

“Two Hundred Years Ago Today”*

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Two hundred years ago today, on a cool clear afternoon in Philadelphia, thirty-nine men put their signatures on the Constitution of the United States and began the process that would create a nation of thirteen separate states. In introducing my remarks today, Dean Stein has called this the birthday of the Constitution. I am sure that when he invited me to speak he expected that I would give the usual congratulations and platitudes and toasts that are appropriate for birthdays and other celebrations, but I rarely do what Dean Stein expects me to do. What I want to do instead is something a little unusual: I do *not* want to celebrate the writing of the Constitution two hundred years ago.

There is a tendency in the bicentennial year—and especially this week—to idealize the events of 1787. We tend to presume that the men who wrote the Constitution were near-perfect demigods, who crafted a brilliant and internally consistent document from their own insights. We assume that the Constitution represents the consensus of opinion of those fifty-five men, and even of the population at large in 1787. I want to debunk those myths. I want to talk instead about the problems, about the mistakes, and about the very different visions of government that were represented at the Constitutional Convention.

In short, I want to suggest that the drafters of the Constitution stumbled and bungled their way in to the document whose origins we are celebrating here today. That debunking process leaves a problem, however. Once we’ve debunked the myth and exposed lack of any solid foundation for the Constitution, we are left with a puzzling question. Why has it worked for two hundred years? If the framers were as inept and as wrongheaded as I am going to suggest that they were, how did they create such an effective and long lasting document? That is the main question that I want to answer today, and it is one of the most important ques-

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tions about the Constitution, because it is what links us to our history.

I want to start with a little historical background to set the stage for the Constitutional Convention. The American Revolution began in 1775 with the shots heard 'round the world, the battle of Lexington and Concord. Although the United States officially declared its independence in 1776, it did not win independence until the end of the war in 1783. Nevertheless, the individual states began creating their first united government while the war was still going on.

In 1777 the newly created Continental Congress, in which all the states were equally represented, drafted the Articles of Confederation. The Articles of Confederation were the first United States constitution. They were adopted by the unanimous consent of all thirteen states and took effect in 1781. This original constitution looked very unlike our present Constitution. The Articles created an extremely loose confederation. The Articles themselves called the union merely a "firm league of friendship." Not yet a nation, the United States under the Articles were instead bound by a treaty. The national government—which consisted essentially of the Continental Congress—had virtually no power. It could not even tax the people or the states, and the only way it could raise money was to "requisition" the states: to *ask* the states for money. With no enforcement mechanism, this source of revenue-raising was not particularly effective.

Despite these flaws the Articles worked reasonably well during the war. There were, however, some problems. The well-known terrible winter at Valley Forge was due not only to the snow, which certainly contributed to the problem, but also to the fact that Congress had simply run out of money for the war effort. There was no money to purchase food, clothing or supplies for the soldiers, and each state responded to requisition requests by accusing the other states of failure to comply with similar requests. Obviously, however, the Articles worked well enough during the Revolution to allow the United States to win the war.

It was not until after the peace that the real flaws in the Articles of Confederation became apparent. Congress still could not raise money, and so it could not pay off the war debts, including debts to both foreign countries and individuals. Congress could not regulate commerce, and so the states started an economic war with each other, competing for trade and imposing various kinds of protective tariffs. As a result of some of these economic problems, there was a recession in 1785 and 1786.

So in 1786, Congress called for a constitutional convention to amend the Articles of Confederation. Twelve states sent delegates—Rhode Island refused—and from May 25 to September 17, 1787, the convention sat in the State House in Philadelphia, where the Declaration of Independence had been signed eleven years before. These delegates produced not the amendments they were requested to draft, but a wholly new Constitution.

We know a good deal about what went on in the convention. James Madison, who was one of seven delegates from Virginia, took detailed notes, which were published after his death.¹ They are a rich resource for historical research, and provide a fascinating glimpse of the different political perspectives of many of the delegates.

