

# Art and the Constitution

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## I. INTRODUCTION

The First Amendment has been with us for 217 years. Over that long history there have been surprisingly few Supreme Court cases involving art—hardly more than a handful—and even fewer that are illuminating. When forced to address the status of art under the Constitution, the Supreme Court has simply said “*of course*” and “*surely*” the free-speech guarantee of the First Amendment protects art.<sup>1</sup> But as I tell my students in constitutional law, when the Supreme Court explains itself by saying “of course” and “surely,” it is a safe bet that the Justices do not really know what they are talking about. This is the case with art. The Court does not tell us what art is, why it is protected, or how the free-speech guarantee can be read to include it.

It turns out that the question of art and free speech is a very difficult one, and this is the reason that art has had a troubled relationship with the First Amendment. The law of obscenity, for example, protects only “serious” art (whatever the Court means by that). But what about happy art? Or humorous art? Or avocational, rather than professional, art?

Congress requires the National Endowment for the Arts (“NEA”) to limit its funding only to those artistic works that are “decent” and respect American values. This definition does not include Karen Finley’s “art” shown below.

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1. The “nude dancing” cases provide examples of the treatment of art under the First Amendment. For example, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1990) (White, J., dissenting), Justice White noted:

[T]he plurality . . . concedes that “nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment. . . .” This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and “inherently embodies the expression and communication of ideas and emotions.”

*Id.* at 587 (quoting majority opinion; *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1087 (7th Cir. 1990) (en banc)).



Photograph of Karen Finley, by Timothy Greenfield-Sanders. Sanders took this photograph in connection with Karen Finley's performance piece *Return of the Chocolate-Smeared Woman*.

Is Finley's art decent? Does it respect the diversity of American values? These are questions that the First Amendment usually forbids a legislature or court to even ask. In reality though, these questions have been asked and, as you may know, answered: The Chair and Council of the NEA judged Karen Finley's art as indecent and, thus, it cannot qualify for NEA grants.<sup>2</sup>

Given this background, why and how should the Constitution protect art? In answering these questions, I must begin with a general but fundamental distinction. There are, I suggest, two types of art. The first type I will call propositional art. This is art that itself makes a cognitive statement or argument by the artist to an audience. Such art may simply represent an object or it may serve as an emotive augmentation of a proposition. Whatever form it takes, such art operates in a linear fashion: It contains *a* coherent message intended by the artist and understood by the audience. For example, a cartoon of Muhammad wearing a bomb for a hat contains a

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2. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 573–77 (1998) (describing how the NEA allocates funding and indicating that the NEA denied Karen Finley such funding).

clear proposition: Islam is violent.<sup>3</sup> Although propositional representations are often thought of as art, they nevertheless present little difficulty under the First Amendment. They are clearly “speech” in the sense that they communicate intended messages or meanings to audiences and thus the Constitution should protect them as free speech.

The second type of art, and the primary focus of this Article, is nonpropositional art. Nonpropositional art conveys no single message and those viewing the art usually will not understand it as doing so (and should not understand it as doing so). Nonpropositional art functions at the sensual and cognitive levels, spurring imagination and re-representation of the presented object or musical score and yielding a message or meaning that is the creation not of the artist’s propositional intention, but of the viewer’s independent construction. We might place Pollock’s *Mural* in this category. Meaning arises for the viewer from the aesthetic or emotional qualities of the painting, which evoke imagination and re-representation.



Jackson Pollock, *Mural* (1943), Gift of Peggy Guggenheim, The University of Iowa Museum of Art, Iowa City, Iowa, 1959.6.

It is this nonpropositional form of art that is more difficult to categorize as material that is protected under the free-speech guarantee, for it does not fit into the propositional model that characterizes “speech” as the Supreme Court has used the term. Indeed, it is nonpropositional art that most accounts for the Supreme Court’s reluctance to bring art into the First Amendment.

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3. See Assyrian Int’l News Agency, Cartoons of Muhammad, <http://www.aina.org/releases/20060201143237.htm> (last visited Apr. 3, 2008) (reprinting Kurt Westergaard’s cartoons that initially appeared in the *Jyllands-Posten* newspaper in Denmark on September 30, 2005); see also *Dutch Must Show Anti-Islam Film*, BBC NEWS, Mar. 10, 2008, <http://news.bbc.co.uk/2/7287973.stm> (discussing Westergaard’s now infamous work). Numerous papers and websites have reproduced the work. See, e.g., Balder.org, Danish Cartoon Artist Kurt Westergaard Would Do It Again, <http://www.balder.org/muhammed/Danish-Cartoon-Artist-Kurt-Westergaard-Would-Do-It-Again.php> (last visited Apr. 3, 2008).

