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# Towards a Borgean Theory of Constitutional Interpretation

Marco Jimenez\*

*This article presents a reworking of Jorge Luis Borges's short story, Pierre Menard, Author of the Quixote,<sup>1</sup> as applied to the U.S. Constitution. In Borges's original story, which deals with important issues governing interpretation, the creation of meaning, and the ascertainment of original intent, Borges's fictional scholar, Pierre Menard, undertakes to translate Cervantes's Don Quixote for a modern audience by creating a Quixote that could have been written by Cervantes today. To do so, Menard begins by immersing himself in the world of seventeenth century Spain, much as an originalist today might immerse him or herself in eighteenth century America, as a first step in providing an accurate, yet modern, translation of the text. As he undertakes the process of translation, however, Menard comes to recognize that the words and phrases used by Cervantes have come to mean something quite different today. Further, he realizes that any change to the words themselves would fail to produce a truly modern translation of this canonical text because it would cause the loss of textual richness and interpretative understanding accumulated over generations. Therefore, in a stroke of genius, Menard recognizes that the best way to translate the Quixote to preserve the text's modern meaning is to produce a word-for-word, line-for-line translation of the antiquated original! It is important to note that Pierre Menard adamantly maintains that his word-for-word rendition of the original words is not simply a copy of the original text. Rather, as Borges's original story suggests, Menard has actually produced a much more nuanced text than Cervantes, one that, though*

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\* Leroy Highbaugh Sr. Research Chair and Professor of Law, Stetson University College of Law; J.D., Yale Law School, 2000; B.A. and B.S., University of Southern California, 1997. I would like to thank Bob Batey and Blake Hudson for comments they provided on this paper. I would also like to thank Leigha B. DiGregory for her excellent research assistance. Any mistakes that remain are, of course, my own. I would also like to thank my wife and son for their love and continuous support.

1. The original story is JORGE LUIS BORGES, *Pierre Menard, Author of the Quixote* (1939), reprinted in Labyrinth: Selected Stories and Other Writings 36–44 (Donald A. Yates & James E. Irby eds., James E. Irby trans., 2007).

verbally identical, “is almost infinitely richer” in that the words penned by Cervantes no longer mean what they once did, but have become imbued with the accumulated historical understanding of many generations.<sup>2</sup>

The parallels to the current debate surrounding the interpretation (or translation, if you will) of our own Constitution are unmistakable. The words no longer mean what they once did, and the best way to convey the current meaning of the Constitution is by using the antiquated words and phrases of the eighteenth century original. These words and phrases, though they have themselves remained the same, are now viewed through the lens of historical events (e.g., the Civil War, Reconstruction, and New Deal) and judicial precedents (e.g., the Dred Scott decision, Plessy v. Ferguson, and Brown v. Board of Education) so powerful as to have changed the meaning (though not the spelling) of the words themselves!

Therefore, in the text that follows, I have attempted to present these parallels by adapting Borges’s story to the U.S. Constitution. I have tried to keep as much of Borges’s original text as possible—including even the structure of his seemingly obscure academic footnotes—while changing what was necessary of the characters, footnotes, and themes to discuss legal, rather than literary, topics.

More specifically, in my version of the story, I attempt to propose, through the text, and develop, through the footnotes, a theory of constitutional interpretation as translation based on the scholarship of Borges’s fictional character, Pierre Menard, as told by a law professor intimately familiar with Professor Menard’s work. In my version, Professor Menard takes it upon himself to update and revise the U.S. Constitution for the twenty-first century and, in so doing, is confronted with a difficult problem of preserving the document’s modern meaning. Professor Menard acknowledges that many of the original words, phrases, and clauses used by the Framers have taken on new meaning over time, or have lost their meaning altogether, which renders the process of interpretation particularly elusive and odious. In a deeply profound exploration of the meaning of meaning, Professor Menard comes to the stark realization that his project of updating the Constitution for the modern generation must necessarily consist not in interpreting the text, but in translating it.

Having made this methodological leap, Professor Menard is next faced with the daunting task of choosing carefully the words, phrases, and clauses that will convey to the modern generation how the Constitution’s text, which was drafted over two centuries ago, should be understood today. Here, Professor Menard makes his second leap: given that the words of the constitution have become imbued with new meaning over time, in part due to historical circumstances, in part due to subsequent legislation, and in part

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2. *Id.* at 42.

*due to judicial interpretation and development, the best way of translating the Constitution to capture and preserve how it is commonly understood today consists, ironically, in rewriting the text so that it is identical to the original! In undertaking this task, Professor Menard shows how constitutional interpretation, even (especially) while remaining faithful to the original text, can be better thought of not as an act of constitutional discovery, but one of constitutional creation, in which the reader (usually a judge, but arguably the governed) creates meaning by translating and transforming the source text into something simultaneously new and familiar. This places Professor Menard's theory in the unique position of both accepting textualism while rejecting its usual bedfellow, originalism, at least as that latter concept is commonly understood today. According to Professor Menard, original intent is relevant only to the extent that "We The People" of the here and now have interpreted this intent; but, by this point, it is our contemporary translation (or interpretation, if you prefer) of the Founders' intent, rather than the Founders' intent itself, that ultimately controls and governs what we call meaning.<sup>3</sup>*

PIERRE MENARD, AUTHOR OF THE CONSTITUTION<sup>4</sup>

*The concept of the definitive text corresponds only to religion or fatigue.*

—Jorge Luis Borges<sup>5</sup>

The *visible* work left by this eminent professor of constitutional law is easily and briefly enumerated. Impardonable, therefore, are the omissions and additions perpetrated by Professor Bachelier, whose tendency toward legal positivism<sup>6</sup> is no secret, which he has had the inconsideration to inflict

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3. For those unfamiliar with Borges's original text, they may review a copy (or, word-for-word translation, if you like) in BORGES, *supra* note 1.

4. The following text is adapted from BORGES, *supra* note 1.

5. SERGIO WAISMAN, BORGES AND TRANSLATION 51 (2005) (quoting and translating 1 JORGE LUIS BORGES, OBRAS COMPLETAS 239) (1996).

6. Legal positivism, which is typically distinguished from legal realism, "defines law not as the product of natural reason or moral dictates but merely as a command issued by a sovereign and backed by a sanction." BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 143 (1994). But see LON FULLER, THE LAW IN QUEST OF ITSELF 47 (1940), who associated legal positivism with legal realism, in large part to discredit the latter. For a general account of Fuller's position see ANTHONY JAMES SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 20 (1998), describing how Fuller "thought that legal realism was a modern American modification to the legal positivism of Jeremy Bentham and John Austin," and noting that Fuller's "association of realism with positivism was supposed to weaken realism."

upon his deplorable readers—though these be few and mostly formalists,<sup>7</sup> if not textualists<sup>8</sup> and originalists.<sup>9</sup> The true friends of Professor Menard have

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7. Legal formalists view the law

as a series of first principles laid down for application by society to recurring disputes or problems. Lawyers and judges are to reason deductively, from the general rules to specific conclusions, using these first principles in order to decide particular cases. Judges are to avoid making any moral or public policy decisions in rendering judgments. Rather, they are to constrict themselves to applying the rules.

KUKLIN & STEMPEL, *supra* note 6, at 143.

