

74TH CONGRESS }
2d Session }

SENATE

{ DOCUMENT
{ No. 232

THE CONSTITUTION
OF THE
UNITED STATES OF AMERICA
(ANNOTATED)

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JANUARY 1, 1938



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1938

GENERAL PRINCIPLES OF INTERPRETATION

The Approach to Constitutional Decisions.

Constitutional interpretation has formed one of the "delicate and important" functions of the Supreme Court.* In the early case of *McCulloch v. Maryland*, Chief Justice Marshall remarked: "We must never forget it is a Constitution we are expounding";¹ and the great cases of constitutional law are studded with similar reminders of the significance of a decision by the Supreme Court construing the basic charter of Government.²

¹ 4 Wheat. 316, 407 [1819].

² See e. g., *Ex parte Garland*, 4 Wall. 333, 382 [1867]; *Hepburn v. Griswold*, 8 Wall. 603, 610 [1870]; *Adkins v. Children's Hospital*, 261 U. S. 525, 544 [1923].

The whole object of constitutional, as of statutory, construction is to give effect to the intention of the framers of the instrument, and additionally, to the intention of the people in adopting it.¹ This intent, together with the general scope of the particular provision, is therefore to be kept constantly in view.² The same general rule was enunciated in somewhat more detail in *Prigg v. Pennsylvania*:³ "It will, indeed, probably, be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions; that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. * * * If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end; and

* The Supreme Court, expressly provided for in the Constitution, was organized pursuant to the Judiciary Act of September 24, 1789 (1 Stat. 73), and held its first term in New York, in February 1790. No cases were decided at the first three terms, while action of a preliminary character only was taken in two cases at the August term, 1791. One case was taken under advisement at the February term, 1792, and further action taken therein at the August term, 1792, but the first case in which an extended opinion was rendered was *Georgia v. Brailsford*, in August 1792, 2 Dall. 402. And with the exception of further hearings in this and another previous case, and on *Hayburn's case* (which was never decided) the first important case decided in the Supreme Court involved the construction of the Constitution (*Chisholm v. Georgia*, 2 Dall. 419 in February 1793).

by another mode it will attain its just end and secure its manifest purpose; it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail.”

¹ *Lake County v. Rollins*, 130 U. S. 670 [1889].

² *Ex parte Yerger*, 8 Wall. 85, 101 [1869].

³ 16 Pet. 539, 610 [1842].

Constitutional decisions are not lightly undertaken. It is a settled principle in the Supreme Court that it will decide only actual matters in controversy essential to the decision of the particular case at bar.¹ The mere raising of a constitutional question, therefore, does not insure a decision upon it. To realize that caution in approaching such problems is of the first importance, it is necessary only to note the practical safeguards and restrictions which the Supreme Court has thrown around its consideration of constitutional questions. Justice Brandeis in a concurring opinion recently enumerated seven:²

(1) The Court will not pass on the constitutionality of legislation in a friendly, non-adversary proceeding.³

(2) The Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it.”⁴

(3) The Court will not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”⁵

(4) The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be decided.⁶

(5) The Court will not pass upon the validity of a statute on complaint of one who fails to show that he is injured by its operation.⁷

(6) The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.⁸

(7) It is a cardinal principle that a statute will, if fairly possible, be construed so as to avoid a question of constitutionality.⁹

¹ *United States v. Alaska S. S. Co.*, 253 U. S. 113, 116 [1920].

² *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346 [1936].

³ *Citing Chicago & Gr. Trunk Ry. v. Wellman*, 143 U. S. 339 [1892].

⁴ *Citing Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners*, 113 U. S. 33 [1885]; *Abrams v. Van Schaick*, 293 U. S. 188 [1934]; *Wilshire Oil Co. v. United States*, 295 U. S. 100 [1935].

⁵ *Citing Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners*, 113 U. S. 33 [1885].

⁶ *Citing Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 191 [1909]; *Light v. United States*, 220 U. S. 523, 538 [1911]; *Berea College v. Kentucky*, 211 U. S. 45, 53 [1908].

⁷ *Citing Tyler v. Judges of Court of Registration*, 179 U. S. 405 [1900]; *Hendrick v. Maryland*, 235 U. S. 610, 621 [1915].

⁸ *Citing Great Falls Mfg. Co. v. Attorney General*, 124 U. S. 581 [1888]; *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, 411-412 [1917]; *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469 [1923].

