793)

[Chisholm, a citizen of South Carolina and executor of the estate of a South Carolina merchant, sued the State of Georgia in the U.S. Supreme Court (original jurisdiction) to recover the value of clothing supplied to Georgia during the Revolutionary War. Georgia refused to appear, on the ground of sovereign immunity. A majority of the Court rejected this claim and rendered default judgment against the State. In response to this decision, the Congress quickly proposed and the States ratified the 11th Amendment. An excerpt from Justice Wilson's opinion is offered as an example of argument based on the plain meaning of the text of the constitution.]

Wilson, J.

[In earlier portions of the opinion, Wilson argued (i) that in relation to the Union, the States are not sovereigns; (ii) that even in European monarchies the practice of sovereign immunity was being abandoned; and (iii) that the people could have established the jurisdiction of the federal courts over States.]

The next question under this head, is, Has the Constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations.....

Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this Court.

But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself. 'The judicial power of the United States shall extend, to controversies between two States.' Two States are supposed to have a controversy between them: This controversy is supposed to be brought before those vested with the judicial power of the United States: Can the most consummate degree of professional ingenuity devise a mode by which this 'controversy between two States' can be brought before a Court of law; and yet neither of those States be a Defendant? 'The judicial power of the United States shall extend to controversies, between a state and citizens of another State.' Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind.

...

Intent of the Framers and Adoption History

HANS V. LOUISIANA
134 U.S. 1 (1890)

[A citizen of Louisiana sued that State in federal circuit court in Louisiana, to recover interest due on state bonds. The State answered with the defense of sovereign immunity.]

Bradley, J.
....

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state. It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that, in cases arising under the constitution or laws of the United States, a state may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other states, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that, under the language of the constitution and of the judiciary act of 1789, a state was liable to be sued by a citizen of another state or of a foreign country. That decision was made in the case of *Chisholm v. Georgia*, 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court. It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that 'the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.' The supreme court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for after its adoption Attorney General Lee, in the case of *Hollingsworth v. Virginia*, (3 Dall. 378,) submitted this question to the court, 'whether the amendment did or did not supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another state.' Tilghman and Rawle argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But on the succeeding day, the court delivered an unanimous opinion 'that, the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state.'

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the states by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*; and this fact lends additional interest to the able opinion of Mr. Justice IREDELL on that occasion. The other justices were more swayed by a close observance of the letter of the constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies 'between a state and citizens of another state;' and 'between a state and foreign states, citizens or subjects,' they felt constrained to see in this language a power to enable the individual citizens of one state, or of a foreign state, to sue another state of the Union in the federal courts Justice IREDELL, on the

contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts. Looking back from our present stand-point at the decision in *Chisholm v. Georgia*, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people. [Quoting from FEDERALIST 81 (Hamilton).]

The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that 'the judicial power shall extend to all * * * controversies between a state and citizens of another state, * * * and between a state and foreign states, citizens, or subjects.' It was argued by the opponents of the constitution that this clause would authorize jurisdiction to be given to the federal courts to entertain suits against a state brought by the citizens of another state or of a foreign state. Adhering to the mere letter, it might be so, and so, in fact, the supreme court held in *Chisholm v. Georgia*; but looking at the subject as Hamilton did, and as Mr. Justice IREDELL did, in the light of history and experience and the established order of things, the views of the latter were clearly right, as the people of the United States in their sovereign capacity subsequently decided.

[Further quotes from the ratification debates.]

It seems to us that these views of those great advocates and defenders of the constitution were most sensible and just, and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

....

Precedent and Interpretive Tradition

POE V. ULLMAN

367 U.S. 497 (1961)

[Action was brought in federal district court to have the Connecticut law prohibiting the sale of contraceptives declared unconstitutional. The Court held that the case was not ripe for decision, because there had been no indication of intention on the part of the state to enforce the law.]

Harlan, J. (grandson of the concurring Justice in *Hans*), dissenting.

I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life. I reach this conclusion, even though I find it difficult and unnecessary at this juncture to accept appellants' other argument that the judgment of policy behind the statute, so applied, is so arbitrary and unreasonable as to render the enactment invalid for that reason alone. Since both the contentions draw their basis from no explicit language of the Constitution, and have yet to find expression in any decision of this Court, I feel it desirable at the outset to state the framework of Constitutional principles in which I think the issue must be judged.

