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Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction *

A NUMBER of recent books have been based, in varying degrees, upon the assumptions that the actual intention of the framers of the Constitution of the United States is of more than historical importance in determining the meaning of the Constitution, and that such intention may legitimately be discovered from sources other than the constitutional document itself.[1] None of these publications, however, question, or even consider, the validity of the technique thus employed.

This study is devoted to an examination of the admissibility and use by the United States Supreme Court of such matters as: (a) debates and proceedings of the Constitutional and Ratifying Conventions, (b) the history of the times of the Convention, (c) contemporaneous exposition of the Constitution, (d) practical construction by other governmental agencies, and (e) the doctrine of acquiesence. Particular attention will be paid to the nature of the Court's reliance on these instruments as aids in determining the meaning of the Constitution; and the whole question of the value and justification of this type of judicial resort will be scrutinized.

At the outset, it should be noted that there is a small body of expository authority in this field which, while it may be controverted, should not be ignored. Story[2] and Cooley[3] both remark extensively upon the nature of the process of constitutional construction.[4] The general theory of these authors, and that of many who have followed them,[5] is that

* This is the first of a series of articles upon this subject which will appear in this *Review*.—ED. NOTE.

[1] HAMILTON & ADAIR, THE POWER TO GOVERN (1937); RODELL, FIFTY-FIVE MEN (1936); CORWIN, COMMERCE POWER V. STATES RIGHTS (1936).

[2] COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed. Cooley, 1873) §§ 397-457.

[3] CONSTITUTIONAL LIMITATIONS (8th ed. Carrington, 1927) c. IV.

[4] See also 1 KENT, COMMENTARIES ON AMERICAN LAW (14th ed. Gould 1896) 243, 313.

[5] WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1935) c. III; Machen, *The Elasticity of the Constitution* (1900) 14 HARV. L. REV. 200.

constitutional interpretation is a function whose sole end is the discovery of the intent of the law-givers,[6] that the most reliable evidence of such intent is the language used,[7] and that, even when collateral materials are legitimately employed, they may only be used in so far as they tend to reveal that intent.[8] Each of these commentators confidently sought to lay down fixed and unvarying rules to control and govern this process[9] in order to make certain and automatic the steps involved.[10] In the course of this series of articles, the proposition, hitherto so fundamental to the doctrines of the abstract writers, that the object of constitutional construction is the discovery of the intention of those who framed or adopted the instrument will be controverted, and another approach to the problem will be suggested.

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[6] "In the case of all written laws, it is the intent of the lawgiver that is to be enforced." 1 COOLEY, *op. cit. supra* note 3, at 124-5. "Far better is it to recognize plainly that the intent of the framers must forever be followed . . . ." Machen, *op. cit. supra* note 5, at 205. "The intent is the vital part, the essence of the law." SUTHERLAND, STATUTORY CONSTRUCTION (1891) § 234. "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and the intention of the parties." 1 STORY, *op. cit. supra* note 2, § 400. *"The object to be attained.* This is, as a general rule, the intention of the Legislature." SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW (1874) 193.

[7] "All language, spoken or written, is valuable only as a more or less imperfect expression of intention. Consequently, any legal instrument—a will, a statute, or a constitution—derives its authority, not from itself, but from the intention of the testator, the legislature, or the people. At the same time, the intention which must prevail is not that locked up in the breast, but the expressed intention." Machen, *op. cit. supra* note 5, at 202-203. "But this intent is to be found in the instrument itself. It is presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it." 1 COOLEY, *op. cit. supra* note 3, at 125. "In construing the Constitution of the United States, we are, in the first instance, to consider what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts." 1 STORY, *op. cit. supra* note 2, § 405.

[8] 1 COOLEY, *op. cit. supra* note 3, at 141-46; 1 STORY, *op. cit. supra* note 2, § 406.

[9] Story said: "... the rules of interpretation have often been shifted to suit the emergency; and the passions and prejudices of the day, or the favor and odium of a particular measure, have not unfrequently furnished a mode of argument which would, on the one hand, leave the Constitution crippled and inanimate, or, on the other hand, give it an extent and elasticity subversive of all rational boundaries. . . . Let us, then, endeavor to ascertain what are the true rules of interpretation applicable to the Constitution; so that we may have some fixed standard by which to measure its powers and limit its prohibitions, and guard its obligations, and enforce its securities of our rights and liberties." 1 STORY, *op. cit. supra* note 2, §§ 398-399.

[10] 1 COOLEY, *op. cit. supra* note 3, at 123-124: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions

The effort on the part of some of the earlier commentators to establish a distinction between "construction" and "interpretation" has subserved no worthwhile object, and has resulted in considerable confusion.[11] Such a highly futile and metaphysical refinement as this will not be adhered to in the present study. But, for the sake of accuracy it must be observed that there is a growing tendency to use the word "construction" as a more fastidious and refined way of expressing the idea which is equally covered by the more vulgar and plebian word "interpretation."

More serious in its consequences has been the almost universal failure to distinguish between the problem involved in statutory construction and that involved in constitutional construction.[12] Statutes are usually specific efforts to accomplish individual or highly related ends. As such, the conditions surrounding their origin and the intent of the legislature in passing them are matters possessing an informative value. They are the instruments of relatively small bodies composed of members presumably capable of understanding and using comparatively exact and technical language.[13] Secondly, aside from the fact that statutes aim to meet temporary and changing conditions and the fact that they are generally

would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. . . . The meaning of the Constitution is fixed when it is adopted and it is not different at any subsequent time when a court has occasion to pass upon it."

[11] BOUVIER, LAW DICTIONARY (8th ed. Rawle, 1914): "Interpretation—the discovery and representation of the true meaning of any signs used to convey ideas. . . . Construction. . . . In practice. Determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement." 1 COOLEY, *op. cit. supra* note 3, at 97: "Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text; conclusions which are in spirit, though not within the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments by the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another, or where it happens that part of a writing or declaration contradicts the rest." See DE SLOOVERE, CASES ON INTERPRETATION OF STATUTES (1931) 82, n. 17.

[12] Machen, *op. cit. supra* note 5, at 201: "The principles relating to statutory interpretation apply in general with equal force to the interpretation of the constitution." See also 1 COOLEY, *op. cit. supra* note 3, at 125; 1 STORY, *op. cit. supra* note 2, § 400.