⁹ *Citing Crowell v. Benson*, 285 U. S. 22, 62 [1932].

The Purpose and Nature of the Constitution.

IN GENERAL.

The Constitution of the United States was made by, and for the protection of, the people of the United States.¹ In *Ableman v. Booth*,² holding that

the process of a State court or judge has no authority beyond the limits of the sovereignty which confers the judicial power, Chief Justice Taney said: "The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities." This language was quoted in substantiation of the opinion of the court by Mr. Justice Field in *Tarble's Case*.³

¹ *League v. De Young*, 11 How. 203 [1851].

² 21 How. 506, 517 [1859].

³ 13 Wall. 397 [1872].

The general object of the Constitution is constantly to be kept in view; the language of each separate provision must be construed with reference to that purpose and so as to subserve it.¹ No court is authorized to construe a clause of the Constitution, so as to defeat its obvious ends, when another construction, equally accordant with the words, and sense, will enforce and protect them.² But the obvious meaning of a provision is not to be restricted by and to the known purposes of its adoption. For example, the Thirteenth Amendment had its origin in the previous existence of African slavery, but the generality of its language makes its prohibition apply to slavery of white men as well; and also to peonage and every other form of compulsory labor. So, the provision of the Constitution prohibiting legislation by States impairing the obligation of contracts (art. 1, sec. 10) had its origin in the existence of tender laws, appraisement laws, stay laws, and installment laws passed by the States soon after the Revolution when their finances were embarrassed, and their people overwhelmed with debts, but in its construction the provision has not been limited to mere commercial contracts.³

¹ *Gibbons v. Ogden*, 9 Wheat. 1 [1824]; *Brown v. Maryland*, 12 Wheat. 437 [1827]; *Maxwell v. Dow*, 176 U. S. 581, 601 [1900]; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 87 [1877]; *Legal Tender Cases*, 12 Wall. 457, 531 [1871]. See also *Dartmouth College v. Woodward*, 4 Wheat. 644 [1819].

² *Prigg v. Pennsylvania*, 16 Pet. 612 [1842].

³ *Railroad Tax Cases*, 13 Fed. 722, 740 [1882], writ of error dismissed, 116 U. S. 138 [1885].

The terms of the Constitution are not to be nullified or evaded by astute verbal criticism without regard to the aim and objects of the instrument and the principles on which it was based; and where words admit of different intentions, that one is to be selected which is most consonant to the object in view.¹

¹ *Aldrich v. Kinney*, 4 Conn. 380, 385 [1822]; *People v. Dowell*, 25 Mich. 247, 261 [1872].

PERMANENCE.

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government, its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded.

It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take.¹

¹ *South Carolina v. United States*, 199 U. S. 437, 448, 449 [1905]. See also *Pensacola Tel. Co. v. Western Union*, 96 U. S. 9 [1878]; *In re Debs*, 158 U. S. 591 [1895].

Some provisions, however, are considered as "progressive." Thus the Eighth Amendment, prohibiting cruel and unusual punishments, "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."¹

¹ *Weems v. United States*, 217 U. S. 349, 378 [1910].

It is the constant changing of conditions and the application to them of the changeless basic grants of the Constitution that give a present interest to the statement penned by Chief Justice Marshall in 1819: "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist."¹

¹ *McCulloch v. Maryland*, 4 Wheat. 316, 404 [1819].

DELEGATED AND RESERVED POWERS.

The Constitution enumerates the powers granted by the people¹ of the then existing States to the General Government.² To distinguish between such granted powers and the powers reserved to the States, the general rule of construction laid down in *Livingston v. Van Ingen* may be cited:

"When the people create a single, entire government, they grant at once all the rights of sovereignty * * *. Everything is granted that is not expressly reserved in the constitutional charter, or necessarily retained as inherent in the people. But when a Federal Government is erected with only a portion of the sovereign power, the rule of construction is directly the reverse, and every power is reserved to the members that is not, either in express terms, or by necessary implication, taken away from them, and vested exclusively in the Federal head. This rule has not only been acknowledged by the most intelligent friends to the Constitution, but is plainly declared by the instrument itself."³ "While the Federal Government is acknowledged as one of enumerated powers, 'there is

no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly", and declares only, that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument."⁴

¹ Jarrott v. Moberly, 103 U. S. 586 [1881]; Martin v. Hunter, 1 Wheat. 326 [1816]; Lake County v. Rollins, 130 U. S. 662, 670 [1889]; Gibbons v. Ogden, 9 Wheat. 1, 188 [1824].

