

# *The Constitution as Code*



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*Von*

*P. R. Baier*

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*The Scholar, Teacher, Judge,  
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*Teaching Justinian's Corpus, Scalia's  
Constitution, and François Géný,  
Louisiana and Beyond<sup>\*</sup>  
par la constitution, mais au-delà de la  
constitution.  
von P. R. Baier.<sup>\*\*</sup>*

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<sup>\*</sup> To the memory of John Henry Wigmore, Editorial Chair of the Association of American Law School's Modern Legal Philosophy Series (1917). This treasure of continental legal philosophy translated into English guided Benjamin Nathan Cardozo in composing his Storrs Lectures at Yale, viz., THE NATURE OF THE JUDICIAL PROCESS (1921), and opened my eyes to the epistemology of the Constitution as Code. I read volume IX of this series, THE SCIENCE OF LEGAL METHOD, when I arrived at Louisiana State University, Paul M. Hebert Law Center, ca. 1972. A generation of teaching and scholarship in the field of constitutional interpretation has confirmed to my mind the link between Code and Constitution that Wigmore first brought to my attention by way of the great gift of Rudolph von Jhering and François Géný in English translation.

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## 1. *Einleitung.*

*Justinian ermahnte seine Professoren der Rechtswissenschaften, die Wahrheit des Corpus Juris zu lehren. Es war ihnen verboten, über den Text hinaus zu gehen.*

My German is a tribute to Rudolph von Jhering of Göttingen, one of my Mount Royal Muses of Mount Helicon.<sup>1</sup> I had better start over in English:—

Justinian admonished his professors of law, *Justinian ermahnte seine Professoren der Rechtswissenschaften*, to teach the truth of the Corpus Juris, *die Wahrheit des Corpus Juris zu lehren*.

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mail: Paul.Baier@law.lsu.edu This paper was read at the Fourth Worldwide Congress of Mixed Jurisdiction Jurists, 24-26 June, 2015, Montreal, Canada. I have borrowed heavily from my earlier canvasses of Justice Harry A. Blackmun and Justice Antonin Scalia in works cited herein. Montreal is an ideal *civitas* from which to sound my ideas anew—in search of lost time. I give my thanks to Mr. Justice Nicholas Kasirer, *Cour d'appel du Québec*, to Olivier Moreteau, Director of the Center of Civil Law Studies at LSU Law Center, to A. N. Yiannopoulos, Eason-Weinmann Chair Emeritus, Tulane University School of Law, and to Tarkan Orhon, of Göttingen, *meinem wissenschaftlichen Mitarbeiter*, for help with the books and for tightening up my German.

<sup>1</sup> I invite the reader to trek to the top of Mt. Helicon with a great civilian scholar, jurist, and professor, A. N. Yiannopoulos, “Megas Yiannopoulos,” Emeritus of Tulane University School of Law (New Orleans), who as my colleague at LSU in my early years of teaching nursed me on the milk of Max Reinstein (Chicago), Albert Erensweig (Berkeley), and Gerhart Kegel (Cologne). I sat wide-eyed in his Civil Law System course at LSU Law School, *ca.* 1972. After forty years’ friendship, I paid homage to him at a Louisiana Law Review banquet, *viz.*, *The Muses of Mount Helicon* (March 21, 2014), in Paul R. Baier, SPEECHES 258 (Louisiana Bar Foundation 2014).

They are forbidden to reach beyond it, *Es war ihnen verboten, über den Text hinaus zu gehen*. Here are Justinian's words in English. I translate from the Latin:

We say this because we have heard that even in the most splendid *civitas* of Alexandria and in that of Caesarea are unqualified men who take an unauthorized course and impart a spurious erudition to their pupils; we warn them off these endeavors, under the threat that they are to be punished by a fine of ten pounds of gold and be driven from the *civitas* in which they commit a crime against the law instead of teaching it.<sup>2</sup>

Justice Antonin Scalia is a contemporary Justinian insisting that his colleagues on the Supreme Court of the United States have committed crimes against the Constitution by going beyond its text as originally understood by its Framers of 1787, by those who added the Bill of Rights of 1791, and by the citizens of the several states who ratified both.

In other words, Mr. Justice Scalia has made a fortress out of the dictionary.<sup>3</sup>

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<sup>2</sup> S. P. Scott's translation THE CIVIL LAW, *infra*, note 68, is my standby pony.

<sup>3</sup> *Contra*, Judge Learned Hand, *Cabell v. Markham*, 148 F.2d 737, 739 (1945): "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes [or constitutions] always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Another New York jurist, Benjamin Nathan Cardozo, has said the same thing about constitutional interpretation in his immortal classic *The Nature of the Judicial Process*. See Part 3f., *infra*.

My task (*meine Aufgabe*) in the *civitas* of Montreal on the stage of the Fourth Worldwide Congress of Mixed Jurisdiction Jurists is to invoke the letter and spirit of Rudolph von Jhering and François Géný against the spurious erudition of Antonin Scalia, the first Roman on the Supreme Court of the United States.

In a phrase: “The Constitution as Code.”

First, the letter and spirit of von Jhering, from his *Unsere Aufgabe* (1857): “*Durch das römische Recht, über das römische Recht hinaus.*”<sup>4</sup> “Through the Roman law, but beyond the Roman law.” This, at a time when Germany was without a code. The jurist’s task, von Jhering realized, was to reshape the old Roman law to fit the actuality of his times.

