degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.

One of my colleagues refers to this conclusion, not without sarcasm, as the “Equal Gratification Clause.” The phrase is apt, and I accept it, though not the sarcasm. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled. To be perfectly clear on the subject, I repeat that the principle is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion. Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.

It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the Griswold case, is and always has been an improper doctrine. Substantive due process requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not. This means that Griswold’s antecedents were also wrongly decided, e.g., Meyer v. Nebraska,21 which struck down a statute prohibiting the teaching of subjects in any language other than English; Pierce v. Society of Sisters,22 which set aside a statute compelling all Oregon school children to attend public schools; Adkins v. Children’s Hospital,23 which invalidated a statute of Congress authorizing a board to fix minimum wages for women and children in the District of Columbia; and Lochner v. New York,24 which voided a statute fixing maximum hours of work for bakers. With some of these cases I am in political agreement, and perhaps Pierce’s result could be reached on acceptable grounds, but there is no justification for the Court’s methods. In Lochner, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, “[A]re we all ** at the mercy of legislative majorities?”25 The correct answer, where the Constitution does not speak, must be “yes.”

C. THE ROLE OF THE TEXT

FREDERICK SCHAUER, EASY CASES

** [It is] clear that there are easy cases in constitutional law—lots of them. The parties concerned know, without litigating and without consulting lawyers, that Ronald Reagan cannot run for a third term; that the junior Senator from Virginia, who was elected in 1982,

22. 286 U.S. 610 (1932).
23. 261 U.S. 525 (1923).
24. 198 U.S. 45 (1905).
25. Id. at 59.
does not have to run again in 1984 or 1986 even though the Representative from the First Congressional District does; that bills receiving less than a majority of votes in either the House or the Senate are not laws of the United States; that the Equal Rights Amendment, the District of Columbia Representation in the Senate Amendment, and the Balanced Budget Amendment are not now part of the Constitution; and that a twenty-nine year-old is not going to be President of the United States. I have equivalent confidence that I will not receive a notice in the mail informing me that I must house members of the armed forces in my spare bedroom; that criminal defendants in federal courts cannot be denied the right to be represented by a qualified lawyer for whom they are willing to pay; and that the next in line to succeed to the Presidency in the event of the President's death is the Vice-President, and not the Secretary of the Interior, the Congressman from Wyoming, or the quarterback for the Philadelphia Eagles.

The foregoing is only a small sample of the legal events that are "easy" constitutional cases. Once free from the lawyer's preoccupation with close cases—those in which the lawyer qua lawyer is a necessary actor in the play— we begin to comprehend the enormous quantity of instances in which the legal results are commonly considered obvious. But why is this? What makes the easy case easy?

In searching for the sources of easiness, it is perhaps best to look for the sources of hardness, and then define easy cases as those without any of the characteristics of hard cases. Such definition by exclusion is not the only approach, but it seems particularly appropriate because it is the exception, the hard case, that most commonly commands our attention.

Prototypically, a vague, ambiguous, or simply opaque linguistic formulation of the relevant rule generates a hard case. Such a linguistic phenomenon may be caused by questions about the result announced by a clearly applicable rule, questions about which rule, if any, is in fact relevant, or both. Regardless of the cause, the result is the same: one cannot find the answer to a question (which is not the same as a controversy) by a straightforward reading of rules.

To the extent that one can find an answer to a question by a straightforward reading of rules, other factors may make a case hard. A case that seems linguistically easy may be hard if the result announced by the language is inconsistent with the "purpose" of the rule. In such cases the tension between the plain meaning of the words and the reason for using those words creates a hard case, in much the same way that linguistic imprecision creates a hard case.

Even if a rule seems plainly applicable, and even if that application is consistent with the purpose behind a rule, it may be that two or more rules, dictating different results, will be applicable. If one rule suggests

39. Part of the problem, of course, is that legal theory in general is undertaken largely by those who train lawyers. We will have made considerable strides when we recognize that not only hard cases, but also all litigation and all lawyers, are in important respects epiphenomenal.
answer A to the question, and another suggests answer B, then it is as if
no answer had been provided. In the calculus of rules, too many rules
are no better than none at all.

Finally, and perhaps most importantly, there may be only one
relevant rule, it may be quite straightforwardly applicable, and its
application would be consistent with its purpose. Yet it may still be
morally, socially, or politically hard, however, in the sense of hard to
swallow. * * *

There may very well be other sources of hardness, but this sample
seems sufficiently large. With these types of hard cases in mind, we can
tentatively define an easy case as one having none of these characteris-
tics of hardness, one in which a clearly applicable rule noncontroversially
generates an answer to the question at hand, and one in which the
answer so generated is consistent both with the purpose behind the rule
and with the social, political, and moral climate in which the question is
answered.

There is clearly more involved than merely describing an easy case.
Perhaps easy cases are like unicorns, quite capable of definition and
description, but not to be found in the real world. Thus, my list of
seemingly easy cases purported to fill this argumentative gap, to show
that easy cases not only can be imagined, but in fact exist if we only
know where to look. And, as should be apparent from the particular
examples offered, my thesis here is that language is a significant and
often underappreciated factor in the production of easy cases. I am not
claiming that only language can generate easy cases. Various other
legal, cultural, and historical phenomena can create those shared under-
standings that will clarify a linguistically vague regulation, statute, or
constitutional provision. And, as the foregoing taxonomy of hard cases
was designed to demonstrate, language alone is insufficient to generate
an easy case. Neither of these qualifications, however, is inconsistent
with my central claim that language is significantly important in produc-
ing easy cases—that language can and frequently does speak with a
sufficiently clear voice such that linguistically articulated norms them-
selves leave little doubt as to which results are consistent with that
command.

One way of supporting the claim that language is important in
producing easy cases is to engage in an extended and most likely
incomprehensible discussion of numerous theories of meaning, attempting
to demonstrate by some collage of philosophical and behavioral
arguments the way in which the use of certain artificially created
symbols can and does enable us to communicate with each other. In
this context, however, and indeed in most others, such an excursus
seems to ignore the most significant piece of evidence supporting a claim
about meaning, which is that even the discussion of meaning would take
place in English. The discussion itself would thus irrefutably prove the
very hypothesis at issue, just as this Article is right now doing the same
thing.
When Wittgenstein remarked that "[l]anguage must speak for itself," he was not claiming that language existed in a vacuum, or that meaning could be disassociated from context. Rather, he was pointing out that the ability of language to function ought to be self-evident, and that the inability to explain all or even any of the sources of this phenomenon does not detract from the conclusion that language does function. Thus, to demonstrate that language works with a typical-looking argument would be possible only because of the conclusion of that very argument. If language didn't "work," the world would be so different from the world in which we live as to be beyond both description and comprehension. Regardless of how understandable this Article may be, it is certainly more understandable to this audience than it would be if it were written in Hungarian, in Chinese, or in semaphore signals. Whether our ability to understand each other in language is biological, behavioral, sociological, or some combination of these is less important than the fact that we can do it.

This is not meant to be the end of an argument, but only the beginning of one. Because law operates with language, understanding the way in which law works requires starting with the proposition that language works. In many instances, some of which I will deal with presently, it may be important to know why or how language works. In many other instances, however, it is sufficient to do less thinking and more looking, and at least take certain observable facts about language as a possible starting point in the analysis.

It is thus worthwhile to note that the Constitution is, even if nothing else, a use of language. By virtue of being able to speak the English language, we can differentiate between the Constitution and a nursery rhyme, between the Constitution and a novel, and between the Constitution and the Communist Manifesto. Let us construct a simple thought experiment involving a person who is fluent in English (even the English of 1984, and not necessarily the English of 1787 or 1868), but who knows nothing of the history, politics, law, or culture of the United States. If we were to show this person a copy of the Constitution, would that person glean from that collection of marks on a piece of paper alone at least some rudimentary idea of how this government works and of what types of relationships exist between the central government and the states, between the different branches of government, and between individuals and government? Although the understanding would be primitive and significant mistakes would be made, it still seems apparent that the answer to the question would be, "Yes." However sketchy and distorted the understanding might be, it would still exceed the understanding produced by a document written in a language not understood by our hypothetical reader, and surpass as well the understanding gained from no information at all.

This general intelligibility of language enables us to understand immediately the mandate of numerous constitutional provisions without

recourse to precedent, original intent, or any of the other standard interpretive supplements. We need not depart from the text to determine the rudiments of how a bill becomes a law, the age and other qualifications for various federal offices, the permissible and impermissible limits on the franchise, the number of terms that may be served by the President, the basic procedure for amending the Constitution, the mechanics of admitting a new state, the number of witnesses necessary in a trial for treason, and the permissibility of calling the defendant as a prosecution witness in a federal criminal case.

In some of these and other instances, some noncontroversial technical knowledge may be necessary for understanding. In order to appreciate the clarity of some of the requirements of the fourth, fifth, and sixth amendments, for example, one must understand what a trial is, how it is conducted, and so on. In order to understand some of the structural provisions, it is useful to have at least some preconstitutional understanding of what a state is. These shared background understandings, however, virtually a part of understanding this language, do not make the notion of a clear meaning implausible. Words themselves are nothing other than marks or noises, transformed into vehicles for communication by virtue of those rules of language that make it possible for the listener to understand the speaker in most cases. But these rules are not contained in a set of maroon volumes, the linguistic equivalent to the United States Code. These rules are made and continuously remade by the society that uses the language, and different rules may prevail in different segments of that society at different times.

Thus, language cannot be divorced from its context, because meanings become clear if and only if certain understandings are presupposed. Language cannot and does not transcend completely the culture of which it is a part. It is not something that has been delivered packaged, assembled, and ready-to-use to a previously nonlinguistic culture. Language and society are part and parcel of each other; understanding a language, even at its clearest, requires some understanding of the society that has generated it.

