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THE AUTHORITY OF THE CONSTITUTION AND ITS MEANING: A PREFACE TO A THEORY OF CONSTITUTIONAL INTERPRETATION

LARRY SIMON*

The United States Constitution establishes our governmental system and proclaims our most basic ideological beliefs. It creates the United States as a federation of semiautonomous states and prescribes, sometimes in considerable detail, the organization and jurisdiction of the federal government, dividing its functions among the legislative, executive, and judicial branches. It enumerates, in various kinds of provisions containing very different kinds of language, the rights, privileges, and immunities that belong to the people or citizens of the nation.

While some of the provisions in the Constitution have relatively unambiguous, specific, and noncontroversial meanings, the language of a great many is so vague, ambiguous, and open-textured that they might be understood to mean almost anything. For example, insofar as language-meaning¹ alone is concerned, virtually anything of importance to a person, such as eating, watching television, or driving a car, might be argued to be a "privilege and immunity" of citizenship and hence constitutionally protected against state action.² I shall consider

* H.W. Armstrong Professor of Constitutional Law, University of Southern California Law Center. B.A. 1963, Hobart College; L.L.B. 1966, Yale Law School.

1. I do not intend the term "language-meaning" to correspond to any particular philosophical, linguistic, or technical definition or concept governing the discovery or ascription of meaning to language. Quite the contrary, I use the term because of its ambiguity and elasticity in order to refer to the variety of meanings that people who are familiar with the language might with plausibility believe or argue to be the correct interpretation.

2. U.S. CONST. amend. XIV, § 1. Of course, the *Slaughterhouse Cases* have gutted whatever meaning the privileges and immunities clause might have had. 83 U.S. (16 Wall.) 36 (1873).

the enormous range of meanings allowed by the Constitution in somewhat greater detail shortly, but for now it is enough to note that insofar as its language-meaning is concerned, the Constitution contains a galaxy of infinite meanings. Constitutional interpretation is the main source of the problem to which this paper is addressed.

Two related concerns are central in the historical debate about constitutional interpretation; however, they are different in ways we would do well to acknowledge more consistently. The first is a concern about the extent to which the Supreme Court's constitutional judgment is or can be "objective." The second is a concern about the legitimacy of the institution of constitutional law, that is, of the Supreme Court declaring laws and other governmental action illegal under the authority of the Constitution.³

To some extent, the bases of concern about the objectivity of judicial decisionmaking in constitutional law are no different from those in other areas of the law. If the interpretation and application of any important legal norm depended entirely on the subjective attitudes of different judges, both choice and equality values could be significantly impaired. Predictability in the law would be virtually impossible, and without predictability individuals and other entities, including governmental bodies, would lack information critical to intelligent planning and choice. Equal treatment of those similarly situated in respect to the law would be a matter of happenstance, depending entirely on the identity and potential coincidence of views of the judges hearing or predicted to hear cases.

In constitutional law, the supremacy of constitutional judgment to other forms of law has added a unique dimension to concerns about judicial objectivity—one that tends to occupy center stage in all debates relating to objectivity. These concerns have their roots in a political philosophy that we can call the "sovereign public" worldview. The sovereign public worldview admits that there is a role in the political system for views about what is good and bad, just and unjust, and right and wrong. But this role is limited: such views properly function as beliefs and arguments, not determinants of social choice. Those with interests or principles at stake can make their various pitches to the

3. These concerns run throughout the interpretation literature. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); J. ELY, *DEMOCRACY AND DISTRUST* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

people. They will argue, as their interests and principles dictate, that levying high taxes or jailing pot smokers, for example, are either indispensable attributes of a good society and in everyone's interest, or unsurpassingly evil and socially wasteful. And the people will be persuaded, as their own interests and principles dictate. But claims like these play their proper role only in helping to shape the people's will or preferences. Once shaped, that will is the final determinant of what we should do as a society.

The concepts of goodness and justice play an odd role in the political philosophy implicit in the sovereign public worldview. It is a very complicated role, but for our purposes what is important is that it is a role that is clearly subordinate to the public's preferences. Once the stage of social choice or lawmaking (as opposed to opinion or preference formation) is reached, what is good or just is irrelevant—or is defined to mean “what the people want.” That is what “democracy” is all about.

The sovereign public worldview has some rather obvious implications for institutional arrangement. If the determinant of social choice should be what the people want, it would seem to follow that the laws should be made—or at least the final say should be had—by legislative bodies that have been established to represent the people and are electorally responsible to them.

Enter, constitutional law and its principal institutional expositor, the United States Supreme Court. Is there any place in the sovereign public worldview for nine lifetime appointees with the authority to veto the social choices made by legislative bodies on behalf of the people? If a place can be found, it will plainly be on the understanding that legislative bodies “normally” have final lawmaking authority and that judicial veto in the name of constitutional law is the exception—that constitutional law is a deviant institution.

But even if it *is* deviant, how can one define the role of this institution within a worldview that sees the good and the just as relevant to public preference formation but sees the public's preferences as the only proper determinant to social choice? To say that a Justice of the Supreme Court should vote to veto laws enacted by legislative bodies when he or she believes them bad or unjust would be flatly inconsistent with this central tenet of the sovereign public worldview. Whatever the role of this deviant institution, it ought to be limited or constrained in some way to assure that the Justices will not end up doing what they think is good or just and calling it constitutional law.

During much of this century, for the many constitutional scholars and judges who have been more or less under the sway of the sovereign public worldview, the task of explaining the function of constitutional law came to be conflated with a search for a way of constraining the Justices. At its highest levels of self-awareness, the resulting scholarship and judicial opinions proceed from the intuition that in order for an explanation to be acceptable, it must eliminate or greatly constrain the Justices' discretion—an intuition, in other words, that the legal question whether or not a law is constitutional will be decided according to criteria other than what the Justices think good or just. For this reason, many judges, lawyers, and scholars have yearned for “objectivity” in constitutional judgment.

Because the quest for objectivity has its roots in the sovereign public worldview, questions concerning the objectivity (or constraints on) and legitimacy of constitutional interpretation have often been conflated. Many judges and scholars have implicitly or explicitly held the view that the Supreme Court can legitimately exercise the authority of the Constitution only to the extent that the question whether or not a law is consistent with the Constitution has an answer that is (in some sense) objective. For those who take this position the questions of the (relative) objectivity and legitimacy of constitutional law are one and the same. This is a conclusion, however, and the premises and reasoning that lead people to reach it are hardly unimpeachable.

For purposes of analysis, it is essential to distinguish the questions. Whether and to what extent constitutional judgment is or can be objective (or constrained) depends on the kinds of norms or value sources that judges do or can look to in deciding whether challenged actions are unconstitutional, and on what the process of “looking to” those sources amounts to. Whether the Supreme Court is behaving legitimately when it exercises the authority of the Constitution, by contrast, depends on what the authority of the Constitution is.

All parties to the interpretation debate, at least in modern times, concede that the Constitution *is* authoritative. That is, it is a species of law that plays and ought to play a role of considerable importance in the governance of the nation and that it is and ought to be “consulted,” “controlling,” “binding,” or whatever in the decisionmaking of those institutions to which it is addressed, most importantly the Supreme Court. Why is this so? What justifies this conception of the Constitution? Why does and should it play such a role? How do we account for its authoritativeness and why is it law? Why do and should we the

people and our institutions pay any attention to it at all? What kinds of claims count as appeals to the Constitution's authority, or as "constitutional interpretation"?

These questions about the Constitution's status as law or its authoritativeness raise both descriptive and normative issues in political and moral theory (or political morality). They can perhaps be best understood in very personal terms: Do you feel allegiance and regard for the Constitution? If so, why? When reflecting on such questions, what exactly is it that you think of as "the Constitution"? If someone were to ask you whether the Constitution is worthy of allegiance and regard, what would you say?

Descriptively, these questions want an explanation of why people, including public officials, believe and behave as if the Constitution is authoritative. Normatively, they want to know whether the Constitution should be authoritative and, if so, why. The descriptive and normative questions might have very different answers. What accounts for the fact that people behave as though the Constitution is authoritative might be indefensible by reference to any acceptable theory of political morality. But that would be a bit odd, at least if the human and institutional behaviors and the conditions of "acceptable" theories of political morality are both generated from attitudes, values, and ideas that come out of the same political culture. One would think it more likely that there will be at least some overlap or correspondence between the descriptive and normative accounts.

Questions about the Constitution's authority are important quite apart from, and in fact are logically prior to, those concerning whether and to what extent its meaning can be "objectively" determined. We can see this quite clearly if we assume for the sake of illustration (as I think will turn out to be true) that the Constitution is (and ought to be) authoritative for reasons that inevitably produce the consequence that to some extent it does not have meanings that can be objectively determined. If this is true, the Supreme Court presumably believes legitimately in giving the Constitution meanings that are not objectively determinable, at least some of the time. In this case, those who hold to some theory that brands it wrong for a court to have such discretionary authority have a quarrel that at least to some extent is properly not with the Court but with the Constitution (or with the presuppositions of our nation's political theory).

Not only do we sometimes fail to attend carefully to the difference between concerns over objectivity and legitimacy (and consequently

the Constitution's authoritativeness), but we also often fail to distinguish between the two clusters of ideas that historically have figured most prominently in disputes over objectivity and legitimacy in constitutional law: constitutionalism and democratic theory. Constitutionalism is the cluster of ideas that concern the problems posed by time, history, and change for a political system based on an authoritative written constitution interpreted by a court. Democratic theory is the cluster of ideas that concern the problems posed by the diversification of our value and institutional systems for a political system based on an authoritative written constitution interpreted by a court. Theories about constitutionalism want to say something about the proper allocation of authority between the original drafters and adopters of constitutional provisions and the enumerated processes for amending the Constitution on the one hand, and the courts that from the time of the origination interpret it and claim to speak with its authority on the other. Theories about democracy and the Constitution want to say something about the extent to which it is proper for the court to invoke the authority of the Constitution to stop other agencies of government from taking actions that (at least in theory) are "what the people want."

A group of claims about how the court should give the Constitution meaning has come to be called "originalism."⁴ These claims rest on the common belief that the provisions of the Constitution should mean throughout history whatever they meant in the "original understanding." Although it is not always exactly clear what the proponents of this view have in mind by the original understanding, or to what extent they agree with one another, there seems to be a consensus that the key to the original understanding is found in the intention of the framers of the Constitution.