Next, François Géný. One hundred years after the *Code Civil*, Géný’s *Méthode d’Interprétation* trumpets “life after text”<sup>5</sup>:

One has tried to replace the syllogistic and dogmatic method, which deduced from the codes a completely fictitious and unreal “life” incapable of development and fixed definitely at the moment the logical construction was completed, by a method which is external rather than only internal as the first was, and the characteristic of which is the constant revival of

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<sup>4</sup> Rudolph von Jhering, *Unsere Aufgabe* in I JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 52 (F. E. von Gerber, Rudolph von Jhering eds., Mauke, 1857).

<sup>5</sup> “Of course, it pains Justice Scalia to see the Court surpassing its bounds. But, truth to tell, the Court has never bound itself to text or original meaning. Life after text frees the judge. *La vie après le texte libère le juge.*” Paul R. Baier, *The Supreme Court, Justinian, and Antonin Scalia: Twenty Years in Retrospect*, 67 La. L. Rev. 489, 514 (2007).

codes, not by their own substance, but through the introduction of all the elements of dynamic life itself.<sup>6</sup>

This, from Raymond Salleilles's *Preface* to Géný's great book.<sup>7</sup>

Salleilles concludes his *Preface* by saying, "I could not end with better words than those inspired by an analogous phrase of Jhering, which is the focal point of the whole book of Mr. Géný: 'Through the Civil Code; but beyond the Civil Code.'"<sup>8</sup>

## 2. *Aix-en-Provence.*

Next, via Air France, we sojourn from Montreal to Aix-en-Provence, France, an ancient Roman outpost for the troops. I taught classes there with Justice Harry A. Blackmun of the Supreme Court of the United States.

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<sup>6</sup> Raymond Salleilles, *Preface to François Géný, METHODE d'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (1899; 2d ed. 1919), Jaro Mayda trans. (Louisiana State Law Institute 1963), p. LXXXI.

<sup>7</sup> Professor Marie-Claire Belleau, of the Université Laval, Québec, renders both Salleilles and Géný as "*juristes inquiets*" in her vibrant reconstruction of their views, viz., *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 Utah L. Rev. 379. Thanks to Nicholas Kasirer for bringing this article to my attention.

<sup>8</sup> Salleilles, *supra* note 6, *Preface*, at LXXXVI.

We were together at Aix-Marseille-III, its *Faculté de droit*, the school of Portalis, progenitor of the *Code Civil*:—“The Codes of nations are the *fruit of the passage of time*; but *properly speaking*, we do not make them.”<sup>9</sup>

Portalis’s foresight, I trust, is familiar to all of you. I owe my first reading of him to my French colleague, friend, and mixed-jurisdiction jurist Professor Alain Levasseur—his enduring *Code Napoleon or Code Portalis*?

The constitution is a code, is it not?

Levasseur’s article sparked my teaching of the United States Constitution as Code. Liberty is open-ended; the judge must give it life. *Par la constitution, mais au-delà de la constitution*.

At Aix, Justice Blackmun voiced the same insight: “No body of men 200 years ago could determine what our problems are today. That is, I suppose, what we have courts for”—“to construe the Constitution in the light of current problems.”<sup>10</sup> We talked anew of the timeless problem of judicial interpretation of written texts, from Napoleon’s *Code* to America’s Constitution, aside the aged fountains of Aix where Portalis, *le père du code civil*, played as a little boy.

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<sup>9</sup> *The Preliminary Discourse of Portalis* (M. Shael Herman, trans.), quoted in Alain Lavesseur, *Code Napoleon or Code Portalis?*, 43 *Tulane L. Rev.* 762, 773 (1969).

<sup>10</sup> Hearing Before Comm. on the Judiciary, United States Senate on the Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States, 91st Cong. 2d Sess. 35 (1970).

This was the summer of 1986, the year of *Bowers v. Hardwick*.<sup>11</sup>

You remember *Bowers v. Hardwick*: The Supreme Court sustained the constitutionality of Georgia's sodomy law as applied to two adult homosexual males caught *in flagrante dilecto* in the privacy of their own bedroom by a wandering policeman. Mr. Justice Blackmun dissented.

"We cannot live with original intent,"<sup>12</sup> he told our *Cours Mirabeau* students.

The Justice and I returned to Aix in 1992, the year of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>13</sup> which saved *Roe v. Wade*<sup>14</sup> by a hair. More on *Roe v. Wade* and François Géný a little later in *meine Aufgabe nach von Jhering*.

Justice Antonin Scalia, "*Il Giudice Justinianus*,"<sup>15</sup> roars in his dissent in *Roe*: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."<sup>16</sup>

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<sup>11</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>12</sup> The quotation is taken from the transcript of the sound recordings of our Aix 1992 classes (hereinafter cited as Aix '92 Transcripts) (recorded with Justice Blackmun's permission; tapes and transcript on file with the author).

<sup>13</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>14</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>15</sup> My characterization, in Paul R. Baier, *The Supreme Court, Justinian, and Antonin Scalia*, *supra* note 5, at 521.