But what does this tell us? Certainly not that the notion of plain meaning is worthless, or that questions of interpreting language collapse completely into questions about a culture. That a rosebush springs from and cannot exist without earth, sun, and water does not mean that the notion of a rosebush is not distinguishable from the concepts earth, sun, and water. Similarly, that language requires context does not mean that language is context. Language operates significantly because of and as a system of rules that enable people within a shared context to understand each other. At times these rules may be vague, and thus may produce hard cases, but at other times the rules can and do operate to produce the very kinds of "easy" cases I have been describing.

* * *

I am * * * quite willing to concede that it is impossible to have an entirely clear constitutional clause, for the same reason that it is
impossible to have an absolutely airtight legal provision of any kind, or an absolutely airtight definition in any field. This is merely a recasting of the well-known message that all terms and all laws have fringe as well as core applications. That there are fringe meanings of words, or fringe applications of laws, for which one can make a reasonable argument for either inclusion or exclusion, does not mean that there are no core cases in which an argument on one side would be almost universally agreed to be compelling, and an argument on the other side would be almost universally agreed to be specious. That I am unsure whether rafts and floating motorized automobiles are "boats" does not dispel my confidence that rowboats and dories most clearly are boats, and that steam locomotives, hamburgers, and elephants equally clearly are not.

This is not to deny that determining the contents of the core, the fringe, and what is wholly outside are contextually and culturally contingent. I can imagine a world in which "elephant" is a fringe (or core) example of a boat, and I can imagine a set of circumstances in this world in which a floating hamburger might legitimately present us with a definitional problem vis-à-vis the class "boats." The mere possibility of such circumstances does not eliminate our ability to make sense out of the words as standardly applied, however. If it did, we would have no way of communicating with each other.

The lesson of open texture, then, is that every use of language is potentially vague*. The precision of language is necessarily limited by the lack of omniscience of human beings, and thus any use of language is bounded by the limitations of human foresight. The non sequitur, however, is the move from the proposition that language is not perfectly precise to the proposition that language is useless.***

Although linguistic nihilism seems scarcely comprehensible as a general statement about language, nihilistic tendencies have had a surprising vitality in legal and constitutional theory. The attractions of nihilism seem to be largely attributable, however, to a cramped view of the legal world, a view that focuses almost exclusively on those hard cases that wind up in court. If we focus only on the marginal cases, only on the cases that a screening process selects largely because of their very closeness, it should come as no surprise that we would have a skeptical view of the power of language to draw distinctions. The cases that wind up in court are not there solely because they lie at the edge of linguistic distinctions, but this is at least a significant factor. Thus the cases that are in court are hardly a representative sample of the effects of legal language. But if we focus instead on easy as well as hard cases, and thus take into our comprehension the full legal world, we see that the cases at the margin are but a small percentage of the full domain of legal

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events; the bulk of the remaining cases are those in which we can answer questions by consulting the articulated norm. * * *

* * *

The perspective described above views linguistically articulated rules as excluding wrong answers rather than pointing to right ones. From this perspective, there is no longer any justification to view the specific and the general clauses in the Constitution as fundamentally different in kind. Since no clause can generate a uniquely correct answer, at least in the abstract rather than in the context of a specific question, the best view of the specific clauses is that they are merely less vague than the general clauses. The language of a clause, whether seemingly general or seemingly specific, establishes a boundary, or a frame, albeit a frame with fuzzy edges. Even though the language itself does not tell us what goes within the frame, it does tell us when we have gone outside it.

It is best to view the role of language in setting the size of the frame as presumptive rather than absolute. Factors other than the language of the text, or the language of a specifically articulated rule in a case or series of cases, often influence the size and shape of the frame of permissible argument. The language of the text itself is still, however, commonly not only the starting point, but also a constant check long after leaving the starting point. When we look at an uninterpreted clause (in the sense of a series of authoritative judicial interpretations), we commonly focus quite closely on the text. Even in those cases in which an established body of precedent exists, reference to the text is never considered illegitimate.

The language of the text, therefore, remains perhaps the most significant factor in setting the size of the frame. Those clauses that look quite specific are those where the frame is quite small, and thus the range of permissible alternatives is equivalently small. Those clauses that look much more general are those with a substantially larger frame, giving a much wider range of permissible alternatives. This, however, is a continuum and not a dichotomy. Those clauses that seem specific differ from those that seem general in that the former exclude as wrong a larger number of answers than do the latter. * * *

* * * If we consider the text to be informative about boundaries, or limits, rather than about centers, or cores, then the text appears far less irrelevant than is commonly assumed. The text presumptively constrains us, or should, from overstepping what are admittedly pretheoretical and almost intuitive linguistic bounds, and thus serves as one constraint on constitutional interpretation.

We can thus view these linguistic frames as telling an interpreter, for example the Supreme Court, which areas are legitimately within the province of interpretation, which subjects are properly the business of the interpretation. An interpretation is legitimate (which is not the same as correct) only insofar as it purports to interpret some language of
Sec. C THE ROLE OF THE TEXT

the document, and only insofar as the interpretation is within the boundaries at least suggested by that language.

SANFORD LEVINSON, LAW AS LITERATURE

60 Tex.L.Rev. 373, 376–89 (1982).

I.

* * *

Constitutions, of the written variety especially, are usefully viewed as a means of freezing time by controlling the future through the "hardness" of language encoded in a monumental document, which is then left for later interpreters to decipher. The purpose of such control is to preserve the particular vision held by constitutional founders and to prevent its overthrow by future generations. The very existence of written constitutions with substantive limitations on future conduct is evidence of skepticism, if not outright pessimism, about the moral caliber of future citizens; else why not simply enjoin them to "be good" or "do what you think best"? Writers of constitutions must have a very high confidence in the ability of language both to "harden" and to control.

* * *

Any writer, including a framer of constitutions, presumably imagines the following relationship between text and reader: "The reader sets himself to make out what the author has designed and signified through putting into play a linguistic and literary expertise that he shares with the author. By approximating what the author undertook to signify the reader understands what the language of the work means." And, of course, in the case of those particular texts called legal, by understanding the meaning the conscientious adjudicator-reader becomes authorized to enforce it.

The remark just quoted comes from an essay vigorously attacking certain strains of contemporary literary criticism that Abrams finds insufficiently respectful of determinate meanings allegedly generated by disciplined study of texts. The disputes currently raging through literary criticism precisely mirror some of the central problems facing anyone who would take law seriously; the basis of this parallelism is the centrality to law of textual analysis.15 If we consider law as literature,


then we might better understand the malaise that afflicts all contemporary legal analysis, nowhere more severely than in constitutional theory.

II

* * *

Two classic approaches to understanding a written constitution involve emphasizing either the allegedly plain words of the text or the certain meaning to be given those words through historical reconstruction. I think it fair to say that these particular approaches are increasingly without defenders, at least in the academic legal community. Even so capable an analyst as Professor Monaghan, who is eager to return to the confines of a knowable “originalist” Constitution, admits that he has no way of handling the authority of judicial precedents that (he argues) violate initial understandings.\textsuperscript{19}

There is not time in this essay to canvass the problems of originalism. Suffice it to say that the plain meaning approach inevitably breaks down in the face of the reality of disagreement among equally competent speakers of the native language. Intentionality arguments, on the other hand, face not only the problem of explaining why intentions of long-dead people from a different social world should influence us, but also, perhaps more importantly, the problem of extracting intentions from the collectivity of individuals and institutions necessary to give legal validity to the Constitution. Even literary critics most committed to the existence of objective meaning through recovery of authorial intent, like E.D. Hirsch, admit that their approach applies only to individually authored works, and therefore cannot be used to analyze a document like the Constitution.\textsuperscript{20}

As Richard Rorty has pointed out, however, there are at least two options open to critics who reject the two approaches outlined above but who, nonetheless, remain interested in interpreting the relevant texts. The first option involves the use of an allegedly more sophisticated method to extract the true meaning of the text. Thus Rorty refers to “the kind of textualist who claims to have gotten the secret of the text, to have broken its code,” as a “weak” textualist,\textsuperscript{21} where the term is


\textsuperscript{20} Monaghan, \textit{Our Perfect Constitution}, 59 N.Y.U.L. Rev. 355, 362 (1984). Like Rosal Berger, see R. Berger, Government by Judiciary 412–13 (1977), Monaghan does not really counsel turning back the clock by instantly overruling all positively misdirected cases. Both offer what might uncharitably be regarded as an “adverse possession” approach to constitutional interpretation, whereby precedents that should at one time have been properly overruled (as wrongly decided) become entitled to recognition as authoritative after the passage of enough time and after the citizenry has come to rely on them. Neither offers the slightest guidance for recognizing the terms of such possession. To be fair, no other theorist of precedent does any better. Perhaps the central difference between law and literature is the lack in the latter of the notion of stare decisis.


\textsuperscript{22} R. Rorty, supra note 14, at 152.
seemingly a metaphor for the power of the individual critic. Whatever pyrotechnics might come from a critic who "prides himself on not being distracted by anything which the text might previously have been thought to be about or anything its author says about it," there remains the infatuation—110 years after Langdell—with the possibility of a science of criticism. A "weak" textualist "is just doing his best to imitate science—he wants a method of criticism and he wants everybody to agree that he has cracked the code. He wants all the comforts of consensus, even if only the consensus of readers of the literary quarterlies" (or law reviews).

Perhaps the best current example of such a "weak" textualist is John Hart Ely, whose Democracy and Distrust, however radical some of its criticisms of so-called "interpretivism" purport to be, is merely the latest effort to crack the code of the United States Constitution and discover its true essence. As James E. Fleming pointed out in a recent review, Ely is engaged in a "quest for the ultimate constitutional interpretivism" which would in effect foreclose further debate about the genuine meaning of the Constitution.

* * *

No one can read Ely and miss his anger at those who merely read their own views into the Constitution. Indeed, most of Ely's reviewers agree with him at least on this last point, even as they criticize him for reading his preferred views into the Constitution. What unites Ely and most of his critics, though, is the continued belief that there is something "in" the Constitution that can be extracted if only we can figure out the best method to mine its meaning.