Originalism seems sometimes to be understood and defended as a theory about constitutionalism, and sometimes as one about democracy, although those who are fond of it are not always careful to tell us the basis of their affection. The essence of originalism, as a claim about constitutionalism, is that it is in the nature of a written constitution (or at least ours) that the meaning of its provisions should be determined as of the time of their origination, and that these meanings can be changed only by amending the Constitution through the processes that are themselves set out in the document. As a claim about democracy,

4. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 204 (1980). See also Schauer, *An Essay on Constitutional Language*, 29 UCLA L. Rev. 797, 797 n.1 (1982).

the apparent appeal of originalism is that limiting the meanings of constitutional provision to those that (arguably) existed at the time of their origination serves to confine the interpretive power of the Supreme Court, a power that some see as a threat to the proper functioning of democracy. Most believers in originalism seem to subscribe, in varying mixes, to both of these claims or beliefs.

This paper is the first in what I hope will be a series exploring the authoritativeness of the Constitution and the implications of its authoritativeness for theories about constitutionalism, democracy, and judicial review. In this paper, I argue that there are powerful reasons for believing that questions of constitutional interpretation in our society cannot be answered independently of theories about the nature and sources of the Constitution's authority. In particular, in Part I, I suggest that no criteria other than what is good and just for society are available to aid in deciding which of competing theories of constitutional interpretation are authoritative, and further, that the source of our own Constitution's authority strongly suggests that these same criteria, which I often refer to as the "authority of moral reasoning," are the proper ones to guide constitutional interpretation. Therefore, in Part II, I argue that the term or concept "constitutional interpretation" has no significant descriptive meaning at all, that its meaning is almost entirely normative. In Part III, I suggest that what also follows is that the question of how the Court should go about interpreting the Constitution cannot be answered in advance of a theory about the Constitution's authoritativeness, and that, while recognition of this is implicit in much constitutional scholarship, failure to appreciate its full implications has caused considerable confusion. Finally, in Part IV, I summarize the status of the debate over the role of originalism in constitutional law, and suggest that the failure to understand that theories of constitutional meaning depend on theories of authority seriously flaws the positions of many parties to the debate and has importance independent of questions about the objectivity and coherence of the concept of framers' intent that have preoccupied the debaters. I end, in Part V, with a suggestion about a way of reformulating the framers' intent question that, although ultimately misleading, points in what I see as the right direction for further constitutional theorizing.

I. AUTHORITY, JUSTIFICATION, AND INTERPRETATION

A text is legally authoritative if it is regarded as a source of legally controlling norms. Justification is the process of giving reasons (or the

substantive reasons given) to support moral and legal claims or arguments. Interpretation is the process by which people find meaning in or attribute it to anything, including texts (or the meaning found or attributed).

A text may be legally authoritative whether or not its authoritativeness is or can be justified. A method for interpreting a text or some particular interpretation of it may also be thought authoritative. Some commentators believe, for example, that framers' intent is the authoritative source of constitutional meaning or method of constitutional interpretation. We shall see that a particular interpretive methodology or interpretation might also be authoritative irrespective of whether it can be justified. It does not follow, however, that questions of justification are irrelevant to the authoritativeness of either texts or interpretations. Whether reasons can be given for regarding a text or interpretation as legally authoritative is often relevant and sometimes critically important.

Justification may be neither necessary nor sufficient to establish the authoritativeness of a text or of an interpretation. If everyone in a group or society regards a text as a source of controlling norms and regards an interpretative methodology or a particular interpretation of the text as controlling or correct, then the text and interpretation simply *are* authoritative for that group or society. If the relevant group members already have this "internal" attitude toward texts or interpretations, it is obviously not necessary to give reasons or make arguments as to why the text or interpretation "ought to be" regarded as authoritative in order for it to be authoritative. If the attitude has been internalized deeply and if it is very widely held by group members—if it amounts to a cultural presupposition—the question whether or not it is justified may not even occur to anyone. Conversely, if virtually no one in the group regards a text or interpretation as authoritative, all the "good reasons" in the world may not move group members to change their attitudes.

Even when a text or interpretation is widely regarded as authoritative, the question whether this is justified can arise, for example, if a dissident challenges the widespread view. Those whose beliefs are challenged by such heresy may, of course, see no reason to respond by way of justification. Perhaps the dissident will simply be regarded as a madman who is due only the response, "You are insane." But this need not be so; for those challenged may well want or need to believe that good reasons can be given for their beliefs, and this seems especially likely if "heretical" beliefs become sufficiently widespread and

involve texts of sufficient importance. A society in which widespread disagreement exists about the legal authoritativeness of important texts may well experience considerable social stress. This stress might manifest itself in violence or other forms of adversary behavior, and the question whether the disputed texts "are" or ought to be authoritative—the question of justification—seems very likely to arise.

The United States Constitution *is* authoritative because major American institutional actors such as legislative bodies, courts, and agencies as well as a large segment of the population have the appropriate internal attitude toward it. That is, they regard the Constitution as a source of legally controlling rules and norms. Justification of the authoritativeness of the Constitution is, therefore, certainly *not* necessary to its authoritativeness. Moreover, if, in the future, significant numbers of relevant actors came to doubt its authoritativeness, attempts at justification might or might not be sufficient to affect their beliefs.

Professor Monaghan, in a frequently quoted passage, has described the Constitution's authoritativeness as follows:

The authoritative status of the written constitution is a legitimate matter of debate for political theorists interested in the nature of political obligation. That status is, however, an incontestable first principle for theorizing about American constitutional law. . . . For the purpose of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration. It is our master rule of recognition, one initially so intended and understood, and one which our "tradition" in fact continues to perpetuate.⁵

To the extent that Monaghan's point is simply that the Constitution is authoritative, I obviously agree. His discussion nonetheless seems misleading in two ways. The less important is Monaghan's express assertion that it is the Constitution rather than the Supreme Court's interpretation of it that is our "rule of recognition." The more important arises not from anything expressly said in the passage, but from one of its apparent contextual purposes, namely (if I read Monaghan correctly),⁶ to support an argument on behalf of originalist methods of interpretation.

5. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383-84 (1981) (emphasis in original).

6. Monaghan also sets out what might be taken as the beginnings of an attempt to justify reference to framers' intent in constitutional interpretation, but he fails to develop his argument in any serious way. See *infra* text accompanying notes notes 66-67. My interpretation of him seems

A rule of recognition, in H.L.A. Hart's terminology, is a rule in a legal system that tells whether other purported rules are valid in that system.⁷ A rule of recognition is neither valid nor invalid. It simply is. What determines the rule of recognition are the beliefs of members of the group or society, especially those of important institutional actors, about the conditions under which rules in that system are valid. I doubt that much turns on whether we describe "the text of the Constitution" or "the Supreme Court's interpretation of the Constitution" as our rule of recognition, although it is worth noting that there is no apparent reason to credit Monaghan's bare assertion that the former is the correct description. The latter (or both jointly) would seem at least as likely a candidate.

Monaghan's apparent belief that the Constitution's authoritative-ness requires or supports an originalist interpretative methodology is more troublesome and is simply and demonstrably incorrect. The authoritative-ness of the Constitution, while obviously of central importance to our political and legal systems, does not settle the question of its meaning. At least to the extent that the language-meanings of its clauses admit of competing interpretations, the bare fact of the document's authoritative-ness or status as our rule of recognition cannot alone establish as correct or authoritative any interpretive methodology or any particular interpretation. The same is true if we take the view that our rule of recognition is "what the Supreme Court says the Constitution means." Granted that Supreme Court interpretations of the Constitution are authoritative, nothing follows from this social fact as to how the Supreme Court should go about interpreting it.

I do not mean to suggest that it is impossible that a particular method of constitutional interpretation could be regarded as correct or

to be supported by his statement suggesting he believes that something about the nature of "meaning" makes the intention of the framers determinative for the meaning of the text:

A distinction is sometimes posited between textual analysis and original intent inquiry such that only the constitutional text and not "parol evidence" can be examined to ascertain constitutional meaning. But any such distinction seems to be entirely wrong. All law, the constitution not excepted, is a purposive ordering of norms. Textual language embodies one or more purposes, and the text may be understood and usefully applied only if its purposes are understood. No convincing reason appears why purpose may not be ascertained from any relevant source, including its "legislative history."

Monaghan, *supra* note 5, at 374-75. I believe this argument fails for two independent reasons. First, the intent of the author of a text does not necessarily determine the text's meaning. Originalism is *one* method of interpretation, not *the* method. Second, and much more important, the real question is whether or not one or another method of applying the Constitution to the facts of the cases is a better method, and this can be determined only by moral argument.

7. See H.L.A. HART, *THE CONCEPT OF LAW* 92-93, 97-103, 112-14, 191-92 (1961).

authoritative in a legal system. This *could* happen in just the way the text of the Constitution (or what the Court says it means) came to be regarded as authoritative: if relevant members of society take an internal attitude toward a particular interpretative methodology—that is, if they believe it is *the* authoritative method. In such a case, the rule of recognition would effectively include a rule about interpretive methodology. My point is *not* that this is conceptually impossible, but rather that this is not in fact true in our society or legal system. There is no widespread consensus or internal attitude about the proper method of constitutional interpretation. With regard to originalism in particular, the notion that the Constitution means what it meant in 1789 has had virtually no currency at all in the Supreme Court during most of this century. This notion is taken seriously by only a handful of constitutional scholars and, so far as I can tell, not by the vast majority of the legally trained population. Furthermore, it seems entirely implausible to think that there is any consensus among the American people that ties their regard for the Constitution to a set of meanings that existed in 1789.

It is precisely because there is no consensual or noncontroversial interpretative methodology that the questions of which methodology and which interpretations are proper cannot be determined other than by assessing the reasons supporting one or another alternative. Attempts to supply an answer by argument-stopping stipulations that simply assert that it is somehow “definitional” or “intrinsic” to a constitution (or at least to ours) that it be “interpreted”⁸ in the proposed way simply will not do. Monaghan’s apparent claim on behalf of originalism simply lacks whatever the requisite “stuff” is that might establish the correctness of a proposed answer. The only people likely to accept such an answer are those who already believe it. If originalists wish to establish the appropriateness of originalism they must provide better reasons for the views they espouse than those given by competing theorists for competing views. Moreover, as in our hypothetical society riven by controversy over the authoritativeness of important texts, these justificatory arguments may or may not persuade people.

As we confront the multiple language-meanings permitted by many of the open-textured provisions of the Constitution, the only ap-

8. This assumes that “interpret” is the word we choose to describe what the Court does when it applies the Constitution to the facts of cases.

parent standard we can bring to bear in evaluating competing arguments for one or another interpretive methodology or interpretation is the extent to which they promote a good and just society. It seems obvious, therefore, that the important clauses of the Constitution do not and cannot have objective or even noncontroversial meanings because what is "good" or "just" will usually be controversial. Ours is a society with enormous diversification of values and institutions. Efficiency, for example, is one but only one criteria of goodness. And constitutional interpretation is bound to reflect this diversity.