<sup>16</sup> *Planned Parenthood*, *supra* note 13, at 1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

By way of going through Salleilles but beyond him, let me quote the preface to our teaching materials at Aix, bound in France's tricolor red, white, and blue, entitled *Constitutional Interpretation: Les procédés d'élaboration* (1986):

The American Constitution, like the French Civil Code, consists of words on paper. Constitutional interpretation begins with words but almost always travels beyond text to the realm of ideas. Whether we shall have more or less liberty, more or less privacy, more or less equality, depends on the work ways of the judge.<sup>17</sup>

Our materials paid special attention to the development of the right of privacy, from *Griswold v. Connecticut* to *Roe v. Wade*, to *Bowers v. Hardwick*, and beyond.

We promised our students a few continental comparisons in class. We advised them that our materials were aimed at exploring the role of the judge and the place of intellectual personality and process in giving shape to the law of the Constitution.

We borrowed the subtitle of our Aix teaching materials from Gény's *Les procédés d'élaboration du droit civil*,<sup>18</sup> a lecture delivered at Nancy in 1910.

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<sup>17</sup> Harry A. Blackmun & Paul R. Baier, *Preface to CONSTITUTIONAL INTERPRETATION: PROCÉDÉS D'ÉLABORATION* vi (June/July 1992) (teaching materials for a summer course on American Constitutional Law at Aix-en-Provence, France) (on file Law Library, Paul M. Hebert Law Center, Baton Rouge, La., USA).

<sup>18</sup> François Gény, *Les procédés d'élaboration du droit civil* (1910), in *LES MÉTHODES JURIDIQUES: LEÇONS FAITES AU COLLÈGE LIBRE DES SCIENCES SOCIALES en 1910*, pp. 174, 196 (Henry Barthélemy ed., 1911).

At the end of his little book Gény emphasizes the role, which he suggests was neglected by theoreticians of his time, *des procédés intellectuels et de la terminologie dans l'élaboration juridique*,<sup>19</sup> the role of the intellectual process and of the terminology in juridical elaboration.

Gény of course was talking about the French Civil Code. His greatest work was his study of the methods of interpretation and the sources of private positive law, *Méthode d'interprétation et sources en droit privé positif*, which was published in 1899 and translated into English by Jaro Mayda under the auspices of the Louisiana State Law Institute in 1963. Only because I teach law in Louisiana, did I receive the gift of Gény.

Imagine my joy when an esteemed scholar among worldwide jurists, Nicholas Kasirer, quondam *doyen* of McGill University Law School, Montreal, now Mr. Justice Kasirer of the *Cour d'appel du Québec*, mentioned my name in trumpeting to the world that:

Recently one scholar linked U.S. Supreme Court Justice Harry A. Blackmun's thinking on the Bill of Rights to Gény's *libre recherche scientifique*, citing Jaro Mayda as the linguistic go-between.<sup>20</sup>

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<sup>19</sup> *Id.*, at 196.

<sup>20</sup> Nicholas Kasirer, *François Gény's libre recherche scientifique as a Guide for Legal Translation*, 61 La. L. Rev. 331, 350 n.74 (2001).

True, my place was only in a Kasirer footnote. But I thank Justice Kasirer for his encouragement as I continue to plead the case for seeing Gény's *Méthode* at work in constitutional interpretation in the United States, or, indeed, at Ottawa.

There is a universality in going beyond text to shape the living law—either of France's *code civil*, America's bill of rights, or Canada's charter of rights and freedoms.

Following Gény and Kasirer, I offer my own Montreal sound<sup>21</sup>: *Par la constitution, mais au-delà de la constitution*.

### 3. Beweise.

Now to the proofs. My itemization lacks elaboration. This is on purpose. “*Nous faisons une théorie et non un spicilège.*”<sup>22</sup> This from Holmes's preface to his great book, *The Common Law* (1881).

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<sup>21</sup> Cf. Nicholas Kasirer, *That Montreal Sound: The Influence of French Legal Ideas and the French Language on the Civil Law Expressed in English* (37th John H. Tucker, jr., Lecture in Civil Law, Paul M. Hebert Law Center, Louisiana State University, 4/10/14, forthcoming in 8 J. Civil Law Studies, no. 2 (2015).

<sup>22</sup> Oliver Wendell Holmes, Jr., *THE COMMON LAW* (1881), *Preface*, p. iv, quoting Lehuëron.

I haven't written a great book. Perhaps my Montreal composition *à la* Gén<sup>y</sup> is a start. Here is my list of scholarly notes. Jaro Mayda's are breathtaking.<sup>23</sup> I only offer a few.

**a.** Madison's ninth amendment to the bill of rights authorizes going beyond the enumeration of rights to vouchsafe others retained by the people.

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<sup>23</sup> Mayda's introduction to his translation of Gén<sup>y</sup>'s *MÉTHODE* includes 267 footnotes, a display of staggering erudition. See "Gén<sup>y</sup>'s Méthode after 60 Years: A Critical Introduction," in François Gén<sup>y</sup>, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (1899; 2d ed. 1919) (Jaro Mayda trans., Louisiana State Law Institute 1963), *Introduction*, pp. v-LXXVI. Thereafter, in progression, Mayda publishes *FRANÇOIS GÉNY AND MODERN JURISPRUDENCE* (Louisiana State University Press, 1978), with endnotes I-XCIV, pp. 103-228, and with a sympathetic *Introduction* by Justice Albert Tate, Jr., of the Louisiana Supreme Court. Justice Tate was duly impressed:

For me, the important perceptions included new insights into viewing the law-in-being as involving a sharing rather than a separation of law-creating powers between the legislature and the judiciary, at least in the development of private-law precepts, and also, by reason of explicit and reasoned formulation, into the judge's duty to do justice without a specific text as being an integral (although exceptional) part of the life of the law.