Against such weak textualists—the decoders, whatever the fanciness of their methods of decoding—Rorty posits "strong" textualists, who reject the whole notion of questing for the essential meanings of a text. "Strong," it should be emphasized, refers to the power of the critic, not the power of the text (or of its author). According to Stanley Fish, one of the leading proponents of this approach, "Interpretation is not the art of construing but the art of constructing. Interpreters do not decode poems; they make them." Fish has argued that "[t]he objectivity of the text is an illusion and, moreover, a dangerous illusion, because it is so physically convincing. The illusion is one of self-sufficiency and completeness. A line of print or a page is so obviously there . . . that it seems to be the sole repository of whatever value and meaning we associate with it."
The view endorsed by Fish regards "human beings as at every moment creating the experimental spaces into which a personal knowledge flows." 35 Meaning is created rather than discovered, though the source of creative energy is the particular community within which one finds him- or herself. Critics more Emersonian in their inspiration, like Harold Bloom, are willing to credit individual acts of creativity, though Bloom's emphasis on the ubiquity of "miereadings," rather than "truthful" renderings of what is inside texts, links him to Rorty's "strong" textualists. 36 All such readers could well join the Whitmanian anthem, where all readings, whether of life or of texts, become songs of oneself.

The patron saint of all strong textualists is Nietzsche:

[whatever exists, having somehow come into being, is again and again reinterpreted to new ends, taken over, transformed, and redirected by some power superior to it; all events in the organic world are a subduing, a becoming master, and all subduing and becoming master involves a fresh interpretation, an adaptation through which any previous "meaning" and "purpose" are necessarily obscured or even obliterated. 37

And the argument of Fish, Bloom, and other strong textualists, whether American or continental, is not that they prefer to do their thing as an alternative to the more banal work of "truthseekers" like Abrams or Hirsch, but rather that the project of ultimate truth-seeking is based on philosophical error. At the very least it presumes a privileged foundation for measuring the attainment of truth, and it is precisely this foundation that Nietzsche and most of the more radical literary theorists deny. Like Rorty, they do not substitute a new candidate for a winning method of how to recognize literary truth when one sees it; rather, they reject the very search for finality of interpretation.

To be sure, none of the radical critics defend the position that any interpretation is just as good as any other. Stanley Fish, for example, notes that he genuinely believes in the validity of any given view that he happens to hold, and he can present reasons for rejecting the views of his opponents on the interpretation of a given text. 38 In this regard Fish seems similar to Ronald Dworkin, who views judging as including the phenomenological experience of feeling oneself to have achieved the uniquely correct solution even to a hard case. 39 But Fish, more candid than Dworkin on this point, admits that his own conviction of rightness will provide no answer at all to anyone who happens to disagree with him, and that there is no way to resolve the dispute. It is at this point that he retreats to his Kuhnian 40 emphasis on communities of understanding and shared conventions. It may be true that these communi-

35. [Id.] at 94. ** *
38. S. Fish, supra note 30, at 338-71.
39. See R. Dworkin, Taking Rights Seriously 279-90 (1977).** *
ties will share, at any given moment, a sense of what distinguishes “on the wall” from “off the wall” arguments, but Fish is acutely aware of the contingency of such judgments. They describe only our own temporal sense of what is currently acceptable, rather than anything genuinely mirroring the essential characteristics of the texts being discussed.

III

Presumably only those professionally interested in literature are forced to wrestle with the issues presented by Abrams and Fish regarding poetics or the interpretation of fiction. But if law is, in some meaningful sense, a branch of literature, then the problems discussed above take on new and bothersome implications. And nowhere is this more true within our own culture than in constitutional interpretation and its emphasis on writtenness.

The role of our Constitution is not only to enable us to pretend that past linguistic acts can control future action. It is also presumably to prevent the rise of Nietzschean “masters.” Nietzsche seems to suggest, however, that a massive exercise in social deception is necessary if we are not to recognize the way that “interpretation” inevitably implies a struggle for mastery in the formation of political consciousness. For a Nietzschean reader of constitutions, there is no point in searching for a code that will produce “truthful” or “correct” interpretations; instead, the interpreter, in Rorty’s words, “simply beats the text into a shape which will serve his own purpose.” 43

* * * If one takes seriously the views articulated by Nietzsche, Rorty, and Fish (among others), one must give up the search for principles and methods of constitutional interpretation. Instead, one assesses the results of an interpretive effort by something other than the criterion of adherence to an inner essence of the text being interpreted

* * *

To put it mildly, there is something disconcerting about accepting the Nietzschean interpreter into the house of constitutional analysts, but I increasingly find it impossible to imagine any other way of making sense of our own constitutional universe. For some years I have organized my own courses in constitutional interpretation around the central question, “But did the Court get it right?” as if one could grade any given opinion by whether or not it measured up to the genuine command of the Constitution. Answering such a question, of course, requires the development of a full set of “principles and methods of correct interpretation,” and my courses have involved a search for such principles and methods.

I still spend a great deal of time examining various approaches, ranging from the linguistic to the historical, from the structural to what my colleague Philip Bobbitt calls the “ethical,” 46 but I have less and less confidence that this is a sensible enterprise. At the very least there is

43. R. Rorty, supra note 14, at 151. 46. See P. Bobbitt, Constitutional Fate (1982) * * *.
no reason to believe that the community of persons interested in constitutional interpretation will coalesce around one or another of these approaches. Moreover, insofar as one accepts the plausibility of an analysis like Rorty’s, there is no reason to regret this, for it is the result of a genuine plurality of ways of seeing the world, rather than of the obdurate recalcitrance of those who refuse to bend to superior argument.

Yet there are obvious difficulties in adopting Rorty’s metaphor of the conversation (rather than the argument), for the principal social reality of law is its coercive force vis-à-vis those who prefer to behave other than as the law “requires.” As Chairman Mao pointed out, a revolution is not a tea party, and the massive disruption in lives that can be triggered by a legal case is not a conversation. The legal system presents a conversation from which there may be no exit, and there are certainly those who would define hell as the vision of their least favorite constitutional interpreter, whether the Court or a benighted law professor.

What does one do, then, when studying opinions, if one gives up the enterprise of determining whether or not they are “correct”? Are cases simply historical fragments which should be studied for insight into the ideology of the time? Of course one no longer would say, for example, that Dred Scott or Lochner v. New York, or any other case, was “wrongly” decided, for that use of language presupposes belief in the knowability of constitutional essence. One can obviously show that constitutional tastes and styles shift over time, but this retreat into historicism has nothing to do with the legal science so desperately sought by Langdell and his successors.

***

Consider the way we treat the innovative judges of our legal tradition, particularly as they appear in law school courses. Do we really wish to argue that John Marshall or Earl Warren (or the most recent dynamic innovator, William Rehnquist) got the essence right in their interpretations of the Constitution, or do we recognize instead the extent to which we have been subjugated by their political visions?

Perhaps the most significant example of this dilemma is John Marshall himself, or rather I should say our response to Marshall. I have little trouble stating that I consider his major opinions to run the gamut from the intellectually dishonest to the majestically visionary.

48. This seems to be the approach taken by some of the most fruitful practitioners of “critical legal studies.” See e.g., M. Horwitz, The Transformation of American Law, 1780–1860 (1977); M. Tushnet, The American Law of Slavery 1810–1860 (1981).
50. 138 U.S. 45 (1905). There is obviously not space here to consider in depth the complexity of our responses to these two cases. One might begin, though, by asking whether Taney’s or Peckham’s arguments in the two cases are really “off-the-wall” in terms of the conventions of American legal discourse; it seems clear that the answer is no.
52. See note 61 on page 135.
and rarely to contain the only (or even the most) plausible rendering of the Constitution. Yet there is also a profound irrelevance to such a criticism. Not only does it assume the existence of a privileged discourse that allows me to dismiss Marshall as “untruthful” rather than merely different, it also ignores the fundamental fact that John Marshall is as much a “founder” of the American legal system as those who wrote the Constitution he purported to interpret. He is, perhaps, the great Nietzschean judge of our tradition.

D. ORIGINAL INTENT

PAUL BREST, THE MISCONCEIVED QUEST FOR THE ORIGINAL UNDERSTANDING

By “originalism” I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.¹ At least since Marbury, in which Chief Justice Marshall emphasized the significance of our Constitution’s being a written document, originalism in one form or another has been a major theme in the American constitutional tradition. The most widely accepted justification for originalism is simply that the Constitution is the supreme law of the land. The Constitution manifests the will of the sovereign citizens of the United States—“we the people” assembled in the conventions and legislatures that ratified the Constitution and its amendments. The interpreter’s task is to ascertain their will. Originalism may be supported by more instrumental rationales as well: Adherence to the text and original understanding arguably constrains the discretion of decisionmakers and assures that the Constitution will be interpreted consistently over time.

The most extreme forms of originalism are “strict textualism” (or literalism) and “strict intentionalism.” A strict textualist purports to construe words and phrases very narrowly and precisely. For the strict intentionalist, “the whole aim of construction, as applied to a provision of the Constitution, is to ascertain and give effect to the intent of its framers and the people who adopted it.”²

Much of American constitutional interpretation rejects strict originalism in favor of what I shall call “moderate originalism.” The text of

1. John Ely uses the term “interpretivism” to describe essentially the same concept. J.H. Ely, Democracy and Distrust: A Theory of Judicial Review, chs. 1-2 (1980). At the cost of proliferating neologisms I have decided to stick with “originalism.” Virtually all modes of constitutional decisionmaking, including those endorsed by Professor Ely, require interpretation. The differences lie in what is being interpreted, and I use the term “originalism” to describe the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values.
the Constitution is authoritative, but many of its provisions are treated
as inherently open-textured. The original understanding is also impor-
tant, but judges are more concerned with the adopters' general purposes
than with their intentions in a very precise sense.

