Professor Tribe also believes Justice Scalia's notion of ascertaining original intent a fallacy. Citing Justice Scalia's insistence on the immutable nature of the First Amendment guarantee of freedom of speech, Tribe "marvel[s] at his confidence that he has captured the correct – to use his locution, 'original' – meaning" of the text, then asks, "What constitutional provision or instruction does Justice Scalia believe requires, or even supports, any such supposition?"[34] He further argues the futility of attempting to discover original intent in a document "that has a strong transtemporal extension" such as the Constitution:

> Much of the Constitution . . . must be comprehended as law promulgated in the name of a "people" who span the generations. . . . [I]t seems to me quite impossible. . . that. . . meanings frozen circa 1791 can possibly serve as the definitive limits to [First Amendment] freedoms as enforced today. . . . [C]onstitutional provisions sometimes acquire new meanings by the very process of formal amendment. . . . [W]hat we understand as "the Constitution" speaks across the generations, projecting a set of messages undergoing episodic revisions that reverberate backward as well as forward in time. [35]

Justice Breyer might endorse Professor Tribe's position on this point:

> [The Framers] wrote a Constitution that begins with the words "We the People." The words are not "we the people of 1787." Rather their words . . . mean that "it is agreed, and with every passing moment it is re-agreed, that the people of the United States shall be self-governed." [36]

In all of this ado about textualism and originalism, Professor Dworkin points out that Justice Scalia is inconsistent in his argument. Dworkin devotes roughly the latter half of his contribution dismantling Justice Scalia's position, calling it "puzzling" on several points, including his views on the content of the First, Eighth, and Fourteenth Amendments. On the topic of the First Amendment, Dworkin writes:

> Professor Tribe. . . proposes that the First Amendment, for example, be read as abstract. So we may gauge [Justice] Scalia's arguments against the principled reading by studying his response to Tribe's suggestion. [Justice] Scalia argues that the First Amendment should be read not as abstract but as dated – that it should be read, that is, as guaranteeing only the rights it would have been generally understood to protect when it was enacted. . . . He ignores, moreover, an apparently decisive argument against a translation of the First

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[34] *Id.* at 79 and 80.

[35] *Id.* at 85 - 87. Professor Tribe also remarks that some passages of the Constitution are meant to be "purely mechanical", but concedes he has no formula for determining which passages are "mechanical" and which are "transtemporal" by nature. *See id.* at 94.

[36] Breyer, *supra* note 5, at 25.

> Amendment as dated. There *was* no generally accepted understanding of the right of free speech on which the framers could have based a dated clause even if they had wanted to write one. [37]

On the First Amendment protections of speech, Justice Breyer notes that a key difference between government today and the government set into motion by the Framers is the relatively new phenomenon of regulation. Extratextual distinctions must be made in order to balance regulation with sufficient protection for the free exchange of ideas. Neither "regulation" nor "ideas" appear in the text – but these realities, Justice Breyer argues, must be accounted for in Constitutional interpretation.

> [C]ourts normally. . . try to classify the speech at issue, distinguishing among different speech-related activities for the purpose of applying a strict, moderately strict, or totally relaxed presumption of unconstitutionality. Is the speech "political speech," calling for a strong pro-speech presumption, "commercial speech," calling for a mid-range presumption, or simply a form of economic regulation presumed constitutional? Should courts begin this way? Some argue that making these kinds of categorical distinctions is a misplaced enterprise. The Constitution's language makes no such distinction. It simply protects "the freedom of speech" from government restriction. "Speech is speech and that is the end of the matter." But to limit distinctions to the point at which First Amendment law embodies the slogan "speech is speech" cannot work. . . . The democratic government that the Constitution creates now regulates a host of activities that inevitably take place through the medium of speech. Today's workers manipulate information, not wood or metal. And the modern information-based workplace, no less than its more materially based predecessors, requires the application of community standards. . . . Laws that embody these standards obviously affect speech. . . . To treat all these instances alike, to scrutinize them all as if they all represented a similar kind of legislative effort to restrain a citizen's "modern liberty" to speak, would lump together too many different kinds of activities under the aegis of a single standard, thereby creating a dilemma. On the one hand, if strong First Amendment standards were to apply across the board, they would prevent a democratically elected government from creating necessary regulation. . . . [and] would unreasonably limit the public's substantive economic (or social) regulatory choices[,] . . . depriving the people of the democratically necessary room to make decisions, including the leeway to make regulatory mistakes. . . . On the other hand, to apply across the board uniform First Amendment standards weak enough to avoid the shoals of *Lochner* would undermine the First Amendment so much that it would not offer sufficient protection for the free exchange of ideas necessary to maintain the health of our democracy. Most scholars, including "speech is speech" advocates, consequently see a need for distinctions.[38]

Each of these arguments on the First Amendment sheds light on the issue of Constitutional interpretation as a whole. On the surface, it is simply impossible to parse controversial "soft money" campaign contributions as a form of speech, but Justice Breyer helps

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[37] Scalia, *supra* note 1, at 123-124 (citation omitted).

[38] Breyer, *supra* note 5, at 39-42. *See also* 19 and *id.,* at 115-120 (on textualism and originalism)

us understand not only that a relationship exists[39], but shows us why this relationship is important: Relationships such as this reinforce the differences in the nature of society as it has evolved since the Constitution was ratified in 1789. Consider Justice Breyer's example of privacy concerns, which he describes as a legal problem arising in part from "the need for already complicated legal regimes to accommodate new technologies":

> The technological circumstance consists of the fact that advancing technology has made the protective effects of present law uncertain, unpredictable, and incomplete. Video cameras now can monitor shopping malls, schools, parks, office buildings, city streets, and other places that current law had left unprotected. Scanners and interceptors can overhear virtually any electronic conversation. Thermal-imaging devices can detect from outside the home activities taking place within it. Technology now provides us with the ability to observe, collate, and permanently preserve a vast amount of information about individuals – information that the law previously did not prohibit people from collecting but which, in practice, was not readily collectible or easily preserved. These technological changes have altered the practical, privacy-related effect of the set of previously existing laws.[40]

It has been the task of the federal judiciary to sometimes "make square pegs fit into round holes" over the course of those 216 years. Nothing about the evolution of our society is going to intrinsically streamline situations such as those in the future. Terms as basic as "speech" and "privacy", and associated protections guaranteed by the First Amendment, must be amended to include all manner of expression which simply did not exist during the Constitutional Conventions. Professor Dworkin shows us that the First Amendment must be interpreted via the abstract method because no such legislation existed at the time upon which the clause could be based. Consideration of context, the use of which both Justice Breyer and Professor Glendon advocate, appear to be capable of providing important guidance for those tasked with such an important responsibility. We the people must rely upon the legislature to make laws to serve society, and must rely upon the federal judiciary to interpret the Constitution as faithfully to the letter as possible while being mindful of how far we've traveled as a nation 229 years young. This is the essence of the difference between my position and that of Justice Scalia.

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[39] *Id.,* at 43.

[40] *Id.,* at 67 – 68.