*Id.*, p. xix. The present author's *théorie de Gén<sup>y</sup>* goes beyond private to public law precepts—*par la constitution, mais au-delà de la constitution*—with thanks to Judge Tate for his encouragement and friendship over the years.

A deep thinker before me in Louisiana, Tulane University Law School's Mitchell Franklin,<sup>24</sup> linked the ninth amendment to civilian methodology—through the Constitution but beyond the Constitution.

The judge goes through the text but beyond the text in order to secure the fundamental rights of the citizen.<sup>25</sup> *Griswold v. Connecticut*<sup>26</sup> is an exemplar.

The right of privacy is fundamental; it is not textual. The court gives it life. Franklin is right. To read him is to be astounded.<sup>27</sup>

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<sup>24</sup> “Mitchell Franklin came to Tulane University School of Law in 1930 as a young New York lawyer with impeccable credentials and no teaching experience. He retired from Tulane in 1967 with an enviable reputation as a teacher, lawyer, philosopher, historian, political scientist, essayist, photographer, and colorful personality.” The Board of Editors, *Mitchell Franklin: A Tribute*, 54 Tulane L. Rev. 809 (1980). “He postulates that, under the ninth amendment, novel constitutional problems must be solved by the analogical development of constitutional texts in the civilian tradition, and not by arbitrary, subjective judicial determination.” *Id.*, at 809-10.

<sup>25</sup> Mitchell Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 Tulane L. Rev. 487 (1966).

<sup>26</sup> 381 U.S. 479 (1965).

<sup>27</sup> See, e.g., Mitchell Franklin, *Concerning the Influence of Roman Law on the Formation of the Constitution of the United States*, 38 Tulane L. Rev. 621 (1964). For real power in a young scholar, see Franklin's contribution to *RECUEIL D'ÉTUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY* (1977), TOME II, TITRE 1, Ch. III, *M. Gény and juristic Ideals and Method in the United States*, pp. 30-45. Franklin says of the allocation of legislative and judicial authority, and the problem of juridical method involved, “The point of departure will have to be M. Geny's *Méthode d'interprétation*, which is the flower of 2,000 years of Romanist thinking upon the problem of juridical

Thomas I. Emerson, a Yale Law Professor and common law lawyer, who won *Griswold v. Connecticut* in the Supreme Court of the United States, is more down to earth:

The precise source of the right of privacy is not as important as the fact that six Justices found such a right to exist, and thereby established it for the first time as an independent constitutional right. It was a bold innovation.<sup>28</sup>

Here, whether he knows it or not, Emerson is echoing von Jhering and Géný.

**b.** Recall Chief Justice John Marshall's *aperçu*, "In considering this question, we must never forget it is *a constitution* we are expounding."<sup>29</sup> The question at hand was whether Congress could charter a national bank. Marshall held yes, relying on the necessary and proper clause. I am sure Géný would agree. France has its *banque nationale*.

But for purposes of my *composition de Montreal*, F. Géný would focus on John Marshall's italics, "*a constitution* we are expounding."

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method, a problem hardly yet perceived in America, a problem calling for the régime of the university law school." *Id.*, at 45. See also Philip Moran, *Mitchell Franklin and the United States Constitution*, 70 *Telos* 26, 36, 37 (Winter 1986-87): "Franklin considers the ninth amendment a use of the method of analogy in Roman law"; "as a dialectical solution to the problem of how to negate or extend the Constitution while preserving existing rights."

<sup>28</sup> Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 *Mich. L. Rev.* 219 (1965).

<sup>29</sup> *McCulloch v. Maryland*, 4 *Wheat.* 316, 407 (1819) (Chief Justice John Marshall's italics, "*a constitution*").

Even in the absence of a necessary and proper clause, Gény would sustain going beyond the text of enumerated powers so as to sustain a national bank. *Banque national; banque de les états-unis*.

c. Enter Mr. Justice Holmes, what he said about reading the Constitution of the United States in *Missouri v. Holland*.<sup>30</sup> You remember the case dealt with migratory birds on the wing over the sovereign state of Missouri.

The State claimed that Congress had no power to protect such migratory birds flying sky high over its sovereign soil.

Holmes, a wise owl perched on Mt. Olympus, sided with the U.S. game warden under Congress's Migratory Bird Treaty Act, *viz.*: “[I]t is not lightly to be assumed that in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.”<sup>31</sup> Holmes goes beyond text:

[W]hen we are dealing with words that are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>32</sup>

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<sup>30</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>31</sup> *Id.*, at 433.

<sup>32</sup> *Id.*

**d.** The same year François Géný delivered his lecture at Nancy, *Les procédés d'élaboration du droit civil* (1910), Justice Joseph McKenna at Washington, D.C., elaborated the meaning of the eighth amendment of the United States Constitution, which prohibits “cruel and unusual punishment.” This is a contemporaneous instance of the constitution as code. I mean *Weems v. United States*.<sup>33</sup>

The Court rescued Weems from a punishment of “*cardena temporal*” with harsh ancillary penalties for stealing 416 pesos—a pittance—from the public till.