Some central doctrines of American constitutional law cannot be
derived even by moderate originalist interpretation, but depend, instead,
on what I shall call "nonoriginalism." The modes of nonoriginalist
adjudication defended in this article accord the text and original history
presumptive weight, but do not treat them as authoritative or binding.
The presumption is defeasible over time in the light of changing experi-
ences and perceptions.

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PART ONE: THE CONCEPTS AND METHODS OF ORIGINALISM

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I. Textualism

Textualism takes the language of a legal provision as the primary or
exclusive source of law (a) because of some definitional or supraelegal
principle that only a written text can impose constitutional obligations,
or (b) because the adopters intended that the Constitution be interpreted
according to a textualist canon, or (c) because the text of a provision is
the surest guide to the adopters' intentions. The last of these, probably
the central rationale for an originalist-based textualism, is sometimes
stated as a preamble to textualist canons. For example:

It is a cardinal rule in the interpretation of constitutions that the
instrument must be so construed as to give effect to the intention of
the people, who adopted it. This intention is to be sought in the
Constitution itself, and the apparent meaning of the words employed
is to be taken as expressing it, except in cases where that assump-
tion would lead to absurdity, ambiguity, or contradiction.8

Implicit in the preceding quotation is a canon of interpretation
paradigmatic of textualism—the so-called "plain meaning rule." Chief
Justice Marshall invoked this canon in *Sturges v. Crowningshield*:

[Although the spirit of an instrument, especially of a constitution, is
to be respected not less than its letter, yet the spirit is to be
collected chiefly from its words * * *. [I]f, in any case, the plain
meaning of a provision, not contradicted by any other provision in
the same instrument, is to be disregarded, because we believe the
framers of that instrument could not intend what they say, it must
be one in which the absurdity and injustice of applying the provision
to the case, would be so monstrous that all mankind would, without
hesitation, unite in rejecting the application.9

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The plain meaning of a text is the meaning that it would have for a “normal speaker of English” under the circumstances in which it is used. Two kinds of circumstances seem relevant: the linguistic and the social contexts. The linguistic context refers to vocabulary and syntax. The social context refers to a shared understanding of the purposes the provision might plausibly serve.

A tenable version of the plain meaning rule must take account of both of these contexts. The alternative, of applying a provision according to the literal meanings of its component words, misconceives the conventions that govern the use of language. Chief Justice Marshall argued this point eloquently and, I think, persuasively, in *McCulloch v. Maryland*, 12 decided the same year that he invoked the plain meaning rule in *Sturgis*. The state had argued that the necessary and proper clause authorized only legislation “indispensable” to executing the enumerated powers. Marshall responded with the observation that the word “necessary,” as used “in the common affairs of the world, or in approved authors, or frequently imports no more than that one thing is convenient, or useful, or essential to another.” 14 He continued:

Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies * * * *. This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view. 15

As Marshall implied, to attempt to read a provision without regard to its linguistic and social contexts will either yield unresolvable indeterminacies of language or just nonsense. Without taking account of the possible purposes of the provisions, an interpreter could not, for example, decide whether singing, flag-waving, flag-burning, picketing, and criminal conspiracy are within the protected ambit of the first amendment’s “freedom of speech,” or whether the “writings” protected by the copyright clause include photographs, paintings, sculptures, performances, and the contents of phonograph records. She would not know whether the phrase, “No person except a natural born Citizen * * * shall be eligible to the Office of President,” disqualified persons born abroad or those born by Caesarian section. We understand the range of plausible meanings of provisions only because we know that some interpretations respond to the kinds of concerns that the adopters’ society might have while others do not.

14. Id. at 413.
That an interpreter must read a text in the light of its social as well as linguistic context does not destroy the boundary between textualism and intentionalism. Just as the textualist is not concerned with the adopters' idiosyncratic use of language, she is not concerned with their subjective purposes. Rather, she seeks to discern the purposes that a member of the adopters' society would understand the provision to encompass.

Suppose that phrases such as "commerce among the several states," or "freedom of speech," or "equal protection of the laws," have quite different meanings today than when they were adopted. An originalist would hold that, because interpretation is designed to capture the original meaning, the text must be understood in the contexts of the society that adopted it: "The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." 21

When a provision is interpreted roughly contemporaneously with its adoption, an interpreter unconsciously places the provision in its linguistic and social contexts, which she has internalized simply because she is of that society. But she cannot assume that a provision adopted one or two hundred years ago has the same meaning as it had for the adopters' society today. She must immerse herself in their society to understand the text as they understood it. Although many provisions of the Constitution may pose no serious interpretive problems in this respect, the textualist interpreter cannot be sure of this without first understanding the ordinary usage at the time of adoption. Did "commerce" include manufacture as well as trade? Did the power to "regulate" commerce imply the power to prohibit it? Did the power to "regulate commerce among the several states" include the power to regulate intrastate transactions which affected interstate commerce? With what absoluteness did 18th century Americans understand the prohibitions against "impairing" contractual obligations and "abridging the freedom of speech?" What did the words "privileges," "immunities," "due process," "equal protection of the laws," "citizen," and "person" mean to those who adopted the fourteenth amendment in 1868?

Despite the differences between textualism and intentionalism, placing a constitutional provision in its original contexts calls for a historical inquiry quite similar to the intentionalist interpreter's. * * *

II. Intentionalism

By contrast to the textualist, the intentionalist interprets a provision by ascertaining the intentions of those who adopted it. The text of the provision is often a useful guide to the adopters' intentions, but the text does not enjoy a favored status over other sources. * * *

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1. Who Are the Adopters?

The adopters of the Constitution of 1787 were some portion of the delegates to the Philadelphia Convention and majorities or supermajorities of the participants in the ratifying conventions in nine states. For all but one amendment to the Constitution, the adopters were two-thirds or more of the members of each House of Congress and at least a majority of the legislators in [three-fourths] of the state legislatures.

For a textual provision to become part of the Constitution, the requisite number of persons in each of these bodies must have assented to it. Likewise, an intention can only become binding—only become an institutional intention—when it is shared by at least the same number and distribution of adopters. (Hereafter, I shall refer to this number and distribution as the "adopters.""

If the only way a judge could ascertain institutional intent were to count individual intention-votes, her task would be impossible even with respect to a single multimeember law-making body, and a fortiori where the assent of several such bodies were required. Therefore, an intentionalist must necessarily use circumstantial evidence to educe a collective or general intent.

Interpreters often treat the writings or statements of the framers of a provision as evidence of the adopters’ intent. This is a justifiable strategy for the moderate originalist who is concerned with the framers’ intent on a relatively abstract level of generality—abstract enough to permit the inference that it reflects a broad social consensus rather than notions peculiar to a handful of the adopters. It is a problematic strategy for the strict originalist.

As the process of adoption moves from the actual framers of a constitutional amendment to the members of Congress who proposed it to the state legislators who ratified it, the amount of thought given the provision surely diminishes—especially if it is relatively technical or uncontroversial, or one of several of disparate provisions (e.g., the Bill of Rights) adopted simultaneously. This suggests that there may be instances where a framer had a determinate intent but other adopters had no intent or an indeterminate intent. For example, suppose that the framers of the commerce clause considered the possibility that economic transactions taking place within the confines of a state might nonetheless affect interstate commerce in such a way as to come within the clause, and that they intended the clause to cover such transactions. But suppose that most of the delegates to the ratifying conventions did not conceive of this possibility and that either they "did not intend" that the clause encompass such transactions or else their intentions were indeterminate. Under these circumstances, what is the institutional intent, i.e., the intent of the provision?

If the intent of the framers is to be attributed to the provision, it must be because the other adopters have in effect delegated their

35. The twenty-first amendment was ratified by state conventions.

Garvey, Mod. Const. Theory 3e—6
intention-votes to the framers. Leaving aside the question whether the adopters-at-large had any thoughts at all concerning this issue of delegation, consider what they might have desired if they had thought about it. Would they have wanted the framers’ intentions to govern without knowing what those intentions were? The answers might well differ depending on whether the adopters had “no intent” or “indeterminate intent.”

A delegate to a ratifying convention might well want his absence of intention (i.e., “no-intent”) regarding wholly intrastate transactions to be treated as a vote against the clause’s encompassing such transactions (i.e., “intent-not”): Since no-intent is the intentionalist equivalent of no-text, to accede to the framers’ unknown intentions would be tantamount to blindly delegating to them the authority to insert textual provisions in the Constitution.

Where the framers intend that the activity be covered by the clause, and the adopters’ intentions are merely indeterminate, the institutional intent is ambiguous. One adopter might wish his indeterminate intent to be treated as “no intent.” Another adopter might wish to delegate his intention-vote to those whose intent is determinate. Yet another might wish to delegate authority to decisionmakers charged with applying the provision in the future. Without knowing more about the mindsets of the actual adopters of particular constitutional provisions, one would be hard-pressed to choose among these.

2. The Adopters’ Interpretive Intent

The intentionalist interpreters’ first task must be to determine the interpretive intentions of the adopters of the provision before her—that is the canons by which the adopters intended their provisions to be interpreted. The practice of statutory interpretation from the 18th through at least the mid-19th century suggests that the adopters assumed—if they assumed anything at all—a mode of interpretation that was more textualist than intentionalist. The plain meaning rule was frequently invoked: judicial recourse to legislative debates was virtually unknown and generally considered improper. Even after references to extrinsic sources became common, courts and commentators frequently asserted that the plain meaning of the text was the surest guide to the intent of the adopters.

This poses obvious difficulties for an intentionalist whose very enterprise is premised on fidelity to the original understanding.