² See McCulloch v. Maryland, 4 Wheat. 316 [1819].

³ 9 Johns. (N. Y.) 507, 574 [1812].

⁴ McCulloch v. Maryland, 4 Wheat. 316, 406 [1819].

Even the express grant of powers by the Constitution cannot be too literally construed. "It is not denied, that the powers given to the Government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the Nation may require, and of employing the usual means of conveyance."¹

¹ McCulloch v. Maryland, 4 Wheat. 316, 409 [1819].

The rule that exceptions from a power establish its existence is as applicable to the Constitution as to other instruments¹ and "an exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition."² Exceptions are not to be implied;³ a negative operation will be given affirmative words only where necessary to their having any operation at all.⁴

¹ Gibbons v. Ogden, 9 Wheat. 1, 191 [1824]; Brown v. Maryland, 12 Wheat. 438 [1827].

² Rhode Island v. Massachusetts, 12 Pet. 657, 722 [1838].

³ Cohens v. Virginia, 6 Wheat. 264, 378 [1821].

⁴ Marbury v. Madison, 1 Cr. 174 [1803].

CONFLICT BETWEEN FEDERAL AND STATE AUTHORITY.

A mere grant of power by the Constitution to the Federal Government does not *per se* transfer exclusive sovereignty in that field, unless so stated in terms, or jurisdiction is prohibited to the States, or there is "a direct repugnancy or incompatibility in the exercise of it by the States."¹ These exceptions have been further elaborated, especially by cases under the commerce clause. As stated in *Cardwell v. American River Bridge Co.*,² the cases "illustrate the general doctrine, now fully recognized, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the States; and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the

States may provide for their regulation and management, until Congress intervenes and supersedes their action."

¹ *Houston v. Moore*, 5 Wheat. 1, 49 [1820].

² 113 U. S. 205, 210 [1885].

In *Brown v. Houston*,¹ the Court said: "So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom."

¹ 114 U. S. 622, 631 [1885]. See also *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 577 [1886].

In *Sturges v. Crowninshield*, involving a bankruptcy statute, Chief Justice Marshall laid down the principle that "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislatures, as if they had been expressly forbidden to act on it."¹

¹ 4 Wheat. 122, 193 [1819].

Whenever any conflict arises between enactments of the National and State Governments, or in the enforcement of their asserted authorities, those of the National Government have supremacy until the validity of the different enactments and authorities is determined by the tribunals of the United States. The Court explained the necessity for such result in *Tarble's Case*: "This temporary supremacy until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments."¹

¹ 13 Wall. 397, 407 [1872].

GENERALITY OF LANGUAGE.

The Constitution is an instrument of government, in general terms, made and adopted by the people for practical purposes.* "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to

* For a brief statement indicating the very practical considerations and proceedings underlying the Constitution, see Historical Note on Formation of the Constitution, p. 9.

mold and model the exercise of its powers, as its own wisdom, and the public interests, should require.”¹

¹ *Martin v. Hunter*, 1 Wheat. 304, 326 [1816].

Primary Consideration—Meaning of Words Used.

Primarily, constitutional interpretation is a question of ascertaining the meaning of the words used. No word or clause can be rejected as superfluous or meaningless, but each must be given its due force and appropriate meaning.¹

¹ *Knowlton v. Moore*, 178 U. S. 41, 87 [1900].

The Constitution must receive a practical construction.¹ Words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.² “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.”³

¹ *Union P. R. Co. v. Peniston*, 18 Wall. 5, 31 [1873].

² *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 618 [1895].

³ *Gibbons v. Ogden*, 9 Wheat. 1, 188 [1824].

Unless there are strong reasons for a contrary interpretation, terms in the Constitution, as in statutes generally, are to be given the meaning they have in common use.¹ But, in view of possible change in usage, and between the literal and the actual construction, that meaning should be given which obtained at common law and at the time the Constitution and its several amendments were adopted.²

¹ *Tennessee v. Whitworth*, 117 U. S. 147 [1886]; *United States v. Sprague*, 282 U. S. 716, 731 [1931].

