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ASSORTED CANARDS OF CONTEMPORARY LEGAL ANALYSIS*

*Antonin Scalia***

EVERY JUDGE, AND indeed perhaps every lawyer, acquires over the years an intense dislike for certain oft-repeated statements that he is condemned to read, again and again, in the reported cases. It gets to be a kind of Chinese water torture: one's intelligence strapped down helplessly by the bonds of *stare decisis*, which require these cases to be read, and trickled upon, time after time, by certain ritual errors. It is usually impossible to cry out, even in a dissent, for these statements typically have little actual impact upon the decision of the case. They are part of its atmosphere, or of its overarching philosophy; it is fruitless to complain about the weather, and unlawyerlike to discuss philosophy rather than the holdings of the cases.

I thought I would indulge myself this evening, therefore, by lashing out against these instruments of torture. There follow, in no particular order of aversion, my most hated legal canards.

I. "REMEDIAL STATUTES ARE TO BE LIBERALLY CONSTRUED."

This venerable phrase is surely among the prime examples of lego-babble. We lawyers have all heard it and read it since our first year in law school. Yet I am not sure that anybody knows — and, worse yet, that anybody really *cares* — what in the world it

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means.

There are a number of problems with the proposition. Foremost among them, I suppose, is the unstated assumption that it is perfectly all right for judges to pick and choose among statutes, interpreting some "liberally" and some "strictly" — or perhaps "conservatively," if you think that is the appropriate antonym of "liberally." As an original matter, that seems to me quite wrong. I should think that the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right. Now that may often be difficult, but I see no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales. And that is particularly so when the thumb is of indeterminate weight. How "liberal" is liberal, and how "strict" is strict?

I think that is even true, as an original matter, with respect to the rule that all criminal statutes are to be strictly construed. Where the meaning of a criminal statute is not clear enough to give reasonable notice, enforcing it would of course be a denial of due process and the statute should be construed to avoid that defect. But that is quite different from saying that *all* criminal statutes should be interpreted to produce, not what is the most plausible meaning their language reasonably conveys, but the meaning that renders the least conduct unlawful — or perhaps the meaning that renders merely *less* conduct unlawful. (As I say, I do not know how much the thumb weighs.) I doubt, for instance, that any modern court would go to the lengths described by Blackstone in its application of the rule that penal statutes are to be strictly construed. Blackstone wrote:

Penal statutes must be construed strictly. Thus the statute 1 Edw. VI. c. 12. having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but *one horse*, and therefore procured a new act for that purpose in the following year. And, to come nearer our own times, by the statute 14 Geo. II. c. 6. stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34. extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and

lambs by name.¹

Arizona, by the way, seems to have preserved a fair and free society without adopting the rule that criminal statutes are to be strictly construed.² That state is, as far as I am aware, the only American jurisdiction that does not purport to apply it — though I have considerable doubt whether the others do much more than purport to do so.

Do not mistake me. I am not proposing abandonment of the so-called “rule of lenity,” or any of the other rules of “strict construction” that courts have announced. Once they have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language — as would be the case, for example, if the Supreme Court were to announce and regularly act upon the proposition that “is” shall be interpreted to mean “is not.” As an original matter, however, I see little to be said for such *a priori* announcements of “strict” or “liberal” construction.

But I have selected for special mention the rule that “remedial statutes are to be liberally construed” because of a defect that goes well beyond the questionability of all such pre-announced distortions. What makes this rule unique is that there is not the slightest agreement on what its subject — the phrase “remedial statutes” — consists of. Webster’s Dictionary defines “remedial” as “intended for a remedy or for the removal or abatement . . . of an evil.”³ On this assumption, of course, *all* statutes would be remedial, since one can hardly conceive of a law that is not meant to solve some problem. Presumably this normal meaning must be rejected, if only because if *all* statutes were liberally construed *none* would be — the norm having been gobbled up by the exception.