3. The Intended Specificity of a Provision

I now turn to an issue that lies at the intersection of what I have called interpretive and substantive intent: How much discretion did an adopter intend to delegate to those charged with applying a provision? Consider, for example, the possible intentions of the adopters of the cruel and unusual punishment clause of the eighth amendment. They might have intended that the language serve only as a shorthand for the Stuart tortures which were their exemplary applications of the clause. Somewhat more broadly, they might have intended the clause to be under-
stood to incorporate the principle of ejusdem generis—to include their exemplary applications and other punishments that they found or would have found equally repugnant.  

What of instances where the adopters' substantive intent was indeterminate—where even if they had adverted to a proposed application they would not have been certain how the clause should apply? Here it is plausible that—if they had a determinate interpretive intent—they intended to delegate to future decisionmakers the authority to apply the clause in light of the general principles underlying it. To use Ronald Dworkin's terms, the adopters would have intended future interpreters to develop their own "conceptions" of cruel and unusual punishment within the framework of the adopters' general "concept" of such punishments.

What of a case where the adopters viewed a certain punishment as not cruel and unusual? This is not the same as saying that the adopters "intended not to prohibit the punishment." For even if they expected their laws to be interpreted by intentionalist canons, the adopters may have intended that their own views not always govern. Like parents who attempt to instill values in their child by both articulating and applying a moral principle, they may have accepted, or even invited, the eventuality that the principle would be applied in ways that diverge from their own views. The adopters may have understood that, even as to instances to which they believe the clause ought or ought not to apply, further thought by themselves or others committed to its underlying principle might lead them to change their minds. Not believing in their own omniscience or infallibility, they delegated the decision to those charged with interpreting the provision. If such a motivation is plausible with respect to applications of the clause in the adopters' contemporary society, it is even more likely with respect to its application by future interpreters, whose understanding of the clause will be affected by changing knowledge, technology, and forms of society.

The extent to which a clause may be properly interpreted to reach outcomes different from those actually contemplated by the adopters depends on the relationship between a general principle and its exemplary applications. 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. Within these fairly broad limits, however, the adopters may have intended their examples to constrain more or less. To the intentionalist interpreter falls the unenviable task of ascertaining, for each provision, how much more or less.

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41. On a rather restrictive view, "would have found" means that, although the adopters did not advert to a punishment, they nonetheless intended that it be prohibited.


43. See id. at 134.
IV. The Interpreter-Historian's Task

The interpreter’s task as historian can be divided into three stages or categories. First, she must immerse herself in the world of the adopters to try to understand constitutional concepts and values from their perspective. Second, at least the intentionalist must ascertain the adopters’ interpretive intent and the intended scope of the provision in question. Third, she must often “translate” the adopters’ concepts and intentions into our time and apply them to situations that the adopters did not foresee.

The first stage is common to originalists of all persuasions. Although the textualist’s aim is to understand and apply the language of a constitutional provision, she must locate the text in the linguistic and social contexts in which it was adopted. * * * The intentionalist would ideally count the intention-votes of the individual adopters. In practice, she can at best hope to discover a consensus of the adopters as manifested in the text of the provision itself, the history surrounding its adoption, and the ideologies and practices of the time.

The essential difficulty posed by the distance that separates the modern interpreter from the objects of her interpretation has been succinctly stated by Quentin Skinner in addressing the analogous problem facing historians of political theory. 52

[If it will never in fact be possible simply to study what any given classic writer has said * * * without bringing to bear some of one’s own expectations about what he must have been saying * * *. These models and preconceptions in terms of which we unavoidably organize and adjust our perceptions and thoughts will themselves tend to act as determinants of what we think or perceive. We must classify in order to understand, and we can only classify the unfamiliar in terms of the familiar. The perpetual danger, in our attempts to enlarge our historical understanding, is thus that our expectations about what someone must be saying or doing will themselves determine that we understand the agent to be doing something which he would not—or even could not—himself have accepted as an account of what he was doing.

To illustrate the problem of doing original history with even a single example would consume more space than I wish to here. Instead, I suggest that a reader who wants to get a sense of the elusiveness of the original understanding study some specific areas of constitutional history, reading both works that have been well received, 54 and also the controversy surrounding some of those that have not. 55

52. Skinner, Meaning and Understanding in the History of Ideas, 8 Hist. & Theory 31, 6 (1969). * * *


55. A recent example is Raoul Berger’s Government by Judiciary: The Transformation of the Fourteenth Amendment (1977), which argues that almost of all the...
The intentionalist interpreter must next ascertain the adopters' interpretive intent and the intended breadth of their provisions. That is, she must determine what the adopters intended future interpreters to make of their substantive views. Even if she can learn how the adopters intended contemporary interpreters to construe the Constitution, she cannot assume they intended the same canons to apply one or two hundred years later. Perhaps they wanted to bind the future as closely as possible to their own notions. Perhaps they intended a particular provision to be interpreted with increasing breadth as time went on. Or—more likely than not—the adopters may have had no intentions at all concerning these matters.\textsuperscript{57}

For purposes of analytic clarity I have distinguished between (1) the adopters' interpretive intent and the intended scope of a provision and (2) their substantive intent concerning the application of the provision. If interpretive intent and intended scope can be ascertained at all, they may instruct the interpreter to adopt different canons of interpretation than she would prefer. Under these circumstances, the intentionalist interpreter may wish to ignore these intentions and limit her inquiry to the adopters' substantive intentions. Leaving aside the normative difficulty of such selective infidelity, this is a problematic strategy: To be a coherent theory of interpretation, intentionalism must distinguish between the adopters' personal views about an issue and their intentions concerning its constitutional resolution. And it is only by reference to their interpretive intent and the intended scope of a provision that this distinction can be drawn.

The interpreter's final task is to translate the adopters' intentions into the present in order to apply them to the question at issue. Consider, for example, whether the cruel and unusual punishment clause of the eighth amendment prohibits the imposition of the death penalty today. The adopters of the clause apparently never doubted that the death penalty was constitutional. But was death the same event for inhabitants of the American colonies in the late 18th century as it is two centuries later? Death was not only a much more routine and public phenomenon then, but the fear of death was more effectively contained within a system of religious belief.\textsuperscript{59} Twentieth-century Americans have a more secular cast of mind and seem less willing to accept this dreadful, forbidden, solitary, and shameful event.\textsuperscript{61} The interpreter must there-

\textsuperscript{57} In any case, the adopters' sense of time and change—of the relationship between present and future—was almost certainly not the same as ours, which has been affected by such phenomena as the industrial revolution, theories of evolution, relativity and quantum mechanics, and the possibility of annihilation.


\textsuperscript{61} See Death in American Experience 102 (A. Mack ed. 1973); P. Aries, supra note 60, at 85–86.
fore determine whether we view the death penalty with the same attitude—whether of disgust or ambivalence—that the adopters viewed their core examples of cruel and unusual punishment.62

Intentionalist interpretation frequently requires translations of this sort. For example, to determine whether the commerce clause applies to transactions taking place wholly within the boundaries of one state, or whether the first amendment protects the mass media, the interpreter must abstract the adopters’ concepts of federalism and freedom of expression in order to find their analogue in our contemporary society with its different technology, economy, and systems of communication. The alternative would be to limit the application of constitutional provisions to the particular events and transactions with which the adopters were familiar. Even if such an approach were coherent, however, it would produce results that even a strict intentionalist would likely reject: Congress could not regulate any item of commerce or any mode of transportation that did not exist in 1789; the first amendment would not protect any means of communication not then known.

However difficult the earlier stages of her work, the interpreter was only trying to understand the past. The act of translation required here is different in kind, for it involves the counterfactual and imaginary act of projecting the adopters’ concepts and attitudes into a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters’ making.

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Even when the interpreter performs the more conventional historian’s role, one may wonder whether the task is possible. There is a hermeneutic tradition, of which Hans-Georg Gadamer is the leading modern proponent, which holds that we can never understand the past in its own terms, free from our prejudices or preconceptions.63 We are hopelessly imprisoned in our own world-views; we can shed some preconceptions only to adopt others, with no reason to believe that they are the conceptions of the different society that we are trying to understand. One need not embrace this essentially solipsistic view of historical knowledge to appreciate the indeterminate and contingent nature of the historical understanding that an originalist historian seeks to achieve.

None of this is to disparage doing history and other interpretive social science. It suggests, however, that the originalist constitutional historian may be questing after a chimera. The defense that “We’re doing the best we can” is no less available to constitutional interpreters


than to anyone else. But the best is not always good enough. The interpreter’s understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism. Although the origins of some constitutional doctrines are almost certainly established, the historical grounding of many others is quite controversial. It seems peculiar, to say the least, that the legitimacy of a current doctrine should turn on the historian’s judgment that it seems “more likely than not,” or even “rather likely,” that the adopters intended it some one or two centuries ago.

V. Two Types of Originalism

The originalist interpreter can approach her task with different attitudes about the precision with which the object of interpretation—the text [or] intentions * * *—should be understood. In this section I describe the attitudes of “strict” and “moderate” originalism—two areas, not points, on a spectrum—and briefly survey the practices of American constitutional decisionmaking in terms of them.

I have devoted very little attention to the most extreme form of strict textualism—literalism. A thorough-going literalist understands a text to encompass all those and only those instances that come within its words read without regard to its social or perhaps even its linguistic context. Because literalism poorly matches the ways in which we speak and write, it is unable to handle the ambiguity, vagueness, and figurative usage that pervade natural languages, and produces embarrassingly silly results.

Strict intentionalism requires the interpreter to determine how the adopters would have applied a provision to a given situation, and to apply it accordingly. The enterprise rests on the questionable assumption that the adopters of constitutional provisions intended them to be applied in this manner. But even if this were true, the interpreter confronts historiographic difficulties of such magnitude as to make the aim practically unattainable.

Strict textualism and intentionalism are not synergistic, but rather mutually antagonistic approaches to interpretation. The reader need only consider the strict textualist’s and intentionalist’s views of the first amendment protection of pornographic literature. By contrast, moderate textualism and intentionalism closely resemble each other in methodology and results.

