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SOME REFLECTIONS ON THE SUCCESS AND FAILURE OF THE CONSTITUTION

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The theme of the University of Dayton's program marking the Bicentennial of the United States Constitution is "The Constitution 200 Years Later: Is It Working?" Although I have taught, written about, and practiced constitutional law for more than a dozen years, I confess to never before having addressed the Constitution with this specific question in mind. Instinctively, it is tempting to conclude that the answer to the question is both obvious and easy: "Of course the Constitution is working. Why, look at how far we have come under its auspices. We enjoy as much freedom and prosperity as any country in the world—more than most. Much of the credit for our success—and what distinguishes us from countries which have been less successful—is our written Constitution."

There is a certain appeal to this view. Although our Constitution never uses the word "free" or "freedom," except for the first amendment's guarantee of "freedom of speech,"[1] it does talk about "liberty," in, for example, the fifth and fourteenth amendments' guarantees that liberty not be deprived without due process of law. Furthermore, it contains a number of provisions which explicitly speak to the protection of property, the right to contract, and other rights which arguably are conducive to prosperity and freedom. Since the Civil War, the Constitution has also had something to say about "equality,"—specifically the fourteenth amendment's guarantee of "equal protection of the law,"[2]—and many of us believe that our commitment to equality is one of our most cherished ideals.

But I think the question of whether the Constitution has worked for us in the past—that is, whether it is, in a significant way, *responsible* for the relative freedom and prosperity we enjoy—and whether it can be expected to play an important role for us in the future, is a much more complicated question than it may first seem. Short of imagining what our legal system and our country as a whole would look like had we not had a Constitution, how can we measure whether our Constitution has served us well? In order to answer this, we need to ask an even more fundamental question: What do we mean—to precisely what

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1. U.S. CONST. amend. I.
2. *Id.* at amend. XIV, § 1.

do we refer—when we talk about "the Constitution"?

At first glance, this question may seem somewhat strange, perhaps especially so coming from a law professor who has been teaching constitutional law as long as I have.[3] In the few pages that follow—and they are not nearly enough to do the matter justice—I shall try to explain why this question—what *is* "the Constitution"?—is not only not silly or frivolous, but why much of our ability to assess the past and future success of the Constitution depends on how we answer it.

Perhaps the reason the question may seem so strange is that it seems to put into question the existence of certain objective, physically verifiable facts that are both widely known and incontrovertible. After all, the Constitution is a real document with real words written on it; you can even see it on display in the National Archives in Washington, D.C.; it is not something that exists only in our minds. The fact that fifty-five men got together in Philadelphia in the summer of 1787 and actually reduced to writing a set of ideas and principles was, in a way, the most distinctive thing they did: the writtenness of our Constitution was one thing that distinguished it from Great Britain's "constitution" and was a characteristic that was later to be replicated by other countries. In reducing their ideas to writing, the Framers manifested their expectation that their Constitution would have a certain permanence and authority it might not otherwise have had.

But in what sense did the Framers expect their Constitution to be permanent? Their expectations were expressed in two different ways. In article V, they explicitly provided a formal mechanism for change.[4] The Constitution could be amended, but only upon the satisfaction of conditions they knew would be difficult. At the same time, in article III, they provided for a Supreme Court, which would have power to decide cases "arising under this Constitution."[5] By creating the Court and giving it this power, the Framers anticipated that the Court would have to interpret the Constitution and apply it in circumstances which might require the Court to declare invalid the acts of legislators and other political officials. They gave the Court this responsibility despite protestations by some that the power to interpret and apply the Constitution necessarily implied the power to determine, and perhaps even to transform, its meaning. And while historians still debate precisely what kind of judicial review the Framers' had in mind, it seems safe to say that judicial review has served to help the Constitution endure as long

3. I have addressed this question more extensively elsewhere. *See* Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U.L. REV. 1435 (1984).

4. U.S. Const. art. V.

5. *Id.* at art. III, § 2, cl. 2.

as it has. Without judicial review—without an institution capable of applying the Constitution in ways which account for and perhaps even accommodate social change—significant parts of the Constitution no doubt would have atrophied and been either ignored or discarded long ago. Thus, by providing for a process of formal amendment, on the one hand, and judicial review, on the other, the constitutional design incorporated features which could have been expected to preserve the basic fabric of the document while permitting it to be adapted to new realities.

Hindsight reveals the wisdom of this design. If we put to one side the first ten amendments, containing the Bill of Rights, which were proposed in 1789 and ratified in 1791, the Constitution has been changed by amendment sixteen times. Many of these changes were indeed radical—for example, the thirteenth, fourteenth, and fifteenth amendments after the Civil War which, among other things, extended citizenship and the right to vote to blacks. But other changes have occurred as well—changes which have been brought about through the much more subtle and gradual process of elaboration and application of the Constitution's provisions.

