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## The Argument for Judicial Review—and for the Originalist Approach to Judicial Review (the Ben J. Altheimer Lecture)

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THE ARGUMENT FOR JUDICIAL REVIEW—  
AND FOR THE ORIGINALIST APPROACH TO JUDICIAL  
REVIEW (THE BEN J. ALTHEIMER LECTURE)\*

*Michael J. Perry\*\**

Part One: The Argument for Judicial Review

I address two fundamental questions in the book from which this lecture is drawn:<sup>1</sup> first, the question of the approach to constitutional interpretation the Supreme Court should follow, and, second, the question of the nature of the role the Court should play—how large or active, or how small or passive, a role—in bringing the interpreted Constitution to bear in resolving constitutional conflicts. Neither question would arise but for the practice of judicial review, which involves, centrally, the Court interpreting the Constitution in the course of resolving constitutional conflicts. In Part One of this lecture, I inquire into the legitimacy of judicial review. I do so not because the legitimacy of the

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\*\* Howard J. Trienens Chair in Law, Northwestern University. I want to express my gratitude, for their wonderful hospitality, to Dean Howard B. Eisenberg and the faculty of the University of Arkansas at Little Rock School of Law. A special thanks to Professor John M.A. DiPippa.

1. The title of the book, to be published late in 1993 by the Oxford University Press, is *THE CONSTITUTION IN THE COURTS*.

practice is at issue in the United States today: Judicial review seems to enjoy virtually consensual support in contemporary American society.<sup>2</sup> I do so because it is useful to explain why a practice that yields persistent controversy about constitutional interpretation and proper judicial role not merely enjoys our support, but merits it. More importantly, the argument for judicial review, as I explain in Part Two of this lecture, is an essential part of the argument for the approach to constitutional interpretation that should inform the practice of judicial review.

The "judicial review" whose legitimacy is under discussion here is the judicial practice of inquiring if a governmental act, or a failure to act, violates the Constitution of the United States.<sup>3</sup> A governmental act whose constitutionality is in question may be, at the one extreme, a statute, or it may be, at the other extreme, a single action by a person in her capacity as an official or employee of the government, or it may be something in between. I am not concerned here with the judicial practice of inquiring if a governmental act (or a failure to act) violates a *state* constitution, although much of what I say in this lecture about judicial review for federal constitutionality, including what I say about the legitimacy of the practice, is applicable to the distinct but analogous practice of judicial review for state constitutionality. I am principally concerned here with judicial review (for federal constitutionality) by the Supreme Court of the United States, although much of what I say about judicial review, including what I say about the legitimacy of the practice, is applicable both to judicial review by a federal court other than the Supreme Court and to judicial review by a state court.

The legitimacy under discussion here is *not* the constitutional legitimacy—the constitutionality—of judicial review, but legitimacy in a different sense: Is judicial review a good practice for us Americans, one we should support, or is it, instead, a practice we would be better off without, one we should oppose? Even if the Constitution establishes the practice of judicial review, we can inquire if we should applaud that state of affairs or, instead, condemn it and try to do something about it. (In Appendix A to this lecture, I comment on the historical question

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2. See *infra* note 115.

3. See ROBERT L. CLINTON, *Marbury v. Madison* AND JUDICIAL REVIEW 7 (1989): "'Judicial review,' as a term used to describe the constitutional power of a court to overturn statutes, regulations, and other governmental activities, apparently was an invention of law writers in the early twentieth century. Edward S. Corwin may have been the first to coin the phrase, in the title of an article in the 1910 *Michigan Law Review*." Clinton's reference is to Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102 (1910).

whether the Constitution establishes the practice of judicial review.)

## I

The problem of the legitimacy of judicial review is rooted in what Alexander Bickel famously called "the counter-majoritarian difficulty:"

The root difficulty is that judicial review is a counter-majoritarian force in our system. There are various ways of sliding over this ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of "the people," the limits that they have ordained for the institutions of a limited government. And it has been done ever since in much the same fashion by all too many commentators. Marshall himself followed Hamilton, who in the 78th *Federalist* denied that judicial review implied a superiority of the judicial over the legislative power—denied, in other words, that judicial review constituted control by an unrepresentative minority of an elected majority. "It only supposes," Hamilton went on, "that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." But the word "people" so used is an abstraction. Not necessarily a meaningless or a pernicious one by any means; always charged with emotion, but nonrepresentational—an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. . . . [I]t is the reason the charge can be made that judicial review is undemocratic.<sup>4</sup>

Although, as Bickel acknowledged at length, "no democracy operates by taking continuous nose counts on the broad range of daily governmental activities"<sup>5</sup> and "the process of reflecting the will of a popular majority in the legislature is deflected . . . by all sorts of institutional habits and characteristics, which perhaps tend most often in favor of inertia,"<sup>6</sup> it is nonetheless true, as Bickel insisted, that

"nothing in the . . . complexities and perplexities of the [American democratic] system . . . can alter the essential reality that judicial

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4. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962).

5. *Id.* at 17.

6. *Id.* at 18-19.

review is a deviant institution in the American democracy. . . . [N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."<sup>7</sup>

Given the counter-majoritarian difficulty, the question arises whether judicial review is a practice we Americans should support. Does judicial review, which enjoys our support, merit our support?

## II

Political communities can establish rights and liberties—that is, they can establish them as “law,” they can accord them the status of “law”—by means of statutory law, and they often do. But political communities can also establish rights and liberties by means of constitutional law, and they sometimes do. Consider what it means for a democratic political community that wants to accord a right (or a liberty) the status of law to opt for the constitutional strategy rather than for—or merely for—the statutory strategy. Consider, that is, what it means, as a practical matter, for a democratic political community to name and then to seek to protect a right by means of constitutional law rather than (merely) by means of statutory law. (The constitutional strategy can be used to establish the various institutions of government, and to allocate power among them, as well as to establish limits, in the form of rights and liberties, on governmental power. But because my principal concern in the book from which this lecture is drawn is with those parts of the Constitution, like the Bill of Rights and the Fourteenth Amendment, that establish rights and liberties, I want to comment on the constitutional strategy mainly as a strategy for establishing rights and liberties.) Whereas statutory law typically may be revised or repealed by legislative majorities, national constitutions typically provide that constitutional provisions may be amended only by legislative and/or popular supermajorities. According to Article V of the Constitution of the United States, for example, “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all

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7. *Id.* at 17-18, 19.

Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . ." Chapter IX of the Constitution of Japan, to cite one more example, provides that "[a]mendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House . . . ."<sup>8</sup>

Indeed, constitutions can and sometimes do provide that a particular provision or provisions may not be amended at all. Article V of the Constitution of the United States provides that "no state, without its Consent shall be deprived of its equal Suffrage in the Senate." The Constitution of Japan arguably immunizes some constitutional provisions to amendment in providing, in Article 11, that "[t]he people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights."<sup>9</sup>

For a democratic political community to opt for the constitutional strategy for establishing a right, then—for it to name and then to seek to protect a right by means of constitutional law rather than (merely) by means of statutory law—is for the community to try to make it especially difficult, both for the present members of the community at a later time and, above all, for the future members at a much later time, to disestablish the right. (And, if and to the extent the community's constitution is taken seriously in the future, opting for the constitutional strategy is for the community not merely to try, but to succeed in making it especially difficult, in the future, to disestablish the right.) Opting for the constitutional strategy is for the community to decree, in effect, that the right may be disestablished, if at all, not by a legislative majority acting through the ordinary politics of legislative revision, but only by a legislative and/or a popular supermajority acting through the

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8. Chapter IX continues: "and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such elections as the Diet shall specify."

9. Similarly, Article 98 provides: "The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate." It has been suggested that the Constitution of Germany, because it "declares that certain fundamental principles are immune to constitutional amendment," exemplifies "absolute entrenchment." Anupam Chander, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L.J. 457, 462 & n.30 (1991).

extraordinary politics of constitutional amendment. (The "may," of course, is the may of legality, not of politics or morality.)<sup>10</sup>

We might be tempted to think that the constitutional strategy for establishing a right differs from the statutory strategy in another basic respect, in that constitutions, unlike statutes, typically declare themselves to be "the supreme law"<sup>11</sup>—and that therefore for a democratic political community to opt for the constitutional strategy is for it to decree that the right is lexically prior to statutory and other nonconstitutional law, in particular to subsequently enacted law. But perhaps a legislature may decree in a statute establishing a right that the right is lexically prior to *subsequently enacted* statutory law in this sense and to this extent:

A court is not to give effect to any future statute enacted by this legislature to the extent the statute, in the court's judgment, violates the right established by this statute, *unless such future statute explicitly states that a court is to give it effect even if in the court's judgment the statute violates the right established by this statute.*<sup>12</sup>

Even if a legislature may, in one session, enact such a decree, however, the legislature presumably may, in a later session, repeal the decree.<sup>13</sup> What is most distinctive about the constitutional strategy, then, is less the supremacy of constitutional law than the extreme difficulty of amending a constitution.

Why, in any event, might a political community want to accord lexical priority to a right? The basic reason, presumably, is that the community deems the right to be especially important. But assuming that a democratic political community may accord lexical priority to a right it deems especially important by means of the kind of statutory strategy suggested in the preceding paragraph, why might the commu-

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10. See *supra* note 25 and accompanying text. Cf. Chander, *supra* note 9, at 462: "An absolutely entrenched [constitutional provision] is . . . (as are all other parts of an existing legal regime) vulnerable to revolution."

11. Article VI of the Constitution of the United States provides that "[t]his Constitution . . . shall be the supreme law of the land . . . ." Article 98 of the Constitution of Japan provides: "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity."

12. See Chander, *supra* note 9, at 463: "One common type of manner and form entrenchment requires that all contrary legislation contain an explicit declaration of its intent to override the entrenched rule."

13. See generally Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379.

nity opt for the constitutional strategy? Why, that is, might at least *some* members of the community want to make it so difficult to disestablish a right or a liberty? A basic reason, presumably, is that they are skeptical about the capacity of the ordinary, majoritarian politics of the community adequately to protect the right, especially during politically stressful times when the right may be most severely challenged. The reasons for their skepticism can be various: They may fear that at some points in the future, perhaps even at many points, they who are so enthusiastic about the right will no longer dominate the ordinary politics of the community, or dominate it to the extent they presently do; they may even fear that many of those who will dominate the ordinary politics of the community, at some points in the future, will be hostile to the right. They may also fear that even at those points when they (the enthusiasts of the right) continue to dominate ordinary politics, they will, for one reason or another, fail adequately to protect the right, or they may fear that their political representatives, over whom they exert imperfect control, will fail adequately to protect it. Whatever the precise reason or constellation of reasons for their skepticism,<sup>14</sup> the constitutional strategy for establishing a right, as distinct from the statutory strategy, presupposes a distrust, a lack of faith, in the (present or future) ordinary politics of the community.

Not that there are not other basic reasons for pursuing the constitutional strategy, which, as I said, can be used to allocate governmental power as well as to establish limits on that power. For example, a political community may need to establish, or to re-establish, its basic institutions, institutional arrangements, and practices, so that an ordinary politics might then begin, or begin again, to operate. Or a community may want to remove certain issues from the agenda of ordinary politics, based less on a fear that its ordinary politics cannot be trusted to resolve the issues than on a fear that a contest about how they should be resolved might incapacitate or even destroy the ordinary politics of the community.<sup>15</sup> Even when a political community does not need to establish any basic institutions, institutional arrangements, or practices, however, and even when the community has little if any reason to fear that a contest about how a certain issue should be resolved might inca-

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14. For a thoughtful discussion of such reasons, see David Chang, *A Critique of Judicial Supremacy*, 36 VILL. L. REV. 281, 290-302 (1991).

15. For a helpful "outline of some of the reasons for entrenching institutional arrangements and substantive rights," see Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 636-43 (1991).



pacitate, much less destroy, its ordinary politics, the community may be skeptical about the capacity of ordinary politics, especially during stressful times, adequately to protect a right the community deems particularly important.

In a federal political community, like the United States, such skepticism may be focused, at a given time, less on the capacity of the (present or future) ordinary politics of the states to protect a right than on the capacity of the ordinary politics of the national government. Or, at a given time, it may be focused less on the capacity of the ordinary politics of the national government than on the capacity of the ordinary politics of the states, or of some of them. Whatever the particular case, such skepticism seems *a*, if not *the*, fundamental reason why the constitutional strategy exemplified by provisions like the Bill of Rights and the Fourteenth Amendment has been pursued in the United States.

Given such distrust, the constitutional strategy will include—and, to be effective, must include—an enforcement mechanism.<sup>16</sup> Judicial review is the principal such mechanism. Article VI of the Constitution of the United States, for example, provides not merely that “[t]his Constitution . . . shall be the supreme law of the land,” but also that “the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” Article 81 of the Constitution of Japan provides that “[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.” Is it the case, then, that the constitutional strategy for establishing a right, which presupposes a distrust of ordinary politics, presupposes a trust in constitutional adjudication; does it presuppose that constitutional adjudication will be adequate to protect the right, even during those politically stressful times when the right may be most severely challenged? Not necessarily. Those who opt for the constitutional strategy for establishing a right may simply be, for whatever reason or reasons, less skeptical about the capacity, in general, of constitutional adjudication adequately to protect the right than about the capacity, in general, of ordinary politics adequately to do so.

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16. See William J. Brennan, *Why Have a Bill of Rights?* 9 OXFORD J. LEGAL STUDIES 426 (1989) (H. L. A. Hart Lecture, delivered on May 24, 1989 at University College, Oxford): “The genius of the Magna Carta, as well as its longevity, lay partly in its creation of a device for resolving grievances and compelling the Crown to abide by the committee of barons’ decision. Paper promises whose enforcement depends wholly on the promisor’s goodwill have rarely been worth the parchment on which they were inked.”

## III

Thus far I have suggested why the members of a political community (or some of them) might opt for the constitutional strategy for establishing a right. I have suggested, that is, why some of the *present* members of a political community might want to try to make it especially difficult for the *future* members (or for themselves at a future time) to undo certain of their deeds. I have said nothing, however, in support of the proposition that when the future becomes the present, the present should acquiesce in the efforts of the past to tie its hands. In particular, I have not explained why we, the living members of the American political community, should support the constitutional strategy (including judicial review) for which long-dead members of the American political community opted<sup>17</sup> when they were the living members of the community and we were not even born. The Constitution begins: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." Well, "We the People of the United States" *now living* did not, not even the oldest among us, establish the basic features of American government—its various basic institutions, institutional arrangements, and practices.<sup>18</sup> (This is not to deny that to some extent, of course, American government is continually being re-established.) The question is not whether *they* (the past) had (what were for them) good reasons for opting for the constitutional strategy. The question, rather, is whether *we* (the present) have (what are for us) good reasons for maintaining, rather than disestablishing, what they bequeathed us. In particular, is judicial review, as it has come down to us,<sup>19</sup> a practice "We the People of the United States" *now living* should support, or is it, instead, a practice we should oppose?<sup>20</sup>

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17. Or arguably opted. See Appendix A to this lecture.