A moderate textualist takes account of the open-textured quality of language and reads the language of provisions in their social and linguistic contexts. A moderate intentionalist applies a provision consistent with the adopters’ intent at a relatively high level of generality, consistent with what is sometimes called the “purpose of the provision.” Where the strict intentionalist tries to determine the adopters’ actual subjective purposes, the moderate intentionalist attempts to understand what the adopters’ purposes might plausibly have been, an aim far more
readily achieved than a precise understanding of the adopters' intentions.

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Strict originalism cannot accommodate most modern decisions under the Bill of Rights and the fourteenth amendment, or the virtually plenary scope of congressional power under the commerce clause. Although moderate originalism is far more expansive, some major constitutional doctrines lie beyond its pale as well.

A moderate textualist would treat almost all contemporary free speech and equal protection decisions as within the permissible ambit of these clauses, though not necessarily entailed by them. Because of our uncertainty about the original understanding, it is harder to assess the legitimacy of these doctrines from the viewpoint of a moderate intentionalist. For example, the proper scope of the first amendment depends on whether its adopters were only pursuing "representation reinforcing" goals, or were more broadly concerned to promote a free marketplace of ideas or individual autonomy. The level of generality on which the adopters conceived of the equal protection clause presents a similar uncertainty, but whether or not a moderate intentionalist could accept all of the "new" or "newer" equal protection, she could read the clause to protect "discrete and insular minorities" besides blacks.

On the other hand, a moderate originalist, whether of textualist or intentionalist persuasion, would have serious difficulties justifying (1) the incorporation of the principle of equal protection into the fifth amendment, (2) the incorporation of provisions of the Bill of Rights into the fourteenth amendment, (3) the more general notion of substantive due process, including the minimal rationality standard, and (4) the practice of judicial review of congressional legislation established by Marbury v. Madison.

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70. See J.H. Ely, supra note 1, at chs. 4–6. See also Mills v. Alabama, 384 U.S. 214, 218–20 (1966). * * *


74. Compare Justice Black's and Justice Frankfurter's views in Adamson v. California, 332 U.S. 46 (1947). See also L. Levy, The Fourteenth Amendment and the Bill of Rights in Judgments: Essays on American Constitutional History 64 (1972); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan.L.Rev. 5 (1949); Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan.L.Rev. 140 (1949).

75. See, e.g., R. Berger, supra note 55; C. Fairman, supra, note 54, at 1207 * * *

76. See L. Boudin, Government by Judiciary (1932); A. Westin, Introduction and Historical Bibliography to C. Beard, The Supreme Court and the Constitution (1912); Judicial Review and the Supreme
Moderate originalism is a perfectly sensible strategy of constitutional decisionmaking. But its constraints are illusory and counterproductive. Contrary to the moderate originalist’s faith, the text and original understanding have contributed little to the development of many doctrines she accepts as legitimate. Consider the relationship between the original understanding of the fourteenth amendment and current doctrines prohibiting gender-based classifications and discriminations in the political process. For the moderate originalist these may be legitimately premised on the equal protection clause. But to what extent have originalist sources guided the evolution of these doctrines? The text is wholly open-ended; and if the adopters had any intentions at all about these issues, their resolution was probably contrary to the Court’s. At most, the Court can claim guidance from the general notion of equal treatment reflected in the provision. I use the word “reflected” advisedly, however, for the equal protection clause does not establish a principle of equality; it only articulates and symbolizes a principle defined by our conventional public morality. Indeed, because of its indeterminacy, the clause does not offer much guidance even in resolving particular issues of discrimination based on race.

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In sum, if you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law—whether “under” the commerce, free speech, due process, or equal protection clauses—explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court’s own precedents. It is rather like having a remote ancestor who came over on the Mayflower.

RICHARD S. KAY, ADHERENCE TO THE ORIGINAL INTENTIONS IN CONSTITUTIONAL ADJUDICATION: THREE OBJECTIONS AND RESPONSES


This essay will critically examine the reasons given by modern scholars for rejecting the conventional norm of judicial review—adherence to the original intentions of the Constitution’s enactors. While variously phrased, their reasons may be subsumed under three general objections: 1) Adherence to the original intentions is impossible; 2) It is self-contradictory; and 3) It is wrong.

While there is some force in each of these objections, I conclude that the first two are unconvincing and the third depends on personal

repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms—conflicts that Professor Sutherland has recently described. 28 Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.

MARK V. TUSHNET, FOLLOWING THE RULES LAID DOWN: A CRITIQUE OF INTERPRETIVISM AND NEUTRAL PRINCIPLES


The rule of law, according to the liberal conception, is meant to protect us against the exercise of arbitrary power. The theory of neutral principles asserts that a requirement of consistency, the core of the ideal of the rule of law, places sufficient bounds on judges to reduce the risk of arbitrariness to an acceptable level. The question is whether the concepts of neutrality and consistency can be developed in ways that are adequate for the task. My discussion examines various candidates for a definition of neutrality, beginning with a crude definition and moving toward more sophisticated ones. Yet each candidate suffers from similar defects: each fails to provide the kinds of constraints on judges that liberalism requires. Some candidates seek to limit the results judges might reach, others the methods they may use. The supposed substantive bounds that consistency imposes on judges, however, are either empty or parasitic on other substantive theories of constitutional law, and the methodological bounds are either empty or dependent on a sociology of law that undermines liberalism’s assumptions about society.

A. Neutral Content

Robert Bork’s version of neutral principles theory would require that decisions rest on principles that are neutral in content and in application. 55 Bork’s formulation may be an attempt to generalize Wechsler’s definition, which characterizes neutrality as judicial indifference to who the winner is. For Wechsler, such indifference was a matter of judicial willingness to apply the present case’s rule in the next case as well, regardless whether the beneficiary in the later case was less attractive than the earlier winner in ways not made relevant by the rule itself. 56 Neutral content for Bork might mean a similar indifference, but now within the case: the principle governing the case should be devel-

126. See Sutherland, The Law and One Man Among Many 36-62 (1906).
65. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind.L.J. 1, 6-7 (1971).

oped in a form that employs only general terms and that avoids any express preference for any named groups. This outcome, however, is impossible. We might coherently require that rules not use proper names, but there is no principled way to distinguish between the general terms that in effect pick out specific groups or individuals and those that are “truly” general. Any general term serves to identify some specific group, hence if the notion of content neutrality is to make any sense, it must depend on a prior understanding of which kinds of distinctions are legitimately “neutral” and which are not. The demand for neutrality in content thus cannot provide an independent criterion for acceptable decisions.

Standing alone, the theory that principles must be neutral in content cannot constrain judicial discretion. But it could be coupled with some other theory—such as interpretivism, Ely’s reinforcement of representation, or a moral philosophy. When coordinated with some such substantive theory, the demand for neutral principles stipulates that a decision is justified only if the principles derived from the other theory are neutrally applied. Yet to require neutral application of the principles of the other theory is merely to apply those principles in given cases; the requirement of content neutrality adds nothing. 65

B. NEUTRAL METHOD

If neutrality is to serve as a meaningful guide, it must be understood not as a standard for the content of principles, but rather as a constraint on the process by which principles are selected, justified, and applied. Thus, the remaining candidate explications of neutrality all focus on the judicial process and the need for “neutral application.” This focus transfers our attention from the principles themselves to the judges who purport to use them.

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1. Prospective Application.—What then are methodologically neutral principles? To Wechsler, such principles are identified primarily by a forward-looking aspect: a judge who invokes a principle in a specific instance commits himself or herself to invoking it in future cases that are relevantly identical. For example, a judge who justifies the holding in Brown v. Board of Education that segregated schools are unconstitutional by invoking the principle that the state may not take race into account in any significant policy decision is thereby also committed to holding state-developed affirmative action programs unconstitutional. The judge’s interior monologue involves specifying the principle about to be invoked, imagining future cases and their proper resolution, determining whether those cases are different from the present one in any

65. In the larger work of which this Article will be a part, I argue that the other, substantive theories are all internally contradictory, at least beyond a narrow range of applications. If that argument is correct, neutral application is again an empty concept, for anything can be derived from a contradiction.
ways that the proposed principle itself says are relevant, and asking whether the principle yields the proper results.

There are two levels of problems with the idea that commitment to prospective neutral application constrains judicial choices. First, there are two features of our judicial institutions that dissipate any constraining force that the demand for prospective neutrality may impose. Second, there is a conceptual problem that robs the very idea of prospective neutrality of any normative force.

(a) Institutional Problems.—The first institutional problem is that Supreme Court decisions are made by a collective body, which is constrained by a norm of compromise and cooperation. Suppose that in case 1 Justices M, N, and O have taken neutral principles theory to heart and believe that the correct result is justified by principle A. Justices P, Q, R, and S have done likewise but believe that the same result is justified by principle B. Justices T and V, who also accept principle A but believe it inapplicable to case 1, dissent. The four-person group gains control of the writing of the opinion, and the three others who agree with the result accede to the institutional pressure for majority decisions and join an opinion that invokes principle B. Now case 2 arises. Justices T and V are convinced that, because case 2 is relevantly different from case 1, principle A should be used. They join with Justices M, N, and O and produce a majority opinion invoking principle A. If principle B were used, the result would be different; thus, there are four dissenters.

Kent Greenawalt has argued that neutral principles theory is required to acknowledge that neutrality sometimes must yield to other considerations, such as the institutional pressure for majority decisions. If the norm of compromise is thought to authorize submersion of individual views in the selection of principles, we could not charge anyone with prospective nonneutrality in the handling of case 1. When case 2 subsequently arises, however, it would be odd—and ultimately destructive of the willingness to compromise—to demand that Justices M, N, and O follow principle B to a result that they, on principled grounds, believe wrong. But at the same time, to allow a judge criticized for nonneutrality to reply that in the particular situation neutrality had to yield to more pressing circumstances is to give the game of theory away. If we allow neutrality to yield to the institutional need here (a need that is quite weak—we all can live with fragmented Courts and decisions), a sufficiently pressing need will likely be available to justify virtually any deviation from neutrality.