While these conclusions are in some sense obvious, it is worth restating them in slightly altered form to emphasize their importance. There is no intrinsically "legal" or "constitutional" answer to the question of how the Constitution should be interpreted. The evaluative standards must come from the external perspectives of political/moral theory. Correspondingly, claims on behalf of the "authoritativeness" of competing constitutional interpretive methodologies, theories, or interpretations rest ultimately on the authority of moral reasoning. That is, each argument claims that it is authoritative because, and only because, it is "correct" as a matter of political morality. And given the range of legitimate disagreement about the requirements of political morality, the "correct" or "authoritative" interpretation will often depend on the interpreter.

Two considerations support these conclusions. The first, which stands on its own bottom, we have already noted: the only apparent alternative way of answering the question of which methods of constitutional interpretation are authoritative is through argument-stopping assertions to the effect that one or another answer is "intrinsic" to the system or "given" in some other ill-defined sense. In the absence of the widespread internalization of beliefs that would lend cultural authority to such claims, there simply is no reason to credit them. The second consideration requires some additional attention, although a full development of it is neither necessary nor appropriate to this paper. It is an affirmative argument on behalf of the ultimate authoritativeness of moral reasoning in matters of constitutional interpretation, and is based on a claim about the source of our Constitution's authority. I want to claim that the source or basis of our Constitution's authority is in what might be described either as a shared moral consciousness or identity, or as a deeply-layered and shared consensual attitude toward certain stories about and norms of political morality that are under-

stood by a sizable number of our people as representational of the value and importance of the Constitution.

The consciousness, identity, or consensual attitude consists, most likely, of two interdependent and mutually reinforcing elements. The first consists of paradigmatic examples or normative accounts of representative or historically important episodes of our national moral life that people are taught by the culture and that serve more or less as examples of the good and bad, the just and unjust, and in this way shape our national moral identity. The second element is related to the first and consists of a widespread, socialized belief in or acceptance of several very abstract values, most importantly, democracy, freedom, equality, and justice.⁹

My claim is not that "everyone" in the United States participates in this consciousness, sense of national identity, or consensus, but that very substantial numbers of people do, at least to some significant extent. It is in large measure because the Constitution is understood as part and parcel of this larger moral story that it is valued and regarded as authoritative by our people. And these moral beliefs or reasons that are the basis of the Constitution's authoritativeness do and should affect its interpretation.

When I discussed the authoritativeness of the Constitution and the notion that the Constitution is our rule of recognition, I noted that it is the very existence among individuals of the internal attitude acknowledging the Constitution as a source of legally controlling norms and as the rule that tells whether other purported rules are valid that accounts for its authoritativeness and its status as a rule of recognition. It is not necessary to a constitution's authoritativeness that any particular reasons or beliefs account for this internal attitude or that its authoritativeness can be justified. H.L.A. Hart makes this point quite explicitly in

9. Studies show that there is broad consensus among Americans on the abstract principles thought to be fundamental values of American society. However, consensus declines with more specific definition and application of these values. Consensus almost completely disappears when specific hypotheticals are considered, particularly when some unpopular person or cause is involved. Disintegration reaches its height in times of stress when people are more sympathetic to certain interests with which they are closely allied. Factors tending to increase consensus are predominantly education and political involvement and participation. *See generally* D. DEVINE, *THE POLITICAL CULTURE OF THE UNITED STATES* 1-76 (1972); E. DREYER & W. ROSENBAUM, *POLITICAL OPINION AND BEHAVIOR, ESSAYS AND STUDIES* 77, 85, 87 (1970). For a discussion of Devine's conclusions see R. CHANDLER, *PUBLIC OPINION: CHANGING ATTITUDES ON CONTEMPORARY POLITICAL AND SOCIAL ISSUES*, A CBS NEWS REFERENCE BOOK 6-13 (1972); H. HOLLOWAY & J. GEORGE, *PUBLIC OPINION* 37-38 (1979); A. MONROE, *PUBLIC OPINION IN AMERICA* 168-71 (1975); R. SIMON, *PUBLIC OPINION IN AMERICA: 1936-1970*, at 116 (1974).

connection with the rule of recognition. He observes that in modern, complex societies, "only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house."¹⁰

Granted that the reasons or beliefs that lead people to regard a constitution as authoritative are not necessary to its authoritativeness, it certainly does not follow that these reasons or beliefs are irrelevant for all purposes. As a descriptive matter, it is not difficult to see how the reasons underlying a constitution's authoritativeness might be thought by members of that society to be quite relevant to the interpretation of ambiguities in it.

Imagine, for example, that for a society at some primitive point in its history, a written constitution represented an agreement between previously warring groups with a monopoly of power. The "authoritativeness" of this constitution might have been based entirely on power and fear. Perhaps, for example, everyone regarded the document as authoritative simply and solely because everyone believed the nation would be torn by war and violence without it and believed that peace was "good." Whether or not the people were aware of it, what they "valued" about their constitution and what caused them to regard it as a source of binding norms was that the world was violent and fearful, or bad, without it and peaceful, or good, with it. Or, imagine that everyone in a society believes that its constitution is authoritative because its author, who is also regarded as its authoritative interpreter, is a goddess. These people, whether they are aware of it or not, regard their constitution as a source of binding norms because they value its author/interpreter, and view her as a source of good.

Suppose that in both of these societies, it turns out that parts of the texts of the constitutions are ambiguous, and therefore require interpretation. We would not be surprised if *in fact* the method or approach taken in interpreting these constitutions developed out of and reflected the basis of our reasons for the respective constitutions' authoritativeness. We would expect, in other words, that the first constitution would be interpreted so as to minimize the chance of violence, which, if the adoption were fairly recent in relation to the interpretation, would probably point towards originalist methodology. Similarly, the interpreter/goddess of the second constitution would probably consider herself free to interpret the constitution in any way she wished, so long as

10. H.L.A. HART, *supra* note 7, at 114.

this was consistent with her status as a goddess, for she is the source of the constitution's authority.

Generalizing this descriptive point, it is quite possible that that which is valued about a constitution by the people subject to it and which causes it to be authoritative for them will affect its interpretation. Or, put in different terminology, just as members of a society may have internal attitudes that result in certain texts having legal authority, they may also have internal attitudes about the reasons that legal texts are valuable and hence authoritative that produce or push towards certain interpretative methodologies or interpretations.¹¹ Whether people in a society do or do not have such internal attitudes toward authoritative legal texts is a question of fact and may vary with societies and times.

There is, however, an important normative difference between the sort of internal attitude with which we are now concerned and many of the other kinds of internal attitudes that may result in a text having legal authority or a rule being a rule of recognition. We saw that a text might be regarded as authoritative and that a rule of recognition might exist irrespective of why it regarded and of whether it can be justified. The kind of internal attitude now under consideration, however, is a value-attitude: that which is valued or believed to be good about a constitution is the source of its authority, and interpretative methodology is derived accordingly. Unlike the situation in Hart's sheeplike society or one in which there is no significant consciousness or consensus about the value or good of a constitution, most members of a society in which there is such a widespread attitude will, by definition, regard the derived interpretive methodology as justified, should the question of justification arise, precisely because it corresponds to their beliefs about why the constitution is valuable or good.

11. Theodore M. Benditt has made the related argument that because the function of law is to resolve or regulate conflicts among people with as little friction or resistance as possible, people must have internal attitudes toward law if it is to work properly. T. BENDITT, *LAW AS RULE AND PRINCIPLE* 103-16 (1978). On this view,

if a system of rules cannot promote the good of the people being regulated by them, then it cannot rationally be accepted by these people. . . . And if a system of rules cannot rationally be accepted, then it fails in its function and is thus not a legal system at all.

Id. at 109. While I am not persuaded that having internal attitudes toward or rationally accepting the rules is a precondition of "law" or "legal systems," I am persuaded that the idea that the people should value our important political values is an ideological mainstay in our political morality and a presupposition of our governmental system. As explained in the text, I also believe that most of our people actually hold internal attitudes toward and/or rationally accept our major political values.

I suggest that the authoritativeness of the United States Constitution is largely a consequence of the fact that major institutional actors and a substantial portion of the people take just such a value-attitude toward it. As discussed earlier, the people hold as a value or a credo of public morality that which they understand to be the Constitution's central tenets: democracy, freedom, equality, and justice. In sum, many of the people believe that these values are (1) what the Constitution is all about, and (2) good for people and society. This is why they regard the Constitution as authoritative.

It should not surprise us, therefore, if these values—which I summarize and sometimes refer to either as the authority of goodness and justice or, more simply, of moral reasoning—in fact have influenced greatly Court interpretations of the Constitution. And it seems quite clear that the courts in general, at least in modern times, have been more swayed in constitutional interpretation by arguments about what is good and just than by any other kind of arguments. I do not believe, moreover, that a sizable segment of the American population would find unacceptable or unjustified the general proposition that in interpreting the Constitution our judges should be guided mainly by what is good and just, although this too is a question of fact (and the people would, without doubt, disagree about which particular interpretations are good or just).

The objection might be made that the fact that the members of a society regard some action as justified does not mean that it is “really” justified. If a society regards as justified the interpretations of a constitution/goddes, for example, does it follow that they are “really” justified? And even if it is true that many members of our society think it justified that in matters of constitutional interpretation judges are guided mainly by what is good and just, does it follow that the practice is “really” justified?

The issue, then, is whether the fact that “the people” believe the courts should interpret the Constitution so as to promote what is good and just for society itself justifies the courts in doing so. The answer is no, for we have yet to justify the proposition that the people's beliefs in the concepts of goodness and justice ought to be given supreme legal expression by the courts. What would be required to make out this justification is an argument, or better, a political theory, that persuasively defends the virtues of a system of governance that includes such an institutional arrangement. I hope to make such an argument at another time, but it is not necessary for present purposes.

The argument will itself necessarily be over what is good and just for society, that is, about the implications of our valuing democracy, freedom, equality, and justice. All I am trying to establish at this time is that in arguing about constitutional interpretation, the argument about what is good and just is exactly what we ought to, and the only thing we could coherently, be arguing about.

The abstract values represented by the words "democracy, freedom, equality, and justice" are not self-defining. As I hope to discuss more fully subsequently, these values arguably make all of the moral concepts in our culture relevant to the evaluation of competing methodologies of constitutional interpretation and particular interpretations—moral concepts that Professor Brian Barry has persuasively proposed to categorize under the headings of Utility, Ideal-Regarding, and Justice concepts.¹² As Alasdair MacIntyre puts it, moral theory today is a "conceptual melange" incorporating "fragments from . . . virtue concepts . . . alongside characteristically modern and individualistic concepts such as those of rights or utility."¹³ Obviously, therefore, the recognition that the authority of the Constitution is that of moral reasoning solves very few, if any, of the difficult problems. It does not, for example, foreclose the possibility that originalism is the "best" interpretive methodology. All that it does require is that the claims be made and evaluated by reference to what is good and just for society. This does not put an end to any arguments, but it is not intended to. It is rather intended as a way of getting them properly started.