18. See Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 925 (1990): "The rhetorical flourish of 'We the People' cannot obscure the simple fact that it is *they*—the drafters, ratifiers, voters, and judges whose mortality has deprived them of an ongoing stake in political affairs—not *we*, who have made most of the decisions embodied in our constitutional tradition."

19. I say "as it has come down to us" because the modern practice of judicial review may not be identical to the original practice. See Appendix A to this lecture.

20. Sunstein writes that "[t]he precommitment strategy permits the people to protect democratic processes against their own potential excesses or misjudgments." Sunstein, *supra* note 15, at 637. But the main point of the constitutional strategy is to tie the hands, not so much of the generation opting for the strategy, but of future generations. That it may not be morally problematic for us to tie our own hands, to some end, certainly does not entail that it is not morally problematic for us to tie someone else's hands, even to the same end. Thus, we must inquire not

The argument for judicial review, the reason we should support the practice, is simple: Judicial review serves us well—not perfectly, but well—as a mechanism for protecting the Constitution of the United States; the obvious alternatives seem palpably inferior; and unless and until we identify and establish a better mechanism, we should continue to support the practice rather than oppose it. In his Hart Lecture at Oxford University, Justice William J. Brennan, Jr., said:

One can imagine a variety of means for redressing violations of fundamental legal rights. Individuals might appeal, for example, to some nonjudicial branch of government authorized to discipline the alleged offender—complaining to the executive about legislative overreaching, for instance, or vice versa. Alternatively, coordinate branches of government could act on their own initiative. Or proposed legislation could be reviewed by a special constitutional court or commission, such as France's Constitutional Council. Or citizens themselves could initiate review by judges empowered to invalidate laws that trench upon protected rights, to halt official conduct that invades those rights, and to order relief for past injuries. In my view, America's experience with the last of these alternatives is the most sensible, effective device for protecting personal liberties. This is particularly true if judges may only be removed for good cause and if their salaries may not be reduced, thus enhancing their independence of decision. It is essential to the defense of liberty that individuals be able to bring their own claims, rather than wait on the decisions of officers of agencies that lack the same stake in the aggrieved party's freedoms. And the importance of passing judgment on the propriety of legislation or government conduct in a concrete setting cannot be overestimated; not all laws are meaningfully subject to challenge before they have been placed in operation and their ramifications become plain, which is all that an advisory body passing on legislation could consider.<sup>21</sup>

The argument for judicial review has force, of course, only for those who believe that the Constitution of the United States is worth protecting. Is it? More precisely, is the constitutional strategy pursued by our political ancestors worth maintaining; are the various constitutional directives they issued worth protecting? In particular: (1) Are the various constitutional directives our political ancestors issued—in particular, the various constitutional directives regarding rights and lib-

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merely why the present generation of a political community might want to pursue the constitutional strategy; we must also inquire why a later generation of the community might want to acquiesce in that strategy.

21. Brennan, *supra* note 16, at 426-27.

erties and other limits on governmental power—so important (if important at all) that they merit their status as “supreme law?” (2) Even if they are so important, should those various directives be placed beyond the reach of ordinary politics?<sup>22</sup>

As evidence that for many constitutional directives issued by our political ancestors an affirmative answer to the question of their importance is not controversial, consider this fact: The Charter of Paris for a New Europe, signed in Paris on November 21, 1990, by the heads of state or government of the thirty-four member nations of the Conference on Security and Cooperation in Europe, including many advanced industrial nations with which the United States has a close political-moral affinity, specifies the following rights and liberties as among the

human rights and fundamental freedoms [that] are the birthright of all human beings, . . . inalienable and are guaranteed by law: [The right of every individual, without discrimination, to] freedom of thought, conscience, and religion or belief, freedom of expression, freedom of association and peaceful assembly, freedom of movement, [freedom from] arbitrary arrest or detention, [freedom from] torture or other cruel, inhuman or degrading treatment or punishment, [the right] to know and act upon his rights, to participate in free and fair elections, to fair and public trial if charged with an offense, to own property . . . and to exercise individual enterprise, to enjoy his economic, social, and cultural rights.

The Charter declares that “[f]ull respect for these precepts is the bedrock on which we will seek to construct the new Europe.”<sup>23</sup> The Charter’s “human rights and fundamental freedoms” are either identical or very similar to many of the rights and liberties our political ancestors constitutionalized. (Because there can be disagreement, and often is, about precisely what right or liberty our political ancestors, in ratifying a particular constitutional provision, constitutionalized,<sup>24</sup> I should say that the Charter’s rights and freedoms are identical or very similar to

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22. It simply will not work to say that we, the living, have “consented” to the Constitution: Few of us have consented. Arguments based on “hypothetical,” not actual, consent are, at bottom, arguments about what we have reason to accept (or no reason to reject): What reasons do we have for accepting, and therefore for protecting, the various constitutional directives issued by our political ancestors? That is simply a verbal variation on the question I am addressing.

23. For excerpts from the Charter see *Summit in Europe: Excerpts from the Charter of Paris for a New Europe as Signed Yesterday*, N.Y. TIMES, Nov. 22, 1990, at A16.

24. There can be disagreement, too, about whether a right or a liberty as constitutionalized by our political ancestors is a right or a liberty against only the national government or, instead, against both the national government and the governments of the states.

many of the rights and liberties our political ancestors constitutionalized *on any plausible account of what they constitutionalized.*)

But that many of the constitutional directives issued by our political ancestors are of fundamental importance does not entail that every such directive should be placed beyond the reach of ordinary politics—does not entail, that is, that we should distrust the capacity of ordinary politics adequately to protect every such directive. Should we distrust the capacity of ordinary politics, whether the ordinary politics of the national government or that of the states (or both)? The fact that our political ancestors, now dead, did so does not conclude the question whether we, now living, should do so. As I argue elsewhere in the book from which this lecture is drawn, there are good reasons for being skeptical about the capacity of ordinary politics adequately to protect all of the most important constitutional directives issued by our political ancestors. But it is not necessary to rely on such skepticism in making the argument for judicial review.

Assume that although we (the living) would and should place beyond the reach of ordinary politics many constitutional directives issued by our political ancestors, we neither would nor should place beyond the reach of ordinary politics every constitutional directive of fundamental importance they (the dead) placed beyond its reach. Assume, too, that not every constitutional directive issued by our political ancestors is so important, if important at all, that it merits its status as supreme law, much less its immunity to ordinary politics. It does not follow that because we would/should not place beyond the reach of ordinary politics a directive they placed beyond its reach, we should not acquiesce in their strategy to constitutionalize the directive. Even if we should be much less skeptical about the capacity of ordinary politics adequately to protect the directive than they were, we should want the Court to continue to protect the directive as a constitutional directive—a directive beyond the reach of ordinary politics—*unless and until we can disestablish the directive in a way that is less problematic than the Court continuing to protect the directive*: Some ways of disestablishing a directive, after all—the President of the United States unilaterally picking and choosing which constitutional directives he will respect, for example, or the Supreme Court unilaterally picking and choosing which constitutional directives it will protect—may well be much more problematic, all things considered, than simply continuing to live with the directive until it can be disestablished in a relatively unproblematic way.

I do not mean to deny the possibility that, depending both on the nature of a constitutional directive issued by our political ancestors and on the relevant particularities of context, it is less problematic, all things considered, for the Court unilaterally to discontinue protecting the directive, or for the President unilaterally to discontinue respecting it, than for the Court to continue protecting the directive, or for the President to continue respecting it, until the directive can be disestablished in a relatively unproblematic way. But that possibility seems marginal. Who among us would be comfortable with the politically unaccountable Court, or even the politically accountable President, exercising such a large power—the power to pick and choose which constitutional directives will be protected or respected—even if in some imaginable, if unlikely, circumstance we might be willing to concede that, all things considered, a judicial or a presidential nullification of a directive constitutionalized by our political ancestors is the lesser or least of evils?

One unproblematic way of disestablishing a constitutional directive issued by our political ancestors, of course, is the amendment process specified by Article V of the Constitution. Whether the Article V process is the only unproblematic way to disestablish a constitutional directive is a separate question. The Article V process is surely the least problematic way. It seems implausible that the Article V process is the only *morally* legitimate way to alter the Constitution,<sup>25</sup> even if it is the only *constitutionally* legitimate way. (Whether the Article V process is the only constitutionally legitimate way to amend the Constitution is a matter of controversy.)<sup>26</sup> In the book from which this lecture

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25. "No matter how far they transgress existing rules, successful constitutional conventions, like those of 1787-89, are unlikely to be perceived as outlaws. If they prosper, they will be founders." Richard S. Kay, *Book Review*, 7 CONST. COMM. 434, 440-41 (1990) (reviewing Russell L. Caplan, *CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* [1988]). See Richard S. Kay, *Comparative Constitutional Fundamentals*, 6 CONN. J. INT'L L. 445 (1991). But cf. Russell Hardin, *WHY A CONSTITUTION? THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 100, 102, 113 (Bernard Grofman & Donald Wittman eds., 1989):

"Contracts are generally backed by external sanctions; constitutions are more nearly backed by default, by the difficulty of re coordinating on an alternative arrangement. . . . [O]nce we have settled on a constitutional arrangement, it is not likely to be in the interest of some of us then to try to renege on the arrangement. And this is generally true not because we will be coerced to abide if we choose not to but because we generally cannot do better than to abide. To do better, we would have to carry enough others with us to set up an alternative, and that will typically be too costly to be worth the effort."

26. See Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). In a subsequent, unpublished addendum (1990), Professor

is drawn, I suggest a modification in the practice of judicial review under which the Congress and the President, acting together in their legislative capacity, would play a larger role, not in amending the Constitution, but in giving shape, in particular contexts, to indeterminate constitutional values. Perhaps they should play a larger role, too, in amending the Constitution, as Bruce Ackerman has recently suggested.<sup>27</sup>

To say that the various constitutional directives issued by our political ancestors are worth protecting is not to deny that some of those directives may be worth protecting only until they can be disestablished in a relatively unproblematic way. The argument for judicial review, which presupposes that the various directives constitutionalized by our political ancestors are worth protecting, is simply that the practice serves us well as a mechanism for protecting those directives, and that unless and until we establish a better mechanism, we should continue to support judicial review rather than oppose it.

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The question of the legitimacy of judicial review is much less difficult than the two questions to which the practice of judicial review gives rise: the question of the approach to constitutional interpretation the Supreme Court should follow and, especially, the question of the role the Court should play—how small/passive, or how large/active, a role—in bringing the interpreted Constitution to bear in resolving constitutional conflicts. I address the first of those questions in Part Two of this lecture.

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Amar argues: "Only if a current majority of deliberate citizens can, if they desire, amend our Constitution can the document truly be said to derive from 'We the People of the United States,' here and now, rather than from the hands of a small group of white men ruling us from their graves. Any contrary reading of Article V would violate the Preamble's promise that the framers' 'Posterity' would continue to enjoy 'the Blessings of Liberty'—most importantly, the liberty of popular self-governance." Bruce Ackerman, too, has offered an extra-Article V theory of constitutional amendment. See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 553 (1990). David Dow rejects "these recent and novel claims." See David Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 4 (1990) (arguing "that the only way to amend the Constitution is in accordance with the mechanism outlined in article V").

27. See Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS* 54-55 (1992).

Part Two: The Argument for the Originalist Approach  
to Judicial Review

The practice of judicial review involves, centrally, the Court interpreting the Constitution in the course of resolving constitutional conflicts. Which approach to the interpretation of the constitutional text, among the approaches that have been recommended to it, should the Supreme Court follow? Which approach to constitutional interpretation should inform the practice of judicial review?

The question of the proper judicial approach to constitutional *interpretation*—to the interpretation of the constitutional text—should not be confused with the different question, addressed elsewhere in the book from which this lecture is drawn, of the proper judicial approach to constitutional *specification*—to the specification of indeterminate constitutional norms or directives represented by the constitutional text. Constitutional adjudication comprises two distinct inquiries. The question addressed in Part Two of this lecture concerns the proper judicial approach to the first of those inquiries: the *interpretive* inquiry, the inquiry into what directive or directives a particular provision of the constitutional text represents. The position I defend in this lecture—“originalism”—is a position about the proper judicial approach to the interpretive inquiry. It bears emphasis that originalism is not a position about the proper judicial approach to the second of those inquiries: the *normative* inquiry, the inquiry into what shape to give, in a particular context, an indeterminate directive represented, or believed to be represented, by a particular provision of the constitutional text. Originalism is a position about constitutional interpretation, not about constitutional specification. Judicial “minimalism,” by contrast, which I discuss elsewhere in the book from which this lecture is drawn, is a position both about constitutional interpretation and about constitutional specification. (As a position about constitutional interpretation, judicial minimalism complements, rather than competes with, originalism.)

I

Constitutional directives are typically about what the institutions of government are to be and how power is to be allocated among them, or about how governmental power is to be limited. What directives is it legitimate, as a matter of democratic political morality, for the Supreme Court to enforce as *constitutional* directives—directives that are



part of "the supreme law of the land"<sup>28</sup> and that, as a legal matter,<sup>29</sup> may not be repealed except<sup>30</sup> by means of the amendment process specified by Article V? The "textualist" answer is that the Court may enforce as constitutional only directives represented by the text of the Constitution. The "nontextualist" answer is that the Court may enforce as constitutional, not only directives represented by the constitutional text, but also some directives not so represented.

It is difficult to the point of impossible, in the context of modern American political-legal culture, to make a persuasive case for nontextualism. The argument for judicial review, presented in Part One of this lecture, presupposes the importance of protecting the Constitution of the United States—the Constitution that begins with the words "We the People of the United States" and, as of 1992, ends with the Twenty-sixth Amendment. What justification can there be, therefore, for the Court enforcing, as constitutional, directives not represented by the Constitution? Recalling that Chief Justice John Marshall's justification for the practice of judicial review, in *Marbury v. Madison*, appealed to the writtenness of the Constitution,<sup>31</sup> Michael Moore has commented that "[j]udicial review is easier to justify if it is exercised with reference only to the written document. . . . By now, the object of [constitutional] interpretation should be clear: it is the written document. Hugo Black was right, at least, about this. Black's Constitution—the one he was so fond of pulling out of his pocket—is our only Constitution."<sup>32</sup>

Samuel Freeman has asserted that "[o]ur written Constitution is . . . only a part[] of our constitution. It plays a significant though non-exclusive role in constitutional interpretation. It is not, and it is not generally understood to be, the complete representation or embodiment of all constitutional conditions and institutions."<sup>33</sup> As Freeman has developed the point:

There is . . . a sense of the term "constitution" that designates an

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28. Article VI of the Constitution provides that "[t]his Constitution . . . shall be the supreme Law of the Land . . . ."