I began by suggesting that we tend to idealize the men who wrote the Constitution, and I must admit that our exaltation has an impressive pedigree. Thomas Jefferson, who was then in Paris, called the convention, "an assembly of demigods."² The French Charge-D'Affaires said that "if all the delegates named for this convention of Philadelphia are present, one will never have seen, even in Europe, an assembly more respectable for the talents, knowledge, disinterestedness and patriotism of those who compose it."³

Who were these most "respectable" delegates? They were fifty-five men from twelve states with different interests, different political views, even different personal lifestyles. They were also very unsure whether they would be successful in reaching an agreement on a new constitution. As late as August 15, three-quarters of the way through the summer, John Rutledge, a delegate from South Carolina, "complained much of the tediousness of the proceedings."⁴ The same day, Oliver Elsworth of Connecticut also seemed to succumb to despair. "We grow more & more skeptical as we proceed," he said, "[i]f we do not decide soon, we shall be unable to come to any decision."⁵

1. James Madison, *Notes of Debates in The Federal Convention of 1787* (Adrienne Koch ed. 1966). Many other editions of Madison's notes have been published. The notes are also included in Max Farrand, *The Records of the Federal Convention of 1787* (1911). Citations in this essay to Madison therefore include the date of the quoted remarks, to enable the reader to locate the quotation in any edition.

2. Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), *reprinted in* *The Adams-Jefferson Letters* 196 (Lester Capon ed. 1959).

3. Letter from M. Otto, French Charge D'Affaires to Comte de Montmorin, French Secretary of State for Foreign Affairs (Apr. 10, 1787), *reprinted in* Farrand, *supra* note 1, at 15 (translation mine).

4. Madison, *supra* note 1, at 465 (Aug. 15).

5. *Id.*

There was good reason for skepticism and despair. Again and again, delegates kept threatening to leave, and to dissolve the convention. The delegates from Virginia and Pennsylvania threatened to leave if the states were given equal representation in the Senate. The delegates from Delaware and New Jersey threatened to leave if the states were given proportional representation in the House. At one point, the debates became so acrimonious that Gunning Bedford of Delaware threatened more than withdrawal. He said that if the large states were to confederate on principles unacceptable to the small states, "the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice."⁶ Both the northern and the southern states also threatened to withdraw more than once over questions of slavery. New York's delegates did withdraw, leaving in early July in disgust with the proceedings. Alexander Hamilton returned and signed the document, but the other two delegates never came back. In fact, of the fifty-five original delegates, only forty-two were still present on September 17. These departures and threats to depart illustrate how serious some of the disputes were.

So with all of these problems and all of these differences, and with farms and businesses and families at home, what kept most of those men in Philadelphia all through that summer? What kept them there was the one thing that they had in common: a dedication to the Republican Experiment. Alexander Hamilton of New York described their task as "decid[ing] for ever [sic] the fate of Republican Government."⁷ That may sound a little melodramatic today, but consider the background against which they were working. All of the governments of Europe were monarchies of one sort or another, but the United States, after rejecting the English king, were determined not to create another monarchy. Instead, they would create a republic, a government based on the people. The delegates believed that there had never in history been a successful republic: all had succumbed quickly to either a tyrant from within or invasion from without. So in writing the Constitution for a republic, the delegates were starting from scratch. They knew, moreover, that the eyes of the world were upon them. That is why Hamilton could cast their task in such momentous terms. And it was that mission—that sense of creating a "new order for the ages"—that kept them in Philadelphia through all the conflicts, all the doubts, and all the despair.

What is particularly interesting and unfamiliar to many mod-

6. *Id.* at 230 (June 30).

7. *Id.* at 196 (June 26).

ern observers is why they were so concerned about the state of republican government. Why did they think that the eleven year-old American Republic was doomed? Elbridge Gerry of Massachusetts spoke the sentiments of virtually all of the delegates when he said: "[t]he evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots. . . . He had he said been too republican heretofore: he was still however republican, but had been taught by experience the danger of the levilling [sic] spirit."⁸ His phrases—"the levilling spirit," "the excess of democracy," "too republican"—were code words. They were common language of the time, representing mistrust of the people and of the popularly elected legislatures in the states. If you read through Madison's notes and also through the letters of the men who were there, this mistrust of the people comes up again and again. According to the delegates at the Constitutional Convention, the people—on whom the republic was supposed to be based—were selfish and ignorant and neither knew nor cared how to run a government. Virtually all of the delegates adhered to this anti-democratic belief, including James Madison, often identified as the father of the Constitution. Madison, for example, advocated an aristocratic Senate, in order, he said, to protect the people against the "transient impressions into which they themselves might be led."⁹

The "transient impressions" to which he was referring included specifically movements in some states for such things as debtor relief, paper money, progressive taxation, and other popular acts that were being considered and enacted in the various state legislatures. For the men in Philadelphia the best known example of the excesses of democracy was Rhode Island, also known as Rogue Island. At the time that the convention was sitting in Philadelphia, the Rhode Island legislature was considering an act that would require complete redistribution of property every thirteen years. From the standpoint of our modern democratic, egalitarian world, some of these fears of the excesses of democracy seem at least misplaced and possibly dangerous.