On the link between legal formalism and legal positivism see Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1144 (1999) (book review) (“Whereas positivism is a *theory of law*, formalism is a *theory of adjudication*, a theory about how judges *actually* do decide cases and/or a theory about how they *ought* to decide them.”) (emphasis added). See also LON FULLER, *ANATOMY OF THE LAW* 177–78 (1968) (“The legal positivist concentrates his attention on law at the point where it emerges from the institutional processes that brought it into being. It is the finally made law itself that furnishes the subject of his inquiries. How it was made and what directions of human effort went into its creation are, for him, irrelevant.”). Thus, for the legal formalist, her interpretive task is not to take into account the social and/or moral forces that brought the law about, but to consider the law in its final written form, as though it sprung, like Athena, fully formed from the head of Zeus. See, e.g., Larry Alexander, “*With Me, It’s All er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 (1999) (“By formalism I mean adherence to a norm’s prescription without regard to the background reasons the norm is meant to serve (even when the norm’s prescription fails to serve those background reasons in a particular case). A formalist looks to the form of a prescription—that it is contained in an authoritative rule—rather than to the substantive end or ends that it was meant to achieve. A norm is formalistic when it is opaque in the sense that we act on it without reference to the substantive goals that underlie it.”).

8. Often distinguished from intentionalists, who would interpret the Constitution according to the lawgiver’s intent, textualists advocate a theory of interpretation based upon the “reader’s understanding,” rather than upon the “speaker’s intent,” and would ask the interpreter—usually the judge—to focus “upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean.” Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351–52 (2005) (citing ANTONIN SCALIA, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 144 (1997)); see also ROBERT BORK, *THE TEMPTING OF AMERICA* 144 (1997) (“If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. . . . Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time.”); Antonin Scalia, *Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation*, Speech at the Catholic University of America (Oct. 18, 1996) [hereinafter *Catholic University Speech*] (transcript available at <http://www.proconservative.net/PCV015Is225ScaliaTheoryConstlInterpretation.shtml>) (“If you are a textualist, you don’t care about the intent, and I don’t care if the Framers of the U.S. Constitution had some secret meaning in mind when they adopted its words.”).

On the link between textualism and formalism see generally ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 25 (1997) (“Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ The answer to that is, *of course it’s formalistic!* The rule of law is *about* form. . . . A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbor with a video camera has filmed the crime and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism! It is what makes

viewed this catalogue with alarm, and even with a certain melancholy. One might say that only yesterday we gathered before his final monument, amidst the lugubrious cypresses, and already Error tries to tarnish his Memory. Decidedly, a brief rectification is unavoidable.

But, before I proceed, I am aware that it is quite easy to challenge my slight authority. I hope, however, that I shall not be prohibited from mentioning two eminent testimonies. Professor de Bacourt (in whose seminar on *Constitutional Theory* I first had the honor of meeting the lamented scholar) has seen fit to approve the pages which follow. Also, Judge Bagnoregio, one of the most respected legal scholars of her generation (and recently appointed to the United States Court of Appeals for the Eleventh Circuit), has sacrificed “to veracity and to death” (such were her words) the stately reserve which is her distinction, and, in an open letter that will be published along with the other articles in this symposium, concedes me her approval as well. These authorizations, I think, are not entirely insufficient.

I have said that Menard’s visible work can be easily enumerated. Having examined with care his manuscripts, both published and unpublished, I found that they contained the following items:

a) An article exploring the judiciary’s clear use of moral language to resolve “non-moral” legal disputes, which appeared twice (with variations<sup>10</sup>)

us a government of laws and not of men.”).

9. “Originalism,” according to Justice Scalia, one of its leading practitioners, “treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated.” Catholic University Speech, *supra* note 8. According to this view, an “interpreter” of a constitution or statute is to “take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.” *Id.*

On the link between originalism and legal positivism see James Wilson, *Contrasts of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, and Winter*, 40 U. MIAMI L. REV. 1171, 1172 (1986).

10. The following vignette, I think, should help shed light on Professor Menard’s theory of constitutional interpretation, which, it seems to me, is almost unanimously misunderstood. Shortly after Professor Menard had written these articles, I was in attendance at a AALS conference with the illustrious law professor when he was asked by another professor (who shall remain nameless) why Professor Menard renounced the well-received argument advanced in his first article by means of a second “correction” published a “mere” seven months after the original. It was suggested, to my ears anyway, through the tone of the question that Professor Menard had either not adequately thought through the issue the first time around, or perhaps was seeking to capitalize on his well-received article’s prestigious placement by following it up, for no other purpose than a publication credit, with a nearly identical piece that took the opposite point of view with regard to every major argument put forward in the first piece.

Rather than being upset with the tone of the question, Professor Menard seemed quite irritated instead with the characterization of his work, and insisted, in no uncertain terms, that it would be a great mistake to view his second article as “correcting,” “modifying,” “renouncing,” or in

in the *Journal of Legal Discourse* (issues of March and October 1989).<sup>11</sup>

b) An article on the possibility of constructing a meaningful vocabulary of legal concepts that would not be synonyms or periphrases of those which make up our everyday moral language, “but rather ideal objects created according to convention and essentially designed to satisfy legal needs” (1991).<sup>12</sup>

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any way “retreating” from the positions taken in the first. Quite adamantly, Professor Menard insisted that, though he protested the use of labels, if one insisted on their use, one should say that the second article was merely a “variation” on the first—a usage I have been careful to follow above—and that the point was more than one of mere semantics. Professor Menard shocked everyone in the audience when he stated that both articles, though published at different dates, were originally written and submitted for publication simultaneously, and were therefore planned, from the beginning, to constitute a single work—a fact I later confirmed with the publisher.

When these comments were first made to the bewildered crowd, of course, all of us were taken by surprise. Another gentleman in the audience (who shall also remain nameless) asked Professor Menard, in light of the contradictory positions taken in each of his two articles, which article better reflected his true belief about the proper role of a judge’s use of moral language in resolving legal disputes, at which time Professor Menard went into a frenzy, and suggested, quite seriously, that if anyone desired to know his true position in the matter, they would be well advised to throw the pages into the air, have their five-year-old son or daughter gather them up into a single pile, and read them in the order dictated by the wind! Professor Menard (despite what was fast becoming a mass exodus from the conference room) maintained that he himself read through several drafts of his manuscript in this manner, and used a similar process for deciding which pages should be published with which article, and (though it was difficult to hear him with all the commotion at this point) further insisted that the different impression made with each reshuffling and rereading of the manuscript would, in time, help establish a “unitary whole” among the readers who attempted such an endeavor.

Needless to say, numerous law professors in attendance mistook Professor Menard’s sincerity—and sincerity it certainly was!—as contemptuous irreverence, a conception I hope to rehabilitate in this article, in part by showing that Professor Menard’s interpretive scholarship, which is commonly viewed as the most absurd of all his scholarship, is in fact the most serious and profound.

11. I also point out to the reader the significance of the fact that, from his earliest visible works, Pierre Menard’s scholarship not only challenged the idea of a central, canonical text, as indicated by the two variations on a single theme as discussed above, but reflected the notion that “interpretation”—a word he abhorred and nearly always substituted in its place “translation”—is always made up of a series of texts, including the subsequent glosses to those texts, which, with each new translation and promulgation, created a new law different from the original. Like Averroes’ translation of a translation of Aristotle, Professor Menard believes our translations of the Constitution can best be understood as translations of translations, and was fond of analogizing this process to stepping into Thales’ river, which, like a legal text, retained the illusion of always being the same while constantly changing and reinventing itself. “Just as no man can step into the same river twice,” Professor Menard was also fond of saying, “So, too, can no man read the same law twice.” This would become the basis for his most ambitious work, his “interpretation” (he always referred to the project as a “translation” or “transcription”) of the *entire* Constitution, including all of its Amendments and subsequent judge-made law interpreting its provisions, for the twenty-first century.