[13] It is notable that the Court has drawn a distinction between statutory and constitutional construction with respect to one particular phase of the subject. While convention debates are directly admitted in cases of constitutional construction, Congressional debates are only admitted indirectly as revealing legislative intent by casting light on the condition that gave rise to the statute. American Net & Twine Co. v. Worthington (1891) 141 U. S. 468; Johnson v. Southern Pacific

judicially construed before these conditions have passed away, there is the extremely important circumstance that legislative bodies meet in frequent session and hence may change the words used if their actual intention is not effectuated. But not so constitutions! They are vastly more general, and are intended to be relatively permanent. As a result of these two factors, the judicial function of moulding constitutions by construction is proportionately greater than in the case of statutes, and the court's freedom of decision is less restricted. Moreover, constitutions are framed and adopted by different bodies, and if the intent of those who gave the instrument force, is to be sought, the matter of numbers alone seems preclusive, and the meaning of language must be taken from its most common, untechnical, and uniform use.[14] Finally, if the original intent is not carried out by the courts, there is not the ready opportunity to revise and restate which exists in the case of statutes.

The matter of statutory construction has been frequently and elaborately treated.[15] For this reason, and because it is a substantially different problem from that involved in constitutional construction, it will not be included as a part of this study. Likewise the subject of the United States Supreme Court's interpretation of state constitutions will be excluded.

Admissibility of Extrinsic Aids in Constitutional Construction by the United States Supreme Court

When speaking of constitutional construction, no expression appears more commonly in the rhetoric of the Court and commentators than that if the language is clear and unambiguous resort to collateral aids to interpretation is unnecessary and may not be indulged in.[16] Stated affirmatively, the doctrine is that the meaning of the Constitution is to be derived from the text itself unless internal factors create a doubt.[17] Thus, in *Sturges v. Crowninshield,*[18] Chief Justice Marshall said:

(1904) 196 U. S. 1; Standard Oil Co. of New Jersey v. United States (1911) 221 U. S. 1; Tapline Cases (1914) 234 U. S. 1. This, however, is purely a verbal difference.

[14] Lake County v. Rollins (1889) 130 U. S. 662, 671.

[15] Sedgwick, *op. cit. supra* note 6; Sutherland, *op. cit. supra* note 6; De Sloovere, *op. cit. supra* note 11.

[16] Ogden v. Saunders (1827) 25 U. S. (12 Wheat.) 213, 302; Craig v. Missouri (1830) 29 U. S. (4 Pet.) 410, 434; Briscoe v. Bank of Kentucky (1837) 36 U. S. (11 Pet.)257, 328m; Prigg v. Pennsylvania (1843) 41 U. S. (16 Pet.) 539, 622; Lake County v. Rollins (1889) 130 U. S. 662, 670; McPherson v. Blacker (1892) 146 U. S. 1, 11; Fairbanks v. United States (1901) 181 U. S. 283, 307-8, 311; United States v. Sprague (1931) 282 U. S. 716, 730-32, and cases there cited; 1 Cooley, *op. cit. supra* note 3, at 141; Madison, Letters and Other Writings (Hunt ed. 1904) 228; 1 Story, *op. cit. supra* note 2, § 405; Willoughby, *op. cit. supra* note 5, §§ 28, 30.

[17] The extensive body of judicial rhetoric dealing with rules of construction when the Court confines itself to the four corners of the constitutional document is outside the scope of this study.

[18] (1819) 17 U. S. (4 Wheat.) 122, 202-203.

". . . it may not be improper to premise, that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be excepted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words, is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." [19]

The reasons commonly assigned in support of this proposition are that the framers said what they meant,[20] that in any event the intent can almost never be exactly ascertained by admitting collateral materials,[21] and that the Constitution as a standard becomes too uncertain when thus grounded on a mere conjecture.[22]

Just how far this broadly stated limitation actually restricts the scope of judicial scrutiny becomes apparent when we consider that most of the cases in which the doctrine is enunciated are either, first, cases in which the Court professedly finds ambiguity, and consequently cases in which the rule appears by way of *dicta* and usually by way of an introduction to an excursion into the realm of extrinsic materials,[23] or second, cases in which the fact of a dissent proves the presence of a doubt but in which the majority invokes the rule as a means of excluding collateral evidence that is persuasive of a conclusion opposite to the decision of the Court.

[19] It should be noted that Marshall's rule permits the use of collateral aids not only in the case of ambiguity but also when the language if followed would perpetrate a result "so monstrous that all mankind would without hesitation unite in rejecting the application." This qualification does not, however, add appreciably to the breadth of the exception. A result which would fall in this category is almost unthinkable, and certainly this exception would not permit escape from the language used where the presence of a dissenting minority on the Court proved the hesitancy of some of mankind to unite in rejecting the application.

[20] Briscoe v. Bank of Kentucky, *supra* note 16, at 328i, 328k. In United States v. Sprague, *supra* note 16, at 732, Justice Roberts worded the same idea as follows: "The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase ... is persuasive evidence that no qualification was intended."

[21] 1 COOLEY, *op. cit. supra* note 3, at 142.

[22] Craig v. Missouri, *supra* note 16, at 434; Prigg v. Pennsylvania, *supra* note 16, at 621. Compare Justice Story's opinion in this case with the stand taken by him at circuit in Mitchell v. Great Works Milling Co. (1843) Fed. Cas. No. 9662, where he excluded Congressional debates when construing a statute.

[23] Ogden v. Saunders, *supra* note 16 (opinions of Johnson and Thompson, J.J.); Craig v. Missouri, *supra* note 16 (opinions of Marshall, C.J. and Johnson, J.); Prigg v. Pennsylvania, *supra* note 16 (opinions of Tawney, C.J., Story, Thompson and Baldwin, J.J.); Briscoe v. Bank of Kentucky, *supra* note 16 (opinions of McLean and Baldwin, J.J.).

I

A good illustration of the first class of cases is *McPherson v. Blacker*,[24] in which a Michigan law authorizing election of presidential electors by districts was sustained. The question at issue was this: Article II, clause 2 of the Constitution says: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, . . ." The validity of the state act was contested on the theory that it did not provide for appointment by the state, that is, the state as a unit, which, it was contended, the language of Article II, clause 2 requires. After stating that the absence of ambiguity limits judicial examination to the confines of the constitutional document, the Court said:[25]

> "Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their proposition as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them . . . ."

The Court referred to the proposals in the Constitutional Convention which culminated in the compromise represented by Article II, clause 2,[26] examined historically the method adopted by the various states under this clause for the appointment of the electors, emphasized the fact that some had chosen electors by districts, and concluded: "The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive."[27] Thus, we have in *McPherson v. Blacker* a clear instance of the situation in which the Court pronounces the general rule against admissibility of extrinsic aids, finds the present case within the exception provided for in the rule,[28] and proceeds to utilize collateral

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[24] (1892) 146 U. S. 1.