² *Veazie Bank v. Fenno*, 8 Wall. 542 [1869].

“The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”¹ Resort to the maxims and principles of the common law is constantly had.² For example, the term *ex post facto*, which, literally construed, would apply to any act operating upon a previous fact, has always been understood as embracing only criminal laws and laws providing for the recovery of penalties or forfeitures.³

¹ *Smith v. Alabama*, 124 U. S. 465, 478 [1888]. See also *United States v. Wong Kim Ark*, 169 U. S. 649 [1898]; *Moore v. United States*, 91 U. S. 270 [1876].

² See e. g., *South Carolina v. United States*, 199 U. S. 449 [1905]; *Callan v. Wilson*, 127 U. S. 549 [1888]; *United States v. Sanges*, 144 U. S. 310 [1892]; *Gompers v. United States*, 233 U. S. 610 [1914].

³ *Locke v. New Orleans*, 4 Wall. 172 [1867].

Where a particular word or sentence, taken by itself, is obscure or of doubtful meaning, such expression is to be examined in connection with its context. *Noscitur a sociis* applies with special force.¹ While the particular

provision involved is the starting point of discussion in each concrete case, and the primary basis for textual construction, it is well settled that the Constitution, together with amendments, is to be regarded as one whole, and construed accordingly.² A provision afterward changed by amendment should be considered in construing the amendment.³ The different clauses should each be given effect and if possible reconciled; and any actual conflict between the original instrument and an amendment is to be resolved in favor of the amendment.⁴

¹ *Virginia v. Tennessee*, 148 U. S. 519 [1893]; *Ex parte Bain*, 121 U. S. 1, 12 [1887]; *Carpenter v. Pennsylvania*, 17 How. 456, 463 [1855]; *Kendall v. United States*, 12 Pet. 524 [1838].

² *Prout v. Starr*, 188 U. S. 537, 543 [1903].

³ *Fletcher v. Peck*, 6 Cr. 87, 139 [1810]; *Brown v. Walker*, 161 U. S. 591 [1896]; *United States v. Wong Kim Ark*, 169 U. S. 649, 654 [1898].

⁴ *Schick v. United States*, 195 U. S. 65, 68 [1904].

Extrinsic Aids to Interpretation.

IN GENERAL.

Where the meaning of a provision is plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text.¹ But where there is ambiguity or doubt the principle stated by Justice Story "with all the lights and aids of contemporary history" applies and may fairly be construed to comprehend all the extrinsic aids which may be resorted to by courts. In fact, constitutional interpretation follows the same rules and has resort to the same sources of judicial information as statutory construction in general.² There can be no construction where there is nothing to construe.³

¹ *McPherson v. Blacker*, 146 U. S. 27 [1892].

² *Rhode Island v. Massachusetts*, 12 Pet. 657, 722 [1838].

³ *United States v. Hartwell*, 6 Wall. 385, 396 [1868].

Before any appeal can be made to practical construction, it must appear that the true meaning of a provision of the Constitution is not clear. No number of statutes, or infractions of the Constitution, however numerous, can be permitted to import a power which does not exist, or to furnish a construction not warranted; long acquiescence of Congress and the Executive, by which the rights of parties have been determined and adjudged for many years, does not make constitutional that which is unconstitutional.¹

¹ *Fairbank v. United States*, 181 U. S. 283, 307 [1901]; *United States v. Boyer*, 85 Fed. 425 [1898]; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 691 [1892].

When the text of a constitutional provision is not ambiguous, the courts are not at liberty to search for its meaning beyond the instrument itself. If a case is within the letter of the Constitution it is not to be excluded from its meaning by showing that it was not in the minds of those who framed and adopted it; it is further necessary to show that, had the case been suggested, the language would have been changed so as to except it. It cannot be inferred from extrinsic circumstances that a case, for which the Constitution expressly provides, is exempted from its operation; such an exception may be made only if

something in the literal construction is obviously absurd or mischievous, or repugnant to the spirit of the Constitution.¹ But for the application of this rule, a case must at least be within the words of the Constitution.

¹ *Dartmouth College v. Woodward*, 4 Wheat. 518, 644 [1819]. See also *Ogden v. Saunders*, 12 Wheat. 332 [1827]; *Houston v. Moore*, 5 Wheat. 1 [1820]; *Briscoe v. Bank of Kentucky*, 11 Pet. 257 [1837].