29. But not as a moral matter. See *supra* note 25 and accompanying text.

30. Or arguably except. See *supra* note 26 and accompanying text.

31. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

32. Michael S. Moore, *Do We Have an Unwritten Constitution?* 63 S. CAL. L. REV. 107, 122-23 (1989). See *id.* at 121-23. See also Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1601 (1989).

33. Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & PHIL. 327, 369 (1990-91).

institution . . . . In its institutional sense, the political constitution of any regime is that system of publicly recognized and commonly accepted rules for making and applying those social rules that are laws. This system of highest-order rules constitutes a political system in that it defines offices and positions of political authority, with their respective qualifications, rights, powers, duties, immunities, liabilities, and so on, and the procedures officials are to observe for making, applying, and enforcing valid laws. As such, the constitution itself cannot be law in an ordinary sense, for what is law within the legal system is ultimately identified by reference to its constitution.<sup>34</sup>

There is no *a priori* reason why a political community cannot put its constitution (in what Freeman calls the term's "institutional sense") in writing. And, indeed, the constitution of the American political community has been put in writing, to *some* extent at least. The Constitution of the United States—that is, the written Constitution—is, whatever else it is, a "system of publicly recognized and commonly accepted rules for making and applying those social rules that are laws. This system of highest-order rules constitutes a political system in that it defines offices and positions of political authority, . . . and the procedures officials are to observe for making, applying, and enforcing valid laws." There can be little doubt, therefore, that the written Constitution is a substantial part, at least, of our constitution. The serious question is whether the written Constitution exhausts our constitution, or whether, as Freeman has asserted, "[o]ur written Constitution is . . . only a part[] of our constitution."

I do not claim that the written Constitution exhausts our constitution (in the "institutional sense" of the term). For example, I suggest in Appendix A to this lecture that the practice of judicial review, as a constitutive feature of American government, is "constitutional" even if the written Constitution does not establish the practice.<sup>35</sup> But even if the written Constitution does not exhaust our constitution, the fact remains that *insofar as the practice of judicial review is concerned*, Freeman is wrong and Moore is right: Our written Constitution is our only constitution; it is the whole, and not merely a part, of our constitution. (To say that the written Constitution is our only constitution is not to prejudge the question of the meaning of the written Constitution; for example, it is not to prejudge the question whether the written Consti-

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34. Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 6 (1992).

35. See *supra* note 118 and accompanying text.

tution, or some part of it, has a "natural rights" meaning.)<sup>36</sup> Freeman to the contrary notwithstanding, the written Constitution is "generally understood to be the complete representation or embodiment of all constitutional conditions and institutions" *that the Supreme Court may enforce or protect*. Freeman may want to make an argument in support of the nontextualist approach to constitutional adjudication, but it is difficult to imagine any such argument that would be credible in the context of modern American political or jurisprudential thought.<sup>37</sup>

Moreover, it is difficult, in the modern period of American constitutional law,<sup>38</sup> even to identify a nontextualist judge. Consider, for example, William J. Brennan, Jr., who is conventionally understood to have followed an "activist" approach to constitutional adjudication. Even if an activist, Justice Brennan is clearly not a nontextualist:

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36. Nontextualism ought not to be confused with a different position, which Gary Jacobsohn has articulated. According to Jacobsohn,

[T]he written Constitution was meant to embody the natural rights commitments of the framers. Therefore, judicial appeals to "higher law" are not justifiable when they lead to a distinction between written and unwritten constitutions, but they are justifiable insofar as they help explicate and illuminate the written words of the Constitution itself. From this perspective the positivists are correct in their insistence upon the exclusive authority of the written document, but fundamentally misguided in their understanding of the nature of this document, since, as we have seen, the written words do not preclude a natural rights content. Judges who accept the intermediate position stated above will not feel free to invoke ideas of natural justice that are not grounded in the constitutional text. Yet neither will they read the text as if it were a business contract or, worse, as an "unprincipled" document. If the Constitution is a set of rules and procedures, it is so in part because it flows out of a coherent and knowable, not arbitrary or ever-mutable, set of philosophic presuppositions.

GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* 75 (1986). To reject nontextualism, therefore, is not necessarily to reject "judicial appeals to 'higher law.'"

37. For an argument that at the time of the founding of the United States, courts sometimes followed the nontextualist approach to constitutional adjudication, see Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). *But see* Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of 'Unwritten' Individual Rights?* 69 N.C. L. REV. 421 (1991) (arguing against Sherry). My claim is that it is difficult to justify the nontextualist approach in the context of modern American political-legal culture. *Cf.* Sherry, this note, at 1176:

By approximately 1820, . . . the reliance on natural law was waning, disappearing entirely within a few years. It is this nineteenth century rejection of the notions of natural rights that has most influenced modern constitutional law. After two brief flirtations with decisionmaking on the basis of natural law, the Supreme Court since 1937 has made a consistent and at least partially successful attempt to link all of its decisions to specific clauses of the Constitution, even when doing so stretches the language to the limits of credibility.

38. The period, that is, since 1954, when *Brown v. Board of Education*, 347 U.S. 483 (1954), was decided.

But if America's experience demonstrates that paper projections are not a sufficient guarantor of liberty, it also suggests that they are a necessary one, particularly in times of crisis. Without a textual anchor for their decisions, judges would have to rely on some theory of natural right, or some allegedly shared standard of the ends and limits of government, to strike down invasive legislation. But an appeal to normative ideals that lack any mooring in the written law . . . would in societies like ours be suspect, because it would represent so profound an aberration from majoritarian principles. . . . A text . . . helps tether [judges'] discretion. I would be the last to cabin judges' power to keep the law vital, to ensure that it remains abreast of the progress in man's intellect and sensibilities. Unbounded freedom is, however, another matter. One can imagine a system of governance that accorded judges almost unlimited discretion, but it would be one reminiscent of the rule by Platonic Guardians that Judge Learned Hand so feared. It is not one, I think, that would gain allegiance in either of our countries.<sup>39</sup>

To reject nontextualism—as Justice Brennan, for example, does—is not to deny that in enforcing, and therefore in specifying, an indeterminate directive represented by the constitutional text, a judge must rely on premises, including normative premises, not represented by the constitutional text. (Elsewhere in the book from which this lecture is drawn, I discuss the judicial process of specifying indeterminate constitutional directives.)

I take it for granted, then, that the Supreme Court may enforce as constitutional only directives represented by the text of the constitution.

## II

It is not always clear, however, what directive (or directives) a provision of the constitutional text represents. Moreover, because any text can be, and in particular because constitutional provisions often are, understood in different ways by different people—whether different people at the same time or different people at different times—the question “What directive does this constitutional provision represent?”

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39. See *supra* note 16, at 432. However activist his approach to constitutional adjudication may have been, Justice Brennan is best understood not only as a textualist, but as an originalist (in the sense of originalism presented and defended in this lecture). See Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 92 n.16 (1988). “Traditional constitutionalism is not hostile to judicial enforcement of aspirational principles—if they can fairly be discovered in the text, structure, and purposes of the Constitution.” *Id.* at 100. (Professor McConnell, a prominent originalist, served as Justice Brennan's law clerk.)

must be met by the question: "This constitutional provision *as understood by whom?*" As I am about to explain, the question "Which approach to constitutional interpretation should the Court follow?" is the question "Whose understanding of the constitutional text should be deemed authoritative—whose understanding should be 'privileged'—for purposes of constitutional adjudication?"

Whose understanding should be privileged? The "originalist" answer is that the "original" understanding should be privileged, that the constitutional text *as originally understood* should be deemed authoritative for purposes of constitutional adjudication. More precisely, and ideally, the understanding of a constitutional provision by "the People" at the time the provision was constitutionalized should be privileged, because they were sovereign. The Constitution begins: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." The ratification of a proposed constitutional provision by the representatives of the People should therefore be taken to presuppose the People's understanding of the provision. Surely it should not be taken to presuppose a secret understanding not shared with, or by, the People.<sup>40</sup>

The point can be put in terms of original "meaning" as well as of original "understanding." The meaning of a constitutional provision to the People at the time the provision was constitutionalized should, according to originalism, be privileged. To speak of *how* a text is *understood by* someone is to speak of *what* the text *means to* her, and vice versa.

Not all the People invariably pay attention, however, and not all who do pay attention, or try to, invariably achieve access to all the relevant information. It is a reasonable working hypothesis that the understanding of a constitutional provision by those who represented the People in the constitutional process is a close approximation to how the provision was understood by the People, *or would have been understood by them* had they been paying attention and had they achieved access to all the relevant information. Therefore, the understanding of a constitutional provision by those who represented the People in the

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40. Whose understanding of a statutory provision, as distinct from a constitutional provision, should be privileged for purposes of statutory adjudication? The understanding of the People at the time the provision was legislated? Or the understanding of the People's representatives, who legislated the provision? Statutes, unlike the Constitution, do not typically begin with "We the People," and the process of legislating a statutory provision is often much less public than the process of ratifying a constitutional provision.

constitutional process—in particular, the ratifiers' understanding—may, according to originalism, be privileged.<sup>41</sup> Moreover, with respect to constitutional amendments proposed by the Congress<sup>42</sup>—as, so far, all the constitutional amendments have been—the congressional understanding may fairly be taken to indicate the ratifiers' understanding. In writing about the original understanding of the Fourteenth Amendment, Alexander Bickel observed:

[T]he debates of the Congress which submitted, and the journals and documents of the legislatures which ratified, the amendment provide the most direct and unimpeachable indication of original purpose and understanding . . . . Of these two sets of materials, the Congressional

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41. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1989):

Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this. The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything. When lawmakers use words, the law that results is what those words ordinarily mean. If Congress enacted a statute outlawing the sale of automatic rifles and did so in the Senate by a vote of 51 to 49, no court would overturn a conviction because two senators in the majority testified that they really had intended only to prohibit the *use* of such rifles. They said "sale" and "sale" it is. Thus, the common objection to the philosophy of original understanding—that Madison kept his notes of the convention at Philadelphia secret for many years—is off the mark. He knew that what mattered was public understanding, not subjective intentions. Madison himself said that what mattered was the intention of the ratifying conventions. His notes of the discussions at Philadelphia are merely evidence of what informed public men of the time thought the words of the Constitution meant. Since many of them were also delegates to the various state ratifying conventions, their understanding informed the debates in those conventions. . . . [W]hat counts is what the public understood. Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the convention, public discussion, newspaper articles, dictionaries in use at the time, and the like.

By "the public of that time" does Bork mean, not the whole public, but that particular public, namely, the enfranchised, on whose behalf the provision was ratified? Or does he mean a public larger than the enfranchised, on the theory that at least some of those who were not enfranchised were being virtually, though not actually, represented by the ratifiers? On "virtual representation," see JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 82-87 (1980).

42. For the text of Article V of the Constitution, which concerns the amendment process, see *supra* text, at 616-17.

debates . . . rank . . . first in importance. It may perhaps be said that whatever they establish constitutes a rebuttable presumption. For it is not unrealistic, in the main, to assume notice of Congressional purpose in the state legislatures. A showing of ratification on the basis of an understanding different from that revealed by Congressional materials must carry the burden of proof. And, of course, the ratifying states are a chorus of voice; a discordant one among them proves little.<sup>43</sup>

The "nonoriginalist" answer to the question of the understanding that should be privileged, by contrast, is that the understanding of some person or persons other than the understanding of the People at the time the provision was constitutionalized, or of their representatives, should be deemed authoritative for purposes of judicial review. The understanding of what person or persons? The understanding of the judge enforcing the provision? The understanding of the present generation of the People—or, if no one understanding of the provision is shared by all members of the present generation of the People, the understanding of some members of the present generation? Which members? ("[T]he central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned.")<sup>44</sup> Whatever a particular nonoriginalist's response, nonoriginalism does not presuppose that the understanding of a constitutional provision by the People at the time the provision was constitutionalized, or of their representatives, is different from the understanding that, according to nonoriginalism, should be privileged. Nonoriginalism holds only that whether or not—and, therefore, even if—the original understanding is different from the latter, the latter understanding, not the former, should be deemed authoritative for purposes of judicial review.

According to originalism, then, the relevant question about a constitutional provision is: "What directive does this provision, as originally understood, represent?" An equivalent inquiry is: "What constitutional directive did the People—or those who represented them, in particular the ratifiers—understand this provision to communicate? What constitutional directive did our political ancestors mean to issue, in ratifying this provision?" According to nonoriginalism, however, the relevant question is: "What directive does this provision, as understood

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43. ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* 214 (1965).

44. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-63 (1989).

by *X*, represent?" (Who *X* is depends, of course, on how a nonoriginalist responds to the question in the preceding paragraph: "The understanding of what person or persons?") An equivalent inquiry: "What directive does *X* understand this provision to represent?"

Which approach to constitutional interpretation—originalism or nonoriginalism—should the Court follow; which approach should inform the practice of judicial review? What should the object of the Court's interpretive inquiry be: the original understanding or a nonoriginal understanding? That is, in enforcing a constitutional provision, should the Court be concerned to enforce the directive represented by the provision as originally understood, the constitutional directive our political ancestors meant to issue in ratifying the provision—or, instead, should it be concerned to enforce the directive represented by the provision as understood by *X*? The question is far from merely an academic one. The directive represented by a constitutional provision as originally understood may well be different from the directive represented by the provision as understood by *X*.

Consider, for example, the free exercise clause of the First Amendment, which provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ." Does the free exercise clause represent only the directive that Congress is not to discriminate against one or more religions, or does it represent the directive that Congress is not only not to discriminate against one or more religions, but that even when regulating behavior in a nondiscriminatory way, Congress is to tread as lightly around religious practice as it practically can. Does the assistance of counsel clause of the Sixth Amendment ("[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense") represent only the directive that government is not to prevent the accused from having a lawyer, or does it represent the directive that government is not only not to prevent the accused from having a lawyer, but that when the accused is unable to procure a lawyer for himself, government is to provide one? Does the privileges or immunities clause of the Fourteenth Amendment ("[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States") represent only the directive that states are not to regulate protected privileges or immunities in a discriminatory way (on the basis of race, for example), or does it represent the directive that states are not to regulate protected privileges or immunities in a discriminatory *or oth-*



*erwise unreasonable* way.<sup>45</sup> The answer to such questions may well depend on whether one is asking about a constitutional provision as originally understood or, instead, about the provision as understood by some person or persons other than the People, or their representatives, at the time the provision was constitutionalized.

