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# FOLLOWING THE RULES LAID DOWN: A CRITIQUE OF INTERPRETIVISM AND NEUTRAL PRINCIPLES

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*Interpretivism and neutral principles are two leading theories of modern constitutional law that attempt to ensure the rule of law by limiting the discretion of judges. According to interpretivism, judges must decide cases in accord with the intent of the framers. Neutral principles theory requires that judges decide cases on the basis of general principles that the judges are committed to applying consistently in all similar cases. Professor Tushnet suggests that liberal political theory has produced both constitutional theories to constrain judges, who would otherwise, according to liberal premises, decide cases on the basis of their own subjective preferences. But each theory, he argues, ultimately depends on presuppositions that are themselves inconsistent with the liberal standpoint. Interpretivism can adequately link the present with the past only on the basis of an historiography that assumes a consensus that it cannot demonstrate. And neutral principles theory can constrain judicial choices only on the basis of a presumed shared understanding of the role of judicial reasoning in our polity. Such a consensus or such an understanding would, however, if generally shared, render constitutional theories unnecessary as further constraints on the courts. Thus, both theories can succeed only at the cost of repudiating their purposes.*

## I. LIBERALISM AND CONSTITUTIONALISM

A ritual is enacted whenever a nominee for a federal judgeship appears before the Senate Judiciary Committee as part of the confirmation process. One Senator will ask, "Do you intend to apply the law rather than make it?" Another will ask, "Will you apply the words of the Constitution in the way that the framers intended?"[1] Nominees, some of whom ought to know better, play their part in the ritual by answering "Yes" to both questions. The ritual has several significances.

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[1] *See, e.g., Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 228–29 (1979) (colloquy between Sen. Hatch and nominee Wald).

Sometimes it provides the opportunity for what Harold Garfinkel has called a degradation ceremony, in which the subject may be made to abase himself or herself as a prerequisite to a transition to a new status.[2] More often it allows the nominee to engage in anticipatory socialization by behaving before the Committee as he or she will behave on the bench.[3] But like most rituals, this one is important primarily because it reveals to us some of the deep assumptions prevalent in the culture.

The Senators' questions evoke the two leading modern constitutional theories, neutral principles and interpretivism. According to the former:

> the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved . . . [, resting] on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply.[4]

According to the latter, judges "should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[5] Such norms are found by interpreting the text, with recourse when necessary to the intent of the framers. These formulations are of course only initial, but they state the theories in general terms. Roughly, they tell judges to do what the Constitution says and to do that in good faith, and in this way to commit themselves to the logical implications of what they decide.

Many theorists believe that interpretivism and neutral principles provide the necessary framework for their theoretical activity. For example, Michael Perry has said that any constitutional theory must be principled in the required sense, and John Ely, in his more expansive moments, treats his theory as

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[2] Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956). For an example in which the nominee refused to go along, see *Nomination of Thurgood Marshall: Hearings Before the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 161–76 (1967) (colloquy between Sen. Thurmond and nominee Marshall).

[3] *See, e.g.*, *Nomination of Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 63–67 (1981) (colloquy between Sen. Biden and nominee O'Connor concerning judicial activism).

[4] H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 21 (1961). What Senators have in mind when they ask about applying, not making, law is a corollary of this thesis — that a judge must remain faithful to the body of law within which he or she works by following the principles previously established, rather than constantly reshaping them to fit his or her preferences in the case at hand.

[5] J. ELY, DEMOCRACY AND DISTRUST 1 (1980).

"the ultimate interpretivism."[6] Theorists — themselves participants in contemporary culture — find interpretivism and neutral principles as attractive as the Senators do.

In this Article, I argue that interpretivism and neutral principles are closely associated with the political philosophy of liberalism.[7] Liberalism's psychology posits a world of autonomous individuals, each guided by his or her own idiosyncratic values and goals, none of which can be adjudged more or less legitimate than those held by others. In such a world, people exist as isolated islands of individuality who choose to enter into relations that can metaphorically be characterized as foreign affairs.[8]

Constitutional theory is essentially a concomitant of liberalism. In a world of liberal individualism, the Hobbesian problem of order immediately arises. If one person's values impel that person, for example, to seize the property of another, the victim cannot appeal to some supervening principle to which the assailant must be committed. Individuals may try to protect themselves from assaults on their persons and property by arriving at mutual-assistance agreements with others. But if the parties to such agreements differ significantly in power, the weaker place themselves at the mercy of the stronger. Hobbes' solution was to transfer all authority to an all-powerful sovereign. Hobbes recognized that such a sovereign could itself threaten person and property, but regarded the gain in security against attack by all others to be worth the cost of insecurity against an attack by the sovereign. Those who understood the dangers of unconstrained private power but also feared the unconstrained power of the sovereign needed a different solution. The Glorious Revolution and John Locke seemed to have provided that solution by placing the

[6] *Id.* at 87–88; *see* Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1113–14 (1980), *discussed at infra* pp. 811–14.

[7] Any summary description of the classical liberal view — the liberalism of Hobbes, Locke, and Mill and that of Dworkin and Rawls — must be a caricature. The description in text is supported by A. GUTMANN, LIBERAL EQUALITY (1980); D. MANNING, LIBERALISM (1976); Bell, *Models and Reality in Economic Discourse*, PUB. INTEREST 46 (special issue 1980); *see also* Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 127–29 (S. Hampshire ed. 1978) (deriving a similar view as the essence of contemporary political liberalism).

