by Kenneth L. Shigley

Ladies and Gentlemen, the Constitution of the United States

This country boy who migrated to the city is more at home in Waffle House than at a formal banquet. However, I have been told that at diplomatic dinners attended by British and American delegations it is customary at some point for a Brit to rise and propose a toast, "Ladies and gentleman, the queen!" It is then customary for a member of the American delegation to respond with, "Ladies and gentleman, the president of the United States!"

Although diplomatically symmetrical, this misses the mark. While the president is our chief executive and head of state, he is not a sovereign or the symbol of our nationhood and unity as a people. It would be more fitting if the toast were, "Ladies and gentleman, the Constitution of the United States!"[1]

This is the only nation on earth in which an incredibly diverse population is bound together, not by ethnicity or geography but by ideas, some of the most important of which are embodied in a written Constitution. Ours is the only government established not by conquest or political decree, but by a four-month seminar including the wisest and most experienced leaders of the nation, which produced a document that has guided the nation's path from infancy to pre-eminence.

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The 55 delegates to the Convention of 1787 were among the best-educated citizens of the former colonies. At a time when few went to college, 22 were graduates of the institutions we now know as Princeton, Harvard, Yale, Columbia, William & Mary, the University of Pennsylvania, Oxford and St. Andrews. They were steeped in classics and philosophy. Twenty-nine had studied law—including several at the Inns of Court in London—though only nine practiced law for a living. They were also experienced in the practical realities of governance and politics; 42 had served in Congress under the Articles of Confederation, and all but two or three had served as public officials in a colonial or state government.

This collection of guys in knee pants and powdered hair met not in some shaded rural retreat but in the midst of the smells and sounds of a bustling 18th century port city. Through streets that often doubled as open sewers milled as diverse a mix of humanity as could be found anywhere in America. I doubt that my German-speaking Schickle/Shigley ancestors ventured in from York County to the city where a crowded immigrant ship had delivered them from Rotterdam a generation earlier, but if so they would have been recognizable as "Pennsylvania Dutch," still speaking largely in the idiom of their native village between Stuttgart and Karlruhe.

Independence Hall, then called the Pennsylvania State House, was so run down that its shaky steeple had to be removed. Determined to maintain secrecy of deliberations, they closed the windows of their crowded 40-by-40 foot meeting room so they were deprived of any cooling breeze, sweating in the stifling heat and humidity.

Merely closing doors and windows was not sufficient to keep out smells, noise and bugs. Nearby was a creek that had become an open sewer into which tanneries dumped rotting animal carcasses, and into which there was a steady flow of animal and ash waste from soap makers and excrement from privies. Swarms of flies and mosquitoes that bred in that open sewer creek plagued the delegates. A hundred feet away, a gang of 25 convicts was excavating for construction of a new courthouse. Across the state house foyer was a busy courtroom with people constantly coming and going. On the block behind them was the city jail, whose inmates loudly called out for alms and cursed anyone who refused. Drunkenness, prostitution, disease and abuse of wives and children were rampant in the city.[2]

Such a gathering would be virtually impossible today. If it were attempted, open access would feed 24/7, wall-to-wall coverage on competing cable news channels, blogs, social media, tweets, etc. Such luminaries as might agree to participate would meet a few times, posture for the media, either agree or not on a general outline and leave the detail work to staff.

But the founding fathers of 1787 met together five or six hours a day, six days a week, from mid-May to mid-September. They debated fiercely in "committee of the whole" that allowed them to argue and reconcile on half-formed ideas. After the daily sessions they often filled their evenings with committee work or discussions over dinners in the taverns, lubricated by copious amounts of good food and wine, which since no one was driving home in cars that had yet to be invented, apparently flowed more freely than is typical at legislative dinners in Georgia today.

The secretary selected to record the proceedings, William Jackson, was a better lobbyist than stenographer and produced only random daily notes. Fortunately, a slight and scholarly young delegate from Virginia, James Madison, soon positioned himself at the table next to the secretary and took copious notes while also participat-

ing in the debates. Each evening Madison would return to his room and write voluminous journals on the secret proceedings of the day. He recorded the clash of conflicting agendas and egos that matched the climate—hot and humid—with a routine of heated debate. Some historians suggest that he slighted the contributions of an even younger delegate, Charles Pinckney of South Carolina. However, the fact is that our record of the origins and original meanings of the Constitution is largely dependent on Madison's diligence and accuracy.[3]

While the delegates quickly agreed to go beyond the mere amendments to the Articles of Confederation that had been their original task, they quickly bogged down in intractable contention about the core structure of the government. They appeared to be in an impasse between large and small states, north and south. Some delegates left in disgust and returned home.