The punishments, said the Court “excite wonder in minds accustomed to a more considerate adaptation of punishment to the degree of the crime.”<sup>34</sup>

You can read the details of the punishment in the report (217 U.S. 349). The important point here is that the majority went beyond the text of the amendment, or found within its spirit,<sup>35</sup> a precept of justice given voice for the first time:

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<sup>33</sup> *Weems v. United States*, 217 U.S. 349 (1910) (per McKenna, J.).

<sup>34</sup> *Id.*, at 365.

<sup>35</sup> “Spirit” is purpose, von Jhering’s *Zweck im Recht* (Göttingen 1877). Or, if you will, “penumbras,” “emanations” of Justice Douglas’s *méthode et technique* in *Griswold v. Connecticut*. Spirit guides the judge in reading text and in going beyond it in order to adapt the law to current social mores, to current reality. *Cf.* *Lawrence v. Texas*, 539 U.S. 558 (2003) (per Kennedy, J.); *Carter v. Canada (Attorney General)*, 2015 SCC 5 (Feb. 6, 2015); *Hudson v. McMillian*, 503 U.S. 1 (1992) (extending the eighth amendment to cover prison conditions in Louisiana’s state penitentiary). Justice Thomas’s dissent (joined by Justice Scalia) makes the point of this paper: “The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation.” 503 U.S.,

Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportional to the offense.<sup>36</sup>

Beyond the eighth amendment, the proportionality principle is a fundamental measuring rod of the constitutionality of laws that impinge on individual rights.

This is true of the decisions of the Supreme Court of the United States, of the *Bundesverfassungsgericht*, of the “fundamental principles of justice” that give life to the Canadian Charter of Rights and Freedoms, *La Charte canadienne des droits et libertés*.

I am sorry to report to you that Louisiana’s Justice Edward Douglass White, who succeeded Melville Fuller as Chief Justice of the United States in 1910, dissented in *Weems*. A jurist of wide learning and large girth, E. D. White’s dissent in *Weems* is Justinian come to life:

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at 28. But it has been. *Durch das römische Recht, über das römische Recht hinaus*.

<sup>36</sup> 217 U.S., at 366-367.

Turning aside, therefore, from mere emotional tendencies and guiding my judgment alone by the aid of the reason at my command, I am unable to agree with the ruling of the court. As, in my opinion, that ruling rests upon an interpretation of the cruel and unusual punishment clause of the Eighth Amendment, never before announced, which is repugnant to the natural import of the language employed in the clause, and which interpretation curtails the legislative power of Congress to define and punish crime by asserting a right of judicial supervision over the exertion of that power, in disregard of the distinction between the legislative and judicial departments of the Government, I deem it my duty to dissent and state my reasons.<sup>37</sup>

In other words, Joseph McKenna should be fined ten pounds of gold and driven from the *civitas* of Washington, D.C.

Twenty-eight pages of E. D. White's magisterial reasoning in *Weems* follow, at the heart of which is White's rejection of the conception "that by judicial construction constitutional limitations may be made to progress so as to ultimately include that which they were not intended to embrace . . . ."<sup>38</sup>

Mr. Justice Holmes joined White's dissent. This is positivism writ large in denial of the constitution as code.

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<sup>37</sup> 217 U.S., at 385 (White, J., dissenting).

<sup>38</sup> *Id.*, at 411.

The jurisprudence of the eighth amendment since 1910, I am happy to report, is convincing proof that Géný’s technique is alive and functioning in the constitutional jurisprudence of the Supreme Court of the United States—whether the justices realize it or not.<sup>39</sup>

When I composed our teaching materials for Aix I asked Justice Blackmun in chambers whether he had ever heard of François Géný. His answer? “No.”

e. As I teach it, Justice Harry A. Blackmun’s opinion for the Court in *Roe v. Wade* is an exemplar of von Jhering’s *Zweck im Recht* (1877) and Géný’s *libre recherche scientifique* (1899).

His lonely search at the Mayo Clinic on abortion and his cardigan reading of “liberty” represent a classical instance of Jhering’s purpose in law and quasi legislation in the style of Géný.

You are free to question my assertion, of course. But first you must read the 71 pages of Professor Jaro Mayda’s critical introduction to his English translation of Géný’s *Méthode*, the 460 pages of its translated text, and the 109 pages of an epilog added by Géný to his second edition—640 pages in all.

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<sup>39</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002): “[I]n light of the dramatic shift in the legislative landscape that has occurred in the past 13 years” [since *Penry v. Lynaugh*, 492 U.S. 302 (1989)], held: the execution of mentally retarded criminals is “cruel and unusual punishment”; *Roper v. Simmons*, 543 U.S. 551 (2005), abandoning *Stanford v. Kentucky*, 492 U.S. 361 (1989), and exercising “our own independent judgment,” held: execution of juvenile offenders younger than 18 who have committed capital offences is “cruel and unusual punishment” in violation of the eighth amendment; *Graham v. Florida*, 560 U.S. 48 (2010), held: “The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”

More conveniently, at this Worldwide Congress of Mixed Jurisdiction Jurists, I proffer Jaro Mayda himself as expert witness. He would be delighted, I assure you, to appear on the stage of Montreal's worldwide Congress of mixed-jurisdiction jurists.