But perhaps the phrase “remedial statutes” is a term of art, so that we must consult distinctively legal sources rather than general dictionaries. And since it is an old legal phrase, I suppose we should begin by consulting the oldest legal sources dealing with the point. The oldest I am aware of (though there may be older) is Blackstone, who wrote his famous Commentaries between 1765 and 1769. Blackstone does not include among his rules for the construction of statutes the rule that remedial statutes are to be liberally construed. He does say, however, that “[s]tatutes against

1. 1 W. BLACKSTONE, COMMENTARIES *88.

2. See ARIZ. REV. STAT. ANN. § 1-211C (1989).

3. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1920 (1961).

frauds are to be liberally and beneficially expounded.”⁴ And Professor Edward Christian of Cambridge, one of the earliest annotators of Blackstone, footnotes the phrase “statutes against frauds” with the statement that “[t]hese are generally called remedial statutes.”⁵ Later in the same footnote, however, he says: “[R]emedial statutes must be construed according to the spirit: for, in giving relief against fraud, or in the furtherance and extension of natural right and justice, the judge may safely go even beyond that which existed in the minds of those who framed the law.”⁶ So in the course of a brief footnote, Christian seems to have gone from the modest notion that remedial statutes were statutes against frauds to the more expansive notion that they were statutes that further “natural right and justice.”

To make the confusion worse, Blackstone himself seems to have defined remedial statutes more expansively still. For while he did not express a rule that they were to be “liberally” construed, he did discuss them in his very first rule of statutory construction. He wrote:

There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.⁷

Perhaps this is just the rule of liberal construction in different words — though that would make his fourth rule, discussed above, (that “statutes against frauds are to be liberally and beneficially expounded”) entirely redundant. But the point for present purposes is that Blackstone meant by remedial statutes something more expansive than statutes against frauds, and even more expansive than statutes that further “natural right and justice.” For he proceeds to give the following as an example of how judges should construe remedial statutes “so . . . as to suppress the mischief and advance the remedy”:

By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let

4. 1 W. BLACKSTONE, *supra* note 1, at *88.

5. 1 W. BLACKSTONE, COMMENTARIES 88 n.19 (E. Christian annot. ed. 1807).

6. *Id.* (emphasis added).

7. 1 W. BLACKSTONE, *supra* note 1, at *87.

long and unreasonable leases, to the impoverishment of their successors: the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer time, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a dean and chapter, they are not void during the continuance of the dean: for the act was made for the benefit and protection of the successor. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during their continuance, being not within the mischief, are not within the remedy.⁸

Thus, Blackstone viewed as "remedial" a statute that voided all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. One can hardly call this a statute against frauds, or even a statute that furthers "natural right and justice." One would suppose, from reading Blackstone, that *all* statutes which change the common law are remedial statutes, except of course penal statutes — which cannot be remedial because he says they are to be strictly construed. If this interpretation is applied to the rule, we have a regime in which *all* statutes (with the possible exception of such incidentals as private bills and revenue-raising measures) are to be *either* liberally construed because they are remedial, *or* strictly construed because they are penal, leaving nothing to be construed straight down the middle, according to its terms — a sort of polarization of statutory construction, both extremes eliminating the moderate center.

If you think the confusion regarding the meaning of "remedial statutes" has abated in the two-plus centuries since Blackstone, all you need do is consult the current edition of Black's Law Dictionary. This gives the following definition, which does indeed seem to divide the universe of laws into "remedial" and "penal":

The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong . . . or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation owing under the statute to such individual or class.⁹

8. *Id.* at *87-*88.

9. BLACK'S LAW DICTIONARY 1163 (5th ed. 1979).

Yet the same item also gives the following quite inconsistent definitions, purporting to be the formulations adopted by various state courts: “[S]tatutes which pertain to or affect a remedy, as distinguished from those which affect or modify a substantive right or duty”; and “That which is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good.”¹⁰

And I could go on. The fact is that there does not exist, and does not seem to have existed since at least the eighteenth century, even a rough consensus as to what the term “remedial statute” might mean — except that it clearly does not mean a penal statute, and clearly does mean (I suppose) a statute that provides a new remedy for violation of a preexisting private right.