In challenging the Court's reluctance today, I offer three conclusions. The first is that art—nonpropositional art—should be protected by the First Amendment because of its link to individual imagination and creativity. The second conclusion is that the First Amendment should protect nonpropositional art *as art*, not as speech. That means that if and when it can be practically identified in law, art's protection should be nearly absolute. My third conclusion is that the Supreme Court can interpret the free-speech guarantee to protect art. I should add that I purposefully omit a fourth conclusion, which involves how the law can practically define nonpropositional art. For that you will have to read my book.

I will proceed in three steps. First, what is the nature of art? Second, what protection should it receive and why? Finally, how can the Supreme Court interpret the free-speech guarantee to include art?

## II. THE NATURE OF ART

Aesthetic art is a form of artistic expression that is visually sensual in nature and that evokes new meaning through acts of imagination and re-representation that are supplied by those who witness it. As Karol Berger puts it in his wonderful book, *A Theory of Art*:

[E]ver since Plato philosophers have been much exercised by the question of what art is, . . . of getting art's ontological status right, of finding a way to distinguish art from other entities. . . . [But] even if we grant this [defined] object the status of art, we still do not know whether and why we should bother ourselves with it.<sup>4</sup>

We should bother ourselves, Berger suggests,

[because of art's] ability to evoke imaginary worlds, and not representation in the strict and narrow sense . . . .<sup>5</sup> [I]n an act of cognition whereby we get to know an object, the . . . powers of imagination . . . and understanding . . . are engaged like two gear wheels. But in an act of aesthetic contemplation, the two wheels spin without engaging and the cognitive mechanism runs on idle . . . . Aesthetic pleasure is "in the harmony of the cognitive faculties," in "the quickening of both faculties (imagination and understanding) to an indefinite, and yet, thanks to the given representation, harmonious activity."<sup>6</sup>

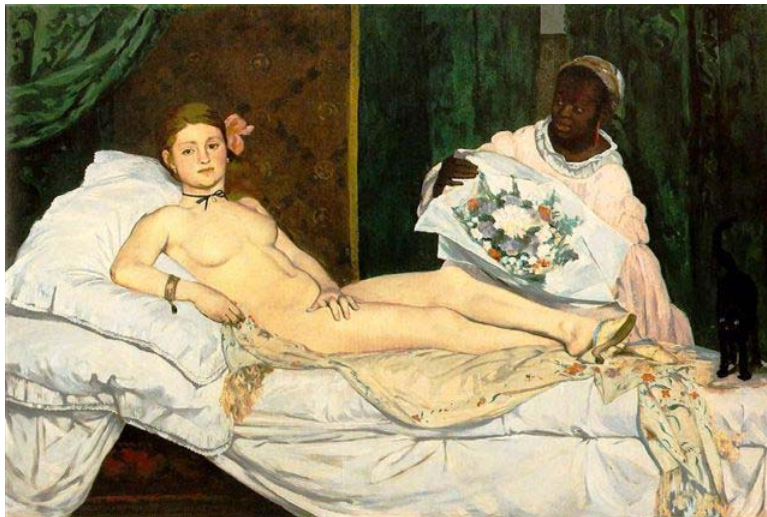
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4. KAROL BERGER, *A THEORY OF ART* viii (2000).

5. *Id.* at 62.

6. *Id.* at 236 (quoting EMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* 59–60 (James Creed Meredith trans., Oxford Univ. Press 1952)).

*Olympia* is perhaps Eduoard Manet's most famous painting, but for many years it was the subject of scandal, controversy, and great embarrassment for Manet himself. This reaction was not the result of the depiction of a nude woman, but instead of a woman kept by an upper-class gentleman, which evoked meaning that threatened the cultural identity and authority of the ruling classes in France.



Eduoard Manet, *Olympia* (1863), Reunion des Musee Nationaux/Art Resource, New York.

Art spurs imagination and re-representation of the objective; it is, perhaps, intrinsic to creativity. Such art, which I call nonpropositional art, is perhaps the highest form of art; more importantly, it is the most dangerous and controversial form of art.