If we were to understand the Constitution as establishing a set of ideas and principles which were expected to be, and which should be, frozen in time, it would be difficult to judge the Constitution a success. If, when we ask whether the Constitution is working, we ask whether the specific intentions of the Framers have been faithfully and explicitly followed, there would be two valid responses.[6] One response would be that we cannot really tell, because we really do not and cannot know what their specific intentions were. But to the extent we can determine what the Framers' intent was with respect to a number of constitutional provisions, it seems clear that at least occasionally, the meaning we attribute to a provision and the meaning they attributed to it are quite different. For example, historians generally agree that the Framers of the original Constitution and the Civil War amendments had no specific intent that the Bill of Rights would be applicable to the states; they were intended to apply only to the federal government.[7] And yet, through the process of judicial interpretation, constitutional provisions such as the first amendment, and its guarantees of freedom of speech, press, and religion, have been held applicable to all levels of govern-

6. For recent calls for a "jurisprudence of original intention," see Meese, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1 (1986); *see also* Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

7. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (Bill of Rights not intended by Framers to apply to states).

ment, including state and local.[8] Similarly, many historians concede that the Framers of the fourteenth amendment did not intend to prohibit even intentional racial discrimination in our public schools[9] nor did they intend the amendment to prohibit the state from engaging in intentional discrimination against women,[10] and yet intentional school segregation and many forms of gender discrimination are now understood to be prohibited by the fourteenth amendment.[11] In addition, despite the fact that the written Constitution nowhere specifies a right to privacy or to freedom of association, the general rights to privacy and association are now recognized and regarded by many as two of our most cherished constitutional protections.[12]

But, does the fact that the Constitution is now understood to have certain meanings which either would have been foreign to, or perhaps even have been objected to by, its Framers mean that it is not working? If we define the Constitution narrowly—as consisting only of the set of meanings given to it by its Framers—we might well conclude that it has not worked well at all; perhaps we might even conclude that, at least in some respects, since it has failed to meet their expectations, it should be regarded by *us* as a failure.

My guess is, however, that many of today's Americans would be reluctant to call a Constitution which prohibits segregation, and which guarantees all of us a substantial degree of freedom in the area of speech, religion, and privacy, a failure. Each of us would, no doubt, disagree with at least some of today's Supreme Court interpretations of the Constitution. Some of us might believe that in interpreting the Constitition, the courts have done too much, or perhaps too little, and, to that extent, that the Constitution is not working as well as it should. For example, some might believe that the Court has gone too far in interpreting the Constitution to guarantee a right of privacy which includes the right to make decisions about whether, when, and how to have, raise, and nurture children free from state interference;[13] others may believe that the Constitution should be understood as conferring

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8. *See* Gitlow v. New York, 268 U.S. 652 (1925).

9. R. BERGER, GOVERNMENT BY JUDICIARY 117–34 (1977). For an opposing view, see Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982).

10. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873); *see* Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 795–97 (1983).

11. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

12. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984).

13. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

even greater freedom in this area.[14] Similarly, some people believe that the Constitution should not be understood as affecting a rather strict separation of church and state, while others believe that the Constitution requires even greater separation than it is now understood to require. Still others might argue that the Constitution should not be understood—as it generally is today—to protect the rights of Nazis, Klansmen, or Communists to speak freely, while some believe that the Constitution confers greater rights in this area than now recognized. And what about the states' right to put people to death? Some people believe that the death penalty is not cruel and unusual punishment prohibited by the eighth amendment, while others believe that it is, and should be, unconstitutional for the state to put people to death.[15]

Although there is no doubt serious and good faith disagreement on these and other issues, I suspect most of us do not believe, or at least would not believe after serious reflection, that the Constitution's meaning today should be limited to the meanings attributed to it by the Framers' generation, or even by more recent generations. If this is true, perhaps we should not judge the success of the Constitution—whether it has worked, or continues to work, well—in purely historical terms. If we reach this conclusion, we will have rejected, at least implicitly, one possible definition of "the Constitution." We will have refused to define the Constitution as—or at least only as—a set of clear, concise rules promulgated by the Framers which must govern absolutely until changed through formal amendment.

If this historically determined view of the Constitution should be rejected, what conception or vision of the document can take its place? Although this is not the place to offer a fully developed response to this question, let me suggest a different view of the Constitution for your consideration—a view which, in many ways, embraces some of the characteristics of the historically-bound approach, but which also moves well beyond it.