Of what value, one might reasonably ask, is a rule that is both of indeterminate coverage (since no one knows what a “remedial statute” is) and of indeterminate effect (since no one knows how liberal is a liberal construction). Surely the rule must have *some* virtue, or it would not have grown so venerable and remained so popular. The answer, of course, is that its virtue is precisely its vice. It is so wonderfully indeterminate, as to both when it applies and what it achieves, that it can be used, or not used, or half-used, almost *ad libitum*, depending mostly upon whether its use, or nonuse, or half-use, will assist in reaching the result the court wishes to achieve.

II. “A FOOLISH CONSISTENCY IS THE HOBGOBLIN OF LITTLE MINDS.”

You are all familiar with this aphorism of Ralph Waldo Emerson's. I am enormously happy to say that as far as I can discern it is not yet so deeply imbedded in the legal culture that it has appeared in a Supreme Court opinion. But it has been used by federal district courts and courts of appeals and is surely among the ten most favorite *bons mots* of law professors. My main point is that it is, in the context of legal analysis, an unacceptable proposition. But before proceeding to that I cannot avoid the more general observation that it is a pretty silly proposition in any context. Perhaps no more is needed to demonstrate that than the quotation of the entire paragraph in Emerson's essay “Self-Reliance” from which the phrase has been taken:

10. *Id.* at 1162-63.

A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall. Out upon your guarded lips! Sew them up with packthread, do. Else if you would be a man speak what you think to-day in words as hard as cannon balls, and tomorrow speak what to-morrow thinks in hard words again, though it contradict everything you said to-day. Ah, then, exclaim the aged ladies, you shall be sure to be misunderstood! Misunderstood! It is a right fool's word. Is it so bad then to be misunderstood? Pythagoras was misunderstood, and Socrates, and Jesus, and Luther, and Copernicus, and Galileo, and Newton, and every pure and wise spirit that ever took flesh. To be great is to be misunderstood.¹¹

It is perhaps presumptuous of me to criticize even one short passage by such an eminent literary figure, but I must believe (though I am not an English scholar) that Emerson's reputation rests upon both style and substance better than this. As for style: One can forgive the mistaken imagery of sewing up guarded lips rather than unsealing them, and perhaps even the imagery of "words as hard as cannon balls," which resembles a Monty Python cartoon; but it is quite impossible to forgive the line "To be great is to be misunderstood," which can only be matched for banality by "Love means never having to say you're sorry." As for substance: It should be noted that Emerson is condemning not just that portion of consistency he considers "foolish." His point is that *all* desire for consistency is foolish. "With consistency a great soul has nothing to do." At the risk of being considered a little statesman, a philosopher, a divine or even an aged lady (at least many of the last category, by the way, seem quite wise to me), this strikes me as unmitigated nonsense. One should assuredly not shrink from changing his views when persuaded that they are wrong. But the person who finds himself repeatedly in that situation — who quite readily speaks today what he thinks today, and tomorrow what he thinks tomorrow, with no concern for, with "simply nothing to do" with, the inconsistency between the two — is rightly regarded, it seems to me, not as a "great soul," but as one who habitually speaks without reflection, that is to say, a right fool. It is an even bet, of course, that Emerson would agree with

11. R.W. EMERSON, *Self-Reliance*, in *ESSAYS AND ENGLISH TRAITS* 66 (C.W. Eliot ed. 1909).

this. Since he undoubtedly considered himself a great soul rather than a little statesman, *etc.*, there is no reason to believe that what he thought yesterday has anything to do with what he might think today.