HISTORICAL ORIGIN.

The historical origin may be considered and historical evidence may be resorted to as aids in the construction and application of words and provisions. "What went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions."¹ "But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin."²

¹ *Marshall v. Gordon*, 243 U. S. 521, 533 [1917]. See also *Twining v. New Jersey*, 211 U. S. 78 [1908]; *Williamson v. United States*, 207 U. S. 425 [1908].

² *Missouri v. Illinois*, 180 U. S. 208, 219 [1901]. See also *Appleyard v. Massachusetts*, 203 U. S. 222 [1906]; *South Carolina v. United States*, 199 U. S. 437 [1905].

HISTORY OF TIME OF ADOPTION.

The history of the time when a provision was framed and adopted should be examined to determine the old law, the mischief, and the remedy, and where it is undoubted that the object of a clause was to incorporate into the instrument certain principles which had become permanently fixed in the law of the mother country, the construction of those principles by the English courts is useful in determining their scope. In placing a construction upon an article of doubtful meaning, the safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it in a way, so far as is reasonably possible, to forward the known purpose or object for which it was adopted.¹

¹ *United States v. Wong Kim Ark*, 169 U. S. 654 [1898].

DEBATES IN CONVENTION AND CONGRESS.

The views of the particular Members or the course of proceedings in the Convention cannot control the fair meaning and general scope of the Constitution as it was finally framed, and what individual Senators or Representatives may have urged in debate in regard to the meaning to be given to a proposed amendment does not furnish a firm ground for its construction, nor is it important as explanatory of the grounds upon which the Members voted in adopting it.¹

¹ *Legal Tender Cases*, 12 Wall. 457, 561 [1871]; 110 U. S. 421, 444 [1884]; *Maxwell v. Dow*, 176 U. S. 581, 601 [1900].

In the case of *Downes v. Bidwell*¹ the court said: "It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of

the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts.”¹

¹ 182 U. S. 244, 254 [1901]. Cf. *Smith v. Turner (Passenger Cases)*, 7 How. 283, 396 [1849].

THE FEDERALIST.

As in the case of other contemporaneous exposition, the construction given to the Constitution by the authors of the Federalist is entitled to great weight. This collection of 85 essays, published in the newspapers immediately after the submission of the Constitution to the State conventions, constitutes indeed a frank advocacy of its adoption, by Hamilton, Madison and Jay; and in applying their opinions to cases which may arise, a right to judge of their correctness must be retained.¹

¹ *McCulloch v. Maryland*, 4 Wheat. 316, 433 [1819]; *Cohens v. Virginia*, 6 Wheat. 264, 419 [1821]; *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 627 [1895].

EXISTING LAW.

The law existing at the time the Constitution and the amendments were adopted and ratified, is often the best basis for ascertaining the scope and effect of a constitutional provision when such provision secures guaranties recognized by such law, rather than establishes new guaranties.¹ For example, “inspection laws” was a term well understood at the time when the Constitution provided (art. 1, sec. 10) that States might lay imposts or duties necessary for executing their inspection laws.² The provision (amendment 6) that an accused person should be confronted with the witnesses against him is subject to exceptions in the case of dying declarations and testimony of witnesses since deceased,—exceptions well established at the adoption of the Constitution and not intended to be abrogated.³

¹ *Ex parte Wilson*, 114 U. S. 417, 422 [1885]; *Turner v. Maryland*, 107 U. S. 38, 52 [1883]; *Mattox v. United States*, 156 U. S. 237, 243 [1895].

² *New York v. Compagnie Générale Transatlantique*, 10 Fed. 357 [1882], affirmed 107 U. S. 59 [1883].

³ *Kirby v. United States*, 174 U. S. 47 [1899].

CONTEMPORARY LEGISLATION.

Proceedings in the State legislatures or the Continental Congress immediately before adoption of the Constitution have an important bearing on the construction to be given to that instrument.¹ And legislation by Congress at the time of proposing or immediately following the proposal or adoption of an amendment, is authoritative in determining the scope of a constitutional provision. For example, the first 10 amendments to the Constitution were proposed by the First Congress on September 25, 1789; at the same session (July 31) an act was passed to regulate the collection of customs duties (1 Stat. 29), which in section 23 authorized customs officials to seize and search for goods suspected of having been fraudulently entered or concealed. It cannot be suggested with any force that the same Congress which proposed the amendments could have regarded the Fourth and Fifth Amendments as forbidding the enactment of those or of kindred provisions.²

¹ *Waring v. Clarke*, 5 How. 411, 456 [1847].