An examination of the source of their fears, however, may prove illuminating. One explanation of the founders' elitism was given by progressive historian Charles Beard in the early 1900s. He suggested that this elitist and anti-populist strain was simply the

8. *Id.* at 39 (May 31).

9. *Id.* at 193 (June 26).

delegates' economic self-interest showing.¹⁰ His thesis was that in order to protect their own property, these fifty-five wealthy men betrayed the spirit of the Revolution of 1776 and produced instead a conservative counter-revolution. This Beardian interpretation of the events of 1787 is still taught, and is still one of the most frequent methods of debunking the myths and criticizing the framers of the Constitution. Beard's analysis clearly underlies Justice Marshall's criticism, of the framers as wealthy, land-holding, slave-owning white males.¹¹ I would suggest, however, that Beard was wrong on both counts.

First, there *was* no contrasting spirit of 1776 to betray. Many of the same people who led the Revolution of 1776 were active in framing the Constitution in 1787. Moreover, most of the leaders of 1776—whether or not they were ultimately involved in drafting the Constitution—were equally mistrustful of the common people. John Randolph of Virginia said in 1774: “[w]hen I mention the public, I mean to include only the rational part of it. The ignorant vulgar are as unfit to judge of the modes, as they are unable to manage the reins of government.”¹² Benjamin Rush of Pennsylvania, commenting in 1776 on the new Pennsylvania Constitution, said: “they call it a democracy—a mobocracy in my opinion would be more proper. All our laws breathe the spirit of town meetings and porter shops.”¹³ Thus Beard's account of a populist spirit of 1776 is, to say the least, somewhat exaggerated.

I have a second—and much more important—disagreement with Beard. I do not believe that it was solely economic self-interest that motivated the delegates in Philadelphia. Listen for example to James Wilson of Pennsylvania on the floor of the Convention on July 13th, 1787. Wilson was as anti-populist as any of them, but he said: “[a]gain he could not agree that property was the sole or the primary object of Govern[ment] & society. The cultivation & improvement of the human mind was the most noble object.”¹⁴ Recall Gerry's description of the people: not that they lack virtue, but simply that they are ignorant and likely to be misled.

10. See Charles Beard, *An Economic Interpretation of the Constitution of the United States* (1913).

11. Address by Justice Thurgood Marshall, Convention of the San Francisco Patent and Trademark Law Association (May 6, 1987).

12. Quoted in Gordon Wood, *The Democratization of Mind in the American Revolution*, in *The Moral Foundations of the American Republic* 109, 113-14 (Robert Horwitz ed. 1986).

13. Quoted in Samuel Harding, *Party Struggles Over the First Pennsylvania Constitution*, in *American Historical Association*, 1894 Annual Report 386 (1895).

14. Madison, *supra* note 1, at 287 (July 13).

The men in Philadelphia in 1787 were republicans, in the sense that they wanted rule by the people rather than by a monarch. They were not, however, democrats; they did not necessarily believe in rule by the masses. They were instead aristocrats of a sort, believing that although the government should be based on and operated for the benefit of the people, only those fit to govern ought to do so. That is certainly elitist, and quite different from modern American sentiments, but it is not necessarily economically self-interested. The framers wanted an aristocratic government not solely for their own good, but also for the good of the country.

Still, they were all radically less egalitarian than we are today. They didn't have much faith in the capacity of the masses to participate in government, and they also disagreed about how to remedy this inability of the masses: how ought they to create a government based on the people when the people were not trustworthy? One of the primary reasons they could not agree on the *means* for creating this new republican government was that they did not agree on the *ends* of government. They did not all agree on the most basic question: what are the purposes of a government?