12. This article is almost universally misread as a failed attempt by Professor Menard—later abandoned—to realize Holmes’s vision for a universal legal language devoid of moral content. See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (“The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary

c) An unpublished monograph on “certain connections or affinities” between the thought of Judges Holmes, Hand, and Posner (1993).

d) An unpublished monograph on Cardozo’s *The Nature of the Judicial Process* (1994).

e) A technical article on the possibility of improving the game of chess by randomizing the starting positions of the pieces.<sup>13</sup> In this piece, Menard proposes, recommends, discusses, and finally rejects<sup>14</sup> this innovation.

constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some state of the argument, and so to drop into fallacy . . . . Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.”)

This misreading—which Menard never objected to, by the way, for the effect was the same—was not only inconsistent with his earlier work, but failed to recognize that Professor Menard’s failure was intentional, and, as such, should have been seen as a universal success, rather than a universal failure, in showing the problems of Holmes’s approach.

13. Professor Menard attributed the idea of randomly shuffling the starting position of the chess pieces (though not the pawns) to the late Grandmaster Bobby Fischer, who unveiled this form of chess in Buenos Aires in 1996. *See, e.g.*, SVETOZAR GLIGORIC, SHALL WE PLAY FISCHERANDOM CHESS? (2002); GENE MILENER, PLAY STRONGER CHESS BY EXAMINING CHESS960: USABLE STRATEGIES OF FISCHER RANDOM CHESS DISCOVERED (2006). As Professor Menard pointed out in his article, it was of great significance to him (though it may not have been for Bobby Fischer) that this innovative variation on an ancient and revered game should be unveiled in Buenos Aires, the birthplace of Jorge Luis Borges, who first inspired Professor Menard to embrace the value of such “creative infidelities” and “mistranslations” as equal to the original, an idea that would have great impact on Menard’s theories of constitutional interpretation as translation. Following Borges, Menard believed that there was no such thing as constitutional interpretation, either by the Supreme Court, by any of the inferior courts, by Congress, or by “We the People,” for “every act of writing is an act of translation,” an idea that will be developed further in this article. WAISMAN, *supra* note 5, at 84; *see also id.* at 94 (“[T]he theory of reading articulated by ‘Pierre Menard’ is also a theory of translation. This begs the question whether every theory of reading is not, by implication, also a theory of translation (and vice versa). This follows from the idea that every reading, every interpretation, is a translation, even within the same language.”); Roman Jakobson, *On Linguistic Aspects of Translation*, in THEORIES OF TRANSLATION 149 (Rainer Schulte & John Biguenet eds., 1992) (“The cognitive level of language not only admits but directly requires recoding interpretation, i.e., translation.”).

Indeed, in hindsight, one can now see that Menard’s early articles on chess helped shape his thinking about law and ultimately prepared him to write his magnum opus on constitutional interpretation, which we shall soon discuss. As Sergio Waisman, who was also intimately familiar with the work of this famous professor, once explained, “altering the rules of chess functions as a metaphor for questioning the structural and semantic rules of language, thus raising issues of meaning and understanding. These references [to chess] reveal Menard’s . . . interest in the arbitrary and constructed aspects of language.” WAISMAN, *supra* note 5, at 98.

14. The reader will perhaps not be surprised to learn that, once again, this author submits that Professor Menard’s rather obscure article has been widely misunderstood and that his so-called rejection of Fischer Random Chess or Chess960 (so named for the 960 possible starting positions) should better be understood, in spite of its conclusions, not as a rejection of the chess variant, but as a ringing endorsement of this reinterpreted classic, and—importantly—every bit equal to the

f) An unpublished monograph developing and applying the principles first discussed in John Searle's paper, *Minds, Brains, and Programs*,<sup>15</sup> to legal discourse generally and constitutional interpretation specifically (1996).<sup>16</sup>

g) A translation, with prologue and notes, of Ruy López de Segura's *Libro de la invención liberal y arte del juego del axedrez* (1997).<sup>17</sup>

h) The worksheets of an unpublished monograph on George Boole's symbolic logic applied to legal argument and judicial decision-making.<sup>18</sup>

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original. Indeed, such a reading goes a long way towards reconciling the confusion expressed by other scholars who have commented (rightly) that the arguments promulgated in the first part of Menard's article recommending this new form of chess seemed more persuasive than the arguments in the second part rejecting the innovation as "unfaithful to the original." Indeed, I perhaps have an unfair advantage over other scholars in this area in that, for several years before his death, Menard and I would frequently play both versions of chess, and he told me once that he equally enjoyed both forms of chess, the classic game in large part due to the exorbitant time he put into opening theory as a youth, and Fischer's reinvention due to his recently-acquired love of tactical surprises.

15. Specifically, in this monograph, which was unfortunately never published, Professor Menard compared the judge adhering to original intent to the man in Searle's Chinese Room, and wondered, first, the extent to which each really knew what he or she was doing, and second, suggested that both were doing much more than they knew. On original intent see *supra* note 8. On Searle's Chinese Room see generally John R. Searle, *Minds, Brains and Programs*, in 3 BEHAV. & BRAIN SCI. 417–57 (1980) (positing the famous Chinese Room thought experiment to argue against the possibility of artificial intelligence). For a summary of the "Chinese Room" argument see John R. Searle, *The Chinese Room*, in THE MIT ENCYCLOPEDIA OF THE COGNITIVE SCIENCES 115, 115 (R.A. Wilson & F. Keil eds., 1999) ("Imagine a native English speaker, let's say a man, who knows no Chinese locked in a room full of boxes of Chinese symbols (a data base) together with a book of instructions for manipulating the symbols (the program). Imagine that people outside the room send in other Chinese symbols which, unknown to the person in the room, are questions in Chinese (the input). And imagine that by following the instructions in the program the man in the room is able to pass out Chinese symbols that are correct answers to the questions (the output). The program enables the person in the room to pass the Turing test for understanding Chinese, but he does not understand a word of Chinese. The point of the argument is this: if the man in the room does not understand Chinese on the basis of implementing the appropriate program for understanding Chinese, then neither does any other digital computer solely on that basis because no computer, qua computer, has anything the man does not have.").

16. Referring to the thirteenth-century manuscript *Ars Generalis Ultima* (or *Ars Magna*) by Ramon Llull, Borges, who had a tremendous influence on Menard's scholarship, once noted that "[a]s an instrument of philosophic investigation, the thinking machine is absurd." WAISMAN, *supra* note 5, at 97 (quoting Jorge Luis Borges, *Raimundo Lulio's Thinking Machine* (1937), in TEXTOS CAUTIVUS: ENSAYOS Y RESENAS EN "EL HOGAR" (1936–1939), at 178 (1986)). Borges's fingerprint on Menard's treatment of Searle's Chinese Room as applied to legal analysis is unmistakable.