In the remainder of this lecture, I want to elaborate the originalist position more fully—the position that in enforcing a constitutional provision, the Court should be concerned to enforce the directive represented by the provision as originally understood, the directive the People at the time the provision was constitutionalized, or their representatives, understood the provision to communicate, the directive they meant to issue—and then explain why the originalist position is much stronger, in the context of modern American political-legal culture, than nonoriginalism.

Before I move on, however, I want to comment on a statement by Ronald Dworkin: “The problem a judge ‘committed’ to original understanding has is not deciding what an abstract provision says—it says something as abstract as the words it uses—but deciding what impact it has in concrete cases. He is trying to *establish* the Constitution’s meaning in that sense, and it is no help to tell him that he must *first* discover its meaning.”<sup>46</sup> Originalists, like Robert Bork (whose position Dworkin was criticizing in the quoted passage), do not suggest, however, nor does their advice presuppose or entail, that the problem an originalist judge faces is deciding what a constitutional provision—a piece of the constitutional text—abstractly worded or otherwise, *says*. They understand that the problem is deciding what the piece of text *means*. In particular, the problem is deciding what the text means in two senses: first, deciding what directive the text, as originally understood, represents, and second, deciding what that directive means, what it requires, in the context of the conflict to be resolved. An originalist judge—indeed, any judge, originalist or not—must *first* “discover” the meaning of the *text*, she must first identify the directive represented by the text, *before* she can address the question of the meaning of the *directive* represented by the text—before, that is, she can decide what the directive means for the conflict at hand and therefore what it *shall* mean for relevantly similar conflicts thereafter, before she can, in that

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45. See Harrison, *Reconstructing the Privileges or Immunities Clause*, 103 YALE L.J. 1385 (1992).

46. Ronald Dworkin, *Bork’s Jurisprudence*, 57 U. CHI. L. REV. 657, 668 n.9 (1990).

sense, "establish" the meaning of the directive. A judge simply cannot do the latter until she has first done the former.

Perhaps Dworkin believes that the question of a constitutional provision's meaning is a nonquestion. Perhaps he believes, for example, that the question, "What does the free exercise clause of the First Amendment, as originally understood, mean, what directive does it represent?" is not a serious question. Perhaps he wants to try to minimize the question by answering (impatiently?) "It means what it says, that 'Congress shall make no law . . . prohibiting the free exercise [of religion] . . .,' *that* is the directive the text, as originally understood, represents; our political ancestors meant what they said and said what they meant, no more, no less!" Such a response, however, is conspicuously unhelpful. *We* do not always succeed in communicating precisely what we mean to communicate, even when we succeed in saying precisely what we meant to say, and there is certainly no reason to assume *a priori* that in saying what they did, in writing a constitutional provision as they did, our political ancestors invariably succeeded in communicating precisely what they meant to communicate (even if they invariably succeeded in saying what they meant to say), that they invariably succeeded in communicating precisely the directive they meant to communicate. And, indeed, with respect to the free exercise clause, they did not succeed in communicating precisely the directive they meant to communicate: In the American political community, there is no widely shared understanding of the meaning of what they said, of the directive they meant to communicate by saying what they did. According to some scholars, the free exercise clause (as originally understood) represents only the directive that Congress is not to discriminate against one or more religions; according to others, it represents the directive that Congress is not only not to discriminate against one or more religions, but that even when regulating behavior in a nondiscriminatory way, Congress is to tread as lightly around religious practice as it practically can.<sup>47</sup>

It is not surprising that sometimes in the American political community there is no widely shared understanding of the meaning of something our political ancestors said (wrote) in the Constitution, of the directive they meant to communicate by saying (writing) what they

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47. See Employment Division, Oregon Dept. of Human Resources v. Smith, 110 S. Ct. 2605 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

did. Sometimes texts—not least, old texts—are or become, in the life of the community, opaque, vague, ambiguous, etc. Sometimes, therefore, a text must undergo a serious interpretive effort—a serious effort at translation or decoding—if the message it was meant to communicate is to be received. Constitutional texts are no exception: Constitutional provisions are sometimes opaque, vague, ambiguous, etc., and sometimes, therefore, a constitutional provision must undergo a serious interpretive effort if the directive it was meant to communicate is to be received. Therefore, sometimes the question of a constitutional provision's meaning, of what directive it represents, cannot usefully be answered by a statement of what the provision says.

The question of the meaning of *a constitutional provision* can be a serious question, therefore, and almost certainly is a serious question in the absence of a widely shared understanding of the meaning of the provision—in the absence, that is, of a widely shared understanding of what directive the provision represents. A judge must first answer that question before “establishing,” in the context of the case at hand, the meaning of *the directive represented by the provision*. Even in the presence of a widely shared contemporary understanding of the meaning of a constitutional provision, the question of the *original* meaning of the provision—of what directive the provision, as originally understood, represents—can be a serious question: The widely shared present understanding may diverge radically from the original understanding.

Of course, the question of the meaning of a constitutional provision is not invariably a serious one. If there is, in a community, a widely shared understanding of the meaning of a text, the question “What does it mean?” if posed by a member of the community, may elicit the impatient reply “It means what it says!” Consider, for example, Section 3 of Article I of the Constitution, which provides, *inter alia*, that “[t]he Senate of the United States shall be composed of two Senators from each State . . . .” Because there is a widely shared understanding of the meaning of the provision in the American political community, the question “What does the provision mean?” (if posed by a member of the community) would seem strange. (If posed by someone not a member of the community, the question would not seem strange, or as strange. That there is in a community a widely shared understanding of the meaning of any provision or text is, of course, a contingent fact, not a necessary one. The situation could be otherwise.) We might be tempted to reply—even though the object of the question is, not what the provision says, but what it means—“It means what it

says, that there shall be two senators—no more, no less—from each state.” This is not to deny that to say of a text “It means what it says!” is to interpret the text, just to emphasize that the question “What does it mean?” may seem strange in the presence of a widely shared understanding of the meaning of the text. But the question “What does the free exercise clause mean?” does not seem strange. Given the absence of a shared understanding of the clause, the (Dworkinian?) reply “The free exercise clause means what it says!” *would* seem, not merely strange, but perverse.<sup>48</sup>

### III

According to the originalist approach to the interpretation of a constitutional provision, the object of the Supreme Court’s interpretive inquiry should be the directive (or directives) represented by the provision as originally understood: the directive the People at the time the provision was constitutionalized, or their representatives, understood the provision to communicate, the directive they meant to issue. A common objective to originalism is that there may well be no single directive a sufficiently large number of the People, or of their representatives in the constitutional process, understood a constitutional provision to communicate; there may well be, in that sense, no single original understanding, no single directive a sufficiently large number of our political ancestors meant to issue.

That possibility is extremely unlikely. Constitutional provisions do not emerge out of thin air. They are efforts to deal with real problems. Consider, for example, the important second sentence of Section 1 of the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” There is no serious ques-

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48. Because there are competing understandings of the meanings of the free exercise clause, of what directive the clause represents—competing understandings intratemporally, in the present, and perhaps also intertemporally, between past and present, in particular, between the time the clause was ratified and the present—the question “What does the clause mean?” is incomplete: What does (did) the clause mean *to whom*, how is (was) it understood *by whom*? Many of the most important constitutional provisions—in particular, many constitutional provisions regarding rights or liberties—are like the free exercise clause in that, there is not only no widely shared understanding of the meaning of the provisions, of what directives the provisions represent, there are, in the American political community, competing understandings (both intratemporally and intertemporally).

tion whether that sentence was understood, by virtually all the persons who constitutionalized it, to communicate at least a set of directives about discrimination against persons "of African descent."<sup>49</sup> As the Supreme Court said in *The Slaughter-House Cases*, "The most cursory glance at [the three post-Civil War Amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. . . . [T]he one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested[, is] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."<sup>50</sup> There is no serious question, either, whether the second sentence of Section 1 was meant to communicate a set of directives not just about discrimination against persons of African descent, but about discrimination based on race.

We do not say that no one else but the negro can share in this protection. . . . Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth [amendment], it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these [amendments], that protection will apply, though the party interested may not be of African descent.<sup>51</sup>

Similarly, in 1880 the Court wrote: "Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the [fourteenth] amendment."<sup>52</sup> The serious, and disputed, question is whether the sentence was understood, by a sufficiently large number of those who constitutionalized it, to communicate any directives about matters other than discrimination based on race<sup>53</sup>—even, perhaps, about matters other than discrimina-

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49. 83 U.S. (16 Wall.) 36, 72 (1872).

50. *Id.* at 67, 71.

51. *Id.* at 72.

52. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

53. The four dissenting justices in the *Slaughter-House Cases*, but not the *Slaughter-House* majority, thought that Section 1 of the Fourteenth Amendment was meant to deal with discrimi-

tion. In any event, the objection that there is no single directive our political ancestors meant to issue in ratifying a particular constitutional provision is best tested by scrutinizing the available relevant historical materials.

None of this is to suggest that the Court will always be able to identify easily, or with certainty, the directive represented by a constitutional provision as originally understood. But it is to suggest that the Court will usually be able to reach a plausible conclusion about original meaning. Sometimes the best the Court will be able to do will be to construct an original understanding on the basis of what we might think of as a hypothetical conversation with those in the past whose understanding counts: The effort must be to discern, on the basis of the available historical materials, which directive *they* most likely would have chosen, in the conversation, confronted by the various possibilities—the various candidate directives—as being the one that best captures the purpose or point or meaning of what they did. That counterfactual project, though difficult, is hardly impossible. That sometimes the best the Court can do is to construct an original understanding is, for purposes of the originalist approach, good enough; that sometimes the Court can do no more hardly counts as an argument for a nonoriginalist approach. (Of course, the counterfactual project described here will often leave a judge ample room for “discretionary” judgments about original meaning; as I explain elsewhere in the book from which this lecture is drawn, “the indeterminacy of history” is one reason why, the view of some originalists to the contrary notwithstanding, originalism does not entail judicial minimalism.)

Indeed, if the Court were usually unable to reach a plausible conclusion—if the originalist approach to constitutional interpretation resulted in treating any significant part of the Constitution as a dead letter—that would surely count as a powerful argument against the claim that the originalist approach is the proper approach. But the originalist approach does not so result. Consider, in that regard, this statement by Robert Bork: “The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working. A provision whose meaning cannot be ascertained is precisely like a provision that . . . is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink

blot on the ground that there must be something under it."<sup>54</sup> Bork then adds:

Oddly enough, the people who relish agnosticism about the [original] meaning of our most basic compact do not explore the consequences of their notion. They view the impossibility of knowing what the Constitution means as justification for saying that it means anything they would prefer it to mean. But they too easily glide over a difficulty fatal to their conclusion. If the meaning of the Constitution is unknowable, if, so far as we can tell, it is written in undecipherable hieroglyphics, the conclusion is not that the judge may write his own Constitution. The conclusion is that judges must stand aside and let current democratic majorities rule, because there is no law superior to theirs.<sup>55</sup>

Bork's polemical point is overdrawn. Let's assume, for the sake of argument, that on some occasion the Court, after painstaking historical inquiry, is finally unable to identify—that, in the Court's view, history is finally silent about—what directive a constitutional provision as originally understood represents. What then? An originalist Court does not have to treat the provision as a dead letter: If the provision is presently understood to represent some directive, the Court can reasonably presume, in the absence of evidence to the contrary, that the provision as originally understood represents the same directive. The Court need not presume, as a kind of default strategy, that the discontinuities in the political-moral life of the historically extended American political community dominate the continuities.

Another common objection to originalism—which is similar to the first objection and, indeed, perhaps merely a variation on it—is that originalism is unable to deal with what is probably the most fundamental interpretive problem, namely, identifying the level of generality of the directive represented by a constitutional provision: For example, a judge cannot determine, pursuant to the originalist approach, whether the directive the People, or their representatives, understood the Privileges or Immunities Clause of the Fourteenth Amendment to communicate is only about discrimination based on race or whether it is about discrimination more generally, of which racial discrimination is simply an instance,<sup>56</sup> or even whether it is about more than discrimination.

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54. BORK, *supra* note 41, at 166.

55. BORK, *supra* note 41, at 166-67.

56. See Ronald Dworkin, *The Bork Nomination*, NEW YORK REV., Aug. 13, 1987, at 6: History alone might be able to show that some particular concrete opinion, like the

This objection seems mistaken. As Bork has explained:

The role of a judge committed to the philosophy of original understanding is . . . to find the meaning of a text—a process which includes finding its degree of generality, which is part of its meaning. . . . [A] judge should state the principle at the level of generality that the text and historical evidence warrant. . . . [Originalism] avoids the problem of the level of generality . . . by finding the level of generality that interpretation of the words, structure, and history of the [constitutional provision] fairly supports.<sup>57</sup>

According to originalism, then, a judge should try not to articulate the directive represented by a constitutional provision (as originally understood) at a level of generality any broader—or any narrower—than the relevant materials (“words, structure, and history”) warrant. Of course, deciding what level of generality the relevant materials warrant may often be a difficult task. It is a mistake—for some, it is wishful thinking—to suppose that the originalist approach to constitutional interpretation is always or even often easy. The originalist approach is often difficult.<sup>58</sup>

In his more polemical moods, Bork complains about the tendency of some “liberals”—both liberal judges and liberal scholars—to “overgeneralize” the original meaning of constitutional provisions. For example: “[Although not all] the theorists of liberal constitutional revisionism”—Bork kindly includes me in that group<sup>59</sup>—“would agree that they have rejected the original understanding, . . . I think it can be shown that they have generalized that understanding so greatly, stated it at such a high level of abstraction, that virtually no one who voted to

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opinion that school segregation was not unconstitutional, was widely shared within the group of legislators and others mainly responsible for a constitutional amendment. But it can never determine precisely which general principle or value it would be right to attribute to them. This is so not because we might fail to gather enough evidence, but for the more fundamental reason that people's convictions do not divide themselves neatly into general principles and concrete applications. Rather they take the form of a more complex structure of layers of generality, so that people regard most of their convictions as applications of further principles or values more general still. That means that a judge will have a choice among more or less abstract descriptions of the principle that he regards the framers as having entrusted to his safekeeping, and the actual decisions he makes, in the exercise of that responsibility, will critically depend on which description he chooses.

57. BORK, *supra* note 41, at 149-50.

58. To say that the originalist approach is difficult is not to say that it is impossible. See MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* 126-27 (1988).