I will offer just two examples of the many different views of the purposes of government that were present at the Convention. Madison and his followers adhered essentially to John Locke's classical liberalism. Specifically, they viewed governments as having very limited purposes: government was, in their view, limited to protecting selfish, vicious citizens from each other. Thus the government was not supposed to become involved in individual lives, nor to become involved with what individuals believed or sought for their own aims, as long as those aims didn't interfere with the lives and aims of others. For the Madisonian liberals, then, the solution to the common people's lack of ability was simple; it was novel, and perhaps brilliant, but it was not very complicated.

What Madison proposed was to take the self-interest of all the various segments of society and oppose them against one another. In this way ambition would counteract ambition, vice would check vice, and the country would virtually run itself, like a well-tuned machine. Madison's crucial contribution was to recognize that where virtue is in short supply among the people, government must instead be designed to run on vice. As one modern critic has pointed out, the cost of Madison's solution is that it "magnif[ies] and multipl[ies] in American life the selfish, the interested, the

narrow, the vulgar, and the crassly economic. That is the substratum on which [Madison] intended [our political system] to rest"¹⁵

Madison's was not the only view of government at the convention, however. James Wilson and others adhered to a form of classical republicanism. Here I am using republicanism not just to mean the antithesis of monarchy, but rather as the antithesis of Madisonian liberalism. Wilson and other American republicans saw an active government as the great educator: a government that would pursue, in Wilson's words, "the cultivation & improvement of the human mind,"¹⁶ and not just protect each from each; a government sustained by and sustaining of a virtuous people who would put the good of the community ahead of their own selfish interests; and a government involved with the mind and the spirit and the ethics of a people. Wilson saw, in short, a government whose purpose was to cultivate an unselfish, aspiring, virtuous people. This type of government—which exercises a deliberative and educative function—requires real people to make real value choices; such choices cannot be made by an "invisible hand." Thus what the republicans tried to accomplish was to ensure that the legislators who would be making these choices would be wise and just. This made these republican framers aristocrats of a sort. They believed that only the educated elite, and not the uneducated masses, could make the right choices. Thus they envisioned a government composed of what Thomas Jefferson later called the "natural aristocracy": an aristocracy of merit and talent rather than of birth.

Despite this fundamental difference in views on the purpose of government, sometimes the liberals and the republicans could agree on the structure of government. The best example of this is the structure of the Senate. Madisonian liberals wanted the Senate chosen by the states rather than by the people, in order to counteract the democratic and popular character of the House of Representatives. This balance was part of the larger Madisonian scheme of checks and balances. Wilsonian republicans, by contrast, wanted the Senate to be chosen by the states rather than by the people because they thought that type of filtered or mediated democracy was the best way to ensure a wise legislature.

Because of these fundamental differences, even where they agreed in principle they had difficulty in practice. For example, in

15. Martin Diamond, *Ethics and Politics: The American Way*, in *The Moral Foundations of the American Republic* 75, 95 (Robert Horwitz ed. 1986).

16. Madison, *supra* note 1, at 286 (July 13).

late June, they had already decided that the Senate terms would rotate, with a third of the Senate up for election at a time. Having decided that, they were trying to decide how long each Senator's term should be. They had just about settled on seven years (with one third elected at a time) when, according to Madison, "Mr. Williamson . . . suggest[ed] '6 years', as more convenient for Rotation than 7 years."¹⁷ Without Hugh Williamson of North Carolina, we would be having Senatorial elections every two and one-third years.

They made other false starts as well. They ultimately wrote a constitution based on three essential principles: dual sovereignty of the state and national governments, separation and balance of power within the national government, and some form of popular election of the government. There were times during the convention, however, when things might have turned out very differently. Imagine what our government would have looked like today if any of the following suggestions, all of which were offered and seriously debated, had been adopted: that there should be more than one President at a time;¹⁸ that the President be elected by the national legislature;¹⁹ that the Senate and the President be elected for life;²⁰ that Senators be paid no salary, because, according to Charles Pinckney of North Carolina, "[a]s this branch was meant to represent the wealth of the Country, it ought to be composed of persons of wealth; and if no allowance was to be made the wealthy alone would undertake the service."²¹ I suppose it did turn out that way, but not quite the way Pinckney envisioned it. Hamilton suggested at one point that the national legislature should appoint the state Governors.²² Coming from a state that currently has a Democratic Governor and two Republican Senators, I am sure you can appreciate the impact that suggestion might have had.