17. It is no accident that Menard, an avid chess player and historian, undertook to translate Ruy López's foundational work of 1561, though this second European chess manual followed Pedro Damiano's earlier work *Questo libro e da imparare giocare a scachi et de li partiti* (1512) by a half-century, for, as Menard would later comment in his work on constitutional interpretation, the latter's relation to the former was akin to the Constitution's relation to the Articles of Confederation: in both cases, the latter works were first in time but second in importance.

18. Although Menard's application of Boolean logic to legal analysis has been described by others as an attempt to establish a lingua franca for legal analysis, I believe, as described *supra* note 12, that Menard's work can be more profitably read as an attempt to show the absurdity of such an approach.

i) An examination of the foundational sources of Anglo-American jurisprudence, illustrated with examples from Justinian's *Corpus Juris Civilis* (529-534), Glanville's *Tractatus de legibus et consuetudinibus regni Angliae* (c. 1188), the Magna Carta (1215), and Bracton's *De Legibus et Consuetudinibus Angliae* (c. 1235) (*Journal of Legal Discourse*, 1999).

j) A reply to Luc Durtain (who had denied the existence of "foundational" sources), illustrated with examples from Luc Durtain (*Journal of Legal Discourse*, 1999).

k) A manuscript translation of the *Divina Commedia* of Dante Alighieri, with notes comparing the punishments administered by Dante to the punishments administered by the modern penal system for similar crimes.

l) A preface to the *Records of the Federal Convention* (2001).

m) The work *Les problèmes d'un problème*<sup>19</sup> (2003), which discusses, in chronological order, two different solutions to the counter-majoritarian difficulty identified by Alexander M. Bickel.<sup>20</sup> Two editions of this book have appeared so far; the second bears as an epigraph Professor Bruce Ackerman's rejection of the counter-majoritarian difficulty<sup>21</sup> and revises the chapters dedicated to James Madison and John Marshall.

n) A determined analysis of the "syntactical customs" of Benjamin Cardozo.<sup>22</sup> Menard—I recall—declared that censure and praise are

19. Problems of a problem.

20. For a statement of the counter-majoritarian difficulty, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (2d ed. 1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That . . . is the reason the charge can be made that judicial review is undemocratic.").

21. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 262 (1991) (claiming that the concerns raised by the counter-majoritarian difficulty brought up by Bickel have been largely negated because "the modern Court has been doing a credible (not perfect) job interpreting the constitutional principles hammered out by "We the People" at the Founding, Reconstruction, and the New Deal (as well as at lesser constitutional moments)").

22. See, e.g., BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 161 (1921) ("Our survey of judicial methods teaches us, I think, the lesson that the whole subject-matter of jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe. We like to picture to ourselves the field of the law as accurately mapped and plotted. We draw our little lines, and they are hardly down before we blur them. As in time and space, so here. Divisions are working hypotheses, adopted for convenience. We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees."). For a treatment of this very matter see LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 22–23 (1993) (agreeing, in large part, with Cardozo's conclusions and adding that "legal and linguistic indeterminacy join forces to produce uncertainty").

sentimental operations that ought to have no place in legal criticism.

o) A transposition into alexandrines of Judge Michael Eakin's dissent in *Pennsylvania v. Noel*.<sup>23</sup>

p) An invective against Judge Eakin, in the *Papers for the Suppression of Reality of Jacques Reboul*. (This invective, we might say parenthetically, not surprisingly reflects the exact opposite of Professor Menard's true opinion of Judge Eakin. The latter understood it as such and their old friendship was not endangered.)

q) A "definition" of Judge Bagnoregio, in the "Victorious Volume of American Judges"—the locution is Professor Gabriele d'Annunzio's, another of its collaborators—published annually by Professor d'Annunzio to rectify the inevitable falsifications of journalists and to present "to the world and to America" an authentic image of her person, so often exposed (by very reason of her prolificacy and activities to promote social justice) to erroneous or hasty interpretations.

r) A proposal for constitutional democracies in developing countries, dedicated to his mentor, Professor de Bacourt (2007).

s) An unpublished manuscript list of ambiguous language which owed its legal efficacy (or lack thereof) to its punctuation.

This, then, is the *visible* work of Menard,<sup>24</sup> in chronological order (with no omission other than a few unfinished articles of circumstance written in response to several ideas advanced by Professor Henri Bachelier). I turn now to his other work: the subterranean, the interminably heroic, the peerless. And—such are the capacities of man!—the unfinished. This work, perhaps the most significant of our time, consists of just the Fourth Amendment to our Constitution's Bill of Rights, and a fragment of Amendment Eight. I know such an affirmation seems an absurdity; to justify this absurdity is the primordial object of this article.<sup>25</sup>

Two texts of unequal value inspired this undertaking. One is that

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23. 857 A.2d 1283, 1289–91 (Pa. 2005) (Eakin, J., dissenting). Anyone with a taste for judicial poetry should read several of the opinions, written in verse, authored by Judge Michael Eakin. See, e.g., *Liddle v. Scholze*, 768 A.2d 1183, 1184, 1186 (Pa. Super. Ct. 2001) (regarding a contract dispute); *Busch v. Busch*, 732 A.2d 1274, 1275–78 (Pa. Super. Ct. 1999) (regarding premarital contracts).

24. It has been pointed out elsewhere that, although other critics are generally familiar with Menard's visible works,

what has not been sufficiently studied is the extent to which nearly every aspect of . . . Menard's "visible work" [is] explicitly or implicitly related to issues of translation. In this sense, these items perfectly anticipate Menard's masterwork, his partial rewriting of the [Constitution], and the issues raised by such a task.

WAISMAN, *supra* note 5, at 95.

25. I also had the secondary intention of sketching a personal portrait of Pierre Menard. But how could I dare to compete with the golden pages which, I am told, Professor de Bacourt is preparing or with the delicate and punctual pencil of Professor Hourcade?

philological fragment by Novalis—the one numbered 2005 in the Dresden edition—which outlines the theme of a *total* identification with a given author. The other is one of those parasitic books that situate Christ on a boulevard, Hamlet on La Cannebière, or James Madison on Wall Street in the twenty-first century. Like all men of good taste, Menard abhorred these useless carnivals, fit only—as he would say—to produce the plebeian pleasure of anachronism or (what is worse) to enthrall us with the elementary idea that all epochs are the same or are different. More interesting, though contradictory and superficial of execution, seemed to him the famous plan of Daudet: to conjoin the Ingenious Gentleman and his squire in *one* figure, which was Tartarin . . . . Those who have insinuated that Menard dedicated his life to writing a contemporary Constitution calumniate his illustrious memory.

He did not want to compose another *Constitution*—which is easy—but *the Constitution itself*. Needless to say, he never contemplated a mechanical transcription of the original; he did not propose to copy it. His admirable intention was to produce a few pages that would coincide—word-for-word and line-for-line—with those of the Founders.

“My intent is no more than astonishing,” he wrote me the 30th of September 2004, from Bayonne. “The final term in a theological or metaphysical demonstration—the objective world, God, causality, the forms of the universe—is no less previous and common than this famed document. The only difference is that the philosophers publish the intermediary stages of their labor in pleasant volumes and I have resolved to do away with those stages.” In truth, not one worksheet remains to bear witness to his years of effort.