I.

In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are 'the powers of government inherent in every sovereignty.' ... Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power of government.... But precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.... But as inescapable as is the rational process in Constitutional adjudication in general, nowhere is it more so than in giving meaning to the prohibitions of the Fourteenth Amendment and, where the Federal Government is involved, the Fifth Amendment, against the deprivation of life, liberty or property without due process of law.

It is but a truism to say that this provision of both Amendments is not self- explanatory. As to the Fourteenth, which is involved here, the history of the Amendment also sheds little light on the meaning of the provision. .... It is important to note, however, that two views of the Amendment have not been accepted by this Court as delineating its scope. One view, which was ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power, sought to limit the provision to a guarantee of procedural fairness.... The other view which has been rejected would have it that the Fourteenth Amendment, whether by way of the Privileges and Immunities Clause or the Due Process Clause, applied against the States only and precisely those restraints which had prior to the Amendment been applicable merely to federal action. However, 'due process' in the consistent view of this Court has even been a broader concept than the first view and more flexible than the second.

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.... Thus the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.' ...

However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights 'which are * * * fundamental; which belong * * * to the citizens of all free governments,' *Corfield v. Coryell*, Fed.Cas.No.3,230, 4 Wash.C.C. 371, 380, for 'the purposes (of securing) which men enter into society,' *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648. Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights.... Indeed the fact that an identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government, suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of i.e. taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. ...
....
Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no 'mechanical yard-stick,' no 'mechanical answer.' The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take 'its place in relation to what went before and further (cut) a channel for what is to come.' ... The matter was well put in *Rochin v. People of State of California*, 342 U.S. 165, 170--171, 72 S.Ct. 205, 208, 96 L.Ed. 183:

> 'The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. * * * These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.'

On these premises I turn to the particular Constitutional claim in this case.

Structure and Effective Functioning of Institutions

STATE OF MISSOURI v. HOLLAND, U. S. Game Warden.
252 U.S. 416 (1920)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment...

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court.... Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that ... this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.... We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

Extratextual Values: Natural Law

CALDER V. BULL

3 U.S 386 (1798)

Chase, J.

…

I cannot subscribe to the omnipotence of a State *388 Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established.

An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, *389 in my opinion, be a political heresy, altogether inadmissible in our free republican governments.

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Extratextual Values: Contemporary Public Opinion

HARPER V. VIRGINIA BOARD OF ELECTIONS

383 U.S. 663 (1966)

[Virginia imposed an annual poll tax of $1.50 on every citizen over 21, which had to be paid as a precondition of the right to vote in any election. The proceeds were used to support local government activities including schools. It was challenged as an unconstitutional infringement on the right to vote, as a fundamental right protected by the due process clause of the 146 Amendment. The majority of the Court held that the tax was unconstitutional.]

Mr. Justice HARLAN, whom Mr. Justice STEWART joins, dissenting.

The final demise of state poll taxes, already totally proscribed by the Twenty-Fourth Amendment with respect to federal elections and abolished by the States themselves in all but four States with respect to state elections, is perhaps in itself not of great moment. But the fact that the *coup de grace* has been administered by this Court instead of being left to the affected States or to the federal political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.

I do not propose to retread ground covered in my dissents in *Reynolds v. Sims*, 377 U.S. 533, 589, 84 S.Ct. 1362, 1395, and *Carrington v. Rash*, 380 U.S. 89, 97, 85 S.Ct. 775, 780, 13 L.Ed.2d 675, and will proceed on the premise that the Equal Protection Clause of the Fourteenth Amendment now reaches both state apportionment (*Reynolds*) and voter-qualification (*Carrington*) cases. My disagreement with the present decision is that in holding the Virginia poll tax violative of the Equal Protection Clause the Court has departed from long- established standards governing the application of that clause.

The Equal Protection Clause prevents States from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances. The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy.... This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its own members, and until recently it has been followed in all kinds of ‘equal protection’ cases.

…

Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one. Over the years these and other restrictions were gradually lifted, primarily because popular theories of political representation had changed. Often restrictions were lifted only after wide public debate. The issue of woman suffrage, for example, raised question of family relationships, of participation in public affairs, of the very nature of the type of society in which Americans wished to live; eventually a consensus was reached, which culminated in the Nineteenth Amendment no more than 45 years ago.