Finally, David Brearley of New Jersey suggested "that a map of the U.S. be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts."²³ These are the mistakes that the drafters caught early, the mistakes that they rectified in the final Constitution.

17. *Id.* at 192 (June 25).

18. *See, e.g., id.* at 46 (June 1), 58 (June 2), 59-60 (June 4).

19. *See, e.g., id.* at 150 (list of resolutions adopted by Convention as of June 19), 383 (list of resolutions adopted by Convention as of July 26 and sent to Committee on Detail).

20. *Id.* at 135-36 (June 18).

21. *Id.* at 198 (June 26).

22. *Id.* at 139 (June 18).

23. *Id.* at 95 (June 9).

There is, however, another illustration of how they went wrong, and that is to look at their predictions of the future.

In the course of framing a new government, they frequently described their visions of the country and the government in the future. Their predictions were not very accurate. Jonathon Dayton of New Jersey was, he said, persuaded that the Constitution was "an amphibious monster" which "never would be rec[eived] by the people."²⁴ He was proven wrong all through 1788, when one state after another ratified the Constitution. Roger Sherman of Connecticut predicted that "the abolition of Slavery seemed to be going on in the U.S. & . . . the good sense of the several States would probably by degrees compleat it."²⁵ Ellsworth similarly predicted "[a]s population increases poor laborers will be so plenty as to render slaves useless. Slavery in time will not be a speck in our Country."²⁶ They too were proven wrong, with tragic consequences.

James Wilson predicted that the Presidential veto power would "seldom be used; t]he Legislature would know that such a power existed, and would refrain from such laws, as it would be sure to defeat."²⁷ To date, the one hundredth Congress has presented forty-seven substantive bills to the President and of those forty-seven substantive bills the President has vetoed four. That is a veto rate of slightly over eight percent, which is probably not what Wilson meant by "seldom." Roger Sherman also had a prediction about the Presidency. He said the people "will never give a majority of votes to any one man; t]hey will generally vote for some man in their own State."²⁸ That prediction, of course, gets proven wrong every four years. In fact, once the twelfth amendment sorted out the problem of determining which candidate was running for which executive office, only once has the President failed to get a majority of electoral college votes, and that was in 1824. Sherman was right when he said that the people would generally vote for some *man*, but I don't believe that's what he meant. Luther Martin of Maryland speculated on the judiciary, suggesting that "a national Judiciary extended into the States would be ineffectual . . ."²⁹

Finally, the framers did not have particularly great expectations about the durability of the Constitution. "Can it be sup-

24. *Id.* at 228 (June 30).

25. *Id.* at 503 (Aug. 22).

26. *Id.* at 504 (Aug. 22).

27. *Id.* at 63 (June 4).

28. *Id.* at 306 (July 17).

29. *Id.* at 160 (June 20).

posed," Nathaniel Gorham of Massachusetts asked "that this vast Country including the Western territory will 150 years hence remain one nation?"³⁰ In the New York ratifying convention, Melancton Smith made a similarly pessimistic prediction. "In three or four hundred years," he said, "[the] population might amount to a hundred millions: at this period, two or three great empires might be established, totally different from our own."³¹

I have just described a group of delegates who had fundamental disagreements over the most basic questions, who had little or no idea what the government should look like and played with strikingly different ideas, and who were shockingly wrong about what the future would bring. They simply could not envision the vast, diverse, egalitarian, commercially successful society that we have today. So how can we explain their success? How could they have been so wrong about so many issues that are central to the structure of government, and still have created a constitution that has lasted two hundred years despite these fundamental changes in our society? The answer is that they did not create it: we did, and we are still in the process of creating it.

The framers were wrong about a lot of things, but they were right about what is perhaps the most basic point. They did write a constitution for the ages, because they wrote an open-ended and flexible document, leaving the construction and the interpretation of it to future generations. In celebrating the bicentennial we should keep in mind that it is both our right and our duty to continue interpreting the Constitution.