The first method he conceived was relatively simple: know the language of the Founders—eighteenth-century English—well, recover the faiths prevalent at the time, imagine fighting against the English or the Native Americans, forget the Reconstruction, the New Deal, the Civil Rights Movement—in short, all of the history of the United States from the year 1789 to the present, and, most challengingly—be James Madison.<sup>26</sup> Pierre

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26. For Professor Menard, the act of interpreting, or, more accurately, translating the Constitution of 1787 was “always undertaken from a specific site,” and took into account not only “the translator’s language, but also the entire cultural and sociohistorical context in which translators perform their task.” WAISMAN, *supra* note 5, at 11. In modern times, the great translators of our Constitution are the Supreme Court Justices, who often find themselves considering a constitutional provision “outside its cultural and historical context,” which not only forces them to “take into account the context of the source text,” but also “[t]hat of the target text, and, most important, the distance between the two. It is in this distance—in a Babel of linguistic, temporal, and spatial displacements—that everything happens: texts and cultures are transmitted or lost, renegotiated,

Menard studied this procedure (I know that, though French was his native tongue, he attained a fairly accurate command of eighteenth-century English) but discarded it as too easy. “Rather as impossible!” my reader will say. Granted, but the undertaking was impossible from the very beginning and of all the impossible ways of carrying it out, this was the least interesting, though perhaps the most common among legal historians today. To be, in the twenty-first century, a Founding Father of the eighteenth seemed to him a diminution. To be, in some way, James Madison and reach the Constitution and Bill of Rights seemed less arduous to him—and, consequently, less interesting—than to go on being Pierre Menard and reach the Constitution and Bill of Rights through the experiences of Pierre Menard.<sup>27</sup> (This conviction, we might say in passing, made him omit the words “and our Posterity” from the Constitution’s Preamble.<sup>28</sup> To include those words would have been to create another character—Madison—but it would also have meant presenting the Constitution in terms of that character and the other Founding Fathers and not of Menard. The latter, naturally, declined that facility.) “My undertaking is not difficult, essentially,” I read

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reexamined, and reinvented.” *Id.* at 12; *see also* GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 24 (1975) (“One thing is clear: every language act has a temporal determinant. No semantic form is timeless. When using a word we wake into resonance, as it were, its entire previous history. A text is embedded in specific historical time; it has what linguists call a diachronic structure.”). Furthermore,

[t]he variety of ways by which a nation’s writers, readers, and translators establish a relationship with this distance is, of necessity, a major aspect of that nation’s cultural identity. Translation is one of the driving forces in the development of any [Constitution] and has a tremendous effect on how that [Constitution] defines itself locally and globally.

*Id.* at 14.

27. Those familiar with Borges’s works will not be surprised to find the same idea expressed in some of his other works. For instance, in his essay *The Fearful Sphere of Pascal*, Borges compares the different meanings given by various ages to the idea that God is a sphere whose center is everywhere but whose circumference is nowhere, and concludes by speculating (asserting, really) that “[i]t may be that universal history is the history of the different intonations given a handful of metaphors. JORGE LUIS BORGES, *The Fearful Sphere of Pascal*, reprinted in *LABYRINTHS*, *supra* note 1, at 192. Or, in *Partial Magic in the Quixote*, Borges (now appropriating the voice of Carlyle for his own purposes) concludes “that the history of the universe is an infinite sacred book that all men write and read and try to understand, and in which they are also written.” JORGE LUIS BORGES, *Partial Magic in the Quixote*, reprinted in *LABYRINTHS*, *supra* note 1, at 196. Or again, in *Kafka and His Precursors*, where Borges tells us that “every writer creates his own precursors. His work modifies our conception of the past, as it will modify the future.” JORGE LUIS BORGES, *Kafka and His Precursors*, reprinted in *LABYRINTHS*, *supra* note 1, at 201.

28. Professor Menard’s Preamble therefore read:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves ~~and our Posterity~~, do ordain and establish this Constitution for the United States of America.

*Cf.* U.S. CONST. pmbl. The importance of this change will soon become clear.

in another part of his letter. “I should only have to be immortal to carry it out.” Shall I confess that I often imagine he did finish it and that I read the Constitution—all of it, including the Bill of Rights and all subsequent Amendments, in addition to every case ever decided by a judge that expounded on that most noble document in some way—as if Menard had conceived it? Some nights past, while leafing through the Reconstruction Amendments—never essayed by him—I recognized our friend’s style and something of his voice in this exceptional clause: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”<sup>29</sup> This happy conjunction of federal power and civil liberty<sup>30</sup> brought to my mind a verse by Shakespeare that we discussed one afternoon:

Whereof what’s past is prologue; what to come,  
In yours and my discharge.<sup>31</sup>

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29. U.S. CONST. amend. XIV, § 1, cl. 2.

30. According to its primary drafter, Congressman Bingham, the Privileges or Immunities Clause of Section 1, Clause 2, of the Fourteenth Amendment was intended to incorporate the first eight amendments against the states. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. John Bingham). In the words of Congressman Bingham:

[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, ‘cruel and unusual punishments’ have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.

*Id.* This approach was later rejected by the infamous *Slaughter-House Cases*, 83 U.S. 36 (1873), leaving the work of incorporation against the states to be largely done by the Due Process Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 1, cl. 4 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

31. WILLIAM SHAKESPEARE, *THE TEMPEST*, act 2, sc. 1, ll.253–54 (Northrop Frye ed., Penguin Books rev. ed. 1970) (c. 1611). Professor Menard, of course, was himself influenced by that great Argentine writer, Jorge Luis Borges, who would have looked approvingly not only upon Menard’s scholarship in general, but would have received with particular pleasure Menard’s invocation of the bard. Borges himself once wrote that “the fervent readers who surrender themselves to Shakespeare become, literally, Shakespeare,” and Professor Menard once told me that those who surrender themselves to the text of the Constitution become its drafters, the very Founding Fathers themselves. JORGE LUIS BORGES, *A New Refutation of Time*, reprinted in *LABYRINTHS*, *supra* note 1, at 224. It is therefore futile (absurd, even) to search for the intent of that which cannot exist—a mind outside our own—for the moment we deceive ourselves into believing we have peered into the minds of the Framers, the thoughts we believe ourselves to have apprehended outside of ourselves now exist

“But why precisely the *Constitution*?” our reader will ask. Such a preference, in an American, would not have been inexplicable; but it is, no doubt, in a Legal Realist from Nîmes, essentially a devoté of Holmes,<sup>32</sup> who engendered Roscoe Pound, who engendered Arthur Linton Corbin, who engendered Karl Llewellyn, who engendered Richard Posner. The aforementioned letter illuminates this point. “The Constitution,” clarifies Menard, “interests me deeply, but it does not seem—how shall I say it?—inevitable. I cannot imagine the universe without Justice Oliver Wendell Holmes’s exclamation: ‘The life of the law has not been logic: it has been experience’<sup>33</sup> or without Bentham’s *An Introduction to the Principles of Morals and Legislation* or Maine’s *Ancient Law*, but I am Quite capable of imagining it without the Constitution. (I speak, naturally, of my personal capacity and not of those works’ historical resonance.) The Constitution is a contingent document; the Constitution is unnecessary. I can premeditate writing it, I can write it, without falling into a tautology. When I was ten or twelve years old, I read it, perhaps in its entirety. Later, I have reread closely certain clauses, those that I shall not attempt for the time being. I have also gone through the Declaration of Independence, the Articles of Confederation, the Federalist Papers, the Records of the Federal Convention, the undoubtedly laborious tribulations of the Supreme Court, and Joseph

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firmly within us, and to now impute, in the present, such a thought to another, who lived in the past, is not only an act of cowardice, but prevents us from taking responsibility for that which exists within ourselves. In the words of Schopenhauer:

The form of the phenomenon of will . . . is really only the *present*, not the future nor the past. The latter are only in the conception, exist only in the connection of knowledge, so far as it follows the principle of sufficient reason. No man has ever lived in the past, and none will live in the future; the *present* alone is the form of all life, and is its sure possession which can never be taken from it. . . . We might compare time to a constantly revolving sphere; the half that was always sinking would be the past, that which was always rising would be the future; but the indivisible point at the top, where the tangent touches, would be the extensionless present. As the tangent does not revolve with the sphere, neither does the present, the point of contact of the object, the form of which is time, with the subject, which has no form, because it does not belong to the knowable, but is the condition of all that is knowable.