Plato was no fan of art. He found art to be dangerous.<sup>7</sup> He thought that it undermined the social order, rested on emotion and force, and unleashed unknown power—as Manet's *Olympia* later did. It was, in short, destructive to civilization—more specifically, to the civilizing influences of reason and cognition and to the peaceful settlement of conflict.

Plato was right in at least one respect. Art is dangerous and incapable of domestication. It rests on emotion and the senses. Art, as I use the term here, is a representation perceived not mainly through our cognitive faculties, but instead through our senses unconstrained by reason. An object or performance that we call art is an instrument through which the presented object is assimilated through the senses and becomes re-

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7. 6 PLATO, THE REPUBLIC, Book X, § 607(B)–(E) (Paul Shorey trans., Harvard Univ. Press 1994) (1935).

represented as something distinct to each person—a perception or understanding grounded in an act of imagination. As John Dewey put it:

The *product* of art—temple, painting, statue, poem, is not the *work* of art. The work takes place when a human being cooperates with the product so that the outcome is an experience that is enjoyed because of its liberating and ordered properties. Esthetically at least:

“ . . . we receive but what we give,  
And in our life alone does nature live.  
Ours is her wedding garment; ours her shroud.”<sup>8</sup>

In the minds of many, art is *skill* in representation of an object in a painting, a musical score, or a play. I am not so certain about this characterization. As critic Clement Greenberg wrote of Edward Hopper, and specifically of Hopper’s painting *Nighthawks*, “Hopper simply happens to be a bad painter. But if he were a better painter, he would, most likely, not be so superior an artist.”<sup>9</sup> *Nighthawks* is art because of its evocation of feeling, understanding, and imagination—about the place, the people, and the world in which the people exist. A better painting would have disturbed the evocativeness of the scene. Hopper’s skill was in presenting an object as an instrument of sensual understanding and imagination.

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8. JOHN DEWEY, ART AS EXPERIENCE 222–23 (1934) (quoting SAMUEL TAYLOR COLERIDGE, *Dejection: An Ode* (Apr. 4, 1802)).

9. Avis Berman, *Hopper*, SMITHSONIAN, July 2007, at 58 (quoting Critic Clement Greenberg).



Edward Hopper, American, 1882–1967, *Nighthawks* (1942), Oil on Canvas, 84.1 cm x 152.4 cm, Friends of American Art Collection, 1942.51. Photograph by Robert Hashimoto, Reproduction, The Art Institute of Chicago.

Was Andy Warhol's art the perfection with which he painted the Campbell's Soup can? He loved Campbell's Soup; he ate it for lunch nearly every day. At the time, everyone ate Campbell's Soup, from the President to Liz Taylor to the bum; the soup was the same for all of them. Warhol also loved Los Angeles and Hollywood, saying, "Everybody's plastic . . . I love plastic. I want to be plastic."<sup>10</sup>

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10. ThinkExist.com, Andy Warhol Quotes, [http://thinkexist.com/quotation/i\\_love\\_los\\_angeles-i\\_love\\_hollywood-they-re/221261.html](http://thinkexist.com/quotation/i_love_los_angeles-i_love_hollywood-they-re/221261.html) (last visited Apr. 3, 2008).



Andy Warhol, "100 Campbell Soup Cans" (1962). Copyright Andy Warhol Foundation/ARS, New York/TM Licensed by Campbell's Soup Co. All Rights Reserved.

Art, Dewey thought, is experience at its highest level. Art is imagination let loose. This is the work of the aesthetic in art, the purely sensual. And this is why art is dangerous.

### III. WHY SHOULD ART BE PROTECTED?

Should the First Amendment's free-speech guarantee protect art as a form of free expression? This question concerns the relationship between the aesthetically grounded art previously discussed and speech protected by the First Amendment. Art and speech are not just radically different, but in a sense they are opposites. Art comes from a sensual response; it is an act of newly imagined meaning by the individuals who witness it. Speech, in contrast, starts with a message that is cognitively shaped and addressed to an audience that understands that message. Meaning follows emotion with art; emotion follows meaning with speech. Speech is therefore linear, while art is not.