II. WHAT IS "CONSTITUTIONAL INTERPRETATION"?

The subject of constitutional interpretation has been a lively one, especially since the publication of Dean Ely's book, *Democracy and Distrust*¹⁴ a few years ago. Debate has centered on whether the Supreme Court ought to and does make what have been called "noninterpretivist" as well as "interpretivist" constitutional judgments.¹⁵ The issues underlying this debate are real and important. They concern questions about the objectivity and legitimacy of constitutional judgment. The use of "interpretivist/noninterpretivist" language, however, has added little but confusion. It has both reflected

12. B. Barry, Fair Division and Social Justice (1983) (unpublished manuscript).

13. A. MACINTYRE, AFTER VIRTUE 234 (1981).

14. J. ELY, *supra* note 3.

15. See, e.g., M. PERRY, *supra* note 3; *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Symposium: Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

and helped to create the impression that there exists some factual description or nonnormative definition of a method or process that is properly called "interpreting" the Constitution, and that what scholars and jurists disagree about is whether many important Supreme Court decisions match up to this description.

With very few exceptions, the debate has not been about whether there is some factual or noncontroversial description. If we disaggregate the phrase "constitutional interpretation" we can easily see why this is so. To the extent that there is any factual, nonnormative definition of "interpretation" it is this: To interpret something is to give meaning to it. We give meaning to such diverse things as music, art, literature, behavior, ourselves, data, and the position of the stars. We also give meaning to legal documents, including the Constitution. With regard to texts, it may be that language-meaning rules must not be violated if the giving of meaning is to be called "interpretation." Perhaps, for example, attachment of the meaning "stop" to the word "go," without any contextual justification, does not count as an "interpretation" of the word "go." Even if adherence to the language-meaning of constitutional provisions is a condition of "interpreting" the document, however, it would not follow that it is wrong to violate language-meaning. All that would follow is that it is not "interpretation." Its wrongness is a separate question.¹⁶

In any event, the language of so many provisions of the Constitution permits such an enormous range of meanings consistent with their language-meanings that an interpreter would rarely, if ever, have to violate the document's language-meaning in order to reach a particular outcome. We have already noted, for example, that eating, watching television, or driving a car could all come within the language-meaning of privileges and immunities of national citizenship under the fourteenth amendment and that health care, education, housing, and so on might also be included. "Life, liberty and property" of the fifth and fourteenth amendments could be understood to cover all that is signifi-

16. Although I argue in Part III of this Article that the term "constitutional interpretation" has no normative definition, I think relatively little of importance depends on this. For example, while I strongly disagree with Professor Michael's comment suggesting that the concept of "interpretation" presupposes reference to author's intent, even assuming this for the sake of argument, at most what is implied is that we should stop calling what the Court does when it gives meaning to the Constitution "interpretation." We could call it "constitutional application" or "evolution" or "extrapolation" or "meaning-giving." Whatever we call the process, the important point I want to make is that there is no persuasive way to evaluate competing methodologies (or "interpretations," "evolutions," or whatever) without at least implicitly asking and answering the question why the Constitution is authoritative.

cant about freedom of choice and “without due process of law” could be understood as meaning “without adequate justification”; that is, among the “processes of law” that are “due” in both the making and administration of law is the process of assuring that it is adequately justified. The “rights reserved to the people” by the ninth amendment might be thought to create or protect virtually any human behavior and be consistent with language-meaning. Any differential treatment by government, or for that matter any failure by government to prevent or prohibit “privately-caused” “inequalities,” might fit the description of denials of the equal protection of the laws. Many other examples might be given.

Somewhat less open-textured provisions of the Constitution also have a wider variety of potential language-meanings than is commonly assumed. For example, Professor Schauer, in his insightful look at constitutional language, suggests that because of language-meaning constraints “a fine of \$1.00 for criticizing the President does not violate the prohibition on cruel and unusual punishment.”¹⁷ Of course, given the aptness of the free speech clause, it would in this case be very odd for a court to reach for cruel and unusual punishment analysis. But if, for example, we had no free speech clause (but still valued free speech greatly) would it really offend the text’s language-meaning for a court to say that any punishment of so cherished a freedom is for that very reason “cruel”? I think not.

Even the very specific clauses of the Constitution could be given some meanings not apparent in their language and still not violate language-meaning rules. I would think, for example, that the requirement that the President be “natural born” could be held no longer applicable on the ground that it was inconsistent with broader and more central nondiscrimination values of the Constitution. This could be accomplished through the common technique of interpreting the language of parts of a text to be consistent with the whole, or through the more radical technique of holding that all provisions of the Constitution are to be understood as amended by later enacted amendments (in this case the fourteenth amendment). Once again, many other examples could be given.

Although many constitutional scholars use the term noninterpretivist to describe controversial Court decisions, they do not appear to be claiming either that these decisions fail, in motivation or effect, to give

17. Schauer, *supra* note 4, at 829.

meaning to the Constitution or that they violate its language-meaning. The debate in the scholarship has not been over whether such claims are true. All Supreme Court opinions of which I am aware give meaning to the Constitution and are consistent with its language-meaning, or at least could be rewritten to be "interpretivist" in these senses.

Insertion of the word "constitutional" before "interpretation" presumably constrains what counts as this form of meaning-giving only by requiring that that to which meaning is being given is the Constitution. But, again, so far as I am aware no one is claiming that the Court is giving meaning to something other than the Constitution. Beyond this, the word "constitutional" supplies no nonnormative, descriptive criteria that limit or constrain the meaning-giving techniques that count as this particular kind of interpretation. Moreover, to repeat, even if the Court does something that does not fit the description "constitutional interpretation," it does not for this reason follow that it has done anything wrong.

What is important about the term "constitutional" is that it points to the special normative context within which the question of meaning arises. By virtue of this context one might believe that there are or ought to be corresponding normative limits or constraints on the pertinent meaning-giving techniques. Apart from the two rather minimal, and I think uncontested, descriptive, but *not* normative, requirements that language-meanings not be violated and that it be the Constitution, itself, to which meaning is given, arguments about the meaning-giving techniques that count as "constitutional interpretation" *must* be normative arguments about which meaning-giving techniques are proper.

Those who describe Court decisions as "noninterpretivist" seem really to be saying that they are "nonoriginalist." Originalism is, however, only one method of interpretation. Use of a nonoriginalist meaning-giving methodology does not produce the consequence that the methodology is "not interpretation."¹⁸ Conversely, the claim that the Constitution should be given originalist meanings is entirely normative, and we should stop using terms that imply anything to the contrary. What the debate has been about is not what it means to give meaning to the Constitution, but what meanings should be given to it.

One notable exception in the recent law review literature is Professor Fiss' attempt to show, as I understand him, that there is some sort

18. Cf. Michaels, *Response to Perry and Simon*, 58 S. CAL. L. REV. 673, 673 (1985) ("interpretation" means considering the original intentions). I'm not sure much is at stake whether we call it interpretation or not, but it seems clear that we have always considered more than the original intention when trying to discern meaning or use of text. See *supra* note 16.

of intrinsically “legal,” self-contained, rule-bound system that in fact amounts to legal (including constitutional) interpretation—a system that Fiss claims makes legal interpretation “objective” in some sense.¹⁹

The legal interpreter, according to Fiss, “is not free to assign any meaning he wishes to the text,” but is rather governed by “disciplining rules” that “specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence), as well as by those that define basic concepts.”²⁰ These rules operate to transform “the interpretive process from a subjective to an objective one, and they furnish the standards by which the correctness of the interpretation can be judged.”²¹ The disciplining rules have this effect because they “govern an interpretive activity” that is “seen as defining or demarcating an interpretive community consisting of those who recognize the rule as authoritative,” namely, the judiciary.²²

Fiss’ point is unclear in several ways. Aside from the previously quoted reference to “words, history, intention, consequence” and “basic concepts,” he gives no examples of disciplining rules, and I am very skeptical that any such rules could be articulated insofar as we are interested in what the Supreme Court does when it “interprets” the Constitution. Of course, there are certain conventions of judicial decisionmaking that the Court follows. For example, it writes an opinion trying to give reasoned justifications for what it is doing, and there may be some (though hardly very confining) boundaries to the idea of a reasoned justification. But, I do not see how these or any of the other noncontroversial, internalized, and concededly important conventions that surround judicial decisionmaking could make the high Court’s manner of constitutional adjudication “objective” in any meaningful sense.²³ Moreover, even if there are “disciplining rules” of some sort, one supposes that these rules themselves require interpretation. Is there another set of disciplining rules that serves to make this interpretation objective?

19. Fiss, *supra* note 3.

20. *Id.* at 744.

21. *Id.* at 745.

22. *Id.*

23. See Bork, *supra* note 3, *passim* (demonstrates substantive failure of attempts to apply neutral principles in first amendment jurisprudence); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804-24 (1983) (discussion of candidates for definitions of neutral principles and the inherent inability of each to constrain decisions).

All of this is made even more puzzling by Fiss' apparent insistence that broad normative claims, let us say ideas about what is good and just, are basically irrelevant to constitutional interpretation, except to the extent they may have been embodied in the disciplining rules. He calls such claims "external criticism," and he believes them to be quite legitimate, but irrelevant to interpretation.²⁴ If Fiss were correct that beliefs and arguments about goodness and justice were irrelevant to constitutional interpretation, then at best we might conclude that he has accurately described what would seem a rather questionable system of decisionmaking. Why should the sort of interpretation he describes deserve our allegiance? Is the process of legal interpretation intrinsically good for some reason? Why? Some degree of skepticism seems warranted if for no other reason than, as Paul Brest has pointed out, the "interpretive community" that makes Fiss' system operate has historically been mostly white, male, Christian, and upper middle class.²⁵

But of course Fiss is not descriptively accurate. A Justice's broad normative beliefs, beliefs about what is good and just (which may or may not include ideas about the judicial role), are what determines how much weight will be assigned to such materials as the "words" and "history" of the Constitution, and to the "intention" of the framers and the "consequences" of the decision, as well as to any other source of information or values that Justices consult from time to time. These beliefs also shape the Justice's ideas about the "basic concepts" relevant to the decision. Different Justices with very different racial or socioeconomic backgrounds, or simply with very different beliefs about justice, are likely to have widely different predisposing attitudes and final opinions regarding what counts as a "denial of the equal protection of the laws," for example.