1 ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND IDEA* 359, 360 (R.B. Haldane & J. Kemp trans., Routledge & Keegan Paul Ltd. 1883).

32. See, e.g., O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881) [hereinafter HOLMES, *COMMON LAW*]; O.W. Holmes, *supra* note 12, at 467 (“[J]udges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.”).

33. See, e.g., HOLMES, *COMMON LAW*, *supra* note 32. The full quote reads:

The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

*Id.*

Story's *Commentaries on the Constitution of the United States*. . . . My general recollection of the Constitution, simplified by forgetfulness and indifference, can well equal the imprecise and prior image of a charter not yet written. Once that image (which no one can legitimately deny me) is postulated, it is certain that my problem is a good bit more difficult than Madison's was. My obliging predecessor did not refuse the collaboration of chance: he composed his immortal work somewhat *à la diable*, carried along by the inertias of language and invention. I have taken on the mysterious duty of reconstructing literally his spontaneous work. My solitary game is governed by two polar laws. The first permits me to essay variations of a formal or psychological type; the second obliges me to sacrifice these variations to the original text and reason out this annihilation in an irrefutable manner. To these artificial hindrances, another—of a congenial kind—must be added. To compose the Constitution at the end of the eighteenth century was a reasonable undertaking, necessary and perhaps even unavoidable; at the beginning of the twenty-first, it is almost impossible. It is not in vain that two hundred twenty years have gone by, filled with exceedingly complex events. Amongst them, to mention only one, is the Constitution itself.”

In spite of these three obstacles, Menard's fragmentary Constitution is more subtle than Madison's. The latter, in a clumsy fashion, opposes to the fictions of chivalry the tawdry provincial reality of his country; Menard selects as his reality the Land of the Free during the century of Benjamin Franklin and Thomas Jefferson. What a series of *espagnolades* that selection would have suggested to Maurice Barrès<sup>34</sup> or Dr. Rodríguez

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34. Maurice Barrès, a French novelist and politician, famously said: “Tout livre a pour collaborateur son lecteur,” which can be roughly translated as: “Every book has as its co-author the reader.” See *Maurice Barrès*, EVENE: TOUTE LA CULTURE, <http://www.evene.fr/celebre/biographie/maurice-barres-499.php?citations> (last visited Sept. 14, 2012). According to this view, when one reads a work, including our own Constitution, he or she, in collaboration with the author whose words he or she is reading, is *creating*, as a co-author, a new work that previously did not exist, with a new *meaning* never before contemplated. Professor Menard was much of this view, and his theory of interpretation as translation combined into a single approach his theories of reading and writing. As Waisman has explained:

Pierre Menard demonstrates that a theory of reading *is* a theory of writing *is* a theory of translation. We begin to see this by noticing that nearly every aspect of the text, including Menard's “visible work” (i.e., his work prior to his rewriting of the [Constitution]), is related to the theorizing of translation.

WAISMAN, *supra* note 5, at 85; see also STEINER, *supra* note 26, at 28–29 (“When we read or hear any language-statement from the past, be it Leviticus or last year's best-seller, we translate. Reader, actor, editor are translators of language out of time. The schematic model of translation is one in which a message from a source-language passes into a receptor-language via a transformational process. The barrier is the obvious fact that one language differs from the other, that an

Larreta! Menard eludes them with complete naturalness. In his work there are no slaves or militias or deists or George Washingtons or public hangings. He neglects or eliminates local color. This disdain points to a new conception of the historical document. This disdain condemns *Salammbô*,<sup>35</sup> with no possibility of appeal.

It is no less astounding to consider isolated Amendments. For example, let us examine the Second Amendment of the Bill of Rights, which states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>36</sup> It is well known that James Madison (like Alexander Hamilton in an analogous passage in *The Federalist Papers*<sup>37</sup>) decided the debate against federal power in favor of allowing the state militias to be armed.<sup>38</sup> Madison was attempting to appease the Anti-federalists: his verdict is understandable. But that Pierre Menard’s Constitution—a contemporary of President Bush’s *La trahison des clercs* and Jürgen Habermas—should fall prey to such nebulous sophistries! Professor Bachelier has seen here an admirable and typical subordination on the part of the author to the hero’s psychology; others (not

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interpretative transfer, sometimes, albeit misleadingly, described as encoding and decoding, must occur so that the message ‘gets through.’ Exactly the same model—and this is what is rarely stressed—is operative within a single language. But here the barrier or distance between source and receptor is time.”).

Professor Menard was fond of quoting (he could do it from memory) a passage from Borges’s short story, *A Note on (Toward) Bernard Shaw* for the idea that if a book can only be understood dialogically, how much truer this must be for a constitution! In fact, Menard would often substitute the word “constitution” in place of the word “book” or “literature,” and would quote Borges’ passage as follows:

[A] constitution is more than a verbal structure or series of verbal structures; it is the dialogue it establishes with its reader [or the governed] and the intonation it imposes upon his voice and the changing and durable images it leaves in his memory. This dialogue is infinite . . . . A constitution is not exhaustible, for the sufficient and simple reason that no single book is. A constitution is not an isolated being: it is a relationship, an axis of innumerable relationships. One constitution differs from another, prior or posterior, less because of the text than because of the way in which it is read: if I were granted the possibility of reading any present-day Amendment . . . as it will be read [a hundred years from now], I would know what the constitution [in one hundred years] will be like.

*Cf.* JORGE LUIS BORGES, *A Note on (Toward) Bernard Shaw*, reprinted in LABYRINTHS, *supra* note 1, at 213, 214 (2007).

35. An historical novel by Gustave Flaubert set in Carthage in the third century B.C.

36. U.S. CONST. amend. II.

37. See, e.g., THE FEDERALIST NO. 29, at 143 (ALEXANDER HAMILTON) (Georg W. Carey & James McClellan eds., Liberty Fund 2001) (“[I]f circumstances should at any time oblige the government to form an army of any magnitude[,] that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.”).

38. See generally Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103–66 (2000).

at all perspicaciously), a *transcription* of the Constitution; the Professor de Bacourt, the influence of Nietzsche. To this third interpretation (which I judge to be irrefutable) I am not sure I dare to add a fourth, which concords very well with the almost divine modesty of Pierre Menard: his resigned or ironical habit of propagating ideas which were the strict reverse of those he preferred.<sup>39</sup> (Let us recall once more his diatribe against Paul Valéry in Jacques Reboul's ephemeral Realist blog.) Madison's text and Menard's are verbally identical, but the second is almost infinitely richer. (More ambiguous, his detractors will say, but ambiguity is richness.)