First Amendment speech has always been a realm of reason. As Alexander Meiklejohn, one of the greatest free-speech theoreticians of the twentieth century, said, free speech is not a guarantee that means everyone can say whatever they want, but rather it is a guarantee that everything worth saying can be said.<sup>11</sup> Unregulated talkativeness, even emotiveness, is not free

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11. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 93–94 (1948).

speech. Notably, Meiklejohn concluded that art is not speech protected by the First Amendment.<sup>12</sup>

This is the source of the problem of art and free speech. Art is, in its very nature, an instrument of sensual representation loosed as an engine of imagination. If this is so, then art's place in the First Amendment is doubtful. The reasons that it is doubtful stem, as Plato said, from the emotive and unpredictable consequences that art spawns in the individual viewer.<sup>13</sup> Andy Warhol's message—and he no doubt had one in mind—was truly created by those who saw his paintings and screens.

This is true as well of Andres Serrano's *Piss Christ*, a photograph of a crucifix in a vat of Serrano's urine.



*Piss Christ* by Andres Serrano. Courtesy of the artist and Paula Cooper Gallery, New York.

Alison Young, a scholar of art and aesthetics, forcefully described the reactions of viewers of *Piss Christ*:

The picture on the gallery wall does not literally touch the spectator; however, the visceral response to artworks such as *Piss Christ* . . . can be interpreted as the shudder arising from an image which transcends the cushioning effect of the fact of representation and threatens metaphorically to touch the spectator.

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12. *Id.*

13. 6 PLATO, *supra* note 7.

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This is the dynamic of ‘aesthetic vertigo.’ Rather than provoking a simple ‘disgusted’ response, artworks such as . . . *Piss Christ* . . . make the spectator dizzy, teetering on the verge of a representational abyss. . . .

. . . The desire to judge these artworks not only as disgusting but also as indecent, or obscene or blasphemous, is a desire for the reinstatement of the law (of community, of religion, of representation) and for a continued segregation of images into the sanctioned and the unwarranted.<sup>14</sup>

To judge *Piss Christ* as blasphemous, in other words, would be to see it only as a cognitive expression represented in the object itself, rather than a vessel containing new and indeterminate meanings loosed by emotion and imagination—aesthetic vertigo and representational abyss.

If speech is reasoned and art is not, if speech can be broken down analytically into a speaker, a message, and a comprehending audience, and art cannot because it lacks a speaker, a message, and a single reasoned comprehending audience—if the meaning of art rests with an unknowable and transient audience—then how can the free-speech guarantee of the First Amendment protect art?

This question becomes all the more difficult when one sees that the kind of protection that befits art is virtually complete immunity from the law. By this I mean immunity for the art and the artist from those harms that may flow from art: violence; blasphemy; racial hatred and intimidation; and political or cultural revolution.

Why is this so? Because of the nature of art itself. Art can emerge from an object never intended as art. One example of this is the Marlboro Man, who has become an artistic icon—evocative, like Manet’s *Olympia* perhaps, of a time and culture.

Or consider the urinal, that most pragmatic and functional of devices, which makes a point, some say, about the ontological structure of sculpture. By conferring the status of “art” on a urinal, Duchamp transformed it into a sculpture yet simultaneously undermined conventions of meaning and aesthetics—much like Warhol was able to do with the Campbell’s Soup can. The “message” conveyed by these pieces of art is their value as instruments that unleash the viewer’s own, perhaps idiosyncratic, leap of imagination and perception. (In the case of the urinal, we can at least hope so.)

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14. ALISON YOUNG, JUDGING THE IMAGE: ART, VALUE, LAW 42, 44 (2005).



Marcel Duchamp, *Fontaine (Fountain)* (1917), photograph by Alfred Stieglitz.

With speech, the law can assign fault and cause, and the law can thus get its hands on regulating speech through the messenger and the message. For example, the Supreme Court said that indecency—dirty words and images—may be the cause of dirty thoughts and moral decay. This is so, the Court said, with Karen Finley's performance "art," which includes Finley posing nude but covered with chocolate and then posing with tinsel to represent the fact that women must always be dressed for dinner (at least this is the meaning for those who do not see the chocolate as a metaphor for feces, Tawana Brawley,<sup>15</sup> and so forth). The Supreme Court has said that the impact of indecent speech on the audience can be identified and judged as a causal consequence of the speech and, thus, as the speaker's act of communicating it.<sup>16</sup> This is also said (and perhaps with greater justification than with Karen Finley's art) about much hard-core pornography, in which

15. Police found Tawana Brawley covered in dog feces in connection with her famous rape hoax. See *Winner in Brawley Suit Says Victory Is Bittersweet*, CNN.COM, July 14, 1998, <http://www.cnn.com/US/9807/13/brawley.verdict.02/>.

16. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (discussing the impact of broadcasting obscene language on potential audiences).

lust is the message and the admittedly emotional response of lust is the consequence. Dirty pictures lead to dirty deeds.

The political revolutionary who incites a crowd to violence engages in a speech act, the causes and consequences of which can be judged in terms of the words used. The legal responsibility can be placed on the speaker, the inciter—for example, members of the Klan burning a cross in public or the utterer of racist speech. Here emotion—aesthetics—follows and indeed serves the message.

None of this is possible with art. Art must be inherently free, just as an act of imagination must be inherently free. And it should be free because it is an act of imagination and creativity in which the agent of the message and of its consequences is the individual viewer, not the artist. Dewey calls the “idea of art as a conscious idea . . . the greatest intellectual achievement in the history of humanity.”<sup>17</sup>

#### IV. INTERPRETING THE FIRST AMENDMENT TO PROTECT ART

It is time now to turn to the final question: Can the Supreme Court create an interpretation of the First Amendment that protects art precisely because it is an unleashed exercise of emotion, re-representation, and imagination in the mind of the audience—a form of expression deserving of its own, quite different, standard of protection?

When considering the Supreme Court’s power to interpret the First Amendment to include artistic expression, one comes face to face with Justice Antonin Scalia and his Constitution—a Constitution of strict construction and tight obedience to the text. Justice Scalia is the father of the strict-constructionism form that has come to be known as “textualism.” As Chief Justice Roberts recently said, “Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.”<sup>18</sup> Textualism is akin to religious fundamentalism. Words are taken as literally true and fixed. No metaphors are allowed. No new words can be added. Like the umpire, textualism strictly confines the Supreme Court’s duty when it interprets the Constitution.

In the text of the First Amendment, we find the phrase “freedom of speech.”<sup>19</sup> “Speech” is the operative term, and for those wedded to the text

17. DEWEY, *supra* note 8, at 26.

18. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, nominee for Chief Justice of the U.S. Supreme Court).

19. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

only, speech means speech, not art. If it were not so, the argument goes, the Supreme Court would have the power to reword the Constitution creatively to fit its idea of “the good.” The Court, it is said, is the least democratic branch, and therefore it must also be the least dangerous branch.

Textualism is not a monolith. There are many variations to it, some of which are important in understanding the problem that the Supreme Court faces when it attempts to include art within the word “speech.” First, there is literal textualism, where we look at just the words—speech is speech, not art. But words are notoriously ambiguous, as is language itself, and words are nothing, really, without context. For Justice Clarence Thomas, the strictest of strict constructionists on the Court, the fact that most language is ambiguous is not a problem. For him, the presence of ambiguity simply means that the courts should back off and leave the interpretation, if any, to the elected branches.

A second variation of textualism understands the Constitution’s words in the context of the authors’—the Framers’—understanding in 1789. When the Framers used the term “equality,” or the term “speech,” what was the general meaning of the term at the time? The problems with this variation are legion, not the least of which is the regional variation in linguistic usage among the Framers. Did equality mean nondiscrimination based on race, or instead “separate but equal?” Did speech mean art, or obscenity, or falsehoods? More embarrassing for the Court, the Constitution’s meaning may turn on what dictionary from the period one relies on. Believe it or not, some Supreme Court decisions rest on dueling dictionaries (never the OED, of course!).<sup>20</sup> It is hard to imagine the Constitution coming to this.

The unseemliness of the pursuit of dictionary-determined textual meaning finally led to Justice Scalia’s brainchild and today’s dominant view of textualism—“public meaning” textualism. The public meaning of the text relies on the common, objective understanding of the words used in the populace and the culture at the time that the words were written.

In the American frontier culture of the late 1700s, art was not thought of very much at all, much less was it thought of as speech. But there are even bigger problems with “public meaning.” Which public does the Supreme Court choose? Men only? Property owners who were voters? Educated men, of whom there were few? How about women? Slaves? So much for objectivity, much less representativeness of the polity that the Constitution and its amendments governs.

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20. For a discussion of the Supreme Court’s use of dictionaries, see generally Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994); Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177 (2003).