Liberalism, neutral principles, and interpretivism are regularly associated, but it is not important to my argument to decide whether they are mutually entailed. Each provides the others with metaphors that come to pervade all three theories, *see* D. MANNING, *supra*, at 9–30 (characterizing liberalism); thus, a challenge to the accustomed way of talking about politics, meaning, or history will be felt as a challenge to the way of talking about the others as well.

[8] *See* Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1242.

sovereign itself under the rule of law. But law, of course, cannot rule on its own; it depends on human agents to give it force. In effect, sovereignty was diffused: instead of being concentrated in the person of a monarch, it was shared between the monarch and the legislature. The monarch in exercising his portion of sovereignty would act pursuant to and be constrained by the laws enacted by the legislature in exercising its portion of sovereignty.

The American Revolution eliminated the monarch from sovereignty and thereby sharply posed the problem of legislative tyranny. The framers' solution, according to one view, was a revised version of Locke's diffused sovereignty, in which power was divided among the separate branches of government, each of which was expected to restrain the others. Yet the separation of powers merely reduced — without eliminating — the risk of oppression. Another view assigns a special role to the judiciary and to the constraints on power embodied in a written constitution. Because the division of power alone was insufficient to reduce the risk of tyranny to an acceptable level, the framers called on the judiciary to serve a special function beyond its role in diffusing power: by commanding the judges to enforce constraints that the Constitution placed on the other branches, the framers provided a check on even the few instances of tyranny that they thought might slip through the legislative and executive processes.

As long as the judges who enforced the constraints could themselves be seen to be somehow removed from self-aggrandizement and political contention, the Lockean solution was entirely satisfactory. Over time, however, it became clear — as a result, for example, of the first era of substantive due process and the legal realists' destructive rule skepticism — that judges no less than legislators were political actors, motivated primarily by their own interests and values. The Hobbesian problem was then seen to recur on a higher level. Its solution lay in the development of constitutional theory, which could serve as a constraint on judges by providing some standard, distinct from mere disapproval of results, by which their performance could be evaluated.[9]

Interpretivism and neutral principles, as the two leading dogmas of modern constitutional theory, are thus designed to

[9] What the Hobbesian problem really demands is not a way of *evaluating* judicial behavior, but a way of *constraining* it. Our system, however, provides no way to enforce constitutional theory coercively; and if it did, the problem of how to constrain the constrainers would merely shift up one level. In consequence, constitutional theory can constrain judges only by creating standards for criticism and, to the extent that the standards are internalized by the judges, for self-criticism.

remedy a central problem of liberal theory by constraining the judiciary sufficiently to prevent judicial tyranny. But it turns out that the two theories are plausible only on the basis of assumptions that themselves challenge important aspects of the liberal world view. Interpretivism attempts to implement the rule of law by assuming that the meanings of words and rules are stable over extended periods; neutral principles does the same by assuming that we all know, because we all participate in the same culture, what the words and rules used by judges mean. In this way, interpretivism and neutral principles attempt to complete the world view of liberalism by explaining how individuals may form a society.

I argue below, however, that the only coherent basis for the requisite continuities of history and meaning is found in the communitarian assumptions of conservative social thought — that, in fact, only these communitarian assumptions can provide the foundations upon which both interpretivism and neutral principles ultimately depend.[10] Conservative social thought places society prior to individuals by developing the implications of the idea that we can understand what we think and do only with reference to the social matrix within which we find ourselves. If I am correct, the liberal account of the social world is inevitably incomplete, for it proves unable to provide a constitutional theory of the sort that it demands without depending on communitarian assumptions that contradict its fundamental individualism.

Interpretivism and neutral principles are two powerful theories, but as we shall see, they cannot stand on liberalism's premises. And conservative social thought, because it rejects the individualist premises that make constitutional theory necessary, need not develop an alternative constitutional theory. The most it must do is elaborate the ways in which we are dependent on each other not merely for peace, as Hobbes would have it, or for material well-being, as Locke would have it, but also for the very conditions under which we can understand and communicate with each other and so form ourselves into a society. This Article does not attempt this last task. I do note, though, that just as conservatism correctly emphasizes our mutual dependence, liberalism correctly emphasizes our individuality and the threats we pose to each other. It may be that we live in a world of tension, in which

[10] In calling the countertradition "conservative," I mean to identify historic continuities with the views espoused by Burke, without intending to deny the apologetic nature of conservative thought. For a discussion of the way in which classical conservatism was related to the class struggle in England, see C. MACPHERSON, BURKE (1980).

no unified social theory but only a dialogue between liberalism and conservatism is possible. In any case, it appears that the construction of a satisfactory constitutional theory will be either impossible or unnecessary.

## II. Interpretivism and Historical Knowledge

It is commonplace to observe that interpretivism has its roots in *Marbury v. Madison*,[11] the Supreme Court's first assertion of the power of judicial review. In that case the Court thought it essential to decide whether a section of the statute organizing the federal court system was consistent with the distribution of judicial authority dictated by the Constitution. Chief Justice Marshall justified the exercise of the power of judicial review by a number of arguments, prominent among which was his appeal to the idea of a written constitution.[12] According to the Chief Justice, the Constitution was law, albeit supreme law, and thus was to be treated just as other legal documents were. Therefore, when the Court was asked to determine the meaning of the Constitution, it was to do what it did when faced with other legal instruments. This enterprise is characteristically "interpretivist": judges must look both to the words of the document and, because such words as "equal protection" and "due process of law" are too opaque,[13] to the intent of those who wrote the document.[14]

Like other theories of constitutional argumentation, interpretivism is subject to both external and internal critiques. The external critique of interpretivism argues that the theory, though it may constrain judges effectively, in fact fails to constrain the legislature (or the executive) in a manner both flexible enough to fit changed circumstances and stringent enough to avoid realistic threats of oppression. The internal critique attempts to determine the maximum coherent content of the theory in order to demonstrate that the theory is conceptually incapable of providing the constraints on judicial tyranny that its advocates claim it offers. I begin my discussion by examining the ways in which an enlightened interpretivism emerges out of external critique, and then examine how the internal critique attacks and transforms this version of the

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[11] 5 U.S. (1 Cranch) 137 (1803).