A second institutional problem is that prospective neutrality involves unreasonable expectations concerning the capacities of judges. Every present case is connected to every conceivable future case, in the sense that a skilled lawyer can demonstrate how the earlier case's

78 Greenawalt, The Enduring Significance of Neutral Principles, 78 Co-
principles ought to affect (although perhaps not determine) the outcome in any later case. In these circumstances, neutral application means that each decision constrains a judge in every future decision; the import of the prospective approach is that, the first time a judge decides a case, he or she is to some extent committed to particular decisions for the rest of his or her career.

There are two difficulties here. First, even if we confine our attention to cases in the same general area as the present one, this formulation of the neutrality requirement is obviously too stringent. We cannot and should not expect judges to have fully elaborated theories of race discrimination in their first cases, much less theories of gender, illegitimacy, and other modes of discrimination as well. Second, to the extent that perceptions of connections vary with skill, the theory has the curious effect of constraining only the better judges. The less skilled judge will not think to test a principle developed in a race-discrimination case against gender-discrimination or abortion cases; a more skilled judge will.

Wechsler responded to these difficulties by relaxing the requirement: the judge must test the principle against “applications that are now foreseeable,” and must either agree with the result in such applications or be able to specify a relevant difference between the cases. But now the judge charged with nonneutrality will often be able to defend by saying that he or she simply had not foreseen the case at hand when the prior one was decided. That defense may lead us to conclude that the judge is not terribly competent, but it defeats the charge of nonneutrality.

(b) Conceptual Difficulty.—The third, largely conceptual difficulty with the theory of neutral principles was foreshadowed by the example of a case whose result could be justified by either of two principles. Neutral application requires that we be able to identify the principle that justified the result in case 1 in order to be sure that it is neutrally applied in case 2. This requirement, however, cannot be fulfilled, because there are always a number of justificatory principles available to make sense of case 1 and a number of techniques to select the “true” basis of case 1. Of course, the opinion in case 1 will articulate a principle that purports to support the result. But the thrust of introductory law courses is to show that the principles offered in opinions are never good enough. And this indefiniteness bedevils—and liberates—not only the commentators and the lawyers and judges subsequently dealing with the decision; it equally affects the author of the opinion.

*** At the moment a decision is announced, we cannot identify the principle that it embodies. Even when we take account of the language of the opinion, each decision can be traced to many different possible principles, and we often learn the justifying principle of case 1

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only when a court in case 2 states it ** *. The theory of neutral principles thus loses almost all of its constraining force when neutrality has a prospective meaning. What is left is something like a counsel to judges that they be sincere within the limits of their ability. But this formulation hardly provides a reassuring constraint on judicial willfulness.

2. Retrospective Application.—Although Wechsler framed the neutral principles theory in prospective terms, it might be saved by recasting it in retrospective terms. The theory would then impose as a necessary condition for justification the requirement that a decision be consistent with the relevant precedents. This tack links the theory to general approaches to precedent-based judicial decisionmaking in nonconstitutional areas. It also captures the natural way in which we raise questions about neutrality. The prospective theory requires that we pose hypothetical future cases, apply the principle, and ask whether the judges really meant to resolve the hypothetical cases as the principle seems to require. Because the hypothetical cases have not arisen, we cannot know the answer; we can do little more than raise our eyebrows, as Wechsler surely did, and emphasize the "really" as we ask the question in a skeptical tone.

In contrast, the retrospective theory encourages concrete criticism ** *. We need only compare case 2, which is now decided, with case 1 to see if a principle from case 1 has been neutrally applied in case 2. But if the retrospective demand is merely that the opinion in case 2 deploy some reading of the earlier case from which the holding in case 2 follows, the openness of the precedents means that the demand can always be satisfied. And if the demand is rather that the holding be derived from the principles actually articulated in the relevant precedents, differences between case 2 and the precedents will inevitably demand a degree of reinterpretation of the old principles. New cases always present issues different from those settled by prior cases. Thus, to decide a new case, a judge must take some liberties with the old principles, if they are to be applied at all. There is, however, no principled way to determine how many liberties can be taken; hence this second reading of the retrospective approach likewise provides no meaningful constraints.

The central problem here is that, given the difficulty of isolating a single principle for which a given precedent stands, we lack any criteria for distinguishing between cases that depart from and those that conform to the principles of their precedents. In fact, any case can compellingly be placed in either category. Although such a universal claim cannot be validated by example, examples can at least make the claim plausible. Therefore, the following paragraphs present several

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*88. But cf. Wechsler, supra note 66, at 51 (stipulating that neutrality is not a matter of adhering to precedents).
instances of cases that simultaneously depart from and conform to their precedents.

The first is *Griswold v. Connecticut*, in which the Supreme Court held that a state could not constitutionally prohibit the dissemination of contraceptive information or devices to married people.\(^{100}\) *Griswold* relied in part on *Pierce v. Society of Sisters*,\(^ {101}\) which held unconstitutional a requirement that children attend public rather than private schools, and *Meyer v. Nebraska*,\(^ {102}\) which held that a state could not prohibit the teaching of foreign languages to young children. In *Griswold*, the Court said that these cases relied on a constitutionally protected interest, conveniently labeled “privacy,” that was identical to the interest implicated in the contraceptive case.

On one view, *Griswold* tortures these precedents. Both were old-fashioned due process cases, which emphasized interference “with the calling of modern language teachers * * * and with the power of parents to control the education of their own.”\(^ {103}\) On this view, the most one can fairly find in *Meyer* and *Pierce* is a principle about freedom of inquiry that is rather narrower than a principle of privacy. Yet of course one can say with equal force that *Griswold* identifies for us the true privacy principle of *Meyer* and *Pierce*, in the same way that the abortion funding cases identify the true principle of *Roe v. Wade*. * * * [T]he retrospective approach to neutral principles must recognize the extensive creativity exercised by a judge when he or she imputes to a precedent “the” principle that justifies both the precedent and the judge’s present holding. [Other examples omitted—eds.]

3. *The Craft Interpretation*.—This critique of the retrospective-application interpretation points the way to a more refined version—what I will term the craft interpretation—of the calls of the neutral principles theorists for retrospective consistency. The failings of this final alternative bring out the underlying reasons that the demand for consistency cannot do the job expected of it.

The preceding discussion has reminded us that each decision reworks its precedents. A decision picks up some threads that received little emphasis before, and places great stress on them. It deprecates what seemed important before by emphasizing the factual setting of the precedents. The techniques are well known; indeed, learning them is at the core of a good legal education. But they are techniques. This recognition suggests that we attempt to define consistency as a matter of craft. When push comes to shove, in fact, adherents of neutral principles simply offer us lyrical descriptions of the sense of professionalism in lieu of sharper characterizations of the constraints on judges. Charles Black, for example, attempts to resolve the question whether law can rely on neutral principles by depicting “the art of law” living between the two poles of subjective preference and objective validation in much

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\(^{100}\) 381 U.S. 479 (1965).

\(^{101}\) 265 U.S. 516 (1925).

\(^{102}\) 262 U.S. 300 (1923).

\(^{103}\) Id. at 401.
the same way that "the art of music has its life somewhere between traffic noise and a tuning fork—more disciplined by far than the one, with an unfathomably complex inner discipline of its own, far richer than the other, with inexhaustible variety of resource." The difficulty then is to specify the limits to permissible craftiness. One limit may be that a judge cannot lie about the precedents—for example, by grossly mischaracterizing the facts. And Black adds that "decision [must] be taken in knowledge of and with consideration of certainly known facts of public life," such as the fact that segregation necessarily degrades blacks. But these limits are clearly not terribly restrictive, and no one has suggested helpful others.

If the craft interpretation cannot specify limits to craftiness, another alternative is to identify some decisions that are within and some that are outside the limits in order to provide the basis for an inductive and intuitive generalization. As the following discussion indicates, however, it turns out that the limits of craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants. The craft interpretation thus fails to constrain the results that a reasonably skilled judge can reach, and leaves the judge free to enforce his or her personal values, as long as the opinions enforcing those values are well written. Such an outcome is inconsistent with the requirements of liberalism in that, once again, the demand for neutral principles fails in any appreciable way to limit the possibility of judicial tyranny.

The debate over the propriety of the result in Roe v. Wade illustrates this problem. It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful. The central issue before the Court was whether a pregnant woman had a constitutionally protected interest in terminating her pregnancy. When his opinion reached that issue, Justice Blackmun simply listed a number of cases in which "a right of personal privacy, or a guarantee of certain areas or zones of privacy," had been recognized. Then he said, "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty * * * or * * * in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." And that was it. I will provisionally concede that this "argument" does not satisfy the requirements of the craft.

116. C. Black, Decision According to Law 81 (1981); see also id. at 21-24 (metaphorical evocation of delicate logic of law); see Sandalow, Constitutional Interpretation, 79 Mich.L.Rev. 1633 (1981) (tracing delicate balance between faithfulness to the constitutional text and accommodation to the needs of the time).

118. C. Black, supra note 116, at 82.

120. 410 U.S. 113 (1973).


But the conclusion that we are to draw faces two challenges: it is either uninteresting or irrelevant to constitutional theory. Insofar as Roe gives us evidence, we can conclude that Justice Blackmun is a terrible judge. The point of constitutional theory, though, would seem to be to keep judges in line. If the result in Roe can be defended by judges more skilled than Justice Blackmun, the requirements of the craft would mean only that good judges can do things that bad judges cannot without subjecting themselves to professional criticism. For example, John Ely argues that, although Roe is beyond acceptable limits, Griswold is within them, though perhaps near the edge. Justice Douglas’ opinion for the Court in Griswold identified a number of constitutional provisions that in his view explicitly protected one or another aspect of personal privacy. The opinion then noted that the Court had in the past protected other interests closely related to those expressly protected. By arguing that those “penumbral” interests overlapped in the area of marital use of contraceptives, Justice Douglas could hold the challenged statute unconstitutional.