Finally, there is one other textualist school that is still primarily focused on the texts, but is willing to look beneath and beyond the words to divine the original underlying purposes of those words. This might be dubbed original-purpose textualism. Purpose-based textualism asks why the Framers included the freedom of speech. What purposes did the constitutional words embody? Once the purposes are divined, we can extrapolate new meanings. Under this view, the Supreme Court has considerable creative power when interpreting the text of the Constitution. Indeed, it likely has too much creative power, for purpose-based interpretation knows no limits. What is the purpose of the equality guarantee? Better yet, what are all of the possible purposes? Separate but equal? Equal opportunity? Protection of minorities? If you pick a purpose, there will often be a vast range of possible meanings to build upon it.

How about free speech? The text of the First Amendment says speech, not art. The historical and cultural meaning of “speech” at the time of the Bill of Rights excluded art, thus in all likelihood foreclosing any purpose that would fairly extend the guarantee to art, as art, and not as ordinary speech. At the time, the Framers saw the speech guarantee as an essential means for the dissemination of information and opinion. The guarantee allowed for reasoned discourse and the education of voters. The purpose of free speech may be to protect only talk about politics.<sup>21</sup> If so, art is likely not protected.

But maybe the purpose of free speech is to guarantee individual free will and liberty. If so, art might well find a place in the First Amendment. But, as Judge Bork put it, why doesn’t speech-as-liberty encompass all conduct, or at least conduct that reflects free choice and doesn’t harm others?<sup>22</sup> There is no good answer to that question.

That is textualism in a nutshell. It was not a prevailing—or even very respectable—theory forty years ago at the end of the Warren Court, when I was a young lawyer. But today textualism seems to have swept the boards—even the most liberal constitutional scholars genuflect to it.<sup>23</sup> Ours is now a world of strict, intentionalized, definitionalized, culturalized, and

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21. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971) (discussing political speech).

22. *Id.* at 25 (stating that the benefits of free speech “do not distinguish speech from any other human activity”).

23. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (arguing as one such liberal constitutional scholar that the right to abortion is “based on the constitutional text of the Fourteenth Amendment and the principles that underlie it”); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 428 (2007) (stating that the author considers himself “both . . . an originalist and . . . a living constitutionalist”).

purposivized textualism. Only lawyers and philosophers could create such a constitutional world—and perhaps not even philosophers!

I am not a textualist. In my view textualism is not a terribly useful idea. It is not needed or even desirable as a limitation on judicial power. I would prefer a power of interpretation that entertains new meanings of the text that are grounded in broad historical patterns of social and cultural change and that are broadly accepted today as reflecting values upon which the founding principles of our democracy rest. For example, equality today, I believe, means nondiscrimination based on race as well as affirmative action. It does not include separate but equal (Jim Crow), even if it did at one time.

This historically and culturally grounded approach contains objective constraints on the creativity of the Supreme Court. It ties the Court to the text, but not to a text consisting only of ossified rules writ by the dead hand of the past. The Constitution instead is a covenant with the future, and the Court's interpretive power is at its strongest with those open-textured and thematic terms in the Constitution such as equality, speech, religious freedom, due process, liberty, and even war.

But even if the Supreme Court's discretion is bounded under this approach, textualists still have a problem with the fact that the judicial branch does the interpreting. The central argument is that in a democracy, judicial power must be limited, because judicial power is undemocratic. The judiciary occupies a realm beyond politics—the neutral umpire whom no one comes to see. The Supreme Court does not fit our idea of representative democracy, where the polity is given responsibility for governing and for making fundamental choices about the social and political orders in which we live. This is a powerful—and in many respects sound—argument. Judicial power, especially the power to interpret—i.e., alter—the Constitution, is decidedly nondemocratic and non-majoritarian.

But if the argument is strong and sound, is it that strong and sound? Does limited judicial power foreclose any creativity? Does it prohibit a court from having the power to interpret the word speech to also mean art and the power to protect art differently than speech? I think not, and here is why: The American Constitution is in fact not democratic—nor even representative—and it certainly is not majoritarian. What we think of as American democracy is no more and no less than the assemblage of constitutional provisions that assign and limit power in the Constitution. We elect presidents by the decidedly undemocratic electoral college—wisely, I think, but that is another matter. We elect representatives in the legislative branch through elections that under no circumstances could be characterized as democratic given voter turnout, voting disqualifications, and the failure of the Constitution to bind those elected to the will of the majority (to the extent that it is voiced meaningfully). The Senate is quite

intentionally nonrepresentative of popular will. Congress is governed by minority interests as seen in the supermajority cloture requirements in the Senate; in the powers of committees and party leaders; in vetoes by the President; and in delegated lawmaking power to the unrepresentative administrative agencies that make most of the law today.