[12] *See id.* at 176–80.

[13] *But see* Laycock, Book Review, 59 Tex. L. Rev. 343 (1981) (arguing that structure of Constitution itself gives content to opaque terms).

[14] *See* J. Ely, *supra* note 5, at 3, 13–17. *But see* Lehman, *How to Interpret a Difficult Statute*, 1979 Wis. L. Rev. 489 (arguing that proper mode of interpreting opaque document does not require recourse to drafters' intent).

theory. The question is whether there can be a form of interpretivism that respects the theory's premises but is invulnerable to both critiques.

### *A. The External Critique*

For about thirty years, roughly from 1940 to 1970, interpretivism had a bad reputation, largely because, allied as it was to politically conservative positions,[15] it seemed too vulnerable to external critique. That critique is captured by counterposing "the dead hand of the past" — interpretivism — to the need for "a living Constitution." That is, a strict adherence to interpretivism seems to require that we find legislation valid unless it violates values that are both old-fashioned and seriously outmoded.[16] The interpretivist deflects this criticism by invoking the specter of judicial tyranny.[17] Of course, the response goes, interpretivism does mean that we will be subject to the risk that the legislature will develop novel forms of tyranny. Empirically, however, novelty in tyranny is relatively rare, and because the framers of the Constitution were rather smart, they managed to preclude most of the really troublesome forms of tyranny through the Constitution they wrote. Some risk of novel forms of tyranny remains, but that risk is significantly smaller than the risk of judicial tyranny that would arise were we to allow judges to cut free from interpreting the text. In this sense, according to the interpretivist, we are indeed better off being bound by the dead hand of the past than being subjected to the whims of willful judges trying to make the Constitution live.

This response is, I think, fairly powerful. But it rests in part on an empirical claim about novelty, a claim that is open

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[15] *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936) (holding unconstitutional the Agricultural Adjustment Act, Act of May 12, 1933, ch. 25, 48 Stat. 31 (repealed)); Patterson v. Colorado, 205 U.S. 454, 462 (1907) (first amendment restricts only prior restraints, not subsequent punishments).

[16] Interpretivism's deference to the vision of the framers can also have the effect of compelling the courts to restrain the legislature unduly. For instance, a narrow construction of the commerce clause, though it might be thought to be dictated by the intent of the framers, would make it impossible for Congress to regulate an economy grown international in scope. The interpretivists' replies to these concerns are identical to their replies to concerns about the insufficiency of judicial control of the legislature: they seek some interpretively justified accommodation between adherence to and adaptation of the framers' intent. The ensuing discussion concentrates on the threat of legislative tyranny, but it is equally applicable to this parallel threat of legislative impotence.

[17] *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

to obvious external attacks. First, the possibilities of innovative legislative tyranny are in fact great because the social and material world in which we live has changed drastically since 1789. Wiretapping provides a standard example of innovation that interpretivism can accommodate only with great difficulty.[18] The drafters of the fourth amendment obviously could not have contemplated wiretapping when they thought about searches. Yet if interpretivism means that we cannot respond to that kind of innovation, it fails to guard against legislative tyranny. Wiretapping is thus a prime illustration for the claim that, because of the broader scope of legislative action, the domain of innovation in legislative tyranny is more extensive than that in judicial tyranny.[19]

Moreover, if we look to the historical record, we discover that, at least according to the interpretivist account, the framers had a fairly limited conception of legislative tyranny. For example, Leonard Levy, the most careful recent student of the history of the first amendment, concludes that the framers did not intend it to prohibit sedition laws, that they meant it to prohibit only prior restraints on publication and not subsequent punishment, and that they did not intend the amendment to insulate speech from regulation simply because the

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[18] *See, e.g.*, Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 281 (1981). Henry Monaghan calls this article's description of interpretivism "splendid," Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360 n.54 (1981), and I take the article as the best available defense of interpretivism.

[19] One would be hard pressed to defend the claim that in contemporary society more tyranny is exercised by willful judges than by willful legislators. Legislative oppression has taken the form of a tax system skewed substantially against redistribution of wealth, a system of subsidies to political activity that at least perpetuates and perhaps magnifies the disparities of power that are occasioned by disparities in wealth, and a system of public assistance to those in need that is administered by a bureaucracy that degrades its supposed beneficiaries.