59. See BORK, *supra* note 41, at 216-17.



ratify the document would recognize the principles of the theorists as his own."<sup>60</sup> It would make just as much sense, however, to complain about the tendency of some ("conservative"?) judges and scholars to "undergeneralize." Indeed, the complaint that some judges tend to undergeneralize seems the more plausible one with respect to constitutional provisions, like the three clauses of the second sentence of Section 1 of the Fourteenth Amendment (the Privileges or Immunities, Equal Protection, and Due Process Clauses), the language of which is relatively general. (At least, as it is or probably would be used today, the language of those clauses is relatively general.) After all, the generality of the language of a constitutional provision is some evidence that the original meaning of the provision—the directive represented by the provision as originally understood—is similarly general (and, therefore, that the directive is relatively indeterminate).

Interpreters who emphasize extrinsic evidence of the founders' intent tend to ignore the generality of the text and to substitute much narrower conceptions of intent. The founders focused on the specific problems most salient to their lives, but they constitutionalized general principles that seem designed to cover whole classes of similar problems. What they left a record of having specifically and consciously intended is often a small subset of the text they proposed and ratified. Interpretation limited to specific and provable intentions thus tends to be fatally inconsistent with the constitutional text.<sup>61</sup>

Of course, it is always possible that—and sometimes merits inquiry whether—language that appears general to us in the present appeared much less general, if not specific, to them in the past.<sup>62</sup> Nonetheless, "[c]ertainly when most readers agree that a particular clause or phrase

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60. BORK, *supra* note 41, at 187.

61. Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 683, 687 (1990). Recall Bork's statement, quoted in the text accompanying note 57, that "a judge should state the principle at the level of generality that the text and historical evidence warrant." Just two pages earlier in his book, however, Bork said: "The Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words alone might suggest." BORK, *supra* note 41, at 147. I wonder how Bork would reconcile the two statements. Bork seems to assume that "historical evidence" warrants a construal of original meaning narrower than the construal warranted by textual language alone. As a generalization about *all* constitutional provisions, that assumption is surely a perilous one (even if it is true of *some* provisions that historical evidence warrants a construal of original meaning narrower than that warranted by text alone). If that is indeed Bork's assumption/generalization—how else might the two statements be reconciled?—then Bork has fallen prey to wishful thinking.

62. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1224-25, 1238-39 (1990).

means one thing, the burden of persuasion ought to be on the advocate of some other meaning. Such a presumption is fully consistent with [the originalist approach to constitutional interpretation] and a convenient rule of administration."<sup>63</sup>

In any event, the commitment of an originalist judge is to retrieve the original meaning of constitutional provisions as accurately as possible and, therefore, neither to over nor to undergeneralize original meaning.<sup>64</sup>

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It is important not to confuse the originalist approach I am presenting here with another version often the target of critics of originalism.<sup>65</sup> Assume that the directive represented by the Privileges or Immunities Clause as originally understood is that states are not to regulate the protected privileges or immunities on the basis of race—in particular, they are not to deny them to any person on the basis of race. Assume further that the ratifiers of the Privileges or Immunities Clause (whose understanding of the clause we are accepting as a proxy for the understanding of the People they represented) happened not to believe that the Clause proscribed racially segregated public schools. According to a problematic version of originalism, segregated schools therefore

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63. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 235 (1988). See McConnell, *supra* note 47, at 1115-16 (discussing the Free Exercise Clause of the First Amendment): "While we cannot rule out the possibility that the term 'prohibiting' might impliedly be limited to laws that prohibit the exercise of religion in a particular way—that is, in a discriminatory fashion—we should at least begin with the presumption that the words carry as broad a meaning as their natural usage."

64. The problem, of course, is that there will often be available a range of historically plausible readings—some more general, some less so—of the original meaning. In that sense, the historical inquiry constitutive of the originalist approach to constitutional interpretation is often indeterminate. I discuss the indeterminacy of originalism in the book from which this lecture is drawn. See *supra* note 1.

65. See BORK, *supra* note 41, at 218 (criticizing Leonard Levy's "highly oversimplified version of the philosophy of original understanding that bears little resemblance to the theory set out in this book. . . . No even moderately sophisticated originalist holds the view Levy refutes [in his *Original Intent and the Framers' Constitution* (1988)]"). The "intentionalist" approach to constitutional interpretation James Boyd White criticizes in his new book bears little resemblance to the originalist approach presented in this lecture. See JAMES WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM*, ch. 5: "'Original Intention' in the Slave Cases" (1990). Cf. *id.* at 114 ("we shall be working out the consequences of at least one version of the view that the Constitution should be interpreted by reference to the intention of the framers") (emphasis added). The approach presented here can be elaborated, and in this lecture is elaborated, *entirely without reference to authorial intentions*.

do not violate the Clause and may not legitimately be disestablished in the name of the Clause.<sup>66</sup> According to the originalism I am presenting here, however, the question whether segregated schools violate the Clause—the Clause *as originally understood*—is not to be referred to the past; it is a question for the present; in particular, it is a question for the court charged with determining whether such schools violate the Clause. What is authoritative, for originalism, is the directive the ratifiers understood a constitutional provision to communicate, the directive they meant to issue. That the ratifiers may not have believed that this or that practice (law, etc.) with which they were familiar violated a constitutional directive they were issuing—even that they believed that the practice did not violate the directive—is not determinative. If in the Court's view a practice does in fact violate a constitutional directive the ratifiers issued, the Court's duty is to invalidate the practice. Of course, that the ratifiers believed that a practice with which they were familiar did not violate a constitutional provision they were ratifying is some evidence of what directive the ratifiers understood the provision to communicate, of what directive they meant to issue in ratifying the provision; in particular, it may suggest that the directive the ratifiers meant to issue does not have precisely the shape—e.g., the breadth—we might otherwise have been inclined to conclude.

*A fortiori*, that a practice is one with which the ratifiers were not familiar—one they did not foresee and perhaps could not have foreseen—and therefore one they could not have believed violated a constitutional directive they were issuing is beside the point. The Court's duty, according to originalism, is to invalidate a practice—whether or not it was foreseen or even foreseeable by the ratifiers—if in the Court's view the practice violates a constitutional directive issued by the ratifiers. As Bork puts it:

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66. See David A. J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1380 (1990) (book review):

[Raoul] Berger's originalism is a kind of appeal to what I call Founders' denotations. He holds that the meaning of a constitutional provision is to be understood in terms of the things in the world to which the relevant Founders would have applied the term at the time the constitutional provision was adopted authoritatively. A provision should be interpreted to include certain things only if those things would have been included within the meaning of the Clause by the Founders. According to Berger, then, the Equal Protection Clause properly cannot be interpreted to invalidate state-sponsored racial segregation because the relevant Founders (the Reconstruction Congress and ratifying state legislatures) would not have regarded such segregation as violative of equal protection.

[A]ll that a judge committed to [the philosophy of] original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or . . . value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows. It does not follow without difficulty, and two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results, but that in no way distinguishes the task from the difficulties of applying any other legal writing.

This version of [originalism] certainly does not mean that judges will invariably decide cases the way the men of the ratifying conventions would if they could be resurrected to sit as courts. Indeed, the various ratifying conventions would surely have split within themselves and with one another in the application of the principles they adopted to particular fact situations. That tells us nothing other than that the ratifiers were like other legislators. Any modern congressional majority would divide over particular applications of a statute its members had just enacted. That does not destroy the value of seeking the best understanding of the principle enacted in the case either of the statute or of the Constitution.<sup>67</sup>

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67. BORK, *supra* note 41, at 162-63. See also Robert Bork, *Original Intent and the Constitution*, HUMAN, Feb. 1986, at 22, 26 ("The objection that we can never know what the [ratifiers] would have done about specific modern situations is entirely beside the point. The originalist attempts to discern [and then enforce] the principles the [ratifiers] enacted, the values they sought to protect."); Robert Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826-27 (1986) (arguing that his originalist theory does not require "judges . . . invariably to decide cases the way the [ratifiers] would if they were here today," but does require them to "confine themselves to the principles the [ratifiers] put into the Constitution"). Cf. Dwor-kin, *supra* note 46, at 670 (commenting on the passage quoted in the text accompanying this note): "We should pause to note what an amazing passage this is. It could have been written by almost any of the people Bork takes to be members of the academic conspiracy against him and the nation." For a vision of the Constitution substantially the same as Bork's, see Edwin Meese, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division, Nov. 15, 1985, Washington, D.C., reprinted in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 31, 33 (1986):

Our approach does not view the Constitution as some kind of super-municipal code, designed to address merely the problems of a particular era—whether those of 1787, 1789, or 1868. There is no question that the Constitutional Convention grew out of widespread dissatisfaction with the Articles of Confederation. But the delegates at Philadelphia moved beyond the job of patching that document to write a *Constitution*. Their intention was to write a document not just for their times but for posterity.

The language they employed clearly reflects this. For example, they addressed

As the foregoing passage confirms, some originalists, like Bork, understand that the specification of a constitutional directive—that is, the development of the concrete, contextual meaning of a constitutional directive—is not only not precluded by the originalist approach but is, indeed, necessitated by it. For example, Bork writes:

When there is a known [constitutional] principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision . . . whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges . . . if the boundaries of every constitutional provision were self-evident. . . . It is the task of the judge in this generation to discern how the [ratifiers'] values . . . apply to the world we know. . . . [Judges may] refine and evolve doctrine . . . , so long as one is faithful to the basic meaning of the [constitutional provision]. . . . To say that such adjustments must be left to the legislature is . . . gradually to render constitutional guarantees meaningless.<sup>68</sup>

Near the end of his book Bork emphasizes that "[t]he provisions of the Constitution state profound but simple and general ideas. The law laid down in those provisions gradually gains body, substance, doctrines, and distinctions as judges, equipped at first with only those ideas, are forced to confront new situations and changing circumstances."<sup>69</sup> Commenting on the Supreme Court's decision in *Brown v. Board of Education*<sup>70</sup> outlawing racially segregated public schooling, Bork says: "[I]t became evident over time that the racial separation the ratifiers of the fourteenth amendment assumed"—the racial separation, i.e., that they took for granted—"was completely inconsistent with the equal protection of the laws they mandated."<sup>71</sup>

It is not difficult to understand why Bork and some other originalists have moved toward what Gregory Bassham calls "moderate inten-

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commerce, not simply shipping or barter. Later the Bill of Rights spoke, through the Fourth Amendment, to "unreasonable searches and seizures," not merely the regulation of specific law enforcement practices of 1789. Still later, the Framers of the 14th Amendment were concerned not simply about the rights of black citizens to personal security, but also about the equal protection of the law for all persons within the states.

The constitution is not a legislative code bound to the time in which it was written.

Meese added: "Neither, however, is [the Constitution] a mirror that simply reflects the thoughts and ideas of those who stand before it." *Id.*

68. BORK, *supra* note 41, at 167-68.

69. BORK, *supra* note 41, at 352.

70. 347 U.S. 483 (1954).

71. BORK, *supra* note 41, at 169.

tionalism" originalism and away from what he calls "strict intentionalism" originalism:<sup>72</sup> The former

recognizes the importance of striking a balance between the values of predictability and stability on the one hand, and those of flexibility and adaptability on the other. . . . Moderate intentionalism enjoys the significant advantage of being able to respond, as strict intentionalism does not, both to originalism's traditional concern with the values of certainty, stability, and judicial restraint, and to the perennial complaint of originalism's critics that the theory is hopelessly at odds with the need to treat the Constitution as a living, flexible document.<sup>73</sup>

Even more important, argues Bassham, is moderate intentionalism's "capacity to recognize that constitutional provisions, in principle, may signify aspirations and values that transcend the framers' temporally bounded conceptions of the scope of those provisions. . . . Moderate intentionalism thus seem[s] an attractive half-way house between two unacceptable extremes: a jurisprudence that constitutionalized the repellent prejudices of former generations on the one hand, and a jurisprudence of open-ended judicial policymaking on the other."<sup>74</sup>

In Appendix B to this lecture, I explain how an originalist judge (of Bassham's "moderate intentionalist" variety), in specifying an indeterminate constitutional directive, should deal with (1) particular practices that they who issued the directive specifically meant the directive to ban, (2) particular practices that they did not understand, or would not have understood, the directive to ban, and (3) particular practices that they specifically meant the directive not to ban. For now I want to note that Bork's insistence that the Cruel and Unusual Punishments Clause of the Eighth Amendment ("cruel and unusual punishments

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72. Bork is admirably frank in acknowledging such movement. See BORK, *supra* note 41, at 352: "The concept of original understanding itself gains in solidity, in articulation and sophistication, as we investigate its meaning, implications, and requirements, and as we are forced to defend its truths from the constitutional heresies with which we are continually tempted." Cf. Solum, *supra* note 32, at 1601: "As originalism has been modified and defined in response to nonoriginalist critiques, the originalist's position has become more and more plausible as a theory of constitutional interpretation. . . . [Originalism] provide[s] an accurate description of the phenomenology of constitutional practice."

73. GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 55-56 (1992).

74. *Id.* at 56. "In short, by adopting moderate intentionalism, conservatives could admit that the framers had sometimes wrought more wisely than they had known, yet deny that they had wrought half so wisely as nonoriginalists often claimed." *Id.* For a similar argument, see Eulis Simien, Jr., *It Is a Constitution We Are Expounding*, 18 HASTINGS CONST. L. Q. 67, 86-108 (1990).

[shall not be] inflicted") simply cannot be interpreted to prohibit imposition of the death penalty because the ratifiers of the Constitution and Bill of Rights presupposed the existence of the death penalty and, elsewhere in the Constitution and Bill of Rights, regulated imposition of the death penalty,<sup>75</sup> is difficult to square with Bork's paean to evolving constitutional doctrine. The ratifiers' expectation that reliance on the death penalty would persist into the future, and their decision, given that expectation, to regulate imposition of the penalty, do not constitute a decision to authorize reliance on the death penalty, to *constitutionalize* the death penalty—in that sense, they do not constitute a decision to exempt the death penalty from possible prohibition by the Eighth Amendment. Of course, that the ratifiers expected a practice, like the death penalty or segregated public schooling, to persist into the future is evidence that they did not believe that they were prohibiting the practice. But that they did not believe that they were prohibiting the practice does not mean that the constitutional directive they issued is not best specified to prohibit the practice. Bork understands that he cannot rule out, on the basis of the originalist approach to constitutional interpretation, the possibility that racially segregated public schooling does indeed violate a directive represented by Section 1 of the Fourteenth Amendment as Section 1 was originally understood—the possibility, in that sense, that such schooling is *really* a violation of Section 1—notwithstanding that the ratifiers of Section 1 did not so think. It is therefore curious that Bork fails to see that, absent evidence that the ratifiers meant to constitutionalize the death penalty—Bork points to no such evidence, and I am aware of none—he cannot rule out, on the basis of the originalist approach, the possibility that the death penalty does indeed violate the directive represented by the Cruel and Unusual Punishments Clause as the Clause was originally understood—the possibility, that is, that the death penalty is *truly* a cruel or unusual punishment—notwithstanding that the ratifiers of the clause did not so believe.<sup>76</sup>

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75. See BORK, *supra* note 41, at 213-14. See also Scalia, *supra* note 44, at 863.