[25] *Ibid.* at 27.

[26] See 5 ELLIOT, DEBATES (1881) 144, 174, 205, 324, 336-9, 357, 359, 360, 363-4, 368, 473, 507, 512, 520, 562. Four methods were proposed for the selection of Presidential electors: by the state executives, by lot from the national legislature, by the people, by the state legislatures.

[27] McPherson v. Blacker, *supra* note 24, at 36.

[28] In seeking to determine the extent to which the Court is restricted by the doctrine of the non-availability of collateral aids except where there is constitutional ambiguity, due weight must be given to the nature of ambiguity itself. Ambiguity is not a fixed and absolute thing, but a matter of degrees of probability. The line between the doubtful and the perfectly clear cannot be drawn with certainty, for it depends not only upon the reasonably objective standard of the words used but also upon the makeup of the individual minds which contemplate the words used, upon the changes in the world of facts which suggest expansion or contraction of the words used, and upon modifications of the idea content of the words used. Thus whether a particular constitutional clause is ambiguous hinges upon a multitude of

materials as the sole constitutional support for the decision rendered.[29]

II

The second type of situation is well exemplified by the procedure followed in *Fairbanks v. United States*.[30] In this case, a stamp tax on foreign bills of lading, imposed in the form of a flat rate and not graduated according to the quantity or value of the articles exported, was held to be a constitutionally forbidden tax on exports. The fact that four justices dissented sufficiently indicated the existence of a doubt.[31] The majority was confronted with the fact that Congress had imposed identical taxes intermittently from 1797 on,[32] and that, not until this case, had their constitutionality been challenged. The opinion elaborately discussed the cases which dealt with the admissibility of collateral materials and concluded that they sanctioned the use of such material only as

complex factors which in their interrelationships may well create a doubt about the meaning of the clearest statement. Moreover, nothing more nearly approaches absolute certainty than that a normally intelligent, legally trained mind in search of a doubt will find the same to its own satisfaction. This fact, together with the nature of ambiguity, makes of the doctrine of non-availability a rule whose exception is so flexible that it may be utilized under almost any conceivable circumstances. Hence, the conclusion seems inescapable that the United States Supreme Court, by using the device of finding a doubt, may render extrinsic aids available in determining the meaning of the Constitution almost at will.

[29] In the quotation from Sturges v. Crowninfield, text to note 18, *supra*, Marshall indicated that, aside from ambiguity, there was another exception to the rule against admissibility of extrinsic aids, namely, if the plain meaning, when followed, would lead to an absurd result. Marshall stated this exception very rigidly; the case must be one, he thought, "...in which the absurdity and injustice of supplying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." In at least one later case, Virginia v. Tennessee (1893) 148 U. S. 503, the Court made use of this exception, though stated in a less restrictive form, in construing Article I, section 10 of the Constitution, which reads, "No State shall, without the Consent of Congress, . . . enter into *any* Agreement or Compact with another State. . . ." (italics added). Justice Field argued that this clause could not reasonably cover every compact and agreement between states, and hence it should be limited to its apparent object, namely, to restrain political agreements and compacts. Two things should be noted about this case: (1) In departing from the plain meaning of the language used, Field relied primarily on the apparent object as revealed by associated words and not as revealed by reference to convention proceedings. That little or no light was cast on the meaning of this aspect of the clause in question by the convention proceedings, see 5 ELLIOT, DEBATES (1881) 131, 381, 546, 561. (2) The whole proceeding above discussed was largely by way of *dicta* since the Court later found that Congress had impliedly consented to the agreement made between Virginia and Tennessee.

[30] *Supra* note 16.

[31] The basis of the dissent was that in view of the wording of the statute and the long continued and uniform practical construction, this tax must be regarded simply as a tax upon the parchment or paper upon which the foreign bill of lading was written.

[32] Acts of 1797 (1 STAT. (1797) 527), 1799 (1 STAT. (1799) 622), their amendments, and an act of 1862 (12 STAT. (1862) 432) are alluded to by the dissent written by Harlan, J.

affirmatory of a determination already reached from the constitutional document or as the basis of decision in a case where the question was doubtful, but that such aids cannot control when there is no doubt.[33] Said the Court: "When the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action although several times repeated and never before challenged."[34] Hence, seeking persistently to imply the absence of ambiguity but never expressly asserting it, Mr. Justice Brewer here enunciated the rule of inadmissibility and decided the issue contrary to the weight of a long continued practical construction, despite the existence of a doubt which the fact of a four judge dissent loudly proclaimed.

Another illustration of the situation in which the Court pretended that there was no doubt as a means of justifying its exclusion of adverse collateral evidence is seen in the Court's treatment of the commerce clause.[35] On the face of it, that clause is reasonably unambiguous, but the long history of judicial fluctuation in its construction and the inevitable appearance of a dissenting minority in all important cases involving its application prove a doubt concerning it so collossal that it cannot be obscured by assumed unawareness. Early in the history of the country Madison argued that the grant of regulatory power over interstate commerce was purely negative, intended to preclude the possibility of restriction on commerce between the states.[36] This conclusion he drew from a consideration of the objects contemplated by the framers, which in turn he derived from an examination of the evil sought to be remedied, namely, the evils resulting from the existing commercial barriers erected

[33] The Court cites thirty-five cases and then says: "An examination of the opinions in those cases will disclose that they may be grouped in three classes: 1) Those in which the Court after seeking to demonstrate the validity or the true construction of the statute has added that if there were doubt in reference thereto the practical construction placed by Congress or the department charged with the execution of the statute was sufficient to remove the doubt; 2) Those in which the Court has either stated or assumed that the question was doubtful and has rested its determination upon the fact of a long continued construction by the officials charged with the execution of the statute; 3) Those in which the Court, noticing the fact of a long continued construction, has distinctly affirmed that such continued construction cannot control when there is no doubt as to the true meaning of the statute." Fairbanks v. United States, *supra* note 16, at 307-308. It should be noted that this list of cases deals indiscriminately with problems of statutory and constitutional construction. For a discussion of the United States Supreme Court's treatment of the problem of extrinsic aids in statutory construction, see Note (1937) 25 CALIF. L. REV. 326.

[34] Fairbanks v. United States, *supra* note 16, at 311.

[35] It is true that the Court, in its treatment of the commerce clause, might, with less embarrassment, have admitted the Madisonian view and then refuted the basis upon which it was built. Professor Corwin believes that the facts cited by Madison in support of his theory either did not exist or were not sufficient to warrant the conclusion drawn. CORWIN, *op. cit. supra* note 1, c. II.