Similarly with property qualifications, it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability. Most of the early Colonies had them; many of the States have had them during much of their histories; and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational

argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens. Nondiscriminatory and fairly applied literacy tests... find justification on very similar grounds.

These viewpoints, to be sure, ring hollow on most contemporary ears. Their lack of acceptance today is evidenced by the fact that nearly all of the States, left to their own devices, have eliminated property or poll-tax qualifications; by the cognate fact that Congress and three -quarters of the States quickly ratified the Twenty-Fourth Amendment; and by the fact that rules such as the 'pauper exclusion' in Virginia law... have never been enforced.

Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the laissez-faire theory of society, *Lochner v. People of State of New York*, 198 U.S. 45, 75--76, 25 S.Ct. 539, 546, 49 L.Ed. 937. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism.

I would affirm the decision of the District Court.

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THEORIES OF CONSTITUTIONAL INTERPRETATION: PART II[1]

Consider the following problem:

In 1970, a number of concerned citizens, worried about what they regarded as the corruption of American life, met to consider what could be done. During the course of the discussion, one of the speakers electrified the audience with the following comments:

> The cure for our ills is a return to old-time religion, and the best single guide remains the Ten Commandments. Whenever I am perplexed as to what I ought to do, I turn to the Commandments for the answer, and I am never disappointed. Sometimes I don't immediately like what I discover, but then I think more about the problem and realize how limited my perspective is compared to that of the framer of those great words. Indeed, all that is necessary is for everyone to obey the Ten Commandments, and our problems will all be solved.[2]

Within several hours the following plan was devised: As part of the effort to encourage a return to the "old-time religion" of the Ten Commandments, a number of young people would be asked to take an oath on their eighteenth birthday to "obey, protect, support, and defend the Ten Commandments" in all of their actions. If the person complied with the oath for seventeen years, he or she would receive an award of $10,000 on his or her thirty-fifth birthday.

The Foundation for the Ten Commandments was funded by the members of the 1970 convention, plus the proceeds of a national campaign for contributions. The speaker quoted above contributed $20 million, and an additional $30 million was collected, $15 million from the convention and $15 million from the national campaign. The interest generated by the $50 million is approximately $6 million per year. Each year since 1970, 500 persons have taken the oath. You are appointed sole trustee of the Foundation, and your most important duty is to determine whether the oath-takers have complied with their vows and are thus entitled to the $10,000.

It is now 1987, and the first set of claimants comes before you:

1. Claimant A is a married male. Although freely admitting that he has had sexual intercourse with a number of women other than his wife during their marriage, he brings to your attention the fact that "adultery," at the time of Biblical Israel, referred only to the voluntary intercourse of a married woman with a man other than her husband. He specifically notes the following passage from the article Adultery, I JEWISH ENCYCLOPEDIA 314:

   > The extramarital intercourse of a married man is not per se a crime in biblical or later Jewish law. This distinction stems from the economic aspect of Israelite marriage: The wife as the husband's possession... and adultery constituted a violation of the husband's exclusive right to her; the wife, as the husband's possession, had no such right to him.

[1] Adapted from Sanford Levinson, "On Interpretation: The Adultery Clause of the Ten Commandments," 58 S. Cal. L. Rev 719.

[2] Cf. Statement of President Ronald Reagan, Press Conference, Feb. 21, 1985, reprinted in New York Times, Feb. 22, 1985, Section 1, p.10, column 3: "I've found that the Bible contains an answer to just about everything and every problem that confronts us, and I wonder sometimes why we won't recognize that one Book could solve a lot of problems for us."

A has taken great care to make sure that all his sexual partners were unmarried, and thus he claims to have been faithful to the original understanding of the Ten Commandments. However we might define "adultery" today, he argues, is irrelevant. His oath was to comply with the Ten Commandments; he claims to have done so. (It is stipulated that A, like all the other claimants, has complied with all the other commandments; the only question involves compliance with the commandment against adultery.)

Upon further questioning, you discover that no line-by-line explication of the Ten Commandments was proffered in 1970 at the time that A took the oath. But, says A, whenever a question arose in his mind as to what the Ten Commandments required of him, he made conscientious attempts to research the particular issue. He initially shared your (presumed) surprise at the results of his research, but further study indicated that all authorities agreed with the scholars who wrote the Jewish Encyclopedia regarding the original understanding of the Commandment.