In the presence of serious social problems (*e.g.*, the cost to society of unwanted and uncared-for children, the high health and life risks resulting from surreptitious abortion practices, the disproportionate burden carried in both instances by the underprivileged socioeconomic groups), the Court finds a teleological gap (created partly by existing legislation). It fills it with reference to the best available medical information about the viability of the fetus as an independent unit of life. And it rules according to the mother's right of decision.<sup>40</sup>

Mayda's critique *à la* Gén $\acute{e}$ y of Justice Harry Blackmun's opinion of the Court in *Roe v. Wade* was rendered in 1978.

Justice Blackmun's teaching of the abortion decision at Aix-en-Provence in 1986, and again in 1992, as I have described it elsewhere,<sup>41</sup> affirms Professor Mayda's assessment.

**f.** The fourteenth amendment guarantees liberty, equality, due process of law. These are words that do not define themselves. Judges fill in these linguistic gaps. One of our greatest judges, Benjamin Nathan Cardozo, taught the connection between code and constitution in his Storrs lectures at Yale. They have come down to us as Cardozo's immortal classic *The Nature of the Judicial Process* (1921).

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<sup>40</sup> Jaro Mayda, FRANÇOIS GENY AND MODERN JURISPRUDENCE 86 (1978).

<sup>41</sup> Paul R. Baier, *Mr. Justice Blackmun, Reflections from the Cours Mirabeau*, 43 Am. Univ. Law Rev. 707 (1994).

Hear him anew: “Today a great school of continental jurists is pleading for a still wider freedom of adaptation and construction.”<sup>42</sup>

The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision—“libre recherche scientifique.” That is the view of Gény and Ehrlich and Gmelin and others. Courts are to “search for light among the social elements of every kind that are the living force behind the facts they deal with.”<sup>43</sup>

Cardozo adds, quoting Ehrlich’s *Freie Rechtsfindung und freie Rechtswissenschaft* (1903), “[T]here is no guarantee of justice except the personality of the judge.”<sup>44</sup> Harry A. Blackmun comes to mind.

And what of the Constitution as Code? Here is what Cardozo thinks of going through the constitution but beyond it: “The same problems of method, the same contrasts between the letter and the spirit, are living problems in our own land and law.”<sup>45</sup> Then comes this: “Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. *The great generalities of the constitution have a content and a significance that vary from age to age.*”<sup>46</sup>

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<sup>42</sup> Benjamin Nathan Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 42 (Yale Univ. Press, 1921).

<sup>43</sup> *Id.*, at 16.

<sup>44</sup> *Id.*, at 16-17.

<sup>45</sup> *Id.*, at 16.

<sup>46</sup> *Id.*, at 17 (emphasis added).

“No one shall be deprived of liberty without due process. Here is a concept of the greatest generality,”<sup>47</sup> says Cardozo. “Yet it is put before the courts *en bloc*. Liberty is not defined. Its limits are not mapped and charted. How shall they be known.”<sup>48</sup>

Cardozo’s answer is to see the ideal of liberty as a “fluid and dynamic conception,” which “must also underlie the cognate notion of equality.”<sup>49</sup>

“From all of this, it results that the content of constitutional immunities is not constant but varies from age to age.”<sup>50</sup>

At this point, I can hear Justice Scalia roaring at me: “*Sed truffa est.*” “But this is nonsense.”

No it isn’t. Cardozo—Scalia’s New York predecessor on the Court—borrowing directly from Géný, tells us:

The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of the lawmakers whose collective will has been declared. It supplements the declarations, and fills the vacant spaces, by the same processes and methods that have built up the customary law.<sup>51</sup>

Constitutional law has been built up the same way: “The Constitution as Code.” Or, *à la Géný*:—“The Civil Law of the Constitution.”

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<sup>47</sup> *Id.*, at 76.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, at 81-82.

<sup>50</sup> *Id.*, at 82-813.

<sup>51</sup> *Id.*, at 17.

g. Justice Harry A. Blackmun's dissent in *Bowers v. Hardwick* (1986) was seventeen years ahead of its time. *Bowers* has been overruled by *Lawrence v. Texas* (2003).

Liberty evolves<sup>52</sup>:—judicial interpretation in “*le sens évolutif*.”<sup>53</sup>

Justice Anthony Kennedy's opinion for the Court is another item of proof. His peroration in *Lawrence v. Texas* is an echo of Portalis, of von Jhering, of Géný:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known of the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>54</sup>

Enough of proofs, enough of *spicilège*. What of *théorie*?

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<sup>52</sup> “Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless ‘becoming.’” *Id.*, at 28.

<sup>53</sup> “The President of the highest French Court, M. Ballot-Beaupré, explained, a few years ago, that the provisions of the Napoleonic legislation had been adapted to modern conditions by a judicial interpretation in ‘*le sens évolutif*.’” *Id.*, at 84.

<sup>54</sup> *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (per Kennedy, J.).

### A. *Siena.*

Here it is necessary that we board the *TGV*, depart from Aix-en-Provence, and travel to Siena, Italy, by way of the Uffizi Museum in Florence. Justice Scalia is waiting for us at the University of Siena.