In articulating this second definition of the Constitution, let me begin by making a general observation. In our country, it has been common for some of the most profound and controversial moral and political issues of each generation to be transformed into constitutional issues. In the mid-1800's, the issue of slavery—an issue over which we fought a war—was perceived by many as not just a political or moral issue, but as a constitutional one. In the first part of the Twentieth

14. *See* Bowers v. Hardwick, 106A S. Ct. 2841, 2848 (interim ed. 1986) (Blackmun, J., dissenting).

15. Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 Harv. L. Rev. 313 (1986).

Century, the economic problems that led to the Depression and then the New Deal came to be perceived as constitutional ones. In the 1950's, the witch hunts of the McCarthy era eventually found their way into the courts and became issues of constitutional principle, as did many of the problems of the civil rights movement and the Vietnam era of the late 1960's and early 1970's. More recently, a host of pressing social problems—problems concerning which the achievement of a political consensus has been most difficult—have come to be understood as constitutional problems regularly submitted to the courts for resolution. Sooner or later, at some stage of their development, we have come to view policy debates concerning abortion,[16] sexual freedom,[17] affirmative action,[18] sexual equality,[19] poverty,[20] and even balanced budgets[21] as constitutional problems.

There are many explanations for this phenomenon, and it would be simplistic to point to any one as the most revealing. But I would submit that one plausible explanation is that we have always viewed the Constitution as having great *symbolic* meaning. When we think of the Constitution's guarantees of liberty and equal protection, of freedom of speech and fair procedures, of freedom of religion, and against self-incrimination, and of security in our persons and homes and protection against cruel and unusual punishment, we don't think so much in terms of the guarantees of specific, narrowly-defined rights as we do of *long-term moral aspirations* and commitments. We refer to constitutional provisions not so much—or at least not just—because we hope to find answers to our problems from the experience and wisdom of the past. Instead we refer to the Constitution, and to the Declaration of Independence and the Constitution's preamble as well, because of what we believe they say about our identity as a people, a people who have always viewed ourselves as committed to a vision of what life in an organized society can and should be. An essential part of that vision was and is the notion that we are committed to an ongoing search for moral development—that we should continuously strive to achieve moral growth, and that we should continue to respect the essential dignity and value of each member of our community. As a part of this commitment, we have always held open the possibility that as men and women, and society in general, evolve, we will confront new problems and possibilities which will cause us to reconsider and re-explore the ideas and values

16. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).
17. *See, e.g.*, *Bowers*, 106A S. Ct. at 2841.
18. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 106A S. Ct. 1842 (interim ed. 1986).
19. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).
20. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971).
21. Bowsher v. Synar, 106A S. Ct. 3181 (interim ed. 1986).

which have formed our past. In this process, we have agreed to hold open the possibility that our past understandings may no longer suffice—or at least suffice completely—to resolve our current and future problems. To be sure, we value our tradition—including the past meanings we have derived from the Constitution—but we do not value tradition blindly—for its own sake. We value tradition to the extent that each new generation finds it worth valuing, and we reject or reform that tradition where it no longer captures adequately our present understanding of ourselves or of the possibilities of our future life together.[22]

In this process, the Constitution is not so much a place we look to for answers as it is a place we turn to as a forum for civilized discourse and debate. We turn to the Constitution—and often to the courts—because it provides a *structure* for carrying on this debate. Instead of confining our search for answers exclusively to the halls of our legislatures or the homes and offices of our executive officials, where too often the debate is shaped by avarice and greed and narrow or short-term self-interest, we look to the Constitution and the courts for more balanced and sober reflection. Instead of taking to the streets, we take to the courts and legislative halls and debate the issues that most trouble us as matters of constitutional principle, not just matters of politics. In this way, the Constitution's langauge and history serve as a starting point, not an ending point, in our search for answers.

The image of the Constitution just described is admittedly abstract and difficult to grasp. But it is an image which captures much more closely than any other the Constitution that we have lived with for 200 years. It is not an image which yields quick or easy answers to the question whether government program X is constitutionally valid or whether official conduct Y is permissible. But when understood in the way I have suggested, the Constitution has been and can be made continuously relevant to a changing society; it can illuminate our collective search for answers to the problems which most disturb each new generation in ways which the close-ended, historically bound conception of the document cannot.

Defined in this way, is the Constitution working? The answer is self-evident. If one judges the success of the Constitution solely in terms of whether one agrees with all of its contemporary interpretations, one might glibbly conclude that the document does not work well at all. But if we judge the Constitution in terms of its role as a forum in and against which we debate and seek to resolve matters of the high-

22. For an elegant discussion, see Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation,"* 58 S. CAL. L. REV. 551 (1985).

est moral and political principle, it seems to me clear that the document has served, and will continue to serve, as an essential component of our commitment to live with each other in a community dedicated to becoming the best it can be.