2. Claimant B is A's wife, who admits that she has had extramarital relationships with other men. She notes, though, that these affairs were entered into with the consent of her husband. In response to the fact that she undoubtedly violated the ancient understanding of "adultery," she states that that understanding is fatally outdated:

    (a) It is unfair to distinguish between the sexual rights of males and females. That the Israelites were outrageously sexist is no warrant for your maintaining the discrimination.
    (b) Moreover, the reason for the differentiation, as already noted, was the perception of the wife as property. That notion is a repugnant one that has been properly repudiated by all rational thinkers, including all major branches of the Judeo-Christian religious tradition historically linked to the Ten Commandments.
    (c) She further argues that, insofar as the modern prohibition of adultery is defensible, it rests on the ideal of discouraging deceit and the betrayal of promises of sexual fidelity. But these admittedly negative factors are not present in her case because she had scrupulously informed her husband and received his consent, as required by their marriage contract outlining the terms of their "open marriage."

    (It turns out, incidentally, that A had failed to inform his wife of at least one of his sexual encounters. Though he freely admits that this constitutes a breach of the contract he had made with B, he nevertheless returns to his basic argument about original understanding, which makes consent irrelevant.)

3. C, a male (is this relevant?), is the participant in a bigamous marriage. C has had no sexual encounters beyond his two wives. (He also points out that bigamy was clearly tolerated in both pre- and post-Sinai Israel and indeed was accepted within the Yemenite community of Jews well into the twentieth century. It is also accepted in a variety of world cultures.)

4. D, a practicing Christian, admits that he has often lusted after women other than his wife. (Indeed, he confesses as well that it was only after much contemplation that he decided not to sexually consummate a relationship with a coworker whom he thinks he "may love" and with whom he has held hands.) You are familiar with Christ's words, Matthew 5:28: "Whosoever looketh on a woman to lust after, he hath committed adultery with her already in his heart." (Would it matter to you if D were the wife, who had lusted after other men?)

5. Finally, claimant E has never even lusted after another woman since his marriage on the same day he took his oath. He does admit, however, to occasional lustful fantasies about his wife. E, a Catholic, is shocked when informed of Pope John Paul II's statement that "adultery in your heart

is committed not only when you look with concupiscence at a woman who is not your wife, but also if you look in the same manner at your wife." The Pope's rationale apparently is that all lust, even that directed toward a spouse, dehumanizes and reduces the other person "to an erotic object."

Which, if any, of the claimants should get the $10,000? (Remember, all can receive the money if you determine that they have fulfilled their oaths.) What is your duty as Trustee in determining your answer to this question?

More particularly, is it your duty to decide what the best single understanding of "adultery" is, regarding the Ten Commandments, and then match the behavior against that understanding? If that is your duty, how would you go about arriving at such an understanding? You may object to the emphasis that is being placed on your deciding. Instead, you might wish to argue that someone else, whether a discrete person or an authoritative institution has the capacity to decide, and your role is simply to enforce that understanding. This argument is certainly possible. To whom, though, would you look to for such authoritative resolution?

Is it possible that your duty, rather than seeking the best single definition of adultery, is instead to assess the plausibility of the various claims placed before you? That is, are there several acceptable answers to the question of what constitutes adultery? Is it enough that you find an argument plausible even though you personally reject it as ultimately mistaken? That is, you might not have behaved as did a given claimant, considering your understanding of "adultery," but does this automatically translate into the legitimate rejection of someone else's claim to have remained faithful to the Commandment?

Is the "sincerity" or "good faith" with which an argument is made relevant? Would it make a difference to you, in A's case, whether he had researched the original understanding of the Commandment after he had engaged in his liaisons? What if he had learned about ancient Israel only a week before, after consulting the best lawyer in town who will receive one fourth of the $10,000 as a contingency fee should you award the money to A?

Consider the six theories of constitutional interpretation discussed in Part I of this handout. How would each theory of constitutional interpretation lead you to decide whether to disburse the $10,000 to each claimant? Fill in the chart on the following page.

Using this theory of interpretation…

Would you award this claimant the money?		Text and Plain Meaning	Intent of the Framers and Adoption History	Precedent and Interpretive Tradition	Structure and Effective Functioning of Institutions	Extratextual Values: Natural Law	Extratextual Values: Contemporary Public Opinion
	A						
	B						
	C						
	D						
	E						