[36] 4 MADISON, *op. cit. supra* note 16, 14-15.

by the states. When bluntly presented with this thesis on three separate occasions,[37] the Court rejected it on the ground that the express language of the Constitution was clear and consequently the extrinsic aids upon which Madison's view was bottomed were inadmissible. In the last of these cases the Court said:[38]

> "While unfriendly or discriminating legislation of the several States may have been the chief cause for granting to Congress the sole power to regulate interstate commerce, yet we fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would directly and substantially, and not as a mere incident, regulate interstate commerce."

It is an extremely suggestive fact, as Professor Corwin points out,[39] that in two of these cases Mr. Chief Justice Fuller, speaking for the Court, rejected the negative theory because of its inadmissibility in the light of the plain meaning of the commerce clause,[40] while in his dissent in two later cases[41] he openly embraced that theory, emphatically asserting that his conduct was warranted by the doubt in the constitutional provision.

III

There is a third situation which further reveals the nature of the Court's use of the rule against admissibility of extrinsic aids. It is that in which the Court utilizes collateral materials assertedly to affirm a conclusion already reached on a basis of the Constitution itself. Thus, Mr. Justice Story, in *Martin v. Hunter's Lessee*,[42] says:

> "Strong as this conclusion stands, upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publically avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system .... This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremedial doubts." [43]

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[37] *In re* Rahrer (1891) 140 U. S. 545; United States v. E. C. Knight Co. (1895) 156 U. S. 1; Addyston Pipe & Steel Co. v. United States (1899) 175 U. S. 211.

[38] Addyston Pipe & Steel Co. v. United States, *supra* note 37, at 229.

[39] *Op. cit. supra* note 1, at 42.

[40] *In re* Rahrer; E. C. Knight Co. v. United States; both *supra* note 37.

[41] Dooley v. United States (1901) 183 U. S. 151; Lottery Case (1903) 188 U. S. 321.

[42] (1816) 14 U. S. (1 Wheat.) 304, 351-352.

[43] See also Cohens v. Virginia (1821) 19 U. S. (6 Wheat.) 264. In Prigg v.

This procedure is clearly a tacit recognition by the Court that the intention of the framers, independently determined, possesses great persuasive value. That persuasive value is not diminished in the slightest by the circumstance that the high tribunal does not explain or cite the reasoning or the authorities justifying the practice. Nor is it diminished by the persistent tendency of the Court in these cases to announce that the language of the Constitution settles the issue in hand, for that tendency merely indicates a judicial awareness that support of the constitutional document is itself a matter of no mean persuasive value. But the important feature of this procedure is that it is one more way in which the Court has cut down and weakened the restrictive effect of the rule against the admissibility of extrinsic evidence.

IV

No less eloquent of the judicial awareness of the persuasive value of collateral materials is the fact that the Court frequently at one and the same time denies the admissibility of such materials and then seeks to demonstrate that properly construed, they do not require a position contrary to that taken by the Court. Thus, in *Sturges v. Crowninshield*,[44] Chief Justice Marshall elaborately states the position and reasoning of defeated counsel to the effect that the history of the times showed that the intention of the framers was something other than the conclusion

Pennsylvania, *supra* note 16, after spending practically all of the space of his opinion on a discussion of collateral materials, Justice Story says, at pages 621-622: "But we do not wish to rest our present opinion upon the ground either of contemporaneous exposition or long acquiescence, or even practical action; neither do we mean to admit the question to be of a doubtful nature, and therefore, as properly calling for the aid of such considerations." Consequently Prigg v. Pennsylvania is a clear illustration of the proposition stated in Part III. It is interesting to note what Story said about the procedure followed in Martin v. Hunter's Lessee, *supra* note 42, and Cohens v. Virginia, *supra*: "Especially did this court, in the cases of . . . *Martin v. Hunter*, . . . and in *Cohens v. Commonwealth of Virginia* . . . rely upon contemporaneous expositions of the Constitution, and long acquiescence in it, with great confidence, in the discussion of questions of a highly interesting and important nature." Prigg v. Pennsylvania, *supra*, at 621. See Fairbanks v. United States, *supra* note 16, at 307-310, and cases there cited.

In United States v. State Bank of North Carolina (1832) 31 U.S. (6 Pet.) 29, 39-40, Story said: "It is not unimportant, to state, that the construction, which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment.... A practice so long and so general would, of itself, provide strong grounds for a liberal consideration; and could not now be disturbed, without introducing a train of serious mischiefs. We think, the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it, would justify us in yielding to it as a safe and reasonable exposition." It is true that this passage had reference to the construction of a statute, but the Court has applied the same reasoning to the construction of the Constitution. Burrow-Giles Lithographic Co. v. Sarony (1884) 111 U.S. 53.

[44] *Supra* note 18, at 198-199. See Craig v. Missouri, *supra* note 16, where Marshall followed an identical procedure.

reached by the Court. After denying that such materials could properly be introduced the Court said, referring to counsel's interpretation of the evil sought to be remedied by the clause in question, "The fact is too broadly stated,"[45] and straightway launched into a discussion of its own version of the history of the times which induced the Convention to write the provision in controversy. Chief Justice Marshall, like most trained minds, found few things easier than to dispute the bases of historic generalization which is probably one reason why he was not embarrassed by the illogicality of controverting the truth of materials to which he had previously denied introduction. But more powerful than logic is the force which impels the judge to use instruments which are themselves more powerful than logic, and consequently Marshall, after covering his stand with the words of the Constitution, not only cast the approbrium of constitutionally extraneous matter upon the adverse position, but also elaborately quoted its groundwork so as more fully to refute its historical accuracy. The departure involved in this process can only be explained on the theory that the Court understood the persuasive value of counsel's historically supported claim of the intention of the framers and took the only means possible of detracting from its efficacy, namely, by controverting its historical correctness. Some speculation might be warranted as to why, if the historical argument of defeated counsel could be met, the Court did not permit it to be introduced on the ground of the presence of a doubt and then proceed to meet it. A probable but partial answer lies in the generalization that it was not part of Marshall's technique to admit a doubt. That he was so emphatic in his statement of the rule by which he first excluded the extrinsic aids offered, tends only to show that he sought to place his primary reliance, in this particular case, upon the constitutional document, and possibly that he was somewhat doubtful about how convincingly he could overcome the argument of the mischief and the remedy. In any event, the result of the whole manipulation in these cases is to deny the admissibility of collateral materials and thereafter treat them as if they had not been excluded, not by allowing them affirmative weight in the decision, it is true, but, by answering them, to increase the convincing attributes of the opinion.[46]

[45] *Supra* note 18, at 203.