In order to do justice to our obligation to interpret the Constitution, we must look to our own sense of justice and fairness, as well as to our traditions; we cannot rely on what is frequently called "the intent of the framers." For I hope that I have demonstrated today that recourse to "the intent of the framers" on contemporary issues is both impossible—because those fifty-five men in Philadelphia had conflicting views on virtually everything—and a fundamental mistake, because the drafters of the Constitution were not demigods, but ordinary men with limited abilities and limited vision.

If we reject the notion that the Constitution is to be interpreted by recourse to the intent of the framers, however, we might have another problem. The most frequent objection to the flexible method of interpretation that I have just suggested is that it lacks

30. *Id.* at 410 (Aug. 8).

31. 2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 382 (1891).

legitimacy. Those who favor looking to "the intent of the framers" argue that if judges interpret the Constitution without looking at "original intent," then unelected judges are imposing their own views and their own values against the will of the popularly elected legislature. Judge Robert Bork took that position before the Senate Judiciary Committee last year, and Attorney General Edwin Meese has made the same argument.

I have already alluded to one difficulty with "original intent:" it is very difficult, if not impossible, to identify "the intent of the framers." Even if you *can* identify it, there are two responses to the originalist argument. One response is simple, and one is more complicated. The simple response is to ask why it is any more legitimate or democratic to look to the interpretation of some wealthy white men of two centuries ago than it is to look to federal judges who, although not elected, are at least appointed by an elected President and an elected Senate.

The more complicated, and more interesting, response involves a sort of a catch-22. If you do look at the intent of the framers (to the extent that it is recoverable), you will find that the framers probably did not intend to limit judges to looking at the framers' intent. That is why I call it a catch-22: looking at the framers' intent tells us not to look at the framers' intent.

How do we know that the framers did not intend to limit what judges could look at when interpreting the Constitution? There are three pieces of evidence that we can look at: theories of interpretation of various legal documents in the late eighteenth and early nineteenth centuries, the actual practice of interpreting both state and federal constitutions during that period, and the founding generation's notion of what they were creating when they drafted or ratified or accepted the Constitution.

If one looks at how eighteenth century lawyers interpreted various documents, including charters, wills, contracts, and the like, one finds that they did not look at the intent of the parties or authors of the document. They looked instead at a reasonable objective interpretation of the language under the circumstances.³²

The second way to recreate what the framers thought about constitutional interpretation is to look at the early practice of constitutional interpretation. A review of the earliest cases demonstrates that the practice of interpreting the Constitution in ways that deviate from and perhaps even conflict with the intent of the framers is also a part of our constitutional heritage. Since the time

32. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985).

of the first Chief Justice, John Jay, judges on all of our courts have been using a variety of techniques—not simply the framers' intent—to interpret the Constitution. In fact, until Madison's notes of the debates in the Federal Convention were published in 1841, there was virtually no evidence of the intent of the framers. In the earliest cases judges might perhaps have asked the drafters what they meant, but apparently they did not do so. Instead, they interpreted the document flexibly and in context. Chief Justice John Marshall, who was perhaps the greatest Chief Justice, played a significant role in establishing the legitimacy of this interpretive technique. In 1819, in *McCulloch v. Maryland*,³³ he said that "we must never forget that it is a constitution we are expounding."³⁴ He suggested it had to be flexibly and expansively interpreted lest it become "a splendid bauble."³⁵

One can consider this type of flexible and expansive constitutional interpretation as itself part of "the intent of the framers." The practice began as early as 1793, early enough to consider it as evidence of the founding generation's intent. Moreover, many of the first Supreme Court Justices were men who had been delegates at the Federal Convention or at the state ratifying conventions, including Ellsworth, Wilson, Rutledge, Paterson, and Marshall. Thus at least some prominent eighteenth and early nineteenth century Americans—whom we can label "framers"—intended an open-ended interpretation not only of general legal documents but of constitutions in particular.

The third reason to believe that the framers did not intend for judges to be governed by the framers' intent is the most important and the least familiar one. The founding generation simply did not think of the Constitution in the same way that we do. We think of the written Constitution as the sole source of fundamental law. One of the first things law students learn in a Constitutional Law course is that a court can invalidate a legislative enactment only if the legislation conflicts with the Constitution. The founding generation didn't think that way. They viewed the Constitution as only one small piece of a large body of fundamental law which included the Constitution, custom, tradition, natural law and natural rights. For the men who wrote and ratified the Constitution, all of those things—a written constitution as well as such things as natural law—could be used by judges to invalidate statutes. In other words, the founding generation expected judges

33. 17 U.S. (4 Wheat.) 316 (1819).