24. Fiss, however, is not consistent in this belief. Fiss, *supra* note 3, at 746-50, 753. Fiss wants to separate the internal and external critics. He acknowledges that internal criticism does not exhaust all evaluations of legal interpretation and that, indeed, "moral, political, and religious" criticism is a valid form of external judgment. *Id.* at 749. In case of conflict the external critic has two options: either to move to work within the system by amending the Constitution, packing the Court, or similar strategies, or to refuse to obey the law. *Id.* at 749-50. All of this seems cut and dried. Yet, Fiss wants to recognize that the ultimate authority of the Constitution is its justness. *Id.* at 753. I do not think Fiss can have it both ways. If the authority of the Constitution is founded on justness, then "moral, political, and religious" criticism is no longer clearly external, and the external critic has one final, very viable third option: that it isn't the law because it's immoral. Fiss himself recognizes the fallacy of any complete separation and, indeed, this is my very point. There is no separation, and the Court ought to be considering the moral and political implications of its decisions up front.

25. Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Brest, *The Democratization of Constitutional Interpretation*, 58 S. CAL. REV. 661 (1985).

In sum, what motivates a Justice's views and opinions about what the Constitution means as applied to particular problems and particular cases is the Justice's system of normative beliefs and values, which in most cases is constantly evolving and, for this reason, more or less open to argument. Some Justices may have come to believe that it is good—indeed required—for judges to go through a particular process of analysis, for example, to try in some “neutral” fashion to figure out the meaning of precedent, or to be guided, for example, by framers' intent, but such a Justice's “legal interpretation” is no less motivated by a system of normative beliefs and values. It is just that such a Justice has a different system from other Justices.

Moreover, constitutional argument and analysis, especially in the Supreme Court, is replete with claims that particular interpretations should be accepted or rejected because they are good for people or society or because of the requirements of justice.²⁶ These are not deviant or suspect forms of arguments. They are an acceptable part of the structure of constitutional claiming. There are no “rules” external to the Justices' complex of values and beliefs that supply anything that might remotely be thought of as “objective” solutions to these disputes—at least within the range of relevant controversies, namely those that reach the Supreme Court. The meaning and force of any such rules that might exist is itself determined by the motivations of the Justices, not the other way around.

Perhaps Professor Fiss has a different understanding of the nature of constitutional argument and judgment. If so, perhaps my disagreement with him turns on questions of fact. If not, perhaps I misunderstand his use of the concept of “objectivity.” The important question is whether constitutional interpretation is somehow less normative or more normatively contained or bounded than I claim. If not, it seems quite obvious that the substance of any debate about constitutional interpretation, in general or in particular cases, will be normative in the broad sense. In other words, there is no objectively correct answer to the question how the Court should interpret the Constitution.

I want to be careful at this point not to be misunderstood. My point has been to take issue with Professor Fiss' claims that certain characteristics of the process of constitutional interpretation operate so as to make Supreme Court interpretations “objective” and also to “furnish the standards by which the correctness of the interpretation can be

26. This is intrinsic to a claiming system, such as constitutional law, that involves evaluation of either the goodness of the consequences or the intrinsic goodness of competing claims.

judged."²⁷ For the reasons I have given, these claims are simply false. I have not claimed and do not believe that all judicial behavior is entirely unpredictable or unconstrained.

In most areas of law, good lawyers can make reasonable predictions about the likely responses of courts to potential claims. This is true to some extent even when the subject is constitutional law and the court, the Supreme Court. This predictability is possible because we can get some idea from each of the nine Justices' past behaviors in writing or joining opinions how that Justice is likely to respond to particular claims in future cases. To the extent Professor Fiss has in mind such predictability when he calls constitutional interpretation objective, I have no major quarrel with him. But, as anyone knows who has worried about a presidential appointment of a "swing" Justice or the possible revival of court-packing plans, the fact that increased knowledge about the values held by Justices makes for increased predictability in the law certainly does not lead to the conclusion that the Justices have objective bases for their judgments. Nor, quite obviously, does knowledge of Justices' values or the predictability of the law furnish any standard for judging the correctness of interpretations.

Prior decisional law—precedent—also may be helpful in shaping and predicting Supreme Court behavior. Professor Bennett has suggested, for example, that just as we might expect an individual judge "to strive mightily to reconcile his various decisions to avoid the cognitive dissonance that could otherwise beset him," we might to some extent expect multimember courts to strive to reconcile contemporary decisions with decisions of their predecessors to avoid "institutional dissonance."²⁸ Conceding that precedent is not irrelevant in constitutional argument and prediction, even Bennett's modest claims about its constraining effect on constitutional interpretation strike me as problematic. Bennett himself, in criticizing originalist theory, argues quite persuasively that decisionmaking on the basis of reasoning by analogy to normatively complex exemplars is by and large unconstrained by values external to the decisionmaker.²⁹ Normatively complicated precedent (most constitutional cases) can, in other words, be legitimately interpreted to mean almost anything the interpreter wishes, and the Supreme Court's behavior seems to me on the whole to be not significantly inconsistent with this hypothesis. To the extent that substantive

27. Fiss, *supra* note 3, at 744-45.

28. Bennett, *supra* note 3, at 481.

29. *Id.* at 480-85.

legal standards make case-by-case interest-balancing relevant to decisionmaking (and this is fairly common in constitutional law), precedent becomes even less constraining.

Perhaps I am overestimating the range of meanings permitted by precedent or the license taken by the Court. In fact, most constitutional doctrines have developed at least somewhat incrementally, and in some areas of constitutional law, such as parts of free speech law, the Supreme Court appears to take precedent quite seriously. Whatever the correct description of the operational importance of precedent, it certainly is not the case that precedent makes constitutional interpretation objective in more than the most minimal sense, and I do not understand Professor Bennett to be saying anything to the contrary. Moreover, precedent does not supply a very important standard for evaluating the correctness of constitutional interpretation. In fact, the standard for evaluating the correctness of the decisionmaking system represented by precedent and *stare decisis* must itself come from perspectives external to law—from moral and political theory.

I also want to be careful to make clear that I do not mean by my criticisms of Professor Fiss' thesis to suggest that there are no limits on the range of likely Supreme Court interpretive possibilities. There are more limits than are commonly supposed, and I do *not* at this point have in mind the various ways the political process checks the Court, although these are important.

Not much is communicated by the often-made claim that Justices impose their "personal values" when they interpret the Constitution. There are personal values and personal values. If we compare the motivation that might cause, say, John Doe to argue that the government has deprived him of property without due process by forcing him to pay a minimum wage to his employees, with the motivation of a Justice asked to adjudicate Doe's case, there surely is an important difference in the immediacy of self-interest. I do not say that a Justice will never experience an issue up for adjudication with the same immediacy of self-interest that a litigant does. But one suspects that the Justices' "personal values" will only rarely translate into self-interest as immediate as a litigant's, and will more commonly amount to a kind of experience-based, personally biased interpretation of values and ideas common in our collective morality. And while our morality has many and conflicting values and ideas, and is subject to many and divergent interpretations, it is not unbounded.

Moreover, it surely is true that Justices have presuppositional beliefs that set important constraints on their likely behaviors and inter-

pretations. Those of us trained in law know there are some arguments that just do not count as legal arguments and some that are so bad as to be embarrassing. No judge wants to be thought incompetent under prevailing professional craft standards, and this may constrain the reasoning process used in reaching a decision, and perhaps on occasion even the outcome. Even more important are the constraints implied by what Professor Deutsch some years ago called the public "agenda."³⁰ Some possible states of the world never really occur to us in any live and real way. They remain in the realm of the unthinkable or, even more accurately, the unthought. Any concept of judicial motivation or discretion must take account of this important constraint as well.

These constraints are important for some purposes. If we step back and ask from a macropolitical theory perspective whether the Justices of the Supreme Court in the United States today follow the practice of giving the Constitution any of the vast range of meanings it might be given by a Martian familiar with the English language, obviously the answer is no. I believe this tells us something very important about the political and moral presuppositions of our concept of law, as well as about the operations of our institutions. The fact remains, however, that within an extremely broad range of possible interpretations of many constitutional provisions, none of these factors will have any significant effect in constraining a Justice's interpretative options. And except for broad boundary conditions that I hope to discuss in a subsequent paper, "inacro" considerations do not supply us with objective criteria for evaluating competing theories of constitutional interpretation or standards for evaluating the correctness of competing interpretations.

How broad is the range within which we can expect an absence of such constraint and therefore disagreement? What sorts of cases do I have in mind when I say that "objective" criteria for both the interpreter and the Court critic interested in the correctness of the decision do not exist? The answer is this: All cases in which "respectable" arguments are available on both sides of an issue, and this includes virtually all important constitutional cases. Let me give some examples.³¹

30. See Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political System*, 20 STAN. L. REV. 169, 249-61 (1968).

31. The arguments of the cases are not stated here because they are contained in the literature and in majority, concurring, and dissenting opinions.

In *Reynolds v. Sims*,³² the Justices were not constrained to reach the one-person-one-vote holding, and the decision was not objectively correct, but neither would have been a decision to leave the question entirely to political processes or to strike down only the grossest malapportionment on an analysis that looked more closely, if subjectively, at case-by-case justifications. The Court was in no sense constrained to extend the one-person-one-vote rule to local government, and its decision to do so is not objectively correct, but neither would have been a refusal to extend it.³³ The solutions for the vast majority of voting and related political rights cases are similarly unconstrained, nonobjective, and indeterminate. On the basis of one political theory about the relationship that should obtain between wealth and political participation, for example, the Court properly struck down limits on campaign spending in *Buckley v. Valeo*.³⁴ But under a different, perfectly sane theory (and set of assumptions about social fact), the Court ought to have sustained the limits, or even held that they were constitutionally required.

The outcome in *Brown v. Board of Education*³⁵ was not constrained by precedent, although it may well be that in this particular instance an outcome opposite to that reached by the Court would have been impossible to justify as a matter of political morality and, therefore, law.³⁶ But most if not all of the big issues in race law have had neither constrained nor determinate, objectively correct, solutions. For example, the Justices were not constrained to hold in *Washington v. Davis*³⁷ that minority group members, disproportionately disadvantaged by government action, must prove that the action was motivated by a discriminatory purpose. This holding is not objectively correct, but neither would have been a standard based on disproportionate effects. And, although I have my own views on the issue, there is no constrained or objectively correct solution to the reverse or benign discrimination problem.

Virtually all of the other important equal protection issues in our generation have neither constrained nor determinate solutions. The

32. 337 U.S. 533 (1964).

33. See A. BICKEL, *supra* note 3, at 190-97.

34. 424 U.S. 1 (1976).

35. 347 U.S. 483 (1954).

36. But see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

37. 426 U.S. 229 (1976).

termination in *Rodriguez v. San Antonio School District*³⁸ of what can be loosely called constitutional "subsidy rights" was not constrained or objectively right or wrong, and neither would have been the continued development of the terminated line of cases. The Court's willingness to extend the suspect or quasi-suspect classification doctrine to cover gender and its unwillingness to extend it in other directions was not constrained or objectively correct, but neither would be the reverse decisions.³⁹

The list could be extended indefinitely (I have not even mentioned the so-called "privacy" right cases), but I think I have given enough examples to show that the nonobjectivity of constitutional judgment is not a trivial matter. What interpretation the Court should have given the Constitution in each of these cases is a normative question. There is no noncontroversial process of "interpretation" that leads naturally or automatically to the right answer.