76. If a judge is what Michael Moore calls a "moral realist," one would expect the judge, if an adherent of originalism to be an adherent of "a morally realist originalism." According to Moore,

such . . . originalism would develop theories about the nature of equality, liberty, liberties of speech and of worship, cruel punishment, and the like, in a never completed quest to discover the true nature of such things. To seek such theories is to conform to the original understanding, just as to seek to apply the word "tiger" by the best theory of what tigers are is to conform to the usual authorial intention in the use of that word.

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Many criticisms of the originalist approach to constitutional interpretation have force if directed against (what Bassham calls) "strict intentionalism" originalism.<sup>77</sup> If directed against the originalism presented here, however, as such criticisms sometimes are,<sup>78</sup> they have

Moore, *supra* note 32, at 135.

Moore's defense of moral realism and his critique of moral conventionalism (*see, e.g., Moore, supra* note 32, at 135) could be construed to confuse metaphysics, or ontology, with epistemology. Knowing Michael Moore, however, I strongly doubt that he's even a little confused about the distinction between metaphysics and epistemology. Perhaps the problem is that Moore is insufficiently careful to distinguish moral conventionalism from a coherentist conception of moral justification. As Moore no doubt understands, one can be a "realist"—a moral realist no less than a scientific realist—with respect to metaphysics but a conventionalist, *in the sense of a* "coherentist" or "holist," with respect to one's conception of justification—moral justification no less than scientific justification. *See* DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* (1989). (Sotirios Barber did seem to fall prey to a confusion of metaphysics with epistemology in his article *Michael Perry and the Future of Constitutional Theory*, 63 *TUL. L. REV.* 1289 (1989)). In his recent, interesting book, Graham Walker is quite clear about the distinction between metaphysics and epistemology, but he seems ultimately to misconstrue the epistemology at issue: coherentist epistemology. *See* GRAHAM WALKER, *MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT* 36 (1990). For example, Walker seems to confuse coherentist epistemology with what he calls "nihilist/subjective epistemology." *Id.* at 57. *Cf.* HILARY PUTNAM, *REASON, TRUTH AND HISTORY* xi (1981) ("the mind and the world jointly make up the mind and the world").

In any event, contrary to Barber's and Walker's criticisms of my work (*see* Barber, *supra* this note, at 1289; WALKER, *supra* this note, at 16-17, 36-38, 124-25, 144 n.106), I am *not* a moral conventionalist. I am a moral realist—as my new book, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991), makes amply clear. (Walker includes John Courtney Murray among those "contemporary thinkers . . . [who] have attempted 'moral realist' approaches to constitutional theory . . . ." WALKER, *supra* this note, at 17, 46. *LOVE AND POWER* is partly a retrieval of Murray's work, especially his *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1944)). I am, however, an epistemological coherentist: My conception of justification is coherentist. *See* MICHAEL J. PERRY, *LOVE AND POWER*, ch. 4. In his book Walker understands Michael Moore—correctly, in my view—to be a moral realist who is also an epistemological coherentist, and Walker criticizes, in part on the basis of the morally realist position, Moore's coherentist epistemology. Although the epistemological differences between, on the one side—the coherentist side—Moore and me, and, on the other, Walker (and Barber?) are real differences (*See* Edmund Santurri, *Nihilism Revisited*, 71 *J. RELIGION* 67 [1991]), I doubt the differences have much cash value, if indeed they have any, insofar as constitutional adjudication is concerned.

77. *Cf.* William Twining, *Talk About Realism*, 60 *N.Y.U. L. REV.* 329, 337 (1985):

It should be a working precept of all jurisprudential criticism and polemics that before launching an attack one should first identify worthy opponents and attribute to them what one considers to be the least vulnerable interpretation of their views that the relevant texts will sustain. Intellectual debate is impoverished when one attacks caricatures; soft targets generally only suit weapons with correspondingly low firepower.

78. *See* Simien, *supra* note 74, at 93-94: "Much of the criticism [of originalism] . . . spills over from a critique of strict originalism and a failure either to perceive or to admit the differ-



much less force, if indeed they have any. Richard Kay has effectively rebutted the principal practical and conceptual criticisms of originalism—criticisms to the effect that it is virtually impossible to discern the original understanding of a constitutional provision or even to know what “the original understanding” means, what it refers to. The reader concerned with such criticisms could do no better, in my view, than to consult Kay’s work.<sup>79</sup> It is remarkable that today some critics of originalism trot out the frayed claims to which Kay has elaborately responded without even citing his work, much less attending to it.<sup>80</sup> It is more remarkable that Bork failed to rely on or even mention Kay’s work, since Bork does not respond to the relevant criticisms, or even identify them, nearly so well as Kay. Not that Kay minimizes the practical difficulties that attend the originalist approach to constitutional adjudication; Kay is at least as sensitive to those difficulties as the critics whose arguments he so effectively parries.<sup>81</sup>

The serious question concerns not the possibility but the legitimacy of the originalist approach to constitutional interpretation: The serious question is not whether originalism *can* inform the practice of judicial review—it can—but whether it *should* inform the practice.

#### IV

Originalism, then—or nonoriginalism? In the context of American political-legal culture, which is the more defensible approach to constitutional interpretation?

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ences between strict and moderate originalism.”

79. See Kay, *supra* note 63, at 236-59. Note that my reference is to Kay’s response to the “It’s Impossible” objection, not to his responses to the “It’s Self-Contradictory” and “It’s Wrong” objections. See *id.* at 259-92. Kay’s response to the “It’s Wrong” objection seems to me basically sound, but, for reasons I develop in the book from which this lecture is drawn, his response to the “It’s Self-Contradictory” objection—in particular, his reading of the original meaning both of the Ninth Amendment and of the Privileges or Immunities Clause of the Fourteenth Amendment—seems to me problematic.

80. So far as I am aware, Ronald Dworkin, who seems to have a continuing interest in challenging Borkian originalism, has never cited, much less discussed, Kay’s important work. See Ronald Dworkin, *The Bork Nomination*, NEW YORK REV., Aug. 13, 1987, at 3; Dworkin, *supra* note 46. In the relevant chapter of his new book where he briefly recites, in the form of questions, the claims to which Kay has responded, James Boyd White fails to notice Kay’s work. See WHITE, *supra* note 65, ch. 5.

81. Richard Kay is not alone. Gregory Bassham’s recent book is excellent in rebutting “three misconceived objections to originalism.” See BASSHAM, *supra* note 73, 67-90. Other good discussions include: Earl M. Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773; Earl M. Maltz, *The Failure of Attacks on Originalist Theory*, 4 CONST. COMM. 43 (1987); Simien, *supra* note 74; Scalia, *supra* note 44.

The argument for originalism begins with the observation that the Constitution of the United States is the yield of an effort—actually, the yield of many efforts over many years—to communicate, by means of a written text, various directives. Those directives are mainly of two types: (1) directives about what the institutions of the national government are to be and about how power is to be allocated, both horizontally, among the (legislative, executive, and judicial) institutions of the national government, and vertically, between the national government and the governments of the states; and (2) directives about how the power of government—the power of the national government or of state government or of both—is to be limited.<sup>82</sup> The argument for originalism—the argument that the originalist approach to constitutional interpretation should inform the practice of judicial review—continues by emphasizing the basic point of judicial review, which, as I explained in Part One of this lecture, is to protect the various directives constitutionalized by our political ancestors: the various directives the constitutional text was originally understood to communicate—understood to communicate by the People at the time the text was constitutionalized, or by their representatives. Because it is not always clear what directive(s) a particular piece of the text, a particular constitutional provision, was originally understood to communicate, however, the Court must “interpret” the provision: It must identify, or try to, the directive the provision was understood, by the People at the time the provision was constitutionalized, or by their representatives, to communicate.

“The Constitution,” in each and all of its various parts, is an intentional political act of a certain sort: an act intended to establish, not merely particular configurations of words, but particular directives, namely, the directives the particular configurations of words were understood to communicate.<sup>83</sup> The fundamental reason any part of the Constitution—any provision of the constitutional text—was ratified is that the ratifiers wanted to issue, and thought that in ratifying the provision they were issuing, a particular directive: the directive that they

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82. Some constitutional provisions limit the power of the national government to protect the power of state government, and some limit the power of state government to protect the power of the national government. Some constitutional provisions limit the power of government—whether the national government, state government, or both—to protect some aspect of the well-being or of the autonomy of persons, whether persons as citizens or persons simply as human beings.

83. Cf. Richard S. Kay, *The Bork Nomination and the Definition of “The Constitution,”* 84 NW. U. L. REV. 1190, 1193 (1990): “The influence of the Constitution is the consequence of continuing regard not for a particular assortment of words, but for the authority and sense of a certain constituent act.”

understood, and that the public they represented understood, or would have understood, the provision to communicate. (Does anyone really believe that were *we* to amend the Constitution in our day, it might be an intentional political act of a different sort: an act intended to establish, not particular directives, but merely particular configurations of words? If not, why would anyone believe that when *they* established or amended the Constitution in their day, they acted to establish merely particular configurations of words?) It is difficult to discern any justification, therefore, for the Court privileging any understanding of a constitutional provision other than the original understanding—for privileging, that is, any directive other than the directive the provision was originally understood to communicate, the directive the provision was ratified to establish.

Richard Kay has argued, in a series of essays, that nonoriginalism, which would have the Court privilege some understanding other than the original understanding, is divided against itself: "There may be plausible theories of government and judicial review which demote the authority of both intention and text, but it is hard to see what the political rationale would be for a theory that elevates a text for reasons unrelated to the people and circumstances which created it."<sup>84</sup> Kay has also asserted that:

[T]o the extent we would bind ourselves, in whole or in part, to rules inferred from mere marks and letters on paper without reference to the will of the human beings who selected those marks and letters, we enter a regime very foreign to our ordinary assumptions about the nature of law.<sup>85</sup>

To deem authoritative the words of a constitutional provision "independently of the intentional act which created them," suggests Kay, "is to disregard exactly that which makes the text demand our attention in the first place. That the words will bear some different meaning is purely happenstance. Without their political history, the words of the Constitution have no more claim on us than those of any other text."<sup>86</sup> Steven Smith has made much the same point: "[I]t is hard to think of any recommendation for a regime of law created by the 'interpretation' of disembodied words that have been methodically severed from the

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84. Kay, *supra* note 63, at 234.

85. Richard S. Kay, *Original Intentions, Standard Meanings, and the Legal Character of the Constitution*, 6 CONST. COMM. 39, 50 (1989).

86. Kay, *supra* note 83, at 1193.

acts of mind that produced them.”<sup>87</sup>

It misses the point to observe of constitutional provisions what Cass Sustein has observed of federal statutes: “The words were enacted; the original understanding was not. . . . Words have passed through the constitutionally specified mechanisms for enactment of laws; intentions have not, and they are therefore not binding.”<sup>88</sup> Yes, the words were enacted. But, as I pointed out earlier, in the absence of a widely shared understanding of the meaning of words—especially, in the presence of competing understandings (intertemporal, intratemporal, or both) of their meaning—there arises the question of *whose* understanding of the words, the meaning of the words *to whom*, is authoritative. I have presented an argument for answering that the original understanding/meaning is authoritative. The ball is in the court of those who do not like that answer to present an argument for answering that some nonoriginal understanding/meaning is authoritative. Saying that “the words were enacted, the original understanding was not” does not constitute such an argument, it does not tell us why we should privilege some present meaning (for example) over the original meaning.<sup>89</sup> Sunstein’s comment that “[i]n the end, Congress enacts laws, not its own views about what those laws mean”<sup>90</sup> is best understood not as a point against the originalism I have presented here. Adapted to the context of constitutional (not statutory) adjudication, the point, which the originalism I have presented here not only accepts but insists on, is that “in the end, the ratifiers (on behalf of the People, whom they represent) establish directives, not their own views about what those directives mean in particular contexts.”

In view of a recent critique of originalism by Samuel Freeman, it bears emphasis that the connected arguments for judicial review and for the originalist approach to judicial review, presented in this lecture,

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87. Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 119 (1989). (For an interesting response to aspects of Smith’s essay, see Larry Alexander, *Of Two Minds About Law and Minds*, 88 MICH. L. REV. 2444 (1990)). See also Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L. J. 1501, 1526-29 (1989). Agreeing that the original meaning of the constitutional text is authoritative, Tom Merrill suggested to me in conversation that a different rule might apply if we had a practice of re-ratifying the Constitution every generation.

88. CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 129 (1990). I suspect it misses the point to make that observation of statutes (federal or otherwise) as well.

89. Cf. *id.* (“courts might well conclude that what is controlling is the contemporary meaning of the statute”).

90. *Id.*

do not partake of ancestor worship of a Burkean or of any other variety.<sup>91</sup> I have not said the constitutional directives our political ancestors bequeathed us should be protected, in part by means of judicial review, just because, or even partly because, our political ancestors bequeathed them to us. (Who makes such a silly argument?) The point, rather, as I explained earlier, is that "we, the People" now living—who, after all, unlike our dead political ancestors, are now politically sovereign—should protect the constitutional directives they bequeathed us for one of two reasons: First, some of the directives they bequeathed us are good directives, directives that were we drafting a constitution from scratch, we should want to include. Second, even if some of the directives they bequeathed us are not directives that were we drafting a constitution from scratch, we should want to include—indeed, even if some of them are directives that we should want *not* to include—we should nonetheless protect such a directive *unless and until we can disestablish the directive in a way that is less problematic than the Court continuing to protect the directive*. The mere fact that supermajorities of those of our political ancestors who were enfranchised bequeathed us certain constitutional directives is simply no part of the argument for the originalist approach to judicial review. Therefore, Samuel Freeman's position to the contrary notwithstanding, "affirming the Constitution as sovereign citizens, and not as subjects of someone else's will," does *not* "require[] that we reject the doctrine of original meaning."<sup>92</sup> (Not that there may not be any *other* reasons for rejecting originalism.)

It bears emphasis, too, that the argument presented here for the originalist approach is not itself originalist. An originalist argument for the originalist approach to constitutional interpretation—an argument, for example, that the judicial review established by the Constitution as originally understood is originalist review—would be question-begging: The argument would presuppose the authority of the very thing at issue—the originalist approach to constitutional interpretation.<sup>93</sup> Inci-

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91. See Freeman, *supra* note 34, at 13.