Benjamin Franklin, the oldest delegate at 81, was revered but quite obese and ailing. He missed several days' sessions while suffering from kidney stones, a condition with which I have a passing familiarity and that is often unfavorably compared with labor pains. When he did attend, he arrived on a French sedan chair carried by convicts. On June 28, 1787, about six weeks into this wrangling, though hardly a conventionally religious man, Franklin made these prepared remarks:

> I have lived, sir, a long time, and, the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We have been assured, sir, in the sacred writings, that '*Except the Lord build the house, they labor in vain that build it*.'
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> I firmly believe this; and I also believe that without His concurring aid we shall succeed, in this political building, no better than the builders of Babel. We shall be divided by our little partial local interests; our projects will be confounded; and we ourselves shall become a reproach and byword down to future ages. And, what is worse, mankind may hereafter, from this unfortunate instance, despair of establishing governments by human wisdom, and leave it to chance, war, and conquest.
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> I therefore beg leave to move that, henceforth, prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service.[4]

The delegates at that point could not agree even on the need for prayer. While the day's session adjourned without a vote, a local clergyman delivered a sermon to the convention six days later on July 4, the 13th anniversary of issuance of the Declaration of Independence. Each day the presence of the venerable Franklin may have reminded even the most secular of the delegates of his call for divine assistance.

Two and a half months later there emerged from this hot, crowded room a document that, with its 27 amendments, is now the oldest and most revered written constitution of any nation on the planet. While Americans have long disagreed about whether there was divine intervention that summer in Philadelphia, the fact that things came out as well as they did is nothing short of miraculous.

The work of the convention was, however, just a draft for consideration until it was ratified by conventions in at least nine states. The confederation Congress meeting in New York was not of one accord. But it debated in secret so that the press only reported the decision to transmit the proposed Constitution to the states with no mention of dissension. Over the next year, newspapers and pamphleteers were as focused on debate over the Constitution as today's media are on any current controversy. The Federalist Papers were written for publication in newspapers to persuade the population to support the Constitution. Ratifying conventions in the states included raucous and occasionally violent debate. They generated scores of proposals for amendments which the first Congress eventually distilled down to the 10 included in the Bill of Rights.[5]

Interpretation and application of that Constitution in cases arising in the complexity of life over the generations since its ratification has led to a development of conflicting schools of thought about the document's meaning and interpretation. In January, I had the privilege of attending with my brother-in-law a joint appearance of U.S. Supreme Court Justices Stephen Breyer and Antonin Scalia at the South Carolina State Bar convention in Columbia. Despite their opposing views, they apparently get along well enough to take their joint road show around the country, explaining their differing views of constitutional interpretation and the role of the Supreme Court. Justice Breyer is an engaging advocate for the "living Constitution" school of thought and an expansive view of the role of the Supreme Court. Justice Scalia is more like a curmudgeonly uncle contending for the pure textualist approach to interpretation and a more restrained judicial role that makes sense to me.

In the early days of the nation, interpretation of the Constitution was virtually indistinguishable from interpretation of statutes, contracts or wills. The same principles applied, carried forward from the English common law, as summarized by Plowden, Coke and Blackstone, combined with a popular distrust of

unrestrained judicial discretion. This eventually gelled somewhat into the "plain meaning" doctrine whereby judges should be faithful agents of the intent of the framers or legislators, an easier task when the judges had personal memory of the ratification debates and texts were still of recent origin. Chief Justice Marshall, in both statutory and constitutional cases, followed a synthesis of law and equity, construing "the literal meaning of the words" with a view to "the general objects to be accomplished by [them]," as well as fundamental legal principles.[6]

This approach to interpretation is generally consistent with the rules of statutory and constitutional interpretation that prevail in Georgia. Our courts look first to legislative intent, applying the ordinary signification to all words except words of art or words connected with a particular trade or subject matter, with more extensive trumping less extensive, specific trumping general, newer trumping older, and deferring to agency interpretations where appropriate.