Good teaching requires a clash of views. At Siena Justice Scalia held court on the subject of separation of powers and the rule of law for Tulane University School of Law. This was July 1991. I tagged along, prepared our teaching materials, and joined him in class. Chief Judge Stephen Breyer (as he then was) by happenstance was in Europe. He joined us. He sat on the backbench.

These two jurists voice competing theories of constitutional interpretation.<sup>55</sup>

Justices Scalia and Breyer are foils. They have captivated scholars of the Supreme Court for two decades.

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<sup>55</sup> Compare Antonin Scalia, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 44-45 (Amy Gutterman ed., 1997) (“Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution.”), with Stephen Breyer, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5-6 (2005) (“My thesis . . . finds in the Constitution’s democratic objective not simply restraint on judicial power or an ancient counterpart of more modern protection, but also a source of judicial authority and an interpretative aid to more effective protection of ancient and modern liberty alike.”)

In our Siena classroom Professors Scalia and Breyer reminded me of the competing schools of thought in the early Roman Principate.<sup>56</sup> The Sabinians, founded by Capito, were firm adherents of the empire inclined to follow tradition and to rest upon authority. The Proculians, on the other hand, founded by Labeo, were republicans of independent mind and prone to innovation.<sup>57</sup> To me, Justice Scalia is a good Sabinian, Justice Blackmun a soft-spoken Proculian.

*Il Giudice Justinianus*, Justice Antonin Scalia, would scoff at the idea that François Géný has any role to play in elaborating the Unites States Constitution.

Mr. Justice Scalia would reject out of hand, and bluntly, his friend Herr Baier's *théorie de Montréal*—"par la constitution, mais au-delà de la constitution." This is foreign nonsense to the Scalianistae.

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<sup>56</sup> Peter Stein, *The Two Schools of Jurists in the Early Roman Principate*, 31 Cambridge Law J. 8 (1972).

<sup>57</sup> H. F. Jolowicz & Barry Nicholas, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 384 (3d ed. 1972), details the two "schools" of jurists—the Proculians and the Sabinians: "Pomponius says that Labeo and Capito (in the time of Augustus) 'first created what may be called two sects,' and that whereas Labeo was a very able man, learned in many branches of knowledge and an innovator in law, Capito held fast by traditional doctrines." *Id.* at 378.

In one of his more sarcastic opinions, Justice Scalia's razor mimics Chief Justice John Marshall: "We must never forget that it is *a Constitution for the United States* that we are expounding."<sup>58</sup>

Expounding the *United States* Constitution, Justice Scalia exclaims in his *Lawrence v. Texas* dissent:

What Texas has chosen to do is well within the range of democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court impatient of democratic change.<sup>59</sup>

You will remember Justinian's warning to his professors of law, Theophilus, Dorotheus, Isidorus, Anatolius, and Salaminius, to mention a majority of five, at the outset of the Digest. They are to teach the truth of the *Corpus Juris*. They are forbidden to reach beyond it.

Let me recall to your minds the proportionality principle of the eighth amendment. In *Roper v. Simmons*,<sup>60</sup> the Supreme Court held that the eighth amendment forbids the death penalty for a seventeen-year-old who bound and gagged a woman with duct tape, tied her hands and feet together with electrical wire, and threw her from a bridge above the Meramec River, drowning her in the water below.

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<sup>58</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) (emphasis added). A plurality of the Court, per Stevens, J., citing the law of foreign nations, held that the eighth amendment prohibits the execution of persons under the age of fifteen at the time of the offense.

<sup>59</sup> 539 U.S., at 603 (Scalia, J., dissenting).

<sup>60</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

Roars our lion-hearted friend Justice Scalia, jaws wide open:

Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision of 15 years ago was *wrong*, but that the Constitution *has changed*.<sup>61</sup>

Justice Kennedy's opinion of the Court relies on the views of foreign jurisdictions in outlawing the death penalty for minors. Antonin Scalia is not impressed: "I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners. I dissent."<sup>62</sup>

### 5. *Una spina nel piede.*

It fell to me to write our Siena examination questions.

Seeing an exquisite sculpture in the Uffizi Museum of a little boy pulling a spine out of his foot gave me an idea. I told our students about the sculpture, "*Una spina nel piede.*"

Question No.1 asked the students to write an essay demonstrating how Justice Antonin Scalia has proved himself a spine in the foot of the Court. Scalia thought this a clever question. He has von Jhering's quick wit.<sup>63</sup>

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<sup>61</sup> *Id.*, at 608 (Scalia, J., dissenting).

<sup>62</sup> *Id.*

<sup>63</sup> "Jhering had a strong sense of humor and satire." Johann George Gmelin, *Dialecticism and Technicality: The Need of a Sociological Method*, in

When we first met our Siena students, anticipating the examination, I told them about my visit to the Uffizi Museum, about the little boy bending over to remove the thorn in his foot, about . . . —Scalia butted in, loudly: “Oh, that’s going to on the examination!” It was.

The students paid no attention to his Honor’s premonition: *a mangiare la pizza*.

## 6. *La théorie de Siena.*

One more observation of *la théorie de Siena*. I played the role of provocateur.

Justice Scalia declined to witness the chaos of Siena’s famous *palio* horse race after a false start the day before.

Instead, we took a walk to see the *Cattedrale di Santa Maria* (Siena’s famous “*Duomo*”). “*Religion statt Pferdefleisch*” (“religion over horsemeat”) von Jhering would say.