[46] Marshall's treatment of the exclusionary rule is worthy of special attention. We have at the outset his emphatic pronouncement in Sturges v. Crowninshield, *supra* note 18. Of similar nature are his remarks in Dartmouth College v. Woodward (1819) 17 U. S. (4 Wheat.) 518. Losing counsel had argued: "The mischiefs actually existing at the time the constitution was established, and which were intended to be remedied by this prohibitory clause, will show the nature of the contracts contemplated by its authors. It was the inviolability of private contracts, and private rights acquired under them, which was intended to be protected; and not contracts which are, in their nature, matters of civil police, nor grants by a state, of power, and even property to individuals, in trust to be administered for purposes merely public."

V

Greatly unlike the foregoing in character, but equally active in limiting the operative sphere of the rule against admissibility of extrinsic aids is the judicial practice of resorting to collateral materials when the constitutional words require definition. To a degree, every constitutional expression requires definition, at least, if you assume that the exact meaning of the framers is the object to be determined, for some of the words used by the framers are no longer current, and others have changed their meaning. But in the rhetoric of the Court, the rule allow-

Ibid. at 608. Marshall's answer was as follows: "It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." *Ibid.* at 644-645. Note that the terms in which the exceptions to the exclusionary rule are stated are less all-embracing than in Sturges v. Crowninshield. No longer need the absurdity be so monstrous that all mankind would without hesitation unite in rejecting the application. The absurdity here need only be so obvious as to "justify" those who expound the Constitution in making an exception. It is also notable that the corresponding clause in the Northwest Ordinance used the expression "Private Contracts" and the omission from the Constitution of the word "private" by men who were fully acquainted with the Northwest Ordinance would seem to give rise to the inference that it was deliberately deleted. This inference, however, which was in support of Marshall's position was not so strong as counsel's deductions from the mischief and the remedy. Consequently it is clear that the Court would here insist on the rule of inadmissibility. It is notable, further, that in his statement of the rule in this case, Marshall made no mention of the exception sometimes permitted in the case of ambiguity. The explanation of this omission is not far to seek; the presence of a doubt was here most undeniable, and Marshall could hence best avoid the embarrassment of the exception by ignoring it.

In Craig v. Missouri, *supra* note 16, Marshall was faced with a similar situation. There a reasonably strong argument was made by losing counsel for the proposition that the evil which the framers sought to remedy by forbidding states to emit bills of credit was making paper money a legal tender. Said Marshall: "Was it even true, that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of conjectured intent to which we are not conducted by the language of any part of the instrument." *Ibid.* at 434. The Chief Justice then went on at great length to refute counsel's reading of history.

In the same vein as the foregoing is his utterance in Gibbons v. Ogden (1824)

ing recurrence to collateral materials for purposes of definition is generally confined to the technical terms of the Constitution. Thus, in determining the meaning of "direct tax," the Court freely examined the definition ascribed to it in expositions contemporary with the adoption of the Constitution, the historical conditions and convention proceedings that gave rise to its introduction into the Constitution, and to subsequent

22 U.S. (9 Wheat.) 1, 188, which, judging by the number of cases in which it is repeated, is the most classic of all statements on the question of the construction of the Constitution. He said, "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." This statement was penned in relationship to the question of whether constitutional grants should or should not be strictly construed; consequently, it may not be regarded as in point on the issue of whether or not the constitutional text is the sole method by which the intention of the framers may be determined. But there are elements in it which reveal Marshall's attitude on the latter question. For one thing, he suggests that the framers were enlightened patriots and men whose intentions require no concealment. Whether or not their intentions require concealment, those intentions still might not have been accurately revealed by the expressions used. For another thing, Marshall says we must take it that the framers intended what they have said. It should be noted, that the framers may well have intended what they said without having communicated their idea through the words used; that is, on a basis of the "tacit assumption" upon which the words were used, the framers may have thought that those words contained a substantially different meaning from that derived by the present day reader. The substance of Marshall's remark in Gibbons v. Ogden, however, tends inescapably to the conclusion that the intention of the framers is to be ascertained only from the language of the constitutional document. Here he does not fail to append the usual qualifying exception: "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule, that the objects for which it was given, especially, when those objects are expressed in the instrument itself, should have great influence in the construction." *Ibid.* at 188-189. Scattered throughout the opinion are expressions in which Marshall reaches beyond the confines of the constitutional document to derive support for his decision from such matters as "All America understands, and has uniformly understood...." and also from the practical construction of Congress.

This line of cases in which Marshall embraces the exclusionary rule, however, does not tell the whole story of his devotion to it. There are other cases in which Marshall participated where he (1) broadened the statement of the rule so greatly as to destroy its restrictiveness, and (2) utterly ignored it and followed a practice substantially contradicting its validity.

(1) Ogden v. Saunders, *supra* note 16, was one of those rare cases in which Marshall constituted part of a dissenting minority. He there said: "Much, too, has been said concerning the principles of construction which ought to be applied to the constitution of the United States. On this subject, also, the court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say, that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers—is to repeat what has been already said more at large, and is all that can be necessary." *Ibid.* at 332. The phraseology here used seems clearly to

practical construction by other departments of the government.[47] In so doing the Court denied that a direct tax could be "taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed,"[48] (a procedure which Chief Justice Marshall had forbidden in the *Dartmouth College* case)[49] and held that these various kinds of collateral evidence were admissible to show the subjects covered by the meaning of the expression as used in 1789. The same technique was employed in establishing the meaning of the expressions "the United States,"[50] "uniform throughout the United States,"[51] "bills of credit,"[52]

mean that either the words or the "object contemplated by the framers" may be used in determining the intent. Marshall referred extensively to the history of the times to show that, by the impairment of obligation of contract clause, the convention intended an inhibition against impairing all contracts and not merely to restrict retrospective laws. His selection of historical material was apt, but Madison's notes on the debates of the Convention, published for the first time thirteen years later, show that his position was incorrect. See 5 ELLIOT, DEBATES (1881) 485, 488, 545, 546.

(2) In Cohens v. Virginia, *supra* note 43, Marshall relied heavily upon collateral materials although he thought that the constitutional document was clear on the issue then before the Court. This departure he justified under the following generalization: "In expounding them, (the words of the Constitution) we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws." *Ibid.* at 416. He then discussed the history of the events leading to the calling of the convention. At page 418 he says, "Great weight has always been attached, and very rightly attached, to contemporaneous exposition." He quotes extensively from the Federalist and refers to the congressional proceedings at the time of the adoption of the Judiciary Act. *Ibid.* at 417-21. In Cherokee Nation v. Georgia (1831) 30 U.S. (5 Pet.) 1, 16, he relied almost completely on extrinsic aids, and in McCulloch v. Maryland (1819) 17 U.S. (4 Wheat.) 316, at the very outset, he bluntly acknowledged: "It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it." *Ibid.* at 401. In determining the intention of the framers Marshall did not here resort, nor did counsel, to the Journal of the Convention which had been published the preceding year. It is reasonably clear from that document that the decision in this case was directly opposite to the will of the Constitution makers. See 1 ELLIOT, DEBATES (1881) 247. When Madison's debates were published, this proposition became even more absolutely established. *Ibid.* at 117, 440, 543-544.