² *Matter of Platt*, 19 Fed. Cas. No. 11,212 [1874]. See also *United States v. Rhodes*, 27 Fed. Cas. No. 16151 [1866]; *Cohens v. Virginia*, 6 Wheat. 264 [1821].

CONTEMPORANEOUS CONSTRUCTION.

Contemporary interpretation of the Constitution is entitled to great weight, and the practice and acquiescence under it for a period of years afford an irresistible answer to objection and fix the construction.¹

¹ *Cobens v. Virginia*, 6 Wheat. 264, 418 [1821]; *United States v. Midwest Oil Co.*, 236 U. S. 459 [1915]; *The "Laura"*, 114 U. S. 411, 416 [1885]; *The "Genessee Chief" v. Fitzhugh*, 12 How. 443, 458 [1852]; *Stuart v. Laird*, 1 Cr. 299 [1803]; *Burrow Giles Lithograph Co. v. Sarony*, 111 U. S. 53, 57 [1884]; *Butte City Water Co. v. Baker*, 196 U. S. 119, 127 [1905]; *Halter v. Nebraska*, 205 U. S. 34 [1907]; *Myers v. United States*, 272 U. S. 52 [1926].

Especially in cases of doubt, the solemn, deliberate, well-considered, and long settled decisions of the judiciary, and the quiet assent of the people to an unbroken and unvarying practice, ought to conclude the action of courts in favor of a principle so established, even when the individual opinions of the judges would be different were the question *res integra*.¹

¹ *Missouri v. Illinois*, 180 U. S. 208, 219 [1901]; *Kilbourn v. Thompson*, 103 U. S. 168, 204 [1881]; *McPherson v. Blacker*, 146 U. S. 1, 27 [1892]; *Wilkinson v. Leland*, 2 Pet. 627, 657 [1829]; *Cooley v. Philadelphia*, 12 How. 299, 315 [1851]; *Veazie Bank v. Fenno*, 8 Wall. 533, 541 [1869].

In *Ames v. Kansas*,¹ it was said that in view of the practical construction put on the particular provision at the moment of the organization of the Government, and of the significant fact that no court of the United States had ever determined to the contrary the Supreme Court was "unable to say" that the vesting of jurisdiction in question was not within the power of Congress. In the recent case of *United States v. Curtiss-Wright Export Corp.*,² the Court cited a long succession of instances wherein power had been granted the President in respect to foreign relations, and held that "an impressive array of legislation * * * enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem [validity of Public Resolution of May 28, 1934 (48 Stat. 811), relating to exports to the Chaco]."

¹ 111 U. S. 469 [1884].

² 299 U. S. 304, 327 [1936].

Liberal Construction.

The Constitution is not to be interpreted with the strictness of a code of laws, or of a private contract. Liberal construction received its great impetus with Chief Justice Marshall, who, in the case of *McCulloch v. Maryland*, laid down the classic rule: "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which

are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.”¹

¹ 4 Wheat. 316, 421 [1819].

In particular, the provisions for the protection of life, liberty, and property are to be largely and liberally construed in favor of the citizen;¹ at the same time they are not to be construed to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. The limitations and ample provisions of the Constitution should not be extended so far as to destroy the necessary powers of the States or prevent their efficient exercise.² In speaking of the liberal construction to be given to restrictive or prohibitive provisions of the Constitution, the Court said in *Fairbank v. United States*: “If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is * * * the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.”³

¹ *Dorman v. State*, 34 Ala. 216, 238 [1859].

² *Brown v. Walker*, 161 U. S. 591 [1896].

³ 181 U. S. 283, 289 [1901].

Liberal construction, however, may not be carried to the extent of inserting anything in the Constitution which is not expressed or cannot be fairly implied. The general rule, that affirmative words may be given negative operation—i. e., may imply a negative of other objects than those affirmed—can be applied only where the implication promotes, not where it defeats, the obvious intention of an article. For example, in the case of the grant to the Supreme Court of original jurisdiction in certain cases, a negative or exclusive sense must be given or it has no operation, but in the grant of appellate jurisdiction, that jurisdiction may be exercised in every case cognizable under article III, in the Federal courts, in which original jurisdiction cannot be exercised, and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.¹

¹ *Cohens v. Virginia*, 6 Wheat. 264, 394 [1821]; *Marbury v. Madison*, 1 Cr. 137, 174 [1803].