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THE SCIENCE OF LEGAL METHOD (1917), PART I, THE PROBLEM OF THE JUDGE, ch. III, pp. 85, 108 n.45. What else about our Mount Royal Muse Rudolph von Jhering? I like this: “He possessed a joyous nature such as is not found often among those of conspicuous learning.” Adolph Merkel, *Rudolph von Ihering*, in ZWECK IM RECHT (Isaac Husik trans. Boston, 1913), Appendix I.

On our walk I mentioned Chief Justice Charles Evans Hughes's interpretation for the Court in *Home Building and Loan v. Blaisdell* (1934)<sup>64</sup> apropos the Contracts Clause. Hughes, of course, was the Supreme Court's great chief justice of the twentieth century, as John Marshall was of the nineteenth.

I paraphrased Hughes in Siena. I quote him exactly in Montreal:

If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation of the framers with the conditions and outlook of their time, would have place upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: "We must never forget it is *a constitution* we are expounding (*McCulloch v. Maryland*); "a constitution intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs."<sup>65</sup>

Justice Scalia took me and Hughes to task. Those who imply from Marshall's utterance that the Constitution must change from age to age are mistaken. "But that is a canard."<sup>66</sup>

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<sup>64</sup> *Home Building and Loan v. Blaisdell* , 290 U.S. 398 (1934).

<sup>65</sup> *Id.*, at 442-43 (citation omitted).

<sup>66</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 853 (1989).

Justice Scalia of Siena reminds me of Bartolus of Sassoferrato. Bartolus frequently expressed scorn for opinions he considered foolish. “*Sed Truffa est.*” “But this is nonsense.” Justice Scalia, I am sure, would condemn my *idée au-delà de Montreal* as:— “Absurd.” He has said the same thing of his colleagues’ rulings:

The notion that the Constitution of the United States, designed, among other things, “to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,” prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.<sup>67</sup>

## 7. *Justinian’s Zweck im Recht.*

Justinian’s purpose in collecting the extracts of jurists that compose the Digest is to prevent judicial caprice, to avoid in his own words, “cases [being] disposed of rather according to the will of the judge than by the authority of law.”<sup>68</sup> Here is the birthright of Justice Antonin Scalia from the lips of Justinian himself.

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<sup>67</sup> *Stenberg v. Carhart*, 530 U.S. 914, 953 (Scalia, J., dissenting).

<sup>68</sup> Second Preface to the Digest, in *THE CIVIL LAW, INCLUDING THE TWELVE TABLES, THE INSTITUTES OF GAIUS, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTION OF LEO* 189, 195 (S. P. Scott trans., Central Trust Co., Cincinnati, 1932).

But Justice Scalia's textualism, his insistence on abiding the letter of the law as originally understood by the citizenry at the time of adoption of the Constitution, is not the sole measure of judicial duty as conceived in the Digest.

Ulpianus tells us: "The law obtains its name from justice; . . . law is the art of knowing what is good and just."<sup>69</sup> A second birthright makes judges "priests of this art, for we cultivate justice aiming (if I am not mistaken) at a true, and not a pretended philosophy."<sup>70</sup>

Justice Harry A. Blackmun told us at Aix, "I think we should pursue justice. Some of us anyway, on the Supreme Court, ought to keep justice in mind, if not constantly every once in a while at least."<sup>71</sup>

### S. *Ottawa.*

Last stop on our *voyage Gény* is Ottawa, Ontario, home of the Supreme Court of Canada. What do we find there?

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<sup>69</sup> *Id.*, at 209.

<sup>70</sup> *Id.*

<sup>71</sup> Aix '92 Transcripts, *supra* note 12.

A late decision of the Supreme Court of Canada holds that life includes death. In other words, Section 7 of the Charter of Rights and Freedoms protects the right to “die with dignity.”

This is *Carter v. Canada*.<sup>72</sup> The facts of life and death—*libre recherche scientifique*—are in the trial record.

“The legislative landscape on the issue of physician-assisted death has changed in the two decades since *Rodriguez*,” says the Court. Canadian society requires a new rule, a new freedom. The ruling is unanimous. The judgment is delivered by THE COURT:

The prohibition on physician-assisted dying infringes the right to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice.

It’s all there, a bold innovation. Read it for yourself.

“Through the charter, but beyond the charter.”

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<sup>72</sup> 2015 SCC 5 (2/6/15).

And just the other day the Supreme Court of Canada advised the World that the Canadian Charter of Rights and Freedoms imposes a duty of religious neutrality on the state. “This duty results from an evolving interpretation of freedom of conscience and religion.”<sup>73</sup>

*“Par la constitution, mais au-delà de la constitution.”*

## 9. *Fertig: fini.*

*Meine lieben Kollegen in Montreal, unserer voyage von Jhering und Gény is finished, am Ende.*

Rudolf von Jhering *et* François Gény *und ich selbst grüssen herzlich* The Right Honorable Beverley McLachlin, Chief Justice, and her side justices, of the Supreme Court of Canada.

*Aufwiedersehen Montreal. Vielen Dank.*

*Merci beaucoup. Au revoir.*

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<sup>73</sup> *Mouvement laïque Québécois v. Saguenay (City)*, 2015 SCC 16 (04/15/15).