Now all of this would not have been worth commenting upon if Emerson had not been inflicted upon the law. I think it generally sound policy to leave poets alone if they leave you alone. But the fact is that Emerson's aphorism — which, as I have observed, is even inaccurate in its more general application — has been regularly and repeatedly applied to the law, where its message is destructive beyond measure. Consistency is the very foundation of the rule of law. If you go through our Bill of Rights, I daresay it does not contain a single provision that various cultures, in various ages, have not in principle rejected: freedom of speech, freedom of press, freedom of religion, even the prohibition of cruel and unusual punishment. But you will search long and hard to find anyone, in any age, who would reject the fundamental principle underlying the equal protection clause: that persons similarly situated should be similarly treated — that is to say, the principle that the law must be consistent. Some societies, of course — even our own, alas, before the Civil War — have not been willing to regard all human beings as “persons,” or to consider them all “similarly situated” insofar as their inherent human dignity is concerned, and it was the elimination of those blind and erroneous classifications (rather than expression of the universally accepted principle of consistency) that was the purpose of the equal protection clause. But even where those blind and erroneous classifications existed, no one would have argued, for example, that two freedmen, or two brahmans, or two serfs, or two noblemen should be treated differently. Indeed, it is the very primeval passion for consistency in the law that prompts the construction of such classifications, for without them the underlying inconsistency in the treatment of human beings becomes unacceptably obvious.

Besides its centrality to the rule of law in general, consistency has a special role to play in judge-made law — both judge-pronounced common law and judge-pronounced determinations of the application of statutory and constitutional provisions. Legislatures are subject to democratic checks upon their lawmaking. Judges less so, and federal judges not at all. The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic. Courts in a precedent-based system such as ours do not re-

solve each case in isolation from the cases that went before, deciding what seems "fair" or in accord with statutory or constitutional text on the basis of stated reasons that are plausible but quite incompatible with equally plausible reasons set forth in an earlier case. Rather, courts apply to each case a system of abstract and entirely fictional categories developed in earlier cases, which are designed, if logically applied, to produce "fair" or textually faithful results.

Thus, for example, when certain events occur a creditor acquires a fictional animal called a "lien," the result of which is to give him a preferred position with respect to some but not all other creditors; a number of sub-rules and sub-fictions determines who is a creditor, how and when a lien is acquired, how and when it is abandoned, how and when it trumps other liens of other creditors. When this elaborate intellectual structure produces a result that seems to the judge patently "unfair" or contrary to governing text, it is not acceptable for him to disregard the structure, with the quip that "consistency is the hobgoblin of little minds." He must, if possible, design a new sub-rule or sub-fiction whose application will not only lead to the result he thinks correct but will also be compatible with the remainder of the structure and conform with prior holdings. If he cannot do that, then (the theory of our system holds) his notions of fairness or textual fidelity are simply out of whack, and he must subordinate them to the law. Without such a system of binding abstractions, it would be extraordinarily difficult for even a single judicial law-giver to be confident of consistency in his many *ad hoc* judgments; and it would be utterly impossible to operate a hierarchical judicial system, in which many individual judges are supposed to produce "equal" protection of the laws. (That is why, by the way, I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it.)

Sometimes, of course, the highest court in the judicial system may come to the conclusion that the result inescapably produced by the binding abstractions is simply wrong — which means a return to the drawing board and the construction of a superseding scheme that leads to the right result. Such overrulings, I must acknowledge, involve a sacrifice of consistency. Yet even while abandoning consistency in the particular case, the court will affirm its enduring value for the system as a whole. For even as the old rationale is abandoned, a new one is announced, which forms the

basis for a new scheme that is to be consistently followed.

In short, if Emerson is right he must include in his rogues' gallery of those who value consistency not only little statesmen and philosophers and divines, but also good judges.

III. "THE FAMILIAR PARADE OF HORRIBLES"

This canard tends to be popular with the same people who like the previous one — for quite logical reasons that I shall in due course discuss. The phrase is often used, as you know, to denigrate the majority's or the dissent's contention that the principle embraced by the other side will produce certain specified undesirable consequences. Those consequences are dismissed, with a wave of the hand, as "the familiar parade of horrors."

I do not know for certain when the phrase was introduced into legal writing, but it appeared in a Supreme Court opinion over forty years ago, in a 1948 Felix Frankfurter dissent.¹² Justice Frankfurter, I should note, did not use it as the projectile for a cheap shot at the majority, but rather was defending his own opinion against the anticipated argument that it contained a "parade of horrors."