With respect to Marshall's treatment of the intention of the framers, see CORWIN, JOHN MARSHALL AND THE CONSTITUTION (1919) 122, where it is said: "Marshall's own outlook upon his task sprang in great part from a profound conviction of calling. He was thoroughly persuaded that he knew the intentions of the framers of the Constitution—the intentions which had been wrought into the instrument itself—and he was equally determined that these intentions should prevail."

[47] Hylton v. United States (1796) 3 U.S. (3 Dall.) 171, 177; Veazie Bank v. Fenno (1869) 75 U.S. (8 Wall.) 533, 540-546; Springer v. United States (1880) 102 U.S. 586, 596-600; Pollock v. Farmers' Loan & Trust Co. (1895) 158 U.S. 601, 618-629.

[48] Pollock v. Farmers' Loan & Trust Co., *supra* note 47, at 632.

[49] *Supra* note 46, at 644.

[50] Downes v. Bidwell (1901) 182 U.S. 244, 249, 278-279, 286.

[51] Knowlton v. Moore (1900) 178 U.S. 41 (opinion of White, J.).

[52] Briscoe v. Bank of Kentucky, *supra* note 16, at 317, 328m-n.

"ex post facto law,"[53] "copyright,"[54] and "pardon."[55]

The effort in this process is to make the terms of the Constitution an absolute standard, and to accomplish this nothing is more essential than to peg them in time. In *Ex parte Wells*,[56] the Court said, ". . . the language used in the constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption." And again,[57] "We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution."[58] When thus resorting to the meaning of the terms of the Constitution as of the time of adoption, the Court most frequently declares[59] that the proper source from which to ascertain the definition is the common law.[60]

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[53] Carpenter v. Commonwealth of Pennsylvania (1854) 58 U.S. (17 How.) 456, 463; Kring v. Missouri (1882) 107 U.S. 221, 227; Orr v. Gilman (1902) 183 U.S. 278, 285-286; Kentucky Union Co. v. Kentucky (1911) 219 U.S. 140, 153.

[54] Burrow-Giles Lithographic Co. v. Sarony, *supra* note 43, at 57-58.

[55] *Ex parte* Grossman (1925) 267 U.S. 87, 112-113, 118-119; *Ex parte* Wells (1855) 59 U.S. (18 How.) 307, 310-311.

[56] *Supra* note 55, at 311. Compare the language of Baldwin, J. in Briscoe v. Bank of Kentucky, *supra* note 16, at 3281, where he said, "The framers of the constitution did not speak in terms known only in local history, laws or usages, nor infuse into the instrument local definitions, the expressions of historians, or the phraseology peculiar to the habits, institutions or legislation of the several states. Speaking in language intended to be 'uniform throughout the United States,' the terms used were such as had been long defined, well understood in policy, legislation and jurisprudence, and capable of being referred to some authoritative standard meaning; otherwise, the constitution would be open to such a construction of its terms as might be found in any history of a colony, a state, or their laws, however contradictory the mass might be in the aggregate."

[57] *Ex parte* Wells, *supra* note 55, at 311.

[58] The authority cited for this proposition was Cathcart v. Robinson (1830) 30 U.S. (5 Pet.) 264, which is dubiously in point. That case was only authority for the proposition that when a state adopted an English statute the adoption included the construction put upon the statute by the English courts at the time of adoption. Marshall there said: "The rule, which has been uniformly observed by this court in construing statutes, is, to adopt the construction made by the courts of the country by whose legislature the statute was enacted. . . . The received construction in England, at the time they are admitted to operate in this country, indeed, to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them." *Ibid.* at 280. The English cases going beyond the holding which existed prior to the revolution were here expressly not followed. Thus the problem in Cathcart v. Robinson was quite different from that in *Ex parte* Wells, for it could well have happened that the framers associated with the word in issue, by reason of our particular history before the time of adoption, a meaning different from that then current in England. See Story's dissent in Briscoe v. Bank of Kentucky, quoted in note 60, *infra*.

[59] See South Carolina v. United States (1905) 199 U.S. 437, 450, and cases there cited; United States v. Wong Kim Ark (1898) 169 U.S. 649, 654, and cases there cited.

[60] WILLOUGHBY, *op. cit. supra* note 5, § 29, has thought it worth while to note that in some instances, notably that of admiralty and bankruptcy, the Court has

VI

Finally, there is a class of cases which utterly destroys whatever vestige remains of the restrictive effect of the rule against admissibility of extrinsic aids save where factors within the constitutional document created doubt.[61] It is a class in which the rule is not only abandoned but in which it is completely ignored, a class in which the questioned constitutional language was exceedingly clear, explicit, and unambiguous, and in which, notwithstanding, the Court, relying solely upon collateral materials, reached a conclusion opposite to that directed by the words used.

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accepted a broader definition than that of the common law in 1789. This is but one more indication of the non-obligatory character of rules of construction upon the Supreme Court. That the English common law is not always regarded as the best source from which to derive the meaning of technical terms, see Story's dissent in Briscoe v. Bank of Kentucky, *supra* note 16, where the meaning of "bills of credit" was under discussion. Story there said: "And I mean to insist, that the history of the colonies, before and during the revolution, and down to the very time of the adoption of the constitution, constitutes the highest and most authentic evidence to which we can resort, to interpret this clause of the instrument...." *Ibid.* at 332.

[61] The question of whether the rule against admissibility of extrinsic aids is applied when the Court is dealing with constitutional amendments should not be overlooked. The problem of determining the intent of framers and ratifiers of constitutional amendments is not substantially different from determining the intent of the framers and ratifiers of the Constitution proper. In the one case, one is dealing with Congress and state legislatures or state conventions and in the other, with the Constitutional Convention and state conventions. The cases indicate, however, that the Court has not even formulated a restrictive rule in the interpretation of constitutional amendments.