And how does the Constitution allocate power? It does so inefficiently—and often to the branch least able to execute it boldly. The power to make war—to fight it—is given to the President,<sup>24</sup> but Congress has the power to regulate the military forces.<sup>25</sup> The power to declare war is given to Congress, that ungainly babble of varying interests and talents.<sup>26</sup> There is no lean, mean fighting machine here. The President is given the power to veto the democratic choices of the legislative branch. The courts are given the power to enforce the Constitution and laws, even in the face of legislative or executive insistence to the contrary.<sup>27</sup> But courts have no power to enforce their will broadly. The fact is that our Constitution is a messy and theoretically ugly business. There are no perfectly crafted and executed theories in it because none were intended, and we are better off for it.

And what about the nature of judicial power? It is clear in the Constitution itself that the Supreme Court has the power to interpret the Constitution, even in the face of executive, legislative, and popular resistance. The power of interpretation, no matter its breadth, is the power of creativity in making law. But how creative should the Supreme Court be? Strict constructionists, tied to the literal text, say “not very.” Fair enough, perhaps. Yet if the Constitution is a covenant with the future—wrought by those who were savvy and wise enough to know that the future would present new problems of governance and who were idealistic enough to believe that the Constitution might last for hundreds of years—where should the power of adaptation be lodged?

The Constitution provides for constitutional amendment, but it is a purposefully onerous and dangerous business, requiring large public demands for change and agreement by a supermajority (three-fourths) that has only rarely been seen in the Constitution’s history.<sup>28</sup> Because of the difficulty in passing constitutional amendments, there must be room for intermediate and gradual change over time. A power to effect such change, even if narrow, is dangerous. Yet there are indisputably thematic parts of the Constitution that imply, even require, adaptation: the guarantees of equality; of due process; of liberty; of separation of church and state, and its frequent

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24. U.S. CONST. art. II, § 2, cl. 1.

25. *Id.* art. I, § 8, cls. 12–16.

26. *Id.* art. I, § 8, cl. 11.

27. *Id.* art. III, §§ 1, 2.

28. *Id.* art. V.

competitor, religious freedom. We should include freedom of speech too—perhaps even especially. Generally, these parts of the Constitution represent an idea's covenant with the future. They contain ideas or themes that, by any fair measure, will have to evolve and change in a way that defies adaptation through the ungainly and dangerous process of constitutional amendment. Indeed, many of these ideas—like free speech—are distinctly counter-majoritarian.

So where should we lodge the power of adaptation and interpretation? In my view, the place to lodge it is in the least dangerous branch, the judicial branch. The Supreme Court is highly educated; principled in the way that it functions; bound by its own prior decisions; committed to reasoned explanation of its interpretations; bound to a text that is often open-textured, but still constraining; and independent of the prevailing political winds of the day, yet part of the larger tides of social and political change.

More important, however, are other more practical—even messier—reasons for giving the power of adaptation to the judicial branch. The Supreme Court has no power of the purse. Its budget, even its ability to function, depends on Congress (a fact demonstrated on more than one occasion in history when Congress simply cancelled the Court's term).<sup>29</sup> The Court has no army, and it has no legislative power; its public support consists only of the respect that it earns by its work. The Court's enforcement power consists, figuratively, of an octogenarian U.S. Marshall with a cane.

The judicial branch, as mentioned before, is the least dangerous branch. It is both wise and weak, creative but truly constrained. For the Supreme Court to overstep its power would be to court disaster for the Court itself. Where better to lodge the momentous power to adapt the Constitution to the tides of historical and cultural change?

## V. CONCLUSION

Free speech—literally, textually, and by common public understanding in the late Eighteenth Century—did not include art, but it should today. The expansion of speech to include art reflects the evolved and evolving habits and attitudes of society at large over a period of more than 200 years. Today, art is a major source of expression and ideas. It is a central feature of the creativity that our culture so prizes. Our culture has evolved from a time when there was no broad private market in art—only patronage—to a time when the private market in art is pervasive. Public and private museums have blossomed, making art accessible to everyone. Doing art, owning art, viewing art, and arguing about art are all part of our national discourse, our cultural identities, and our collective acts of imagination. The very idea of art, as

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29. See Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1980 n.24 (1990).

Dewey put it, is foundational in our culture. In such an environment, it would be foolish and foolishly narrow minded to deny art its place in the Constitution or to deny the Supreme Court the power—indeed the duty—to say so.