Stare Decisis.*

The doctrine of *stare decisis* assumes an added importance where the Constitution is under consideration.

The general maxim is, that a point of law once settled by a decision forms a precedent not afterward to be departed from—a precedent for the guidance of courts in substantially similar cases, adherence to which is necessary to preserve the certainty, stability, and symmetry of our jurisprudence.¹ The doctrine is based on the assumption that the rules of law to which it applies have been determined by a court having final jurisdiction of the questions involved;² and it applies with especial force with respect to rules of property and business law.³ Thus, in 1862, where the Supreme Court summarily refused to reconsider its decision, five times affirmed, as to the validity of the act establishing the State Bank of Ohio, Justice Swayne stated: "Whatever differences of opinion may have existed in this Court originally in regard to these questions, or might now exist if they were open for reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhausted in the earlier cases."⁴

¹ See Broom, *Legal Maxims*, 7th ed., p. 147; The "Madrid", 40 Fed. 677, 679 [1889].

² *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 27 Colo. 1 [1899].

³ See, e. g., *Treon v. Brown*, 14 Ohio 482, 488 [1846]; *Newberry v. Trowbridge*, 4 Mich. 391, 395 [1857]; *Hines v. Driver*, 89 Ind. 339, 342 [1883]; *Kneeland v. Milwaukee*, 15 Wis. 691 [1863]; *Minnesota Min. Co. v. National Min. Co.*, 3 Wall. 332 [1866]; *Mitchell v. Burlington*, 4 Wall. 270 [1867]; *Nadal v. May*, 233 U. S. 447 [1914].

⁴ *Wright v. Sill*, 2 Black 544 [1863].

Application of the doctrine presupposes a decision by a majority of the court; affirmance by an evenly divided court, while conclusive as to the particular matter in litigation, does not constitute the case an authority for the determination of other cases, either in the Supreme or inferior courts.¹

¹ *Hertz v. Woodman*, 218 U. S. 205, 213 [1910].

On the other hand, the authority of a decision is not lessened by a failure to give the grounds for decision. Thus, in *Fidelity & Deposit Co. v. United States*, 187 U. S. 315 [1902], it was held that the decision in *Smoot v. Rittenhouse* [unreported], upholding the validity of a certain rule of the District of Columbia Supreme Court, was authoritative, though no grounds of decision were stated; and the inference to be drawn from that circumstance was that the Court felt there was no question as to the validity of the rule under consideration.

Application of the doctrine further presumes a discrimination between what is decision and *obiter dictum*. Thus, it was stated in *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 574 [1895]: "Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue."

General expressions in an opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected but ought not to control the judgment in a subsequent suit when

* See also p. 950.

the very point is presented for decision.¹ No opinion can be relied on as binding authority unless the case called for its expression. Its weight of reason must depend on what it contains; but it cannot be said that a case is not authority on one point because although that point was properly presented and decided in the regular course of the consideration of the case, something else was found in the end which disposed of the whole matter.²

¹ *Cohens v. Virginia*, 6 Wheat. 399 [1821]. See also *Brooks v. Marbury*, 11 Wheat. 78 [1826].

² *Carroll v. Carroll*, 16 How. 275 [1853]; *Florida Cent. R. Co. v. Schutte*, 103 U. S. 118 [1881]; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485 [1900].

However, while the doctrine is thus recognized and acted upon by the Supreme Court within limits, in the language of Justice Brandeis, "*stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command."¹ It is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right; but it does not require the court to follow a clearly erroneous authority. As early as 1849, Chief Justice Taney stated his position that "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."²

¹ Dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405 [1932]. See also *Hertz v. Woodman*, 218 U. S. 205 [1910].

² *Smith v. Turner (Passenger Cases)* 7 How. 283, 470 [1849].

In the light of experience and better reasoning, the Supreme Court has not infrequently overruled its constitutional decisions.¹

¹ For a list of such cases, see dissenting opinion of Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 407 (note 2), 409 (note 4) [1932].