(1) In dealing with the first ten amendments, the rhetoric of the Court seems to demand resort to collateral evidence in every situation. See Frohwerk v. United States (1919) 249 U.S. 204; Near v. Minnesota (1931) 283 U.S. 697. In Robertson v. Baldwin (1897) 165 U.S. 275, this process is most fully rationalized. The Court said, at pages 281-282: "This law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunties which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating those principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press ... does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms ... is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall twice be put in jeopardy ... does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion, ...nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, or pardon or by statutory enactment.... Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial."

(2) In another large class of cases, the accepted mode of definition is to examine historical development. I refer to those cases in which one or the other of

The latest of this class of cases is *Williams v. United States*,[62] in which the Court was obliged to construe Article III, section 2, extending the judicial power of the United States to "controversies to which the United States shall be a party." Mr. Justice Sutherland, speaking for the Court, held this clause to mean only "controversies to which the United States shall be a party plaintiff."[63] The theory of the decision was that, in view of the fact that the doctrine of sovereign immunity from suit was well settled and understood at the time of the framing of the Constitution, the framers could not have intended that Article III should include suits against the United States.[64] Of course this antiquated maxim of the common law was not that the sovereign could not be sued but that the sovereign could not be sued without its consent, and consequently Mr. Justice Sutherland here not only abrogated the clear and explicit lan-

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the due process clauses is being considered and in which some variation of the doctrine announced in Murray's Lessee v. Hoboken Land & Imp. Co. (1855) 59 U.S. 18 How.) 272, 277, is applied. The Court there said: "We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." See Hurtado v. California (1884) 110 U.S. 516; Twining v. New Jersey (1908) 211 U.S. 78; Powell v. Alabama (1932) 287 U.S. 45.

(3) In other situations involving the construction of amendments the Court is equally unrestrained by exclusionary rules. In Robertson v. Baldwin, *supra*, the Court exempted from the operation of the 13th Amendment a case plainly within its words but one which, on a basis of collateral evidence could claim exceptional treatment. In United States v. Wong Kim Ark, *supra* note 59, at 653-654, the Court said: "In construing any act of legislation, whether a statute enacted by the legislature or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted." Again, in Minor v. Heppersett (1874) 88 U.S. (21 Wall.) 162, where the question of the relationship of citizenship to suffrage, was raised, resort was had to the definitions of the common law, historical meanings at the time of the adoption of the Constitution and practical constructions as indicated by acts of Congress and by the practice of the states.

Note should be made of the fact that in the Wong Kim Ark case, *supra* note 59, mention is made of the inadmissibity of Congressional debates in construing constitutional amendments. To the same effect see Maxwell v. Dow (1900) 176 U.S. 581. In the latter case the two authorities cited for this rule were both cases in which the Court denied introduction to Congressional debates on the matter of statutory construction. See Note (1937) 25 CALIF. L. REV. 326, 335.

[62] (1933) 289 U.S. 553.

[63] Justice Sutherland admitted that the meaning of the words used was clear; he said: "We are here immediately concerned only with that provision of Article III which extends the judicial power to 'Controversies to which the United States shall be a party.' Literally, this includes such controveries whether the United States be party plaintiff or defendant; . . ." *Ibid.* at 573.

[64] The Court also relied to some degree upon the practical construction of the questioned clause by the Judiciary Act of 1789, and upon an inference derived from

guage of the Constitution, but, in so doing, he relied on a misstatement of a proposition known to most laymen. Even granting the legitimacy of his procedure the framers most certainly did not know what he attributed to them as a basis for his determination. However, whether the manipulation was rightly or wrongly employed, this was a case in which the Court resorted to collateral aids to justify a decision opposite to the clear language of the Constitution.

Another such case, and one almost as recent, is *Smiley v. Holm*.[65] In this decision, the Court held that when a state legislature prescribes the time, place, and manner of holding Congressional elections under Article I, section 4, it is performing a law-making function in which the veto power of the state governor participates, if, under the state constitution, the governor has that power in the making of state laws. Article I, section 4 provides, "The times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; . . ." This language seems reasonably well calculated to preclude the decision here rendered.[66] The Court relied upon a long continued,[67] practical and uniform construction by the states, and disregarded, not however without mention,[68] the fact that at the time the Constitution was adopted only two states permitted veto of

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the fact that the clause "controversies to which the United States shall be a party" was not qualified by the word "all" which preceded many of the associated grants of judicial power. *Ibid.* at 573-574.

[65] (1932) 285 U. S. 355.

[66] The Court, however, sought to imply a doubt in this Constitutional provision by reversing the presumption of the formal rule against admissibility. Instead of saying that ambiguity must first be found before resort to collateral aids can be justified, the Court here suggested that reliance on extrinsic evidence is proper until it is shown that the constitutional language is absolutely clear and without a doubt. The Court said: "Certainly, the terms of the Constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the States." *Ibid.* at 369.

[67] The Court also relied on an argument that it was no more incongruous to provide for executive veto participation in this situation than to provide that Congress in making its regulations under the same provision would be subject to the veto power of the President, and that, the latter being necessarily implied, the framers intended the same implication in the case of the state legislatures as is shown by the fact that neither the convention debates nor contemporary exposition indicated a contrary intention. Thus, in this case the Court not only reaches the conclusion dictated by affirmative extrinsic evidence but supports an argument with the doctrine that it is proper unless forbidden by the convention debates or contemporary exposition.

[68] The Court said: "The argument based on the disposition, during the early period, to certain executive authority in the States, and on the long time which elapsed in a number of States before the veto power was granted to the Governor, is of slight weight in the light of the fact that this power was given in four States shortly after the adoption of the Federal Constitution, that the use of this check has gradually been extended, and that the uniform practice (prior to the questions raised in relation to the present reapportionment) has been to provide for Congres-

ordinary legislative acts.[69] Would it not follow that such veto was sufficiently exceptional to render unwarrantable the inference that the framers could have intended to provide for such veto participation with respect to this power because they did not expressly forbid it?

Perhaps the case which best exemplifies the situation in which the Court, relying on collateral materials, refuses to effectuate the clear expression of the constitutional document, and certainly the one in which the rhetoric is most boldly in support of the procedure followed, is *Popovici v. Agler*.[70] In that case, the Court held: (1) Article III, section 2 of the Constitution, extending the judicial power to all cases affecting ambassadors, other public ministers, and consuls, and investing the United States Supreme Court with original jurisdiction of such cases, does not, of itself, exclude jurisdiction in the courts of a state over a suit against the vice-consul for divorce and alimony; (2) the provisions of the Judicial Code, section 24, paragraph 18, and section 256, paragraph 8, giving the district courts original jurisdiction, exclusive of the courts of the several states, over all suits against consuls and vice-consuls should not be construed as granting to the district courts or denying to the state courts jurisdiction over suits for divorce and alimony. Said Mr. Justice Holmes,[71] speaking for the Court:

> "The language [of the constitution], so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used.... If when the constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child where matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes."