If the current complaints of self-styled conservatives are taken as a measure of judicial tyranny, the instances that they identify, with one exception, pale in comparison. The elimination of prayer in schools and the limited use of pupil transportation remedies in desegregation cases, though important to some, do not have the broad impact that the instances of legislative oppression have. The issue of abortion is more problematic, but the extent to which the increase in abortions is attributable solely to judicial action is open to question. The women's movement was achieving some legislative victories before Roe v. Wade, 410 U.S. 113 (1973), and might well have continued to succeed in the legislatures. It bears emphasizing that, even after the first Hyde Amendment terminated federal financing of abortions, Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976), legislatures and state courts responsible to the electorate continued to provide such assistance in the states in which 85% of the nation's Medicaid abortions were performed before the cutoff. *See* Cates, *The Hyde Amendment in Action*, 246 J. A.M.A. 1109, 1110 (1981).

speech was political.[20] Similarly, the Bill of Rights provided protection, such as it was, against encroachment only by the national government, not by the states.[21] Because a genuine interpretivism would thus protect only against limited varieties of legislative tyranny, it fails to achieve its objective. When the real risks of legislative tyranny are recognized, they appear more serious than the prospects of judicial tyranny.[22]

Now the external critique begins to bite hard: interpretivism seems to constrain judges only at the cost of leaving legislatures too little constrained. One might expect critics to abandon interpretivism as an inadequate bulwark, but the power of the ideas underlying interpretivism moves them instead to attempt to rescue it with its own tools. Revisionist critics such as Ely and Douglas Laycock accuse interpretivists of being halfhearted in their commitment to their theory. These critics contend that, if we examine the Constitution closely, we will discover clauses concerning which the framers intended the courts to have a free, noninterpretivist hand. Ely relies on the portion of the fourteenth amendment that bars the states from making "'any law which shall abridge the privileges or immunities of citizens of the United States.'"[23] Laycock relies on the ninth amendment: "'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'"[24]

But, on two counts, the interpretivists condemn this proposed route to salvation. First, because the revisionists are trying to play the game of theory on the interpretivists' terms, they are vulnerable to attack on historical grounds. When the revisionists invoke the privileges and immunities clause or the ninth amendment, they are met by a barrage of evidence from interpretivists that these supposedly broad clauses actually had

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[20] L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION at ix (Torchbook ed. 1963).

[21] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). After the 14th amendment was adopted, the Court "selectively incorporated" the Bill of Rights into the due process clause of that amendment and thereby significantly expanded the safeguards against at least some forms of legislative tyranny. *See* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963). But this development is fairly clearly contrary to the intent behind the amendment. Due process in 1868 meant fair procedures; the due process clause of the 14th amendment was not designed to promote the substantive goals of such provisions as the first amendment. *See* R. BERGER, *supra* note 17, at 134–56.

[22] One important kind of response to this difficulty is to loosen the demands of fidelity to the framers' intent. Examination of this response, however, is best deferred. *See infra* pp. 800–02.

[23] J. ELY, *supra* note 5, at 22–30 (quoting U.S. CONST. amend. XIV, § 1).

[24] Laycock, *supra* note 13, at 350–54 (quoting U.S. CONST. amend. IX).

narrow and well-defined meanings.[25] The ninth amendment, for example, is said to mean merely that the Constitution itself does not authorize judicial denial of other rights and to have no implications for legislative authority to deny those rights.

The second response is more interesting. The interpretivist concedes the possibility that some provisions of the Constitution license noninterpretivist theories. But, he contends, we can at least rule out some results under those theories on interpretivist grounds. Suppose that the framers, while they were drafting one of the noninterpretivist provisions, were aware of a specific practice. Suppose further that, as far as the record shows, they agreed overwhelmingly that the provision would not make the practice unconstitutional. Surely, the interpretivist claims, given these assumptions we could not rely on the noninterpretivist provision to invalidate the practice even if the provision might otherwise authorize invalidation.[26] This claim seems hard to dispute. Unhappily for the revisionist, though, this second interpretivist response states in general terms the relevant history of the fourteenth amendment with respect to school segregation. As Michael Perry puts it, "segregated public schooling was present to the minds of the Framers; they did not intend that the [equal protection] clause prohibit it; and no historical evidence suggests that they meant to leave open the question whether the clause should be deemed to prohibit the practice."[27] If noninterpretivist constitutional interpretation must rest on an interpretive warrant, then *Brown v. Board of Education* seems unjustifiable.

Interpretivism is alluring enough that, even at this point, revisionists need not throw up their hands, and they usually do not. Instead they can try to rely on Ronald Dworkin's distinction between generic "concepts," such as equality, and specific "conceptions," such as ideas of what equality meant in particular circumstances.[28] Dworkin argues that the fourteenth amendment enacts the concept of equality, not specific conceptions. The framers had a conception of equality that regarded segregated schools to be equal, but they enacted

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[25] *See, e.g.*, R. BERGER, *supra* note 17, at 20–36 (privileges and immunities clause); Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Perry, *supra* note 18, at 272–73 (ninth amendment).

[26] Perry, *supra* note 18, at 299–300.

[27] *Id.* at 300 (footnote omitted). Perry argues that, in the absence of some indication that the framers intended to leave open an issue of which they were aware, the interpretivist must presume that the issue has been closed. *Id.* at 299–300.

[28] R. DWORKIN, TAKING RIGHTS SERIOUSLY 134–36 (1977). For a critique, see Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1037–41 (1977).

something more general, something that they knew would develop in ways they knew not. Constitutional provisions that embody concepts rather than conceptions license (and demand) noninterpretivist approaches.