The reason I say that the "parade of horrors" put-down appeals to the Emersonian school of jurisprudence is this: Just as one cannot conceive of a parade unless one believes in organization, so also one cannot take seriously a jurisprudential parade of horrors unless one believes in the demands of logic and consistency as the determinants of future judicial decisions. The judge without that belief — the judge who does not operate on the assumption that he must decide the case before him on the basis of a general principle that he is willing to apply consistently in future cases — can simply dismiss the predictions of future mischief by quoting Justice Holmes's reply to Chief Justice Marshall's venerable dictum that "the power to tax [is] the power to destroy."¹³ "The power to tax is not the power to destroy," Holmes said, "while this Court sits."¹⁴ The notion that predicted evils cannot occur "while this Court sits" is comforting, of course, but hardly a response to how

12. *Shapiro v. United States*, 335 U.S. 1, 55 (1948) (Frankfurter, J., dissenting).

13. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

14. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting from the striking down of state taxes on sales to the United States government). Holmes was later vindicated when *Panhandle Oil* was overruled. See *Alabama v. King & Boozer*, 314 U.S. 1, 9 (1941).

they can be avoided without repudiating the legal principle adopted in the case at hand. I would have thought it a better response to Marshall's dictum that the power to tax the activities of the federal government cannot constitute the power to destroy the federal government so long as the tax is generally applicable and nondiscriminatory — because it is implausible that the state would destroy its own citizens as well. Instead, however, Holmes simply said "not . . . while this Court sits," and excused Marshall's ignorance with the observation that "[i]n those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree."¹⁵ (Here Holmes flatters himself and his legal realist disciples. Perhaps it was not as *generally* recognized, but I am sure Marshall was quite aware of it.) "The question of interference with Government," Holmes concluded, "is one of reasonableness and degree and it seems to me that the interference in this case is too remote."¹⁶

Of course if one is to adopt as the controlling legal principle "reasonableness and degree," one need fear no parade of horrors. As soon as the result seems "unreasonable," or goes "too far," the remaining marchers will be sent home. But what guidance does such a principle provide for the lower courts, and what check is it against the personal preferences of future judges? "Be reasonable and do not go too far" is hardly more informative than "Do justice," or "Do good and avoid evil." Once one departs from such platitudes and insists upon an analytical principle that is *not* value laden, then, and only then, does the parade of horrors become a meaningful threat.

It is not my wish to banish the phrase "parade of horrors" from legal discourse, as it is, I must confess, to banish the Emersonian hobgoblin. Some arguments deserve to be dismissed as a "parade of horrors," but the careful legal writer will proceed to explain why — why all of the untoward results asserted to follow from the principle the court is adopting indeed do not follow; why the logical principle governing the court's decision does not have those consequences, or can be limited by another logical principle to avoid them. That was the approach adopted, for example, by Justice Brennan's dissent in *Goldman v. Weinberger*,¹⁷ the case that upheld an Air Force regulation prohibiting the wearing of

15. *Panhandle Oil*, 277 U.S. at 223 (Holmes, J., dissenting).

16. *Id.* at 225 (Holmes, J., dissenting).

17. 475 U.S. 503 (1986).

yarmulkes in uniform. Justice Brennan wrote:

The Government dangles before the Court a classic parade of horrors, the specter of a brightly-colored, "rag-tag band of soldiers." Although turbans, saffron robes, and dreadlocks are not before us in this case and must each be evaluated against the reasons a service branch offers for prohibiting personnel from wearing them while in uniform, a reviewing court could legitimately give deference to dress and grooming rules that have a *reasoned* basis in, for example, functional utility, health and safety considerations, and the goal of a polished, professional appearance. It is the lack of any reasoned basis for prohibiting yarmulkes that is so striking here.¹⁸

That is the "parade of horrors" argument employed *comme il faut* — with an explanation of why the parade will not occur.