In these expressions, we see the most skillful formulation of an idea which is the exact antithesis of the rule against admissibility of extrinsic aids. As thus stated, it is tantamount to saying that in every situation, whether the constitutional language is ambiguous or clear, resort must be had to collateral materials, for they alone may reveal "the tacit assumptions upon which it is reasonable to suppose that the language was used." Implicit in this idea is a most complete denial of man's capacity accurately to express his will in words. We must know more than what is said! We must know the background and the psychology of the speaker, the "prevailing climate of opinion" in which he spoke, the en-

sional districts by the enactment of statutes with the participation of the Governor wherever the state constitution provided for such participation as part of the process of making laws." *Ibid.* at 370.

[69] Massachusetts through the governor, and New York through a council of revision.

[70] (1930) 280 U.S. 379.

[71] *Ibid.* at 383-384.

tire complex of circumstances surrounding the utterance. The underlying assumption of this proposition is not that discovery of actual intention might frequently depend upon sleuthing out hidden motives and concealed purposes.[72] The real premise of the doctrine is simply that, no matter how deliberate the effort may be, intentions cannot be satisfactorily set forth in words because of the inadequacy of the medium. There is a world of conditioning precepts which, existing in the minds of both the writer and the reader, will usually modify an idea in course of transmission. Chief Justice Marshall might warn that "it would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be excepted from its operation,"[73] (precisely what was done in the *Agler* case) but Holmes would not rest upon so artificial a foundation as the language used.

Nor was Justice Holmes the first to enunciate this doctrine. Justice Brewer had said much earlier:[74]

> "To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the constitution, and inquire what they must have understood to be the meaning and the scope of those grants. . . .The exemption of the state's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the state in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the constitution was framed. What, in the light of that condition, did the framers of the convention intend should be exempt?" [75]

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[72] This was the apparent though implied derogation which Marshall sought to cast in the statement quoted from Gibbons v. Ogden, *supra* note 46.

[73] *Supra* note 20.

[74] South Carolina v. United States, *supra* note 59, at 450, 456.

[75] See also Corfield v. Coryell (1832) Fed. Cas. No. 3230. Dillon v. Gloss (1921) 256 U. S. 368, is a somewhat different type of case from that involved in Part VI above. The Dillon case concerned the question whether Congress could prescribe a reasonable time within which ratification of a Constitutional amendment must take place when proposing it. The Court held that ratification must be within a reasonable time, and that Congress had power to prescribe such a time, are matters deductible from the text of the Constitution and the nature of amendments. Thus, to a degree, there was here reliance on extrinsic aids, (certainly of a different character from those discussed above) to warrant an implication in the absence of constitutional language. It is significant that the Court here sought direction from the debates of the Constitutional and Ratifying Conventions. It said, page 371, "Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question." That this statement is true see 5 ELLIOT, DEBATES (1881) 132, 381, 495, 530, 551, 564.

The case of United States v. Flores (1933) 289 U. S. 137, also presents a different type of situation. The question there was whether Article III, section 2 of the Constitution, extending the judicial power to all cases of admiralty and maritime jurisdiction conferred on Congress power to define and punish offenses committed by United States citizens on its merchant ships lying within the territorial limits of other countries (in this case 250 miles up the Congo), ArticleI, section 8, clause 10, of the Constitution grants to Congress the power "to define and punish Piracies and Felonies

VII

By way of summary, it might be said that the doctrine of the United States Supreme Court that the meaning of the Constitution is to be derived from the text itself unless internal factors create a doubt survives in a state of great infirmity. Never a vital doctrine, its present weakness represents the course of its history and results from its origin, its intrinsic character, the nature of its use, and the development of antithetical doctrines. Formulated in conditions that made it only a *dictum*, it never overcame the stigma of its unfortunate birth. The fact that it contained within itself an imponderable and unconfining limitation on the scope of its restrictive operation in the form of an exception where ambiguity was present, and the fact that other exceptions were developed in the case of judicially-perceived absurd consequences and need for definition of terms, both contributed to make the doctrine, in actual operation, a self-contradictory statement, the whole of which could not logically be used at one time, and the separate parts of which opposed each other. Furthermore, its frequent invocation to justify use of its exceptions, its use even in cases of doubt to exclude adverse evidence, its breach to affirm conclusions already reached on other grounds, and its employment to exclude material whose accuracy was thereafter denied—all indicate that it is a doctrine of general utility, the variety of whose conflicting uses increases the weakness of its specific character as an exclusionary rule. Finally, although after the foregoing this would seem hardly necessary, the Court has developed a doctrine which is the exact opposite of the rule against admissibility of collateral materials which tends to simplify the procedure by alleviating the necessity of

committed on the high Seas and Offenses against the Law of Nations." Counsel argued that as this specific grant of power to punish offenses outside of the territorial limits of the United States was thus restricted to offenses occurring on the high seas, the more general grant could not be resorted to as extending either the legislative or judicial power over offenses committed on vessels outside the territorial limits of the United States and not on the high seas. Justice Stone rejected this contention. He resorted to the proceedings of the Constitutional Convention to show that Article I, section 8, clause 10 was intended to transfer a power from the Congress under the Confederacy to the Congress under the Constitution in pursuance of a resolution to the effect that the new Congress should have all the powers of the old, and that Article III, section 2 was the result of a proposal, independently made and considered in the Convention, that the admiralty jurisdiction ought to be given wholly to the national government. Said the Court, "In view of the history of the two clauses and the manner of their adoption, the grant of power to define and punish piracies and felonies on the high seas cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the national government by Article III, § 2." *Ibid.* at 149. Thus the procedure in this case was to resort to convention proceedings as a means of resolving a doubt created by the language of the Constitution and also as a means of avoiding a construction which would have resulted in a moderately absurd consequence.

judicial manipulation of the latter rule so as to permit use of desired aids. Thus, the doctrine of the Court rendering collateral materials unavailable in cases of constitutional construction is, like every other doctrine of the Court, usable or not as other independent factors seem to dictate. Like all the other instruments of the Court its ultimate utility depends on its merits as an instrument of persuasion in that most indispensable of judicial functions, namely, writing the most convincing opinion possible under the circumstances. We must conclude, the test of the invocability of the rule being a matter of forensic expediency, that collateral materials may be introduced in all cases in which they tend to assist the Court in supporting the decision reached.

Jacobus tenBroek.

UNIVERSITY OF CALIFORNIA,
BERKELEY, CALIFORNIA.