Here again the interpretivist has two reasons not to embrace the revisionists' position. First, like Ely and Laycock, Dworkin can be called upon to live up to the interpretivists' historiographic standards if he wants to play their game. He therefore can be required to produce evidence of an interpretivist sort that the framers knew that they were enacting provisions that embodied a moral content richer than their own moral conceptions. And, simply put, there is no evidence at all that they did.[29] The distinction relies on modern theories of law that, I am certain, were quite foreign, indeed probably incomprehensible, to the framers of the Bill of Rights and the fourteenth amendment. Their theories of law were at the same time both more positivistic and more allied to theological versions of natural law theories than is the secularized vision of moral philosophy from which Dworkin draws his distinction.[30]

The second objection rests on a frontal attack on the proposed distinction between concepts and conceptions, a distinction that reflects a general problem in constitutional theory. Frequently an analysis turns completely on the level of generality at which some feature of the issue under analysis is described.[31] But the choice of that level must be made on some basis external to the analysis. For example, why describe the concept of equality on a level of generality so high that it obliterates the specific intention to permit segregation? After all, the concept is — at least in part — built up from particular experiences of what is seen as equal treatment; it is to that extent derived from conceptions of equality.

Rather than directly specify a principled basis for the choice of levels, Dworkin suggests the problem is resolved by the fact that judges' choices are constrained by a shared and evolving grasp of the political theory that the judges serve.[32] I return

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[29] Perry, *supra* note 18, at 297–98.

[30] *See* R. COVER, JUSTICE ACCUSED 8–30 (1975); Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

[31] *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-13, at 946 (1978) (noting that, in determining whether homosexual preferences deserve constitutional protection, "[i]t is crucial, in asking whether an alleged right forms part of a traditional liberty, to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct").

[32] *See* Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 498–500 (1981). Dworkin's analysis might alternatively be read as a call for a metatheoretical defense

to Dworkin's appeal to a shared vision of the judicial role in my discussion of neutral principles. For now two doubts can be raised. First, the very existence of controversy over his theory shows that Dworkin cannot confidently be taken to be describing what participants in our society in fact think is the proper practice of judging. Second, interpretivism seems to be a theory of meaning in history. It is odd, though by no means implausible, to claim that we need a political theory to support a theory of meaning. In any case, this notion that meanings are determinate only in the context of particular social visions is the stuff of conservative social thought, not of the liberal individualism that motivates both Dworkin's view and interpretivism generally. Liberalism requires that society not consider the preferences or moral views of one person to be more important than those of another. But if we can understand a person's preferences only by invoking a substantive moral theory, the attempt to distinguish between individual views and social values collapses. Once interpretivism has been pushed this far, it no longer is interpretivism at all.

The external critiques developed thus far do not demolish interpretivism. But the responses to those critiques have the effect of weakening the theory seriously. The most coherent version of interpretivism protects against only the few specific forms of legislative tyranny that the framers had in mind.[33] Interpretivism might have been quite protective had the framers been more visionary. But that is not how things were. Still, interpretivists can argue with some force that interpretivism is better than the alternatives. Interpretivism gives us a Constitution with many opportunities for legislative tyranny, some, though few, limits on legislatures, stringent limits on judges, and few opportunities for judicial tyranny. The alternatives provide many opportunities for judicial tyranny, few limits on judges, and an unknown mixture of opportunities for and limits on legislative tyranny. As is true of all external critiques, those of interpretivism do not themselves make it impossible to defend the theory; everything depends on the balance we think appropriate.

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of interpretivism — that is, for a demonstration that a suitably flexible interpretivism is the mode of judicial decisionmaking that best accords with our broader vision of a just society. This alternative project recalls an anecdote about Indian cosmography. A traveler, it is said, asked a wise man to describe the earth's place in the universe. The wise man replied that the stars were on a bowl above the earth, that the earth rode on the back of an elephant, and that the elephant stood on the shell of a huge turtle. But what, asked the traveler, does the turtle rest upon? "Ah, after that it is turtles all the way down," was the reply.

[33] For one possible qualification, see *infra* note 62.

### *B. The Internal Critique*

The internal critique cuts deeper; it undermines in several steps the plausibility of interpretivism as a constitutional theory. The first step is an argument that interpretivism must rest on an account of historical knowledge more subtle than the naive presumption that past attitudes and intentions are directly accessible to present understanding. The second step identifies the most plausible such account, the view — sometimes called hermeneutics — that historical understanding requires an imaginative transposition of former world views into the categories of our own. The third step is an argument that such an imaginative transposition implies an ambiguity that is inconsistent with the project of liberal constitutional theory (and interpretivism). The project of imaginative transposition can be carried through in a number of different ways, with a number of different results, none of which is more "correct" than the others. The existence of such an indeterminacy means that interpretivism, unless it falls back on nonliberal assumptions, cannot constrain judges sufficiently to carry out the liberal project of avoiding judicial tyranny.

*1. Interpretivist History.* — We can approach the problems of historical knowledge by noting the standard criticism of "law office" history.[34] Interpretivism calls for an historical inquiry into the intent of the framers. That inquiry is conducted by lawyers imbued with the adversary ethic. The standard criticism is that lawyers are bad historians because they overemphasize fragmentary evidence and minimize significant bodies of conflicting or complicating evidence in the service of their partisan goals.