III. AUTHORITY AND MEANING IN CONSTITUTIONAL THEORY

The fact that all of the important questions about constitutional interpretation are normative, taken in conjunction with the enormous range of meanings that are consistent with the language of the document, has the following rather important implication for constitutional theory: We have no reason or justification, in advance of normative theories about the value of constitutional law, for assuming that the Constitution, taken as a whole, has any particular set of meanings. Absent normative assumptions or arguments, the Constitution contains a galaxy of infinite meaning. The first step in understanding the value of constitutional law is to understand why the Constitution is and ought to be authoritative. If I am right that the authority of our Constitution is the authority of moral reasoning, then at least we have strong reasons for believing that the Constitution should have those meanings that are good and just for society. At a minimum, however, we ought to recognize that the evaluation of theories of unconstitutional meaning depend on theories of constitutional value and authority.

Although there has been very little discussion in the literature of what I mean by "constitutional authority," most if not all of those who have participated in the interpretation debate have at least implicitly

38. 411 U.S. 1 (1972).

39. See J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

taken positions in the matter. For example, Dean Ely's argument that the Constitution should be given only those meanings that promote "participation" in the political process and are "representation-reinforcing" must presuppose some view as to why the Constitution is and ought to be authoritative, why it is and ought to be law, and why we do and ought to pay attention to it.⁴⁰

Ely's book is in fact mildly schizophrenic on questions like these. He tends to present his thesis as a legal argument to the effect that his position provides the "best" or the "correct" interpretation of several important lines of cases decided by the Supreme Court. But at the same time he presents it as a theory about what is good for society, and it is this aspect of his presentation that identifies his view about the Constitution's authority. He must believe that we do or, at least, that we ought to regard the Constitution as authoritative and the institution of constitutional law as justified because it is good for us.

The authority of the Constitution, on Ely's view, is the authority that we all implicitly acknowledge by believing that it counts as a reason for an individual or a group doing or refraining from doing something that it is "good" or "just" to do or not do it. This concept of authority is implicit in the institution or practice of moral reasoning, moral argument, or moral justification. And Ely's manner of arguing on behalf of his own conception of what is good for our society necessarily presupposes that the political theory of authoritativeness and law that underlies the Constitution and our political system has as its basis this concept and form of authority.

I agree with his implicit view of the Constitution's authority. Although I am not entirely confident that Ely's concededly powerful thesis takes full account of the implications of its own presuppositions on this score, this question is beyond my current ambition. The important point for now is that Ely's theory of meaning is made possible only by his implicit theory of authoritativeness. If we all believed that the authoritativeness of the Constitution had nothing to do with its being good for us, then Ely's arguments that its meaning should be determined according to what is good for us would strike us in much the same way that the ravings of some fringe religious figure about the Bible's meaning probably strikes an Episcopalian.

Some more, rather striking examples of the kinds of problems that arise when we fail to appreciate that theories of meaning depend on

40. See J. ELY, *supra* note 3, at 75, 181.

theories of authority can be found in Professor Perry's book, *The Constitution, the Courts, and Human Rights*.⁴¹ Professor Perry's paper for this Symposium⁴² candidly rejects the parts of his earlier analysis that I here criticize, and I offer this criticism only because it serves to illustrate sharply the kinds of problems that inevitably arise when we fail to acknowledge the virtually absolute dependence of theories of meaning on theories of constitutional value and authority. On the whole, his book is very insightful, and my criticisms are directed to its conceptual foundation, not to its principal arguments or conclusions.

At the very beginning, Perry excluded from his subject matter "contra" constitutional policymaking, by which he meant decisionmaking "that goes *against* the framers' value judgments."⁴³ He staked out as his domain "extra" constitutional policymaking, that is, decisionmaking that "goes *beyond*" the framers' value judgments,⁴⁴ and he proceeded to develop *within this domain* the theory that constitutional law can be understood and justified as a vehicle for moral debate and as a search for an objectively true morality. His basic claim, in other words, was that the Court can rightly play the moral role as he defines it so long as it doesn't do things that are "contra" constitutional.

Before one can sensibly distinguish between going "against" and "beyond" the Constitution, one needs to decide what the various provisions of the document mean. It is, of course, this decision that I am claiming cannot be coherently thought about, much less made, in advance of a theory about value and authoritativeness. Perry did not concern himself with these matters at this stage, however. As I understand him, in order to define the domain within which his theory applies, he adopted an essentially originalist conception of meaning in order to distinguish between the "contra" and "extra" categories.

Had he, instead, adopted language-meaning as the criteria for distinguishing between contra and extra, he would have avoided some of the conceptual disorders brought on by his choice of the broader originalism concept. In a language-meaning approach, we could understand contraconstitutional to describe Court interpretations that violate the language-meanings of the text. All else—the vast majority of

41. M. PERRY, *supra* note 3.

42. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551 (1985).

43. M. PERRY, *supra* note 3, at ix (emphasis in original).

44. *Id.* (emphasis in original).

Court interpretations, given the enormous range of language-meanings allowed by the document—would be extraconstitutional.

If Perry had adopted language-meaning as the way to understand what the Constitution means, his decision to exclude contraconstitutional decisionmaking would presumably rest on the claim that what the Court can properly say in the name of the Constitution depends on whether and to what extent the language of the document speaks clearly and unambiguously to the problem or case with which the Court is faced. On one version of the Constitution's authoritativeness there is a good argument to support this claim, but it is not and cannot be, as Perry seemed to suppose, based on the bare fact that language has meaning. The argument is and must be related to a political theory about the Constitution's authoritativeness. And such an analysis would lead to some nonintuitive conclusions about both the concept of "contra" constitutional decisionmaking and the extent to which the Court is "bound" by the document's unambiguous language.

At all events, Perry did not seem to have in mind only language-meaning rules as the way to understand what the Constitution means. He also had in mind some version of the framers' specific intent. Unfortunately, this conception of constitutional meaning wreaks havoc with the contra-extra distinction; for if the Constitution means what the framers intended it to mean we can talk sensibly about a category of extraconstitutional decisionmaking only if the framers in some sense "left room" for such a category.

If we assume for the moment (as Perry seemed to) that the framers had only very limited and specific intentions, and that these comprise the meaning of all of the broad, open-textured provisions in the Constitution, then it is quite unclear why a Supreme Court interpretation that "goes beyond" these limited and specific intentions does not "go against" them. Perhaps Perry's claim that there is a distinction between the two categories itself rested on an unarticulated "interpretation" of what the framers intended. Perhaps he believed that the framers authorized or at least did not intend to prohibit Supreme Court actions that "go beyond" their specific intentions. If this is so, then Perry's "noninterpretivist" theory of judicial review rests on an interpretive basis—one that he does not even defend.

If he had attempted this defense, moreover, he would have discovered that it is not easily made. Suppose the Supreme Court had held in 1800 that the free speech clause barred a state from prohibiting live nude dancing in places of entertainment, or from awarding libel judg-

ments to those in the public eye except in very limited circumstances. Or suppose the Court in 1875 had held that the equal protection clause substantially limited the ability of the states to distinguish between men and women. Or suppose at either date it interpreted some provision in the Constitution to create a right to abortion. As I understand Perry's enterprise, he wanted to think of these interpretations as extraconstitutional, as going "beyond" not "against" the values embodied in the written document. I very much doubt that the various framers or that observers in 1800 or 1875 would have thought of them this way. If such interpretations would have been thought contraconstitutional then, how can they be extraconstitutional today? More straightforwardly, is it possible that the framers' intent would have provided a "correct" standard of meaning then, but not today?

Unless the answer to the question is yes, Perry's thesis is in considerable trouble. The reason is that he had a seriously schizophrenic conception of the Constitution's authority. On the one hand, as his exclusion of contraconstitutional from the domain of his theory shows, he believed that the Constitution's authority is in some way tied into its language and the framers' intent. That is, he is to some extent an originalist. On the other hand, as his rather interesting theory of "noninterpretive" review illustrates, he thinks the Court has authority of some kind—based on "functional justification" and/or objective morality—to speak in the name of the Constitution. Unless the authoritativeness of framers' intent can change through history, however, Perry must reconcile the apparent conflict between these claims of authoritativeness. And if he really is as reverential of framers' intent as the structure of his analysis seems to suggest, he ought to bow to it as superior—in which case his noninterpretivist theory virtually self-destructs because most of the important things that the Court has done or might do by virtue of it would be contraconstitutional.

A good case can be made that recourse to framers' intent to supply constitutional meaning may have been quite proper in 1800 or 1875, but not today. Once again, however, the argument must be grounded in a political theory about constitutionalism and constitutional authority. Such an analysis leads not to the confirmation of a schizophrenic theory of authority, but to a unitary theory that sees the Constitution's authority as based on the authority of moral reasoning.

The failure to appreciate that theories of meaning depend on theories of authority is not limited to theorists who promote one or another version of originalism. Professor Schauer, in his exceptionally illumi-

nating article on constitutional language, argues that many of the more important provisions of the Constitution use "theory-laden" terms that "are incomplete, and . . . [this] commits the user to the fact that the completion is going to come from somewhere else."⁴⁵ He further suggests that the broader, more open-textured provisions commit us to the ongoing development of "moral or political theories."⁴⁶

Taken as a claim about the nature of the meanings that the Constitution's language allows, as opposed to requires, I find Schauer quite persuasive. He seems, however, to believe that it follows just from the nature of the document's language that the Court should interpret the Constitution through the lenses of moral and political theory. I also happen to be sympathetic with his conclusion about constitutional interpretation. But it is not a conclusion that can properly be drawn just from the document's language.

Suppose we assume, as Schauer seems to admit, that the framers had a much more limited, particular, contextual, historical, exemplary understanding of the language they used in drafting the document. The Constitution might be given these meanings consistently with its language. Why shouldn't it? Or might not it be best to say that because its author-intended meaning and language-meaning are inconsistent, it has no meaning? Schauer gives only passing attention to such questions. He seems to say that whether or not "users" (including the framers) of moral and political theory-laden language "intended to be so committed does not matter. It's just part of the rules of the game [of using such language]."⁴⁷

In this passage, Schauer has put forward an incipient notion about constitutional authority that rests on what might best be thought of as the "Groucho Marx" theory of language significance. On Groucho's television "quiz" show of yesteryear, if a contestant inadvertently spoke the day's "secret word," a wooden duck descended on stage and the contestant was awarded a hundred dollar prize. The words were significant only because they were uttered at a particular time and place, despite (or because of) their inadvertence.