92. See Freeman, *supra* note 34, at 17:

Public reason requires, at a minimum, that the Constitution's meaning be comprehensible and affirmable without appeals to external authority. The absence of others' authority (that of our ancestors, of God, or of anyone else) follows from democratic sovereignty. Therefore, affirming the Constitution as sovereign citizens, and not as subjects of someone else's will, requires that we reject the doctrine of original meaning.

93. In at least one passage in his book Bork seems to come close to making the question-begging originalist argument for originalism. See BORK, *supra* note 41, at 177. In the main, how-

dentally, the argument that the founders' approach to legal interpretation was not originalist, in countering the question-begging originalist argument for originalism, counters an argument that, because question-begging, is already fatally flawed.

(Was the founders' approach to legal interpretation originalist? Not in the "strict intentionalism" sense of originalism.<sup>94</sup> But there seems to be little reason to doubt that to the extent "the framers collectively intended judges to employ any particular theory of constitutional interpretation, there can be little doubt that this interpretive theory was some variety of originalism. For during the founding era and indeed for much of the succeeding century, originalism was not simply the dominant theory of constitutional hermeneutics; with unimportant exceptions it was the only such theory."<sup>95</sup> If the founders' approach was not originalist even in the "moderate intentionalism" sense, the argument for originalism presented here would be undermined to this extent: We could not longer say, as I have, that the Constitution, in each and all of its various parts, is an intentional political act of a certain sort—an act intended to establish, not merely particular configurations of words, but particular directives, namely, the directives the particular configurations of words were understood to communicate. We would have to say, instead, that in some of its parts—the parts ratified at the founding—the Constitution is an act intended to canonize merely particular configurations of words.)

Of course, a judge purporting to follow the originalist approach to constitutional interpretation can act in bad faith,<sup>96</sup> but so can a judge purporting to follow any other approach to constitutional interpreta-

ever, Bork seems to understand that any valid argument for originalism cannot be originalist. BORK, *supra* note 41, at 150.

94. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). (The strict intentionalism/moderate intentionalism language is Gregory Bassham's. See *supra* notes 72-74 and accompanying text.)

95. BASSHAM, *supra* note 73, at 68.

For important critical comments on H. Jefferson Powell's famous article, *supra* note 94, see BASSHAM, *supra* note 73, at 67-71; Lofgren, *The Original Understanding of Original Intent*, 5 CONST. COMM. 77 (1988); Simien, *supra* note 74, at 99-102.

96. See Robert H. Bork, *Foreword* to G. McDOWELL, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* v, xi (1985): "[E]ven a judge purporting to be [an originalist] can manipulate the levels of generality at which he states the [ratifiers'] principles. . . . [E]ven under [originalism] there are no safeguards against that except the intellectual honesty of the judge and the scrutiny of an informed profession that accepts the premises of [originalism]." See also Suzanna Sherry, *Original Sin*, NW. U. L. REV. 1215, 1222 (1990) ("originalism leaves . . . much room for . . . manipulation").

tion. The more significant point concerns the relation between the originalist approach and the exercise of judicial "discretion." The argument presented here does not presuppose that the originalist approach always or even often constrains judicial discretion to a significant extent. (Nor does it presuppose that a nonoriginalist approach *fails to* constrain judicial discretion.)<sup>97</sup> As Bork<sup>98</sup> and many other enthusiasts of originalism (e.g., former Attorney General Edwin Meese)<sup>99</sup> seem not, or not always, to understand, originalism does not entail—it does not necessarily eventuate in—judicial minimalism. I develop the point, at length, elsewhere in the book from which this lecture is drawn.

## V

### The polemical character of academic constitutional discourse in

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97. See Smith, *supra* note 87, at 111-12:

To be sure, the words of the enacted law may continue to constrain the judge. But the essential fact that made *those words* (and not a science fiction novel, or even a law review article) efficacious to bind the judge—*i.e.*, the fact that the words express a specific collective decision made by the designated political authority—is now de-emphasized or dismissed. The legal text is methodically disassociated from the phenomenon upon which its power to constrain depends. The important question that emerges from this new perspective is not whether the statute, so viewed, *could* constrain judicial choice. Perhaps it could. But the critical question is why a statute, so understood, *should* constrain judges.

98. See BORK, *supra* note 41, at 150:

Even if evidence of what the founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the Constitution's words. If that method of interpretation were not common in the law, if James Madison and Justice Joseph Story had never endorsed it, if Chief Justice John Marshall had rejected it, we would have to invent the approach of original understanding in order to save the constitutional design. No other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters, perhaps radically, the design of the American republic. The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution.

For a critical comment on Bork's argument that—and here I quote Richard Posner's construal of Bork's argument—that "the judiciary should embrace originalism . . . [because] it is implicit in our democratic form of government. Originalism is necessary in order to curb judicial discretion, and curbs on judicial discretion are necessary in order to keep the handful of unelected federal judges from seizing the reins of power from the people's representatives." See Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1369-70 (1990).

99. See Edwin Meese, III, *The Battle for the Constitution*, 35 POL'Y REV. 32 (1985); Edwin Meese, III, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1 (1986); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986). (In his better moments, Meese contended for "moderate intentionalism" originalism. See *supra* note 67.) See also William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

the United States is evident in the tendency of some scholars to roll their eyes, if not sneer, when someone defends the originalist approach to constitutional interpretation. Sometimes the originalist approach is derisively waived away with epithets like "authoritarian."<sup>100</sup> It would be more productive were critics of originalism to take the time and spend the effort to present and defend an alternative, nonoriginalist approach.

What might a nonoriginalist approach to constitutional interpretation, and the argument for it, look like? Suppose that (1) the Supreme Court believes that a particular constitutional provision as originally understood represents directive *D*, but (2) there is a very widespread belief, perhaps even a consensus, among the present generation of the People of the United States—at least, among those members of the present generation who think about such matters—that *D* is, for some reason or reasons, no longer acceptable. Might one then successfully contend for the legitimacy of the Supreme Court refusing to enforce *D*? (If there is such a consensus, why not amend the provision?) Even if so, the argument would not support the Court enforcing, in the name of the provision, a directive not represented by the provision as originally understood; it would support merely the Court refusing to enforce *D*. Moreover, about what existing constitutional provision (or provisions) can it plausibly be said that there is a widespread belief, in the American political community (among those citizens who think about such matters), that the directive arguably represented by the provision as originally understood is no longer acceptable?

Suppose, instead, that (1) there is a widespread belief, perhaps even a consensus, among the present generation of the People of the United States (or among those citizens who think about such matters) both that the meaning of a particular constitutional provision—the directive represented by the provision—is *E* and that *E* is not merely acceptable but morally compelling, but (2) the Court believes, perhaps correctly, that *E* is not the directive represented by the provision as *originally understood*. Might one then successfully contend for the legitimacy of the Court enforcing *E*? Even if so, the supposition is counterfactual: For any right- or liberty-regarding provision of the Constitution the subject of a significant amount of litigation, there is almost certainly a significant dissensus (among those citizens who think about such matters) about the meaning of the provision—about, that

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100. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1521-23 (1988).



is, whether the provision represents this or, instead, that directive.<sup>101</sup> What is needed, therefore, is an argument that the Court may enforce as constitutional a directive represented by a constitutional provision *neither* (in the Court's view) as originally understood *nor* even (given the dissensus) as understood by some significant segment of those among the present generation of the People who think about such matters. That seems like a rather large, and largely unchecked, power to concede to an electorally unaccountable judiciary.

Samuel Freeman has recently argued that the written Constitution should be interpreted to represent, not the directives the provisions were originally understood to represent, but

the principles *we* could reasonably intend in endorsing [the Constitution] as our public charter. . . . Against originalism's proposal that the Constitution be interpreted by asking what values or principles our ancestors intended, I have suggested an alternative inquiry: What principles could we, as sovereign citizens, mutually acknowledge as interpretive of the Constitution in the free and public use of democratic reason?<sup>102</sup>

In responding to Freeman's proposal, I want to consider several possibilities:

1. *The principle "we could reasonably intend" in endorsing, as a part of our public charter, a particular provision is the principle the provision was originally understood to establish.* In that case, the practical difference between the originalist approach and Freeman's is nil.

2. *There is more than one principle we could reasonably intend in endorsing (as a part of our public charter) a particular provision, only one of which is the principle the provision was originally understood to establish.* But in that case, why should we want to concede to a judicial elite—the nine members of the Supreme Court, or a majority of them—the power to privilege, in the name of the provision, any principle other than the one the provision was originally understood to establish, which, *ex hypothesi*, is one of the principles, though not the only one, we could reasonably intend in endorsing the provision? Why, that is, should we want to make that concession unless we are inclined to romanticize the Supreme Court (something that it is becoming in-

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101. Consider, for example, the Free Exercise Clause of the First Amendment. See *supra* note 147 and accompanying text.

102. Freeman, *supra* note 34, at 17 & 20.

creasingly difficult to do)?

3. *The principle a particular provision was originally understood to establish is not one we could reasonably intend in endorsing the provision.* . . . However we may evaluate it as a matter of political theory,<sup>103</sup> Freeman's proposal is, at the end of the day, of little practical consequence except to the extent it is the case that the principles the Constitution was originally understood to establish are not ones we could reasonably intend in endorsing, as our public charter, the Constitution. What reason do we have for supposing that any, much less many, of the principles the Constitution was originally understood to establish are not ones we could reasonably intend in endorsing the Constitution? The challenge to Freeman is to identify those provisions about which it is the case that the principles they were originally understood to establish are not ones we could reasonably intend in endorsing the provisions.<sup>104</sup>

3.1. The principle a particular provision was originally understood to establish is not one we could reasonably intend in endorsing the provision, *but the provision can be understood to represent a principle we could reasonably intend in endorsing the provision.* What existing constitutional provisions fit that description? Again, for any right- or liberty-regarding provision of the Constitution the subject of a significant amount of litigation—e.g., the Free Exercise Clause of the First Amendment, the Assistance of Counsel Clause of the Sixth Amendment, and the Privileges or Immunities Clause of the Fourteenth Amendment—there is almost certainly a significant dissensus, among those citizens who think about such matters, about whether the provision represents this or that directive: Such a provision is almost certainly understood, by different citizens, to represent different directives. Perhaps, therefore, such a provision can be understood to represent, not

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103. Freeman's argument is pervaded by his Rawlsian/contractarian/neo-Kantian political-philosophical presuppositions. Those presuppositions are quite problematic, as I, like increasing numbers of others, have argued elsewhere. See MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS*, ch. 1 (1991). See also, e.g., WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); Stephen A. Gardbaum, *Why the Liberal State Can Promote Ideals After All*, 104 HARV. L. REV. 1350 (1991); Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3 (1990).

104. What if a particular constitutional provision will bear only one reading, and thus read the principle represented by the provision is not one that, as free and equal citizens, we could reasonably constitutionalize? Freeman's position: "[W]hen the inherited Constitution contains provisions deviating from equal sovereignty, the court is in no position to contravene it by declaring them invalid." Freeman, *supra* note 34, at 37.

just one principle we could reasonably intend in endorsing the provision, but more than one such principle.

3.2. The principle a particular provision was originally understood to establish is not one we could reasonably intend in endorsing the provision, *but the provision can be understood to represent more than one principle we could reasonably intend in endorsing the provision*. Why should we concede to the Court the power, not merely to decline to enforce the principle the provision was originally understood to represent—which, *ex hypothesi*, we could not reasonably intend in endorsing the provision—but also to choose which of the two or more principles we *could* reasonably intend, shall be privileged?

I doubt that in the context of American political-legal culture—a culture in which there is a healthy skepticism about placing too great an unchecked power in any political elite's hands—any argument for a nonoriginalist approach to constitutional interpretation (at least, any such argument I can imagine) would be credible. In what context, if any, might an argument for a nonoriginalist approach be credible? Imagine a country, *J*, whose constitution was imposed on it by another country that had recently defeated it in war. Imagine, too, that (1) although after a time many citizens of *J* have come to embrace the constitution, many others oppose it, and that (2) the party that has been in power since the end of the war, and that has appointed all the judges to the country's constitutional court, came to power in part on the basis of a platform of opposition to the constitution. Imagine, finally, that for various practical reasons, involving both domestic and international politics, the party in power no longer seeks to repeal the constitution but chooses, instead, to pay it lip service.<sup>105</sup> One can see how, in such a political-legal context, the originalist approach to the interpretation of the constitution might have little appeal and a nonoriginalist approach that marginalized the constitution—by ignoring the directives it was originally understood to represent and, instead, imputing to it thin, inconsequential directives—might have considerable appeal. Notice, however, that the nonoriginalist approach contemplated in this scenario involves a judicial role that is relatively small/

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105. Of course, this imaginary scenario is based, albeit loosely, on the constitutional experience of post-World War II Japan. See KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* (1991). Relatively few citizens of contemporary Japan seem to oppose the Constitution of Japan; most seem to embrace it. The Liberal Democratic Party (which, as it is sometimes said in Japan, "is neither liberal nor particularly democratic") is still understood by many citizens of Japan, however, to be "anti-constitutional."

passive, vis-à-vis the other institutions of government, rather than large/active. "Nonoriginalism . . . is a two-way street that handles traffic both to and from individual rights."<sup>106</sup>

So, while not impossible to imagine the outlines of a coherent argument for a nonoriginalist approach to constitutional interpretation, the context in which that argument might be credible is worlds removed from the political-legal context of the United States. Pending the elaboration of a persuasive case for a nonoriginalist approach to constitutional interpretation—persuasive in the context of American political-legal culture—we must conclude that the originalist approach is the more defensible one and should, therefore, inform the practice of judicial review.

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Many people—judges and others—who find originalism an attractive approach to constitutional interpretation do so partly, if not principally, because they believe that the originalist approach, if properly understood and followed, entails—that it necessarily eventuates in—a relatively small or passive judicial role in resolving constitutional conflicts, rather than in a relatively large or active role; they believe that originalism entails a process of constitutional adjudication that is "legal" rather than "political." Relatedly, many critics of the modern Supreme Court's "activism," which they see as illegitimately political—most prominently, perhaps, Robert Bork<sup>107</sup>—think that originalism gives them the needed constitutional-theoretical ground from which to mount a fundamental assault on the legitimacy of much of the modern Court's work product.

There *is* a sense in which the judicial role under originalism is smaller or more passive than the judicial role under some imaginable nonoriginalist positions. Under originalism the Court is to enforce as constitutional only directives with a particular pedigree: directives represented by the constitutional text as originally understood. Under an imaginable nonoriginalism, by contrast, the Court may enforce as constitutional directives represented by the constitutional text as it, the Court, understands the text, even if the directives are not represented by the text as originally understood. Nonetheless, the originalist approach to constitutional interpretation does not entail—it does not nec-

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106. Scalia, *supra* note 44, at 856.