Though some lawyers surely deploy the kind of history thus criticized, interpretivism need not rest on that sort of bad history. But the difficulty goes deeper. Interpretivist history requires both definite answers (because it is part of a legal system in which judgment is awarded to one side or the other) and clear answers (because it seeks to constrain judges and thereby to avoid judicial tyranny). The universal experience of historians, however, belies the interpretivists' expectations. Where the interpretivist seeks clarity and definiteness, the historian finds ambiguity. I have already mentioned the interpretivist view of the history of the first amendment. But if we were able to sit down for a talk with Thomas Jefferson about civil liberties, a good historian will tell us, we would

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[34] *See, e.g.*, Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155–58.

hear an apparently confused blend of assertions: libertarian theory, opposition to the enactment of sedition laws, the use of sedition laws once in office, and so on. Jefferson's "intent" on the issue of free speech is nothing more than this complex set of responses.[35]

Because evidentiary materials are frequently incomplete and fail to yield answers of sufficient clarity, interpretivists must rely on supplementary evidentiary rules.[36] Raoul Berger, for example, proposes a burden of proof: one who claims that the framers of the fourteenth amendment intended to alter substantially the relations that existed in 1871 between state and national government must provide more persuasive evidence than must one who claims that the amendment's framers did not intend such alterations.[37] Similarly, Berger invokes lawyers' rules about legislative debate: statements made on the floor of the Senate, for instance, are to be given more weight than statements made in private letters.[38]

These supplementary evidentiary rules are simultaneously helpful and misleading. The rules may have two functions. First, they may be crystallized expressions of what more detailed inquiries have shown usually to have been true. Berger's federalism burden-of-proof rule, for example, is partly justified by the fact that, upon examining the range of uncontroversial situations in which national-state relations were altered, we discover much more evidence about the relevant intent in the situations in which those relations were altered substantially than in the situations in which they were altered less substantially. In fact, the federalism rule may turn out to be merely an instance of the generally useful historiographic principle that it is reasonable to require more evidence to show a radical discontinuity than to show a steady continuity in history.

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[35] In this area, the ambiguity does not entirely escape the historians on whom interpretivists rely. Leonard Levy, the source of the interpretivist view of the first amendment, gave one of his books on the question the title *Jefferson and Civil Liberties: The Darker Side* and thus suggested that there was a brighter side as well. L. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963).

[36] The denial of ambiguity is part of a family of ideas about historical knowledge and ultimately about social life that is central to the world view of liberalism. *See* D. MANNING, *supra* note 7. *See generally* R. UNGER, KNOWLEDGE AND POLITICS (1975) (characterizing the world view of liberalism). The hermeneutic approach, to which I turn shortly, *see infra* pp. 798–800, takes a very different view of supplementary rules. For the liberal, these rules in particular cases either reach the correct result or generate historical errors; for the hermeneutic historian, however, such rules are simply instances of the creative process by which we impose order on the past.

[37] R. BERGER, *supra* note 17, at 17, 153–55.

[38] *Id.* at 6–7. Other examples of Berger's use of supplementary evidentiary rules can be found in *id.* at 49–51, 74, 75–76, 116, 124, 136–37, 157, 160, 194–95, 207, 223.

Second, the rules may embody policy judgments that are independent of the rules' role in promoting accurate reconstructions of the past. The intent rule, for instance, may be justified on the ground that the interpretivist should look for a "special" kind of intent — the kind exhibited on relatively formal occasions and expressed in relatively formal terms, rather than the "private intent" of letters and the like. To restrict the focus of the inquiry to such a "special" kind of intent is to make a policy judgment that expressions of opinion on relatively formal occasions ought to be given special weight. The federalism rule can also serve as an example: it is partly justified by a policy preference for maintaining the distribution of authority between state and nation.

These justifications for supplementary rules, however, in the end distort the interpretivist inquiry. An historian interested in the history of the fourteenth amendment might conclude that, on balance and taking into account the supplementary rules to the extent that they are based on a concern for accuracy, Senator *X*'s private letters provide a better guide to his intentions and to those of his colleagues than do his statements on the floor of the Senate. The historian might conclude that, all things considered, a stray expression about federalism really does reveal what the framers intended.[39] And to the extent that the supplementary rules are based on policy grounds, the liberal project itself is defeated; justifying the rules on policy grounds directly confronts liberalism with the

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[39] A dramatic illustration of the difference between the history done by interpretivists and that done by historians is the contrast between the sources of evidence used in R. BERGER, *supra* note 17, and in H. HYMAN, A MORE PERFECT UNION (1973). The former concentrates on the congressional debates over the proposed 14th amendment, with occasional allusions to secondary accounts of the history of Reconstruction. The latter augments its attention to the debates with detailed and illuminating analyses of the political and social history of Reconstruction. For an even broader view, see M. KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA (1977). I find it instructive that Berger only occasionally cites these works — the best recent studies of the Reconstruction period — and then only for points that are marginal to their arguments.

The difficulties with Berger's approach are exemplified in his brief discussion of whether the framers of the 14th amendment meant to distinguish between citizens and aliens in providing that no "State shall deprive any person of life, liberty, or property without due process of law." *See* R. BERGER, *supra* note 17, at 215–20. Berger directs his attention to the rather thin legislative history on the issue. An historian would also write about the framers' views on, for example, immigration policy to provide us with a comprehensive picture of how the framers thought about the issues broadly conceived. Though the example is drawn from an area of little concern to Berger, it typifies his entire work. *See* Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

anomaly of relying on a particular political or social vision to support interpretivism.