34. *Id.* at 421.

35. *Id.*

to look outside the written Constitution in reviewing the validity of statutes. They did not think they were reducing all of fundamental law to a single written document. Thus if we follow their intent, judges should look not only outside the framers' intent, but also outside the written Constitution itself.

Since I began by remarking that it is virtually impossible to discover the framers' intent, let me give you some of the evidence from which I draw the conclusion that the framers intended judges to look beyond the Constitution. It is evidence that suggests a perspective of Americans of that century, and thus is not limited to those who attended the various conventions.

First, even before 1787, state courts were reviewing the validity of state statutes. In determining whether a state statute was valid, both the lawyers' briefs and the courts' opinions cited, indiscriminately, not only the state constitution or charter, but also the "fundamental laws of England," the law of nations, Blackstone's *Commentaries*, the Magna Carta, "general principles binding all governments," "common right and reason," "inalienable rights," and "natural justice."³⁶ This practice continued after 1787 as well, even in the federal courts. The earliest Supreme Court opinions considering the constitutionality of state and federal statutes relied not only on the written Constitution, but also on "fundamental principles," "vital principles [of] free republican governments," "the fundamental laws of every free government," "principles of justice and policy," "the dictates of the moral sense," "right reason and natural equity," "the reason and nature of things," "public principles," "the common sense of mankind," "the maxims of eternal justice," "the principles of civil right," and "natural justice."³⁷ When the early Justices *did* cite the Constitution, they cited not only the parts we are familiar with, but also the preamble, which guarantees (among other things) the establishment of justice and the "blessings of liberty."³⁸ If the modern Court has difficulty interpreting such phrases as "due process of law" or "equal protection of the laws," imagine the problems of interpreting the preamble.

There is also evidence from legislative debates that the founding generation believed that natural rights existed beyond those protected in the Constitution. In opposing the Bill of Rights, many legislators and others argued that an enumeration of rights

36. See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi L. Rev. 1127, 1134-46 (1987).

37. See *id.* at 1167-76.

38. See *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

would be dangerous because it would imply that only the enumerated rights were protected.³⁹ They argued that if some rights were written into the Constitution, judges would conclude that those listed rights were the only rights protected. This common eighteenth century argument presumes, of course, that there *are* other rights out there, even where not specifically enumerated in the Constitution. One member of the House of Representatives in 1789 ridiculed the idea that the Bill of Rights could possibly contain all of the rights of citizens. If that was the case, he said, "the drafting committee might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased and go to bed when he thought proper."⁴⁰ The House did not find it necessary to protect those sorts of rights, which they believed would be protected regardless of whether they were put in the Constitution. To pacify critics, and to guard against the feared construction of a Bill of Rights, they added the ninth amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

These cases and legislative examples range from 1780 to 1819. They suggest that the founding generation did not intend to embody all of fundamental law in a single written document. Thus invalidating statutes by looking to various sources and not just to the written document or the intent of its authors is perfectly consistent with the intent of the framers.

What does this conclusion mean today? It means when the Court's critics ask where in the Constitution is there a right to privacy, one answer can be that judges are supposed to look outside the Constitution. It means when the Court's critics ask how the Constitution allows affirmative action programs designed to make all members of our society full and productive members, one answer can be that being an equal member of society is a natural inalienable right, which does not need the explicit sanction of the Constitution. And it means that our task as lawyers and scholars and judges is not only to interpret the Constitution, not only to point to specific phrases or particular Supreme Court cases, but also to make reasoned and persuasive arguments about justice and fairness and legitimacy. In other words, it means that we should proceed on the assumption that some of our most important rights are not found in the written words of the Constitution. Alexander Hamilton expressed that very assumption in 1775: "The sacred

39. See Suzanna Sherry, *supra* note 36, at 1161-67 (1987).

40. 1 Annals of Cong. 732 (J. Gales ed. 1789).

rights of mankind are not to be rummaged for among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, . . . and can never be erased or obscured"⁴¹

41. Alexander Hamilton, *The Farmer Refuted, & C.*, in 1 *The Papers of Alexander Hamilton* 81, 122 (Harold Syrett ed. 1961).