On the Groucho Marx theory of language significance, it does not matter whether any act of intelligence or purpose lies behind the Constitution's language, or whether any functions are performed or values

45. Schauer, *supra* note 4, at 826.

46. *Id.* at 827.

47. *Id.* at 826.

promoted by giving it one set of meanings over another. The authority of the Constitution is based simply on the fact that the document uses the secret words. One imagines Schauer telling Jefferson (once the words were uttered), "gottcha."

IV. ORIGINALISM AND THE INTENTION OF THE FRAMERS

Originalism describes the group of claims that share a belief that the Constitution should mean today what it meant in "the original understanding." All originalist theories rest at least implicitly on three claims. First, there existed as a matter of psychological and historical reality a collective state of mind (however defined) of the real group of people who participated in the drafting and/or adoption of the original Constitution and each of its amendments, and this state of mind determines the meanings that these people as a group intended various constitutional provisions to have.⁴⁸ Second, judges and scholars today can, by historical research, come to reasonably reliable and certain understandings about this state of mind as it relates to a substantial number of important provisions in the Constitution. Third, the meanings supplied by research into this state of mind are authoritative—if not descriptively (because the courts do not in fact give the Constitution these meanings) then normatively (that is, the document ought to be given these meanings).⁴⁹

Much has been written about framers' intent lately, especially with respect to the first and second of these questions. There is no point in recapitulating this debate in any detail or in reciting the now standard litany of cautions concerning both the concept and discoverability of collective states of mind. My main point is to emphasize the critical importance of the much less debated third question: assuming that a coherent collective state of mind could be reliably defined and discovered, so what? By virtue of what should it be authoritative?

To illustrate the importance of this question I would like to dredge up for a moment one part of the debate over the existence of the framers' state of mind—namely, the question of whose intent we are looking for. In particular, I would like to give a bit more attention than is customary to the potentially important difference between the drafters and the ratifiers of the Constitution and its amendments. The drafters and

48. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). For criticisms of this notion, see Brest, *supra* note 4; Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

49. See R. BERGER, *supra* note 48; Monaghan, *supra* note 5.

ratifiers were two separate groups. The state legislature selected the drafters as delegates to a convention to revise the Articles of Confederation.⁵⁰ After the convention, the drafters requested that each state hold a general election to select delegates to a state convention that would decide whether the state would approve the new government.⁵¹ The two groups appear to have had different views on the Constitution; that is, thirty-nine of the fifty-five drafters voted to endorse the Constitution,⁵² while the ratifiers' votes ranged from unanimous acceptance to rejection, with some states ratifying by only a slim margin.⁵³ Originalists rarely attend to the difference between drafters and ratifiers,⁵⁴ although they usually look to sources that bear much more directly on the drafters' state of mind. Either of two explanations, one factual and the other normative, might account for their inattention to possible differences.

First, those originalists who ignore the distinction may know or assume that the ratifiers had exactly the same understandings of all constitutional provisions as the drafters had. I am not aware of any research establishing this, however, and it seems wrong in light of the following historical facts: (1) the drafters and ratifiers were two separate groups, selected by different voting blocs; (2) the state ratifiers independently debated the meaning and implications of the new document,⁵⁵ and (3) the proceedings for the drafting convention were, as per the drafters' agreement, kept secret.⁵⁶

Originalists generally claim that the drafters had quite limited, concrete meanings in mind for many of the most ambiguous and open-textured provisions. There is no basis to presume that the ratifiers were aware that the general language of the Constitution carried such spe-

50. I L. HACKER, *THE SHAPING OF THE AMERICAN TRADITION* 236-38 (1947); F. McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 21-22 (1958).

51. I L. HACKER, *supra* note 50, at 237-38. *See generally* F. McDONALD, *supra* note 50; R. RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTI-FEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788* (1983).

52. I L. HACKER, *supra* note 50, at 237. The states named a total of 75 delegates, but only 55 ever attended the convention. *Id.*

53. While Delaware, Connecticut, Georgia, and New Jersey approved the Constitution without significant opposition, in some states the margin was only three votes, and in still other states the popular vote was against the Constitution, but the ratifiers changed their positions after being elected. *Id.* at 237-38.

54. Raoul Berger did distinguish between the drafters and the ratifiers in R. BERGER, *CONGRESS V. THE SUPREME COURT* (1968).

55. *See id.*; F. McDONALD, *supra* note 50.

56. C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 190 (1929).

cific meanings. Pro-Constitution forces lobbied the populace and delegates with arguments favorable to their side,⁵⁷ but how did the ratifiers come to learn the meanings of each provision, especially since the proceedings of the original Constitutional Convention were secret? It is not clear what other information the ratifiers had. I see no reason to make the most counterintuitive assumptions about the level of their information and understanding.

If originalists do not know or assume that the drafters and ratifiers shared the same understanding, perhaps the reason they fail to attend to the potential difference is that they regard it as unimportant. Given that they usually rely on data that bears more directly on the drafters, we might infer that they believe the ratifiers' understandings are either irrelevant or of greatly subordinate importance. But I am not aware of any originalist who makes or defends this claim. Nor is it immediately clear why it might be true.

What kind of a question is it to ask whether the state of mind of the drafters, on the one hand, the ratifiers, on the other, or both, is relevant or important in determining constitutional meaning? Quite obviously it is a question about the political theory of the Constitution; there simply is no other universe of discourse within which it might be a question. To defend the superior importance of the drafters' intent, one would have to come forward with a political theory of American constitutionalism that supports the conclusion that drafters' state of mind is authoritative. And I very much doubt that anyone could develop a minimally coherent and persuasive theory about constitutionalism⁵⁸ that would locate the Constitution's authoritativeness in *any* version of originalism, let alone settle the question as between the drafters and ratifiers.⁵⁹

Whichever group's state of mind the participants in the recent framers' intent debate have had in mind, very little effort has been directed toward theorizing about the question why it might be thought that any identified states of mind matter. Instead, the main arguments have been over whether there really existed any state of mind of the

57. *Id.* at 153-54.

58. Any plausible theory might depend heavily on the existence of the amendment process. Yet, Paul Brest has aptly pointed out some of the fallacies of such a claim. It assumes that nonaction means consent to the status quo. It also ignores the realities of the burdensome amendment process. See Brest, *supra* note 4, at 236-37.

59. Democratic theory arguments pose different problems. We may tolerate adherence to a notion of originalism—assuming such a concept made sense—because we believe that changes in a democracy ought to be made by the legislature. See Tushnet, *supra* note 23, at 792.

sort that originalist theory presupposes, and if so, at what level of generality it existed, and to what extent and through what methodologies we can discover its implications for contemporary problems.

While generalization about this debate is hazardous, we can identify at least roughly the major positions that have emerged. Professors Berger, Monaghan, and several others take the position that what the framers had in mind when they drafted most of the important provisions were quite specific, limited, historically and contextually identifiable goals or exemplary instances, and that these intentions are binding on us today.⁶⁰ Others, including Professor Dworkin, argue that while the framers may have had these particularistic intentions, they simultaneously had very general or abstract intentions and that these are the ones that ought to count in constitutional adjudication.⁶¹

Still others, like Professor Tushnet and to some extent Dean Sandalow, have argued that no description of framers' intent as to specific, particularistic, exemplary language can capture what the provisions they framed really "meant" to them.⁶² This knowledge can be gained only by understanding the worldview into which these particularistic conceptions fit. A historian or a court really interested in finding the framers' meanings must therefore use what some people call a "hermeneutic" approach, which calls for the interpreter to "enter the minds of his or her subjects, see the world as they saw it, and understand it in their own terms."⁶³

Finally, Professor Bennett and, at least by implication, Professor Moore argue that no matter how specific and historically contextual the framers' intent was, that intent necessarily leaves considerable room for the future shaping of meaning—shaping that must depend on the judgment of interpreters and cannot in any realistic sense be bound to or guided by the framers' states of mind.⁶⁴ This is true for either of two accounts of what the object of the framers' intentions were. First, the object of their intentions may have been goals. Perhaps, for example, the correct description of the intention behind the fourteenth amendment is that the framers wanted the former slaves not to be denied equal treatment in matters that concerned fundamental rights. But the

60. R. BERGER, *supra* note 48; Monaghan, *supra* note 5.

61. Dworkin, *supra* note 48.

62. See Tushnet, *supra* note 23, at 786-87; Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

63. Tushnet, *supra* note 23, at 798.

64. Bennett, *supra* note 3, at 472-74; see also Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 256 (1981).

determination of which forms of dissimilar treatment should be outlawed in order to further this goal will change through history and depend largely on the judgment of interpreters. Second, the object of their intentions may have been exemplary instances. Perhaps, for example, the framers of the fourteenth amendment wanted to prohibit the imposition of disabilities against the former slaves accomplished by the infamous black codes.⁶⁵ But if so, the only reasonable assumption is that they wanted state behaviors "like" these exemplary instances covered as well, and the shape and direction of such analogical extensions must also depend largely on the judgment of interpreters and must change through history as new "analogues" or cases come into the picture.

Proponents of framers' specific intent, as I suggested earlier, sometimes seem to believe that this interpretive methodology is somehow validated or made authoritative by the authoritativeness of the Constitution. Why they think this is less than crystal clear. Professor Monaghan seems to suggest several different explanations. At one point, he says that the authority of the Constitution is a first principle that requires no explanation or justification because, quoting Aristotle:

it is a lack of education to know of what things one could seek a demonstration and of what he should not. For, as a whole, a demonstration of everything is impossible; for the process would go on to infinity, so that even in this manner there could be no demonstration.⁶⁶

At another point, Monaghan proposes what might be understood as either the same or a quite different explanation: "Our legal *gründnorm* has been that the body politic can *at a specific point in time* definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment."⁶⁷ Whatever we make of this, it is clear that Monaghan believes that these propositions support the view that constitutional text should be given textually plain meaning as supplemented when necessary by the meanings the framers intended.

No doubt Aristotle is quite right that at some point analysis is no longer possible, but this cannot justify our picking any point we see fit to declare that our beliefs make further analysis irrelevant or unneces-

65. See R. BERGER, *supra* note 48; see also Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1953).

66. Monaghan, *supra* note 5, at 383-84 (quoting ARISTOTLE, METAPHYSICS 1006a(5)-(10) (Apostle trans. 1966)).

67. *Id.* at 376 (emphasis in original).

sary—at least not if we wish to persuade. On what are Monaghan's beliefs about plain meaning and framers' intent based? Presumably, they are not based on the belief that the framers were divine or infallible. Nor could they be based on the idea that they are what "everybody believes" because, as we have seen, there are neither presuppositional beliefs nor widespread consensual attitudes in our society that might lend support to such a claim. Nothing seems to stand behind Monaghan's assertions except his own belief, and that does not make them true.