It is a revelation to compare Menard's Constitution with Madison's. The latter, for example, wrote:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>40</sup>

Written in the eighteenth century by Madison, the "Father of the Constitution," this enumeration is a mere rhetorical praise of history.<sup>41</sup> Menard, on the other hand, writes:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>42</sup>

What "shall not be violated" is the *right* of the *people*: the idea is

39. See, e.g., *supra* notes 10 and 12.

40. U.S. CONST. amend. IV.

41. According to Professor Amar, Madison's choice of words were themselves probably "influenced by the celebrated 1763 English case of *Wilkes v. Wood*, one of the two or three most important search-and-seizure cases on the books in 1789," and was based on the common law action of trespass, in which an aggrieved individual could bring his or her suit directly against a public official who engaged in an unlawful search and/or seizure, and who could, in turn, be found strictly liable for his or her actions. AKHIL REED AMAR, *THE BILL OF RIGHTS* 65–66 (1998). As Professor Amar explains, "There was no such thing as 'good faith' immunity." *Id.* at 69. See also *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that federal officers who wiretapped phone lines to gather information about a suspect from a public rather than private property location did not violate the Fourth Amendment because there was no physical invasion of a "constitutionally protected area" that resulted in the actual trespass of suspect's property).

42. Cf. U.S. CONST. amend. IV.

astounding. Menard, a contemporary of Richard Rorty, does not define the right of the people as an inquiry into the common law writ of trespass but as an inquiry into an individual's expectation of privacy.<sup>43</sup> The right of the people, for him, is not based on what *has* happened; instead, it is based on what we *judge* to have happened.<sup>44</sup> The final phrases—"and no Warrants

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43. See, e.g., *Katz v. United States*, 389 U.S. 347, 351 (1967) (abandoning the trespass doctrine, which defined privacy in terms of geographic location, and holding that the FBI's gathering of information about the suspect by attaching an electronic listening and recording device to the outside of a public telephone booth frequently used by the suspect was a violation of the suspect's Fourth Amendment rights). The Court famously held that, even though the listening and recording device did not physically invade the interior of the phone booth, "the Fourth Amendment protects people not places," thereby moving the court's analysis away from an inquiry into geographic location and towards an individual's expectation of privacy. *Id.*

44. In all fairness to Madison, it should be pointed out that the "Founder of the Constitution" himself wrote that "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character." Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 228 (William C. Rives & Philip R. Fendall eds., 1884). Indeed, Madison's own *Notes of Debates in the Federal Convention*, which are "incomparably our foremost source for the secret discussions of that hot summer in Philadelphia in 1787," were not even published until 1840, a full "fifty-three years after the Constitutional Convention had met" and "five years beyond the entire tenure of John Marshall as Chief Justice." LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION I* (1988) (internal citation omitted). Therefore, much to Professor Menard's pleasure, "throughout the formative period of our national history, the High Court, presidents, and Congress construed the Constitution without benefit of a record of the Convention's deliberations." *Id.* Accordingly,

the Framers seem to have thought that 'the original understanding at Philadelphia,' which Chief Justice William H. Rehnquist has alleged to be of prime importance, did not greatly matter. What mattered to them was the text of the Constitution, construed in the light of conventional rules of interpretation, the ratification debates, and other contemporary expositions.

*Id.* at 2 (citing *Trimble v. Gordon*, 430 U.S. 762, 778 (1977)).

To this, Professor Menard would be mostly in agreement, and completely in agreement if we were to remove the words following the comma after the word "Constitution" in the last sentence. As the illustrious professor once told me, to those of us who believe that original intent is primary, this curious historical fact seems puzzling. A better view, according to Professor Menard, is that the authorship of the Constitution is irrelevant (in the traditional sense), because "We the People" are its true authors. According to this view, the notion of meaning changing continually with its readership, any theory of interpretation should take into account not the relationship between the object (the Constitution) and its original drafter (Madison), nor that between the original drafter and the reading subjects ("We the People"), but between the object and the reading subjects. In doing so, Professor Menard recognized (as did Madison) what Burke formalized long before:

A nation is not an idea only of local extent and individual momentary aggregation, but it is an idea of continuity which extends in time as well in numbers and in space . . . it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time.

RUSSELL KIRK, *EDMUND BURKE: A GENIUS RECONSIDERED* 142 (1967).

Strangely, many theories of constitutional legitimacy, even those that are based on the will of the governed, either fail to adequately stress or ignore altogether the importance of the temporal element, rendering discussions of modern-day legitimacy anachronistic at best.

Professor Menard, however, believed that following a textualist approach to constitutional

shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”<sup>45</sup>—are brazenly pragmatic.<sup>46</sup>

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interpretation based on originalism (as opposed to the non-originalist textualist approach favored by Menard) is to accept a theory of the social contract whereby individuals (real and sometimes imagined) in an original position (again, sometimes real, and sometimes imagined) have agreed to principles of government and justice (one would hope) that have binding force not only on those who originally made the compact, which is understandable, but on all future generations as well, which amounts to a sort of legal despotism, no matter how defective their forecasts of the future may have been, and without the benefit of future developments in science and better understandings of human nature. See, e.g., Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001, 1010 (1988) (arguing that according to such a positivist view of Constitutional interpretation, “it makes no difference . . . if the sovereign command is nothing but arbitrary will: order still requires capitulating to it”). Sherry explains that “[a]n appeal to the finality and exclusivity of the historical Constitution is . . . morally and politically dispiriting. It tells us that we as a society are not good enough to make our own moral decisions: we must instead adhere slavishly to the product of the better minds that went before.” *Id.*; see also Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 538 (1987–1988) (“We turn to the [Constitution] to tell us how to live, because we have abandoned the project of our own moral self-governance.”).

If one is committed to a social contract at all—and there are few other persuasive theories of constitutional legitimacy that do not border on a sort of legal despotism—I much prefer (and believe that Professor Menard would be inclined to agree) to follow the idea of Binmore and others, who suggested that there is something defective about being able to appeal to the original position only once, even for those who were not there to agree. According to Binmore,

The problem to be considered next concerns the *timing* of appeals to the original position. In my theory, it is clear that one can no longer envisage appeals to the original position taking place in some mythical bygone age or in some timeless limbo. Since nothing binds anyone to anything, everybody must always be free to call upon the original position at any time for a reassessment of what is just. In particular, such appeals must be possible right now—upon this very bank and shoal of time. It may be that the current state of nature itself represents a social contract achieved through the use of the original position in the past. But, since nobody is committed to hypothetical agreements reached in the past, nothing prevents the original position being used anew to coordinate the behavior necessary to bring about a further reform. The implications create technical problems, but it is clearly conceptually attractive to be working with a notion of social justice that allows appeals against past judgments at any time.

1 KEN BINMORE, *GAME THEORY AND THE SOCIAL CONTRACT* 39–40 (1994). It is precisely this type of mechanism, which concerns constitutional legitimacy, which Professor Menard’s theory concerning constitutional interpretation takes into account.