Early in the 20th century, jurists and scholars began to look beyond the tired old Constitution of the framers to advocate for a "living Constitution."[7] Going beyond the flexibility intentionally built into the Constitution, this approach enabled judges to solve social and economic problems by "updating" the Constitution in accordance with their own values and policy choices. Some sought to abrogate the "dead hand" of the framers by applying what they felt to be the spirit of the Constitution discerned through penumbras and emanations from the original text. The meaning of the Constitution thus becomes as subjective as an individual's reaction to a Rorschach ink blot test.[8] The distinction between this and simply making stuff up is sometimes difficult to measure. Thus the courts are politicized while significant issues are removed from political decision making in the democratic process.

At times there has been a tendency to mix this approach to interpretation with a constitutional jurisprudence that borrows from the common law tradition, treating the "living Constitution" rulings of judges as the supreme law of the land, when in fact it is the Constitution itself that is the supreme law of the land.

Seeking an objective basis for judicial restraint, by the 1970s there was a movement toward returning to the original intent of the Constitution. Looking to the history and context of the drafting and ratification of the Constitution, judges may seek to rule upon contemporary issues in light of the intent of the framers. Madison's journal of the Constitutional convention, the Federalist Papers and acts of the first Contress are ground to be plowed in seeking that intent. However, anyone who has spent much time around a legislative process can attest that a collective subjective intent is sometimes hard to discern even when laws are being passed. Combing through the records of even recent legislation can be an unreliable guide to legislative intent. Looking back generations or centuries, the often muddled and incomplete historical record of debates can support multiple conclusions.[9]

On the premise that only the text of a Constitution or statute is a reliable measure of the collective intent of the lawmakers, we have now come to an emphasis on "textualism," seeking to determine as objectively as possible the public meaning of a text at the time it was adopted. Rather than playing amateur historian with inadequate time and resources by poring through the

historical record, a judge may look to dictionaries and legal treatises extant at the time of enactment to determine what words and phrases would have meant to the educated legislators or member of ratifying conventions who adopted them.[10] This has the virtue of providing an objective grounding that does not wander far afield into matters that ought to be reserved to the people and the other branches of government. Determine what the text meant to an educated reader when it was adopted, then seek to honestly apply that core meaning to the current situation. It isn't easy or mechanical, but it is an approach consistent with upholding the Constitution and exercising judicial restraint.

There are other theories of interpretation—political process theory, pragmatism theory, etc. But all theories, however all-encompassing they may be portrayed, can be skillfully manipulated to reach political and policy conclusions that a judge subjectively prefers. All people, including those who wear black robes and speak from elevated benches, are vulnerable to *hubris* and guard against it.

The unchecked exercise of judicial power, no matter which theory of interpretation a judge purports to follow, is the antithesis of judicial restraint. Thus, all theories should be considered with an attitude of judicial humility, subjecting the judge's personal preferences to a fair and objective reading of the law. One Georgia judge recently referred to this in the context of the theological concept of "death to self."

Judges should therefore exercise common sense and give due deference to the legitimate roles of the legislative and executive branches that are also sworn to uphold the Constitution. Where the expressed legislative intent can be honestly reconciled with the requirements of the written Constitution, due deference is in order.

But where the two cannot be reconciled, the strength and independence of the courts is essential to uphold the Constitution as written and maintain the liberty of the ordinary free citizens who might share a counter with me at Waffle House.[11] GBJ

Endnotes

1. Justice Antonin Scalia has used this illustration for years, including in remarks at an American Bar Foundation dinner honoring former Senator David Gambrell of Georgia, in New Orleans of February 4, 2012.
2. Richard Beeman, Plain, Honest Men: The Making of the American Constitution (2009).
3. *Id. at 93-98.*
4. Benjamin Franklin, The Works of Benjamin Franklin 376-78 (John Bigelow ed., Fed. ed. 1904). *See* 2 James Madison, The Papers of James Madison 984-86 (Henry D. Gilpen ed., Washington, Langtree & O'Sullivan 1840) (1797) (recording Franklin's speech).
5. Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 (2010).
6. *Compare*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 63 (1994) (contrasting "faithful agents" with "independent principals"); William N. Eskridge, Jr., *All About Words: Early Understandings Of The "Judicial Power" In Statutory Interpretation, 1776-1806*, 101 Colum. L. Rev. 990, 996-97 (2001) (contending that early methods of judicial statutory interpretation went beyond mere consideration of the plain text); and John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2388-93 (2003) (recognizing but criticizing the canon that statutes may be interpreted to avoid absurd results).
7. *See., e.g.*, H. McBain, The Living Constitution (1927).
8. William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).
9. Steven G. Calabresi, Ed., Originalism: A Quarter-Century of Debate (2007).
10. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1998).
11. J. Harvie Wilkinson, Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance (2012).

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