But do not scoff at the "parade of horrors" in principle, as though the marchers in fact never materialize. To disabuse yourself of that notion, it is enough to read Justice Harlan's dissent in *Plessy v. Ferguson*,¹⁹ the case that upheld a Louisiana law requiring rail carriers to provide separate coaches for blacks and whites. "[T]he judgment this day rendered," he said, "will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."²⁰

If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day?²¹

Those horrors, or horrors very much like them, did indeed ensue from the decision in *Plessy v. Ferguson*. So use the phrase "parade of horrors," if you wish, to identify predictions that you can demonstrate are ill-founded, because the legal rule asserted to

18. *Id.* at 519-20 (Brennan, J., dissenting) (citations omitted).

19. 163 U.S. 537 (1896).

20. *Id.* at 559 (Harlan, J., dissenting).

21. *Id.* at 557-58 (Harlan, J., dissenting).

produce them *has* a limiting principle that will prevent their occurrence. But do not dismiss the parade of horrors as an inherently unacceptable method of argumentation. The marchers are necessarily phantoms only if consistency is a hobgoblin.

IV. "IT IS THE ESSENCE OF THE JUDICIAL FUNCTION TO DRAW LINES."

I will say only a few words about this one, because it belongs to the same family of ducks as the last. Like "the familiar parade of horrors," it can be true enough if properly applied, but is usually employed for the unworthy purpose of evading analysis. And, like that other phrase, it is generally used to dismiss the argument that it is impossible to distinguish situation *x*, covered by the majority's or the dissent's proposed disposition, from situation *y*, which quite obviously should *not* be subjected to that disposition. It simply does not suffice to refute such an argument to say that "it is the essence of the judicial function to draw lines."

Of course it *is* the essence of the judicial function to draw lines, because it is the essence of the judicial function to be governed by lines, the lines of the logical and analytical categories I discussed earlier. The dispute is not over whether lines should be drawn, but whether they should be drawn now or later. The right answer is ordinarily now, for two reasons. First, because the correctness of today's decision as the application of a neutral legal principle cannot be assessed unless that principle also appears to produce acceptable results in other contexts. If it does not, and if there is no rational exception that shows how it can be limited, then it is an erroneous principle — not only for the future, but also for the case before the court today.

The second reason line-drawing must be done at once, at least in appellate opinions, is that most lawyers and their clients do not have the luxury of waiting for it to be done at a later date. Perhaps in the infancy of the common law it would have sufficed to say, in response to the alleged future mischief that a decision might entail: "We will cross that bridge when we come to it. We will draw the necessary line when the occasion arises." But when one is operating, as we are today, in a judicial system in which the Supreme Court of any jurisdiction reviews a minuscule proportion of the decided cases, the function of a good decision is to make the distinctions — or at least the obviously necessary distinctions — clear from the outset, so that hundreds of cases will not be decided incorrectly before the Supreme Court has the opportunity to

revisit the field.

In short, the riposte that should usually be made to the argument that "it is the essence of the judicial function to draw lines" is: "Quite so; and you have not done it."

V. "[W]E MUST NEVER FORGET, THAT IT IS A *CONSTITUTION*
WE ARE EXPOUNDING."

I will conclude with a few observations concerning the misuse of this old chestnut, the famous statement of Chief Justice Marshall's, written in *M'Culloch v. Maryland*.²² It is often trotted out, nowadays, to make the point that the Constitution does not have a fixed meaning — that it must be given different content, from generation to generation, retaining the "flexibility" needed to keep up with the times. There are many instances of this use. I will give you as an example one that is perhaps not the best, but that does conform to the principle *de viventibus nil nisi bonum*: Justice Fortas's dissent in *Fortson v. Morris*.²³

That case involved an equal protection clause challenge to the provision of the Georgia constitution which provided that, if no candidate for governor should receive a majority of the votes cast, the General Assembly would choose between the two candidates having the most votes. The Court upheld the provision, in an opinion by Justice Black which ended: "Article V of Georgia's Constitution provides a method for selecting the Governor which is as old as the Nation itself. Georgia does not violate the Equal Protection Clause by following this article as it was written."²⁴ Fortas's dissent summons up Marshall's dictum in support of the proposition that, because "[m]uch water has gone under the bridge since the late 1700's and the early 1800's,"²⁵ it is appropriate for "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause [to] change."²⁶

Now it is not my object here to discuss the substantive accuracy of such reasoning. It does seem to me that a constitution whose meaning changes as our notions of what it *ought* to mean change is not worth a whole lot. To keep government up-to-date

22. 17 U.S. (4 Wheat.) 316, 407 (1819).