If Griswold is acceptable, we need only repeat its method in Roe. Indeed, Justice Douglas followed just that course in a brilliant concurring opinion. And even if Griswold’s logic is rejected, skilled lawyers could still rewrite Roe to defend Justice Blackmun’s outcome. There is in fact a cottage industry of constitutional law scholars who concoct revised opinions for controversial decisions. Thus, the craft interpretation of neutrality in application is ultimately uninteresting for reasons that we have already seen. At most it provides a standard to measure the competence of judges, a standard that by itself is insufficient to constrain adequately the risk of tyranny.

The other difficulty with the craft interpretation runs deeper. Craft limitations make sense only if we can agree what the craft is. But consider the craft of “writing novels.” Its practice includes Trollope writing The Eustace Diamonds, Joyce writing Finnegans Wake, and Mailer writing The Executioner’s Song. We might think of Justice Blackmun’s opinion in Roe as an innovation akin to Joyce’s or Mailer’s. It is the totally unreasoned judicial opinion. To say that it does not look like Justice Powell’s decision in some other case is like saying that a Cubist “portrait” does not look like its subject as a member of the Academy would paint it. The observation is true, but irrelevant both to the enterprise in which the artist or judge was engaged and to our ultimate assessment of his product.

C. Rules and Institutions

We can now survey our progress in the attempt to define “neutral principles.” Each proposed definition left us with judges who could

125. Ely, supra note 121, at 929-30.
enforce their personal values unconstrained by the suggested version of the neutrality requirement. Some of the more sophisticated candidates, such as the craft interpretation, seemed plausible because they appealed to an intuitive sense that the institution of judging involves people who are guided by and committed to general rules applied consistently. But the very notions of generality and consistency can be specified only by reference to an established institutional setting. We can know what we mean by “acting consistently” only if we understand the institution of judging in our society. Thus, neutral principles theory proves unable to satisfy its demand for rule-guided judicial decisionmaking in a way that can constrain or define the judicial institution; in the final analysis, it is the institution—or our conception of it—that constrains the concept of rule-guidedness.

Consider the following multiple choice question: “Which pair of numbers comes next in the series 1, 3, 5, 7?” (a) 9, 11; (b) 11, 13; (c) 25, 18.” It is easy to show that any of the answers is correct. The first is correct if the rule generating the series is “list the odd numbers”; the second is correct if the rule is “list the odd prime numbers”; and the third is correct if a more complex rule generates the series. Thus, if asked to follow the underlying rule—the “principle” of the series—we can justify a tremendous range of divergent answers by constructing the rule so that it generates the answer that we want. As the legal realists showed, this result obtains for legal as well as mathematical rules. The situation in law might be thought to differ, because judges try to articulate the rules they use. But even when an earlier case identifies the rule that it invokes, only a vision of the contours of the judicial role constrains judges’ understanding of what counts as applying the rule. Without such a vision, there will always be a diversity of subsequent uses of the rule that could fairly be called consistent applications of it.

There is, however, something askew in this anarchic conclusion. After all, we know that no test maker would accept (c) as an answer to the mathematical problem; and indeed we can be fairly confident that test makers would not include both (a) and (b) as possible answers, because the underlying rules that generate them are so obvious that they make the question fatally ambiguous. Another example may sharpen the point. The examination for those seeking driver’s licenses in the District of Columbia includes this question: “What is responsible for most automobile accidents? (a) The car; (b) the driver; (c) road conditions.” Anyone who does not know immediately that the answer is (b) does not understand what the testing enterprise is all about.

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131. One possible rule is the following: \( f(1) = 1; \) for \( n \) greater than 1, if \( n \) is divisible by 5, \( f(n) = n \); if \( n - 1 \) is divisible by 5, \( f(n) = f(n - 1) - f(n - 2) \); if neither \( n \) nor \( n - 1 \) is divisible by 5, \( f(n) = 2n - 1 \).

132. Although I believe that the realists demonstrated this point, I acknowledge that most of them refused to press their arguments all the way to the conclusion drawn in the text. For overviews of the realist movement, see E. Purcell, The Crisis of Democratic Theory 74–94, 159–78 (1973); W. Rumble, American Legal Realism (1968).
In these examples, we know something about the rule to follow only because we are familiar with the social practices of intelligence testing and drivers’ education. That is, the answer does not follow from a rule that can be uniquely identified without specifying something about the substantive practices. Similarly, although we can, as I have argued elsewhere, use standard techniques of legal argument to draw from the decided cases the conclusion that the Constitution requires socialism, we know that no judge will in the near future draw that conclusion. But the failure to reach that result is not ensured because the practice of “following rules” or neutral application of the principles inherent in the decided cases precludes a judge from doing so. Rather, it is ensured because judges in contemporary America are selected in a way that keeps them from thinking that such arguments make sense. This branch of the argument thus makes a sociological point about neutral principles. Neither the principles nor any reconstructed version of a theory that takes following rules as its focus can be neutral in the sense that liberalism requires, because taken by itself, an injunction to follow the rules tells us nothing of substance. If such a theory constrains judges, it does so only because judges, before they turn to the task of finding neutral principles for the case at hand, have implicitly accepted some image of what their role in shaping and applying rules in controverted cases ought to be.

There is something both odd and important here. The theory of neutral principles is initially attractive because it affirms the openness of the courts to all reasonable arguments drawn from decided cases. But if the courts are indeed open to such arguments, the theory allows judges to do whatever they want. If it is only in consequence of the pressures exerted by a highly developed, deeply entrenched, homeostatic social structure that judges seem to eschew conclusions grossly at odds with the values of liberal capitalism, sociological analysis ought to destroy the attraction of neutral principles theory. Principles are “neutral” only in the sense that they are, as a matter of contingent fact, unchallenged, and the contingencies have obvious historical limits.

At the same time, however, the theory shows us an institution at the heart of liberalism that contains the potential for destroying liberalism by revealing the institution’s inconsistencies and its dialectical instability. The neutral rule of law was Locke’s solution to the Hobbesian problem of order. But the rule of law requires that preexisting rules be followed. If we accept substantive limitations on the rules that courts can adopt, we abandon the notion of rule-following as a neutral enterprise with no social content; yet if we truly allow all reasonable arguments to be made and possibly accepted, we abandon the notion of rule-following entirely, and with it we abandon the ideal of the rule of law. What is odd is that liberalism has generated an institution that reveals these irresolvable tensions.


G. BALANCING

T. ALEXANDER ALEINIKOFF, CONSTITUTIONAL LAW IN THE AGE OF BALANCING


I. THE DEFINITION AND FORMS OF BALANCING

A. Definition

The metaphor of balancing refers to theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests. By a "balancing opinion," I mean a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and weighs a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests. * * *

This definition captures most of the work that the Supreme Court does under the name of balancing.

Some commentators see balancing as any method of resolving conflicts among values. But choices may be made among values in ways that are not based on an assessment of the "weights" of the values at stake. Similarly, balancing, as I define it, differs from methods of adjudication that look at a variety of factors in reaching a decision. These would include some of the familiar multi-pronged tests and "totality of the circumstances" approaches. These standards ask questions about how one ought to characterize particular events. Was the confession voluntary or involuntary? Did the government action constitute a "taking"? In answering such questions, one starts with some conception of what constitutes voluntariness and involuntariness and then asks whether the particular situation shares more of the voluntary elements or the involuntary elements. Or one begins with a checklist of factors that have been used in the past to determine whether a "taking" has occurred. The reasoning is thus primarily analogical. Balancing represents a different kind of thinking. The focus is directly on the interests or factors themselves. Each interest seeks recognition on its own and forces a head-to-head comparison with competing interests.

B. Metaphorical Forms

The balancing metaphor takes two distinct forms. Sometimes the Court talks about one interest outweighing another. Under this view,

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7. See, e.g., Shifrin, [The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment], 78 Nw.U.L.Rev. 1212, 1249 (1983) ("[B]alancing is nothing more than a metaphor for the accommodation of values.").


the Court places the interests on a set of scales and rules the way the scales tip. For example, in New York v. Ferber, the Court upheld a statute criminalizing the distribution of child pornography because "the evil * * * restricted by the statute so overwhelmingly outweighs the expressive interests, if any, at stake." 11 Constitutional standards requiring "compelling" or "important" state interests also exemplify this form of the balancing metaphor. 12

The Court employs a different version of balancing when it speaks of "striking a balance" between or among competing interests. The image is one of balanced scales with constitutional doctrine calibrated according to the relative weights of the interests. One interest does not override another; each survives and is given its due. Thus, in Tennesee v. Garner, 13 which considered the constitutionality of a state statute permitting the use of deadly force against fleeing felons, the Court ruled neither that the state interest in preventing the escape of criminals outweighed an individual's interest in life nor that the individual's interest outweighed the state's. The "balancing process" 14 recognized both interests: The Court ruled that an officer may not use deadly force unless such force is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a threat of serious physical harm. 15 What unites these two types of balancing—and the reason they will be considered together—is their shared conception of constitutional law as a battleground of competing interests and their claimed ability to identify and place a value on those interests.

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IV. AN INTERNAL CRITIQUE OF BALANCING

Despite the widespread use of balancing, the Supreme Court has spent surprisingly little time exploring the difficult analytic and operational problems the method presents. The following sections highlight a number of these issues. The first set of problems takes the balancing metaphor seriously and examines how interests are identified, valued and compared. The second set of problems raises the question of whether balancing—even if adequately performed—is a justifiable or sensible method of constitutional interpretation.

A. The Problem of Evaluation and Comparison

A frequent criticism of balancing is that the Court has no objective criteria for valuing or comparing the interests at stake. As Laurent Frantz has nicely put it, the judge's task is to "measur[e] the unmeasur-