*2. Intentions and Liberal Thought.* — The interpretivist project requires the discovery and use of unambiguous historical facts; the only way that interpretivists can find such facts is to embrace what are fundamentally flawed historiographic methods. Underlying the interpretivists' reliance on these methods is the view that individuals are the primary units of human experience and history and that larger social wholes are best understood as aggregates of such individuals. From this view, it follows that an individual's beliefs, intentions, and desires have their character independent of, or prior to, the larger social and conceptual context in which they occur, a context that the liberal vision sees as a product of all antecedent individual perspectives. The project of the liberal historian thus is to study the historical record for evidence of what the intentions and beliefs of historical actors actually were.[40]

On this account, intentions must be real, determinate entities;[41] the interpretivist must be able to identify and understand specific intentions of the framers with respect to one part of the Constitution or another. I can introduce the difficulties with this approach to historical knowledge by reference to two recent works on American history.

Leo Marx's *Machine in the Garden*[42] discusses the ways in which Americans thought about technological change. One of

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[40] Just as public policy, according to the liberal account, results from the aggregation of individual choices through some complex mechanism of public choice, so some complex mechanism of historical choice aggregates the intentions of the relevant actors to produce the interpretivist's "intention of the framers." Paul Brest, for example, uses the metaphor of "intention votes" to capture the interpretivist notion of aggregation. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 212–13 (1980).

I put aside as a debater's trick the occasional criticism of interpretivism that claims to show the theory's incoherence by pointing to the complex question of whose intentions count. *See, e.g.*, Dworkin, *supra* note 32, at 482–83. Supplementary evidentiary rules that designate the intentions of the framers as adequate surrogates for the intentions of their less involved contemporaries may provide an adequate answer to this challenge.

[41] The interpretivist view thus regards historical intentions in the way that scientists regard atoms — as entities that are real and determinate if not directly observable. The ensuing critique of this view of intentions closely resembles arguments by philosophers of science that atoms and other theoretical entities are our ways of organizing our experience, not real parts of the world. A different view would recognize an important ontological difference between intentions and atoms. If this latter view is accepted, the arguments presented here have no necessary connection to arguments in the philosophy of science concerning the "reality" of theoretical entities.

[42] L. MARX, THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA (1964).

Marx's central items of evidence, used to great effect, is a painting of a pastoral scene through which a railroad train is peacefully passing.[43] Marx's point of view suggests that historians cannot reconstruct a world in which railroads did not exist but everything else remained the same. The existence of railroads affected how people thought about their relation to the natural world, and those conceptions in turn affected the desire to invest and the value placed on growth. As Marx shows, perspectives, beliefs, and intentions are thoroughly interwoven with the concrete social and economic realities of their day. Marx's insight is that the contents or meanings of beliefs and intentions are shaped by the entire societal context in which those beliefs and intentions arise and that they in turn alter. When interpretivists presume that they can detach the meanings that the framers gave to the words they used from the entire complex of meanings that the framers gave to their political vocabulary as a whole and from the larger political, economic, and intellectual world in which they lived, interpretivists slip into the error of thinking that they can grasp historical parts without embracing the historical whole.

In fact, the richest kinds of historical understanding do not rest on the isolation of discrete and determinate beliefs or intentions of historical actors. Here I can use as an example Leon Litwack's *Been in the Storm So Long*,[44] one of the great works of American history. Litwack examines emancipated slaves' response to freedom in the immediate aftermath of the Civil War. He presents incredibly rich detail, drawn from letters by former slaves, Federal Writers' Project interviews with over two thousand ex-slaves, newspaper interviews, and government records. We are forced to conclude that the response to freedom was extremely complex. The ambiguity and contradiction that Litwack discloses in individual responses to emancipation demonstrate the impossibility of singling out specific past intentions or beliefs without denying the shifting, complex circumstances that led each person to develop such ambiguous and contradictory understandings of his or her world. One cannot finish Litwack's book without gaining some historical understanding. Yet that understanding is not gained because Litwack has somehow captured the thoughts or feelings of particular former slaves. Rather, he has provided us with a wealth of materials from which we can piece together a tenuous and readily displaced sense of the slaves' perspectives and predicaments.[45]

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[43] *Id.* at 220–21.

[44] L. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979).

[45] Litwack's study can be usefully compared with an exemplary work from within

*3. The Hermeneutic Alternative.* — These examples raise doubts about easy acceptance of an interpretivism whose theory of historical knowledge presumes that past beliefs and intentions are determinate and identifiable. Those doubts can be deepened by comparing this theory of history to its main rival, the hermeneutic tradition.[46] In that tradition, historical knowledge is seen as "the interpretive understanding of [the] meanings" that actors give their actions.[47] The historian must enter the minds of his or her subjects, see the world as they saw it, and understand it in their own terms.[48] For my purposes, Litwack's book is a paradigmatic hermeneutic history. Justice Brandeis' eloquent opinion in *Whitney v. California*,[49] which recreates one version of the world view of the framers, is the best example in the case law of a hermeneutic effort to understand the past. Brandeis' reconstruction, though partial and largely unsupported by specific references to what any framer actually said, does in the end bring us into the framers' world:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties;

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the more objectively oriented tradition on essentially the same topic, R. RANSOM & R. SUTCH, ONE KIND OF FREEDOM (1977). After one reads Litwack's book, one is sure to find that the latter work, enlightening though it undoubtedly is, never gets beneath the surface of the human experience with which both books are concerned.