23. 385 U.S. 231 (1966).

24. *Id.* at 236.

25. *Id.* at 247 (Fortas, J., dissenting).

26. *Id.* at 248 n.5 (quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966)) (Fortas, J., dissenting).

with modern notions of what good government ought to be, we do not need a constitution but only a ballot-box and a legislature. But never mind that dispute. What I am addressing here is not whether the "evolutionary" theory of the Constitution is correct, but whether it is shown by the above quote to be endorsed by as orthodox an authority as John Marshall himself. The answer is not only "Not at all," but "To the contrary."

Marshall's words, you will recall, were written in the course of considering whether Congress had the constitutional power to incorporate a Bank of the United States. Establishing a bank or creating a corporation were not among the powers *expressly* conferred; but Marshall's point, in the passage at issue here, was that it is the nature of a constitution not to set forth everything in express and minute detail. The nature of the document at issue, he said, "requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."²⁷ A constitution that went beyond that, "to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."²⁸ In assessing the significance of the fact that the power to incorporate a bank is not specifically mentioned, then, "we must never forget, that it is a *constitution* we are expounding."²⁹

None of this, of course, has anything to do with whether the meaning of a constitution changes from age to age. That Marshall did not believe the latter is conclusively shown when he turns to his next argument, the provision of the Constitution that gives Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the specifically conferred legislative powers.³⁰ He acknowledges that the word "necessary" can be used to mean "indispensabl[e]."³¹ In this context, however, he says that it must reasonably be given another of its common meanings: "convenient, or useful,"³² or "appropriate."³³ He ex-

27. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

28. *Id.*

29. *Id.*

30. U.S. CONST. art. I, § 8, cl. 18.

31. *M'Culloch*, 17 U.S. at 414.

32. *Id.* at 413.

33. *Id.* at 415.

plains why:

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers . . . would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.³⁴

This argument rests entirely upon the premise that the interpretation given today must be adhered to. Otherwise, there would be no need to bear in mind the "exigencies of the future" — which could be met by saying, as Justice Fortas said, "Well, our notions of what the Constitution permits have changed."

More faithful to John Marshall's philosophy, it seems to me, is Justice Black's use of Marshall's words:

We are admonished that in deciding this case we should remember that "it is *a constitution* we are expounding." We conclude as we do because we remember that it *is* a Constitution and that it is our duty "to bow with respectful submission to its provisions." [Quoting Marshall from *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 377 (1821).] And in recalling that it is a Constitution "intended to endure for ages to come," we also remember that the Founders wisely provided the means for that endurance: changes in the Constitution, when thought necessary, are to be proposed by Congress or conventions and ratified by the States. The Founders gave no such amending power to this Court. Our duty is simply to interpret the Constitution, and in doing so the test of constitutionality is not whether a law is offensive to our conscience or to the "good old common law," but whether it is offensive to the Constitution.³⁵

Or as Felix Frankfurter put it more concisely: "Precisely because 'it is *a constitution* we are expounding,' we ought not to take liberties with it."³⁶

* * *

I have come to the end of my remarks — not, I am sorry to say, because I am out of canards but because I am out of time.

34. *Id.*

35. *Bell v. Maryland*, 378 U.S. 226, 341-42 (1964) (Black, J., dissenting) (footnotes and citation omitted).

36. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting) (citation omitted).

The catharsis has done me good, and I return, reinvigorated, to reading opinions and biting my tongue. Much of what I have said has been in a humorous vein, but I hope I have not entirely obscured the serious purpose behind it. The fallacy that passes for truth by the mere frequency of its repetition is a particular peril for lawyers working in the common-law system. Like all men and women, we are comfortable with familiar formulations, and in addition are trained to follow what has been said before. It is sometimes worth pausing to consider whether it has been said aright.