Monaghan's alternative claim that our "legal grundnorm" allows one "body politic" to bind all future ones might be interpreted as resting on a different theory of constitutional authoritativeness, namely, the authority of moral reasoning that we saw underlies Ely's analysis. Interpreted in this fashion, we would understand Monaghan to be saying that it is good for a society in general and over time for it to be possible for one "body politic" to bind subsequent ones in certain ways. From this it might follow that the Constitution should mean what the framers intended. To some extent this is a tenable position, as I shall argue at a later time, but it requires considerable elaboration and cannot be persuasively maintained without very substantial qualification because of powerful and competing claims of no less status about what is good and just for society.

Dworkin's pitch for abstract over specific intent (or concepts over conceptions) strikes me, as it has others, as entirely unpersuasive—at least if understood as the theory about framers' intent that it usually purports to be. While he has identified what he means by abstract intent (or concepts) at varying, although uniformly high, levels of generality, Dworkin's description of what one of these things is, usually sounds as if it amounts to nothing beyond that which is described by the words of the Constitution. At least on one occasion he in fact described what he meant by abstract intent as a statement that "matches the words . . . voted for."⁶⁸ On this view, for example, the abstract intention of the authors of the equal protection clause was to prevent states from denying persons the equal protection of the laws. Dworkin has also conceded that the only evidence he has that such an abstract intention existed is the language of the Constitution.⁶⁹

A theory of author's intention that defines the relevant state of mind in terms of the authored language and then purports to prove that

68. Dworkin, *supra* note 48, at 489.

69. *Id.* at 494-95.

such a state of mind in fact existed solely by offering in evidence the same language, sounds rather more like a theory about the authored language than about the author. Granted that one cannot conclusively disprove that the framers had the abstract intention Dworkin claims, it remains unclear what is to be gained by adding this Rube Goldberg twist to enable a conclusion about framers' intention to be drawn on the basis of concepts and evidence that have only to do with constitutional language.

Apparently Dworkin believes that his arguments on behalf of particular interpretations of the Constitution are (or sound as if they are) more authoritative if they can in some fashion be linked to the framers, although he has never articulated any theory about why this is so. Moreover, he defines the framers' states of mind at such a high level of abstraction that any such "linkage" is to framers who have been entirely disembodied, abstracted out of time and history, and transformed into some sort of theoretical intenders. One wonders what sort of a theory of authoritativeness could find a role for framers like these. One wonders as well how relevant the framers really are to Dworkin's otherwise interesting and often appealing theories about constitutional law.

If we assume for the sake of argument that the framers really did have abstract intentions simultaneously with specific ones, the question of which intention ought to control when they conflict can be answered only by the development of political theories about constitutionalism, as Dworkin himself has argued.⁷⁰ The same point holds, however, in only slightly altered form, if we assume the framers had no such disembodied intention. The important question then is simply whether or not the Constitution's authority, as a matter of political theory, derives from the framers, and if not, whether an interpreter's resort to Dworkin's "concepts" can be justified by a nonoriginalist theory of its authoritativeness. More must be said by way of justification than that the words of the Constitution themselves *are* concepts, assuming, of course, that we are not satisfied with what I have previously called the Groucho Marx theory of language significance. But *this* is the important question, not the heading under which Dworkin should be filed.

The hermeneutic approach to historical interpretation rather obviously has much to recommend it as a way of expanding our understanding of history, and its criticism of the narrowness of the historical

70. *Id.* at 488-97.

perspective of originalists like Professor Berger seems quite persuasive. But realistically it does not have a great deal to offer constitutional interpretation. Put crudely, to enter the mind of the framers would require very considerable study of (indeed, immersion in) their history and culture, and for one who does not find this worthwhile for its own sake or who is simply pressed for time, the question is whether the payoff would be commensurate with the investment. There is sufficient reason for doubt on this score to require, at the least, that we have a clearer sense than we currently have of why we might want to make the investment.

Understanding the framers' worldview and how the provisions of the Constitution relate to it is not going to produce anything resembling determinate solutions to contemporary problems in constitutional law, as Professor Tushnet well understands. The rather obvious reason for this is that our world is very different from theirs. Although there is not enough literature attempting a hermeneutic interpretation of the framers' intent to support a final judgment, it seems quite unlikely that even the most exhaustive and sensitive study could generate information that will have more than the most general import for contemporary issues. Professor Tushnet gives as his only example of a hermeneutic understanding Justice Brandeis' eloquent if fictionalized account in *Whitney v. California*⁷¹ of why the framers valued freedom of speech. Tushnet describes the virtue of what he sees as Brandeis' hermeneutic approach as follows:

It matters not very much that [the framers'] views on specific aspects of governmental design may have differed in detail from Brandeis' reconstruction; what matters is that the framers designed a government that comported with their sense of a world in which civil virtue reigned. The significance and the ramification of this sense are what Brandeis strove to capture, and they are what interpretivism, too, must recognize to be central.⁷²

"Civil virtue" is very fine, but it does not tell us very much about the meanings we should give the Constitution. In fact, this passage suggests that the hermeneutic approach may lead to understandings of the framers' intent on levels of abstraction that make Dworkin (whom Tushnet criticizes for abstractness) look like a country lawyer. It seems to me that before we run off for hermeneutic training we ought to be quite confident that it is relevant to constitutional interpretation, and,

71. 274 U.S. 357 (1927).

72. Tushnet, *supra* note 23, at 799.

once again, this can be determined only on the basis of political theories about the Constitution's authoritativeness.

The Bennett and Moore critiques of originalist presuppositions strike me as quite powerful. My preceding summary does not do justice to either of their analyses, but it seems to me that they have at least shifted the burden to the originalists to prove that their enterprise is intellectually coherent.

In what sense can it be maintained that the answers to questions of which means further a framer-intended goal, or which new problems are "like" a framer-intended exemplar, can be found in the framers' intent? Can intended goals and exemplary instances set discernible boundaries on interpretation? How so? For example, if prevention of unequal treatment in fundamental rights was the goal of the framers of the fourteenth amendment, or prevention of black-code disabilities their exemplar, can proponents of originalism maintain that it is the framers' conception of "unequal" and "fundamental" or the framers' beliefs about what is "like" a black-code disability that must govern means/goals or analogical interpretation today? Can we know enough about the framers' beliefs and states of mind to turn this trick?

Even so, what is the answer to the hermeneutic (and common sense) criticism that such an interpretive technique rescues a semblance of "objectivity" at the cost of losing the entire sense of what the framers' concepts really meant to them? If *X* (education, health care) was not fundamental then but is today, is it "truer to their intent" to hold that it is or is not fundamental? If they did not believe segregation was "unequal" but we do today, is it "more faithful" to their meaning to prohibit or permit it?

Instead of pursuing these avenues of argument, will originalists abandon any claim that theirs is a theory of constitutionalism and rely instead exclusively on the supposed threat to "democracy" posed by a court with wide-ranging interpretive discretion? Might they claim, for example, that the framers' conceptions of "fundamental" or "unequal" should control whether or not this is true to their meanings, just so that judicial discretion can be contained? Or, more directly, might they argue that the Court should assume that all legislation is constitutional unless it is clear, beyond a shadow of a doubt, that the framers wanted it otherwise?

I do not know what the originalists will do, but this much is certain: Final resolution of the validity of originalism as a theory about

constitutionalism and democracy will require the development of theories about constitutional authority. The questions I have raised about the proper interpretation of "fundamental" and "unequal" can be answered only by political and moral theories about the authoritativeness of the Constitution because this is the only way to decide what it might mean even to pose the question of which interpretation is truer to their intent or faithful to their meaning. Originalism's internal coherence is obviously important, and in my judgment has been cast in grave doubt. Of at least equally obvious importance, however, is whether originalism or some version of it can be justified even on the assumption that it or some version, is coherent, and if not whether we can justify any alternative program for giving meaning to the Constitution.

V. CONCLUSION: A FALSE BUT HELPFUL START

This takes me back to where I started. By virtue of what is the Constitution authoritative? Why and in what sense is it "binding" or "law"? What role or place in its authoritativeness is the origination and hence the drafters and adopters? What is the relationship between the authority of the Constitution and democratic theory? I am not going to try to answer these questions in this paper, but I would like to conclude with a misleading but helpful way of precluding the kind of inquiry these questions involve.

We can ease into them by posing a hypothetical that is not very far afield from the conventional debate about originalism. Imagine that we could go back to the point of origination and ask the framers whether they really cared very much if the institutions that were going to interpret the Constitution paid any attention to the meaning they intended it to have. What would be their likely response?

Any answer is a guess. If we make the rather likely assumption that this prospect would not have been a matter of indifference to them, however, it seems much more likely than not that they would have been considerably more concerned about the future that was relatively near than about the one that was far distant. The rather obvious basis for this guess is a judgment about the way most people feel about such matters. Certainly they would understand that their interests would be much more vitally at stake during their own lifetimes, and those of the then-existing people they cared about, than thereafter. And insofar as they saw themselves as architects of a good or just society rather than as interested parties to a bargain, it also seems likely that they would have had the wisdom to understand that they were not omniscient. It is

not unreasonable to think, on this basis, that they would have had much greater confidence in the goodness and justice of their plans for a society and culture they knew and understood, than for ones they must have had the good sense to realize they could not very easily even imagine.

Of course, to the extent this story rings true, there is no reason to suppose that the provisions that enumerate the procedures for amending the Constitution are exempt from it. On this view, the framers were vitally concerned that the Constitution mean what they intended it to in the relatively near future and wanted any departure from this meaning to be accomplished by amendment. As to the distant future, they simply did not care a great deal how the Constitution was going to be interpreted or what would become of the amendment process.

My purpose is not to draw from this story the conclusion that the Supreme Court can do whatever it wants in interpreting the Constitution because it has the framers' "okay." Quite the opposite. Even if the framers would have answered our questions as I have supposed, this alone cannot establish the appropriateness of the Court's doing whatever it wants. What else is needed, in the first instance, is an account of why the framers' wishes are or ought to be authoritative. I suspect that most people would find the answers I have given about the framers' likely response intuitively more likely than alternative answers. I intend to appeal to this intuition at another time because its basis is closely related to what I think is the most contemporarily important theory of the Constitution's authority, that is, the authority of moral reasoning. The intuition, however, cannot conclude the issue.

In fact, to make further use of this hypothetical, we must assume that the framers' response would have been quite the opposite from what we have to this point argued it probably would have been. We must suppose that their answer to our question whether they cared if the courts paid any attention to the meanings they intended would have been a thundering and unanimous yes—"for now and evermore, our intention must rule, and the only way around this is to amend the Constitution." The question that must then be raised is, so what? Why should anyone then or now care what the Constitution says or what they wanted? Of what does the Constitution's or the framers' pretense or claim to authority consist?