107. See BORK, *supra* note 41.

essarily eventuate in—a small or passive judicial role; the originalist approach is not necessarily inconsistent with a judicial role as large or active as any apostle of “the Warren Court” (I count myself one) could reasonably want.<sup>108</sup>

But that is a subject, and an argument, for another day.

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108. Relatedly, it is a mistake to think that originalism is an adequate basis for challenging the legitimacy of the “activist” decisions that have so exercised the modern Court’s fiercest critics, like Bork. As Lawrence Solum has observed, “[T]he originalists have won a Pyrrhic victory [over nontextualists and nonoriginalists]. As originalism has been clarified in response to its critics, it has gradually become more and more evident that it has no force as a critique of the kind of interpretation practiced by the Warren Court.” Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1602 (1989).

## Appendix A

## DOES THE CONSTITUTION ESTABLISH JUDICIAL REVIEW?

Does the Constitution of the United States—whether as ratified in 1789, as amended by ratification of the Bill of Rights in 1791, or as subsequently amended, for example, by ratification of the Fourteenth Amendment in 1866-68—establish the practice of judicial review? More specifically, does it establish judicial review: (1) by *state* courts, of acts of *state* government; (2) by *federal* courts, in particular by the Supreme Court, of acts of *state* government; (3) by *state* courts, of acts of the *federal* government; or (4) by *federal* courts, in particular by the Supreme Court, of acts of the *federal* government?

Judicial review of the first sort is mandated by the Supremacy Clause of Article VI of the (1789) Constitution, which provides: "This Constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Judicial review of the second sort—in particular, appellate review by the United States Supreme Court of state court decisions about the federal constitutionality of state acts—"is not compelled by the language of the [1789] Constitution; it is implied from desirable ends ['uniform construction and application of the Constitution as against inconsistent state law throughout the country'] that are attributed to the entire [constitutional] scheme. But most assuredly there is nothing in the language that forbids it. And Congress has so provided [for such appellant review]—consistently, from the first Judiciary Act of the first Congress onward—and it has done so unambiguously."<sup>109</sup> Moreover, at least by 1868, when the Fourteenth Amendment became a part of the Constitution, it was taken for granted—indeed, it was a basic presupposition of the Fourteenth Amendment—that the Constitution establishes, in the form of appellate review of state court decisions, judicial review by the Supreme Court of state acts.

What about judicial review, of state acts, by federal courts other than the Supreme Court? That practice, too, is well established—and it does not seem problematic, given that federal court decisions about the federal constitutionality of state acts are subject to appellate review by the Supreme Court, which, in consequence of its power to review state

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109. BICKEL, *supra* note 4, at 13.

court decisions about the federal constitutionality of state acts, already has the power to review state acts.

The constitutional pedigree of judicial review of the third and fourth sorts—judicial review of federal acts—is more controversial. Some have argued that the Constitution, as ratified in 1789, establishes such review, but others have disagreed.<sup>110</sup> Even if by itself the constitutional text (as of 1789) is not clear, it is possible that, as some historians have argued, those who, during 1787-89, voted to ratify the Constitution understood and meant it to establish judicial review of federal acts; other historians, however, have argued that the ratifiers did not so understand the Constitution, or that the evidence that they did so understand it is weak.<sup>111</sup> Whatever the understanding of the ratifiers, Leonard Levy and others have argued that the practice of judicial review of federal acts was for the founding generation of Americans a strong and eventually inescapable inference from the nature and structure of the national government established by the Constitution.<sup>112</sup> Moreover, by 1791, when the Bill of Rights became a part of the Constitution, it was almost certainly taken for granted that the Constitution establishes judicial review of federal acts. Indeed, such review is almost certainly a basic presupposition of the Bill of Rights. Recall, in that regard, that Hamilton's argument for such review, in *The Federalist No. 78*, was published in 1788.<sup>113</sup> Recall, too, that "[i]n introducing the Bill of Rights . . . to the First Congress, Madison declared that 'independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or the executive.'"<sup>114</sup>

Even if we accept one or more of the arguments for the constitutionality of judicial review of federal acts, this problem remains: Recent scholarship suggests that the practice of judicial review of federal acts that was (arguably) established by the Constitution at the end of the eighteenth century was not as broad as the practice that was subse-

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110. See MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 13-14 (1982).

111. See *id.* at 14-15.

112. See *id.* at 15-17. Cf. CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW*, ch. 3 (1969).

113. See Clinton L. Rossiter, *Introduction*, *THE FEDERALIST No. 78* at viii (Clinton Rossiter ed., 1961).

114. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 66 (1980) (quoting 1 *ANNALS OF CONGRESS* 457 (1834)).

quently established by the Supreme Court, in the late nineteenth century, and that prevails today.<sup>115</sup> To credit that scholarship is to conclude that if the Constitution—whether as ratified in 1789 or as amended by ratification of the Bill of Rights in 1791—established a practice of judicial review of federal acts, it did not establish the broad modern practice, according to which “courts are entitled to overturn any act of Congress [or of the President] they find to be unconstitutional, as long as a relevant case is brought before them. Moreover, such a finding by the Supreme Court of the United States is final, not subject to further action by any other agency of government, except in conformity with the Court’s decision.”<sup>116</sup> According to the narrower practice established by the Constitution at the end of the eighteenth century, however, “federal courts are entitled to invalidate acts of Congress and the President with finality only when to let such acts stand would violate the constitutional restrictions on judicial power.”<sup>117</sup> However, does not Madison’s statement to the First Congress, quoted in the preceding paragraph, imply that the judicial review that is a basic presupposition of the Bill of Rights is a broader practice than that?

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115. See CLINTON, *supra* note 3. For a recent, revisionist view of the emergence of the modern practice of judicial review—a view that offers a different perspective from Clinton’s—see SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990).

116. CLINTON, *supra* note 3, at ix.

117. *Id.* at x. “A close reading of *Marbury v. Madison* [v. *Madison*] itself supports no more than this narrow view. Subsequent decisions of the Supreme Court lend additional support.” *Id.*

When the framers undertook to place formal limitations on the legislative power, they left little room for doubt as to what they had done. First, they provided for executive review of policy by instituting the veto power. Second, they provided for legislative review through the override capacity. Third, they provided for limited judicial review in cases of a judiciary nature.

This kind of coordinate review bears little resemblance to the famous Jeffersonian idea which sometimes carries a similar label. His central point seems to be that all the agencies of national government possess a similar capacity to pass judgment on constitutional questions, no matter what the question involved. . . .

[Under t]he “Marshallian” variant [of coordinate review] . . . , the decision as to where power to make a final authoritative determination of constitutionality lies depends upon the type of case involved; and specifying the type of case in turn depends upon functional relations which stem from the system of balanced government established in the Constitution.

*Id.* at 25-26. For an informative review of Clinton’s argument, see Kent Newmyer, *Marbury v. Madison* AND JUDICIAL REVIEW, 7 CONST. COMM. 380 (1990) (book review). See also Franck, *Origins and Limits of Judicial Review*, 52 REV. POLITICS 485 (1990).



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The debate about whether the Constitution establishes judicial review has limited relevance today. The practice of judicial review, including the modern practice of judicial review of federal acts, has indisputably become a definitive feature of American government—indeed, a feature we unreservedly hold out as a model to the world. Any argument that judicial review was not established by the Constitution and is, in that sense, “unconstitutional,” however plausible the argument may be as an historical matter, is, at this point in the development of American political institutions and practices, antiquarian. In the sense that judicial review is now a definitive feature of American government—a *constitutive* feature—judicial review is constitutional.<sup>118</sup>

My concern in Part One of this lecture, in any event, has been not with the legal question of the constitutionality of judicial review but with the political-moral question of its legitimacy. In addressing that question the state acts/federal acts distinction is not relevant. The force of my argument for judicial review does not depend on whether the judicial review is of state acts or, instead, of federal acts.

### Appendix B

#### THE ORIGINALIST APPROACH: AN ADDENDUM

How should an originalist judge, in specifying an indeterminate constitutional directive, deal with (1) particular practices that they who issued the directive specifically meant the directive to ban, (2) particular practices that they did not understand, or would not have understood, the directive to ban, and (3) particular practices that they specif-

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118. See BLACK, *supra* note 112, at 71:

[J]udicial review of Acts of Congress for federal constitutionality . . . rests also on the visible, active, and long-continued acquiescence of Congress in the Court's performance of this function. The Court now confronts not a neutral Congress nor a Congress bent on using its own constitutional powers to evade the Court's mandates, as some state legislatures have tried (and as Congress very clearly could succeed in doing, in many cases, if it were so minded), but rather a Congress which has accepted, and which by the passage of jurisdictional and other legislation has facilitated, this work of the Court.

See also Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 7 (1992) (judicial review “is primary among . . . the many significant practices, institutions, and procedures that are part of our constitution . . . that are not set forth in the document bearing the name ‘the Constitution’”). Cf. SNOWISS, *supra* note 115, at x: “I do not offer this [historical] reinterpretation as a way of attacking or defending the [modern] institution of judicial review. I share the prevailing view that judicial authority over legislation has by now generated sufficient support to be unaffected by assessments of original intent.”

ically meant the directive not to ban?

An originalist judge should not adopt a specification of an indeterminate constitutional directive if according the specification a particular practice (law, etc.) they who issued the directive specifically meant to ban, and indeed thought that in ratifying the constitutional provision at issue they were banning, does not violate the directive. Instead, she should deem the directive determinate with respect to the question of the constitutionality of such a practice and rule that the practice violates the directive. To do otherwise is almost certainly, if not necessarily, to misconceive the precise character of the directive they issued.<sup>119</sup> The better approach, for an originalist judge, is to presume that a specific aspect of the (complex) directive they issued is that the practice in question is forbidden.<sup>120</sup>

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119. Cf. Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981):

[O]ur understanding of the framers' intentions is necessarily distorted if we focus solely upon their larger purposes, ignoring the particular judgments they made in expressing those purposes. Intentions do not exist in the abstract; they are forged in response to particular circumstances and in the collision of multiple purposes which impose bounds upon one another. . . . [B]y wrenching the framers' "larger purposes" from the particular judgments that revealed them, we incur a loss of perspective, a perspective that might better enable us to see that the particular judgments they made were not imperfect expressions of a larger purpose but a particular accommodation of competing purposes.

120. One might want to argue, on that basis, that *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) was wrongly decided. (For a discussion of the case, see CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 39-51 (1969)). On the other hand, one might respond to an argument of that sort by insisting that the relevant description of the practice they who issued the relevant directive specifically meant to disallow is not *P* but *P at time T*, or *P in context C*, whereas the practice the court is being asked to invalidate in the name of the directive is *P at time U*, or *P in context D*. However, such a response may seriously underestimate the intertemporal continuities in the historically extended American political community. Cf. *Maryland v. Craig*, 110 S. Ct. 3157, 3172 (1990) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting):

According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." . . . That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." . . . The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—"face-to-face" confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedures preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); there-

Should an originalist judge ever adopt a specification of an indeterminate constitutional directive if according to the specification a particular practice they who issued the directive did not think they were banning—or, in the case of a practice they did not foresee and perhaps could not have foreseen, would not have thought they were banning if they had foreseen the practice—violates the directive? Or, instead, should she deem the directive determinate with respect to the question of the constitutionality of such a practice and rule that the practice does not violate the directive? It is possible, of course, that to conclude that a directive, properly specified, does not tolerate a practice they who issued the directive did not think, or would not have thought, they were banning may be to misconceive the character of the directive they issued.<sup>121</sup> But it is also true that to insist that “the directive they issued” must be understood so as to tolerate any practice they who issued the directive did not think, or would not have thought, they were banning may be to misconceive the character of the directive they issued. “A principle does not exist wholly independently of its author’s subjective, or his society’s conventional exemplary applications, and is always limited to some extent by the applications they found conceivable;” nonetheless, “[w]ithin these fairly broad limits, . . . [they who constitutionalized the principle] may have intended their examples to constrain more or less.”<sup>122</sup> Relatedly, to say that whatever “the directive they issued” is, it *necessarily* tolerates any practice they who issued it did

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fore the Confrontation Clause is not violated by denying what it explicitly provides for—“face-to-face” confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was “face-to-face” confrontation. Whatever else it may mean in addition, the defendant’s constitutional right “to be confronted with the witnesses against him” means, always and everywhere, at least what it explicitly says: the “‘right to meet face to face all those who appear and give evidence at trial.’”

121. Cf. LAWRENCE A. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1164-65 (2d. ed. 1988) (discussing the Establishment Clause of the First Amendment):

Where the original intent *not* to outlaw a practice is clear, a judge ought to view the history as evidence that the practice does not violate the Constitution. The showing should not, however, settle the question entirely—particularly if the context has changed. . . . To prevail, the opponent ought to demonstrate that, history notwithstanding, the practice offends the fundamental concepts . . . that underlie the constitutional language.

122. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 217 (1980). Brest adds: “To the [originalist] interpreter falls the unenviable task of ascertaining, for each provision, how much more or less.” *Id.*

not think, or would not have thought, they were banning is at odds with the originalist approach defended in Part Two of this lecture, which "recognize[s] that constitutional provisions, in principle, may signify aspirations and values that transcend the framers' temporally-bounded conceptions of the scope of those provisions. . . . Moderate intentionalism thus seem[s] an attractive half-way house between two unacceptable extremes: a jurisprudence that constitutionalized the repellent prejudices of former generations on the one hand, and a jurisprudence of open-ended judicial policymaking . . . on the other."<sup>123</sup>

But what if they who issued a directive not only did not think, or would not have thought, that in issuing the directive they were banning a particular practice, but specifically meant not to ban it; what if they specifically meant to allow the practice? If their specific intention to disallow a particular practice should be deemed determinative, why not also their specific intention to allow a practice? Even if their specific intention to allow a particular practice should be deemed determinative, about what provisions of the United States Constitution, provisions regarding a right or a liberty, is it the case that they who voted to ratify the provision specifically meant, not only to disallow a particular practice (or practices), but also to allow a particular practice? Is it true, for example—do the relevant historical materials support the claim—that they who voted to ratify the Fourteenth Amendment specifically meant, not only to disallow discrimination based on race, but also to allow discrimination based on sex? That they did not think they were banning discrimination based on sex is beside the point: The question is whether they specifically meant to allow it. Who among those who voted to ratify the Fourteenth Amendment, and how many, specifically meant to allow such discrimination? It seems that it would be quite difficult, with respect to constitutional provisions regarding rights or liberties, to support an historical claim, not merely of a specific intention to disallow, but of a specific intention to allow alongside a specific intention to disallow. Indeed, it seems quite doubtful that such claims could often (ever?) be sustained.

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123. See *supra* note 72.