45. Cf. U.S. CONST. amend. IV.

46. As Arthur Danto had argued, Menard’s important work in this area has helped us recognize that two seemingly identical charters “can be perceptually indistinguishable and yet be two, not one, in number.” Michael Wreen, *Once is Not Enough?*, 30 BRIT. J. AESTHETICS 149 (1990); see also WAISMAN, *supra* note 5, at 14 (arguing that Menard’s theory of Constitutional interpretation “challenges the notion that translations are necessarily inferior to the original and suggests that the concept of a ‘definitive text’ is a fallacy” and even “suggests that so-called originals are as much

The contrast in style is also vivid. The archaic style of Menard—quite foreign, after all—suffers from a certain affectation. Not so that of his forerunner, who handles with ease the current English of his time.

There is no exercise of the intellect that is not, in the final analysis, useless. A philosophical doctrine begins as a plausible description of the universe; with the passage of the years it becomes a mere chapter—if not a paragraph or a name—in the history of philosophy. In law, this eventual caducity is even more notorious. Like the Magna Carta or the Articles of Confederation, the *original* Constitution—Menard told me—was, above all, an entertaining document; now it is the occasion for patriotic toasts, grammatical insolence and obscene *de luxe* editions. Fame is a form of incomprehension, perhaps the worst.<sup>47</sup>

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‘drafts’ as translations are”).

Indeed, as Arthur Danto goes on to explain, the very existence of Menard’s Constitution, when placed alongside Madison’s Constitution, could

generate classes of indiscernible copies, the one class copies of the work of [Madison], the other copies that of Menard: but these would be copies of different, even importantly different, works, though nothing would be easier than to mistake a copy of [Madison’s Constitution] for a copy of Menard[’s Constitution].

ARTHUR C. DANTO, *THE TRANSFIGURATION OF THE COMMONPLACE* 34 (1981). The question here—and one of great importance for Constitutional interpretation—is whether two seemingly identical copies of two seemingly identical works can, in fact, be radically different from one another.

Leibniz, for one, thought the answer was “no.” As Danto explains,

It is a consequence of a theory of Leibniz that if two things have all the same properties they are identical, and that identity indeed means that, for every property F, *a* is identical with *b* in case, whenever *a* is F, so is *b*. It must follow that if the works in question have all the same properties, they must be identical.

*Id.* at 34–35.

But the very point of Menard’s scholarship is to suggest that they are not identical, thereby “forcing us to avert our eye from the surface of things [e.g., the text of the Constitution], and to ask in what[,] if not surfaces[,] the differences between distinct works must consist.” *Id.* at 35; *see also* WAISMAN, *supra* note 5, at 14 (“Pierre Menard teaches us that, through changes in the context, even the same words in the same language can gain entirely new meanings—and that this can occur, paradoxically, without necessarily losing the old meanings.”).

In his book, Professor Ackerman seems to take this approach, and suggests that, though the text of the Constitution is largely the same now as it was in 1787, we have, in fact, not had *one*, but *three* separate Constitutions since this time: the first, which belonged to the Founders, the second, which stretched from the time of the Reconstruction to the time of the New Deal, and the third, which has endured since the New Deal. *See generally* ACKERMAN, *supra* note 21; Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 *YALE L.J.* 449, 449 (1989) (“[T]he Constitution has, in fact, had many lives. The document is a vessel into which we pour our national debate over the nature of legitimate political authority. That debate has reached different answers at different times. The survival of the formal text should not blind us to the reality of radical change in the meaning of the Constitution.”). Professor Menard agreed in principle with Professor Ackerman’s general approach, but would suggest that there have been an *infinite* number of Constitutions, rather than three. *See generally* ACKERMAN, *supra* note 21.

47. None of this is to suggest, of course, that the structure of government set up by the original

There is nothing new in these nihilistic verifications; what is singular is the determination Menard derived from them. He decided to anticipate the vanity awaiting all man's efforts; he set himself to an undertaking that was exceedingly complex and, from the very beginning, futile. He dedicated his scruples and his sleepless nights to repeating an already extant charter in an alien tongue. He multiplied draft upon draft, revised tenaciously, and tore up thousands of manuscript pages. He did not let anyone examine these drafts and took care they should not survive him. In vain have I tried to reconstruct them.

I have reflected that it is permissible to see in this final Constitution a kind of palimpsest, through which the traces—tenuous but not indecipherable—of our friend's previous writing should be translucently visible. Unfortunately, only a second Pierre Menard, inverting the other's work, would be able to exhume and revive those lost Troys . . . .

“Thinking, analyzing, inventing (he also wrote me) are not anomalous acts; they are the normal respiration of the intelligence. To glorify the occasional performance of that function, to hoard ancient and alien thoughts, to recall with incredulous stupor that the *doctor universalis* thought, is to confess our laziness or our barbarity. Every man should be capable of all ideas and I understand that in the future this will be the case.”

Menard (perhaps without wanting to) has enriched, by means of a new

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Constitution, or the civil liberties protected by the original Bill of Rights, were not, at the time they were enacted, deserving of their many accolades. It is to suggest, however, that what has made these ideas endure was not the document at all, but its internalization, translation (a term Menard preferred to the much more confusing “interpretation”), and promulgation by “We The People.” As Ken Binmore once explained:

All that stands between us and anarchy are the ideas that people carry around in their heads. Our property, our freedom, our personal safety are not ours because Nature ordained it so. We are able to hang on to them, insofar as we do, only because of the forbearance of others.

BINMORE, *supra* note 44, at 4. To the extent that we enjoy property, freedom, personal safety, and myriad other blessings of liberty, we owe these gifts largely to the internalization of the principles first put forth in the Constitution and the Bill of Rights. Only not in the way normally supposed. It is not documents themselves that preserve these blessings of liberty. It is us. Were these documents to be destroyed tomorrow, I do not suppose anyone would seriously contend that the basic structure of our government, or the civil rights we enjoy thereunder, would suddenly collapse or undergo a rapid transformation and reinvention. It is the continual but gradual transformation and reinvention of the ideas captured in these documents that prevents such a fate. That is to say, it is not the Constitution itself that guides our behavior, but our internalization of the *ideas* encapsulated in the *modern* Constitution; a Constitution that has been given teeth not by the delegates of thirteen states along the eastern seaboard over two centuries ago, but by the internal forum of countless individuals spread across fifty states in the year 2009 (for example). The documents may live on forever, but if the *contemporary understanding* of these documents is lost tomorrow, we will have awakened to discover that we have lost our republic.

technique, the halting and rudimentary art of reading: this new technique is that of the deliberate anachronism<sup>48</sup> and the erroneous attribution. This technique, whose applications are infinite, prompts us to go through the *Odyssey* as if it were posterior to the *Aeneid* and the book *On Interpretation* of Professor Henri Bachelier, as if it were by Professor Henri Bachelier. This technique fills the most placid works with adventure. To attribute the *De Legibus et Consuetudinibus Angliæ* to William Blackstone or to Joseph Story, is this not a sufficient renovation of its tenuous spiritual indications?

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48. As one observant commentator has noted, there are temporal and spatial displacements that exist between the time and place a text is written, and when and where it is read. By focusing on shifts in meaning that occur as a text is displaced through time (diachronically) and space (synchronically, geographically), [Professor Menard] is beginning to develop a fluid conception of texts with relation to their contexts and readers.

WAISMAN, *supra* note 5, at 46. Waisman continues: "This line of thought leads [Menard] to a discussion of how the meaning and interpretation of words change, even within the same language, from country to country, from one individual reader to another, and from generation to generation." *Id.* By doing so, Menard "thus emphasizes the importance of the reader and the context of a text (the context in which a text is read, when, and by whom) in determining that text's meaning." *Id.*