[46] The best presentation of this view for those accustomed to Anglo-American styles of philosophical writing is R. COLLINGWOOD, THE IDEA OF HISTORY (1956). Collingwood goes far along the way to the conclusions that I draw here, but he does not quite state them openly. Jürgen Habermas and Hans-Georg Gadamer have explored aspects of the hermeneutic tradition using a different style of philosophical writing. For summaries, see A. GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY 175–77 (1979); A. GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD 54–65 (1976); R. KEAT, THE POLITICS OF SOCIAL THEORY: HABERMAS, FREUD, AND THE CRITIQUE OF POSITIVISM 202–03 (1981); T. MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 162–239 (1978). For a lawyer's perspective, see Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979); Abraham, *Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision*, 23 ARIZ. L. REV. 771 (1981).

Though I do not believe that fashions in historical scholarship necessarily move in the direction of truth, I think it worth noting that contemporary historical scholarship finds in the hermeneutic tradition an understanding of the enterprise better than what previously prevailed. *See* Woodward, *A Short History of American History*, N.Y. Times, Aug. 8, 1982, § 7 (Book Review), at 3, 14; *cf.* Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What The Law Is,"* 23 ARIZ. L. REV. 581, 584, 595 (1981) (assessing hermeneutic literary criticism as a style of constitutional interpretation).

[47] R. KEAT, *supra* note 46, at 3.

[48] Although not cast in these terms, Dworkin's concern that the concept of intention be adequately developed, Dworkin, *supra* note 32, at 477–78, is one that is repeatedly raised within the hermeneutic tradition.

[49] 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

> and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[50]

Here Brandeis recalls to us the framers' belief in a republic dominated by civic virtue. It matters not very much that their views on specific aspects of governmental design may have differed in detail from Brandeis' reconstruction; what matters is that the framers designed a government that comported with their sense of a world in which civic virtue reigned. The significance and the ramifications of this sense are what Brandeis strove to capture, and they are what interpretivism, too, must recognize to be central. The ways in which people understand the world give meaning to the words that they use, and only by recreating such global understandings can we interpret the document the framers wrote.[51]

The dilemma of interpretivism is that, if it is to rely on a real grasp of the framers' intentions — and only this premise gives interpretivism its intuitive appeal — its method must be hermeneutic, but if it adopts a hermeneutic approach, it is foreclosed from achieving the determinacy about the framers'

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[50] *Id.* at 375–76. In a footnote to this passage, Justice Brandeis quotes Jefferson on the value of free public discussion. *Id.* at 375 n.2.

[51] *Cf.* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 2–12 (G. Anscombe trans. 3d ed. 1958) (words have meanings only relative to the entire social context in which those words are used).

meanings necessary to serve its underlying goals. The interpretivists' premise of determinate intentions is essential to their project of developing constraints on judges. But the hermeneutic approach to historical understanding requires that we abandon this premise. In imaginatively entering the world of the past, we not only reconstruct it, but — more importantly for present purposes — we also creatively construct it. For such creativity is the only way to bridge the gaps between that world and ours. The past, particularly the aspects that the interpretivists care about, is in its essence indeterminate; the interpretivist project cannot be carried to its conclusion.

Consider an example. We have already seen that interpretivism's most plausible version leads one to conclude that school segregation is not unconstitutional.[52] In *Brown v. Board of Education*, however, the Supreme Court said, "In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation."[53] Chief Justice Warren was not rejecting the use of historical inquiries in constitutional law; he was instead approaching the task of discovering the past in a hermeneutic way.

Suppose that we did turn back the clock so that we could talk to the framers of the fourteenth amendment. If we asked them whether the amendment outlawed segregation in public schools, they would answer "No." But we could pursue our conversation by asking them what they had in mind when they thought about public education. We would find out that they had in mind a relatively new and peripheral social institution designed (say) to civilize the lower classes. In contrast, they thought that freedom of contract was extremely important because it was the foundation of individual achievement, and they certainly wanted to outlaw racial discrimination with respect to this freedom. Returning to 1954 and the question for the Court in *Brown*, we might, in an antic moment, challenge the interpretivists with their own weapons. Our hermeneutic enterprise has shown us that public education as it exists today — a central institution for the achievement of individual goals — is in fact the functional equivalent not of public education in 1868, but of freedom of contract in 1868.[54]

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[52] *See supra* p. 790.

[53] 347 U.S. 483, 492–93 (1954).

[54] This situation is but one of many in which substantial historical change obstructs attempts to equate the institutions known by the framers with modern versions that

Thus, *Brown* was correctly decided in light of a hermeneutic interpretivism.[55]

The problem raised by this interpretation of *Brown* is that the need to identify functional equivalents over time necessarily imports significant indeterminacy — and therefore discretion — into the interpretivist account; alternative hermeneutic accounts of *Brown* are also possible. Consider, for example, the implications of Herbert Wechsler's argument that *Brown* was problematic because it failed to consider the effect of desegregation on the interest of white parents and students in associating only with those of whom they approved.[56] A hermeneutic defense of that criticism might argue that education today is an important part of American civil religion[57] and that it is therefore the secular functional equivalent of true religion in 1868. The framers would certainly have considered forced association in churches to be improper; thus, Wechsler's

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go by the same name. A similar difficulty attends Robert Nagel's effort, Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective*, 1981 SUP. CT. REV. 81, 97–108, to defend contemporary enforcement of the rights of states, *see, e.g.*, FERC v. Mississippi, 102 S. Ct. 2126 (1982); National League of Cities v. Usery, 426 U.S. 833 (1976), by reciting the admittedly important values that the framers thought that federalism served. In a world in which the so-called community school boards in New York City would have represented populations in 1967 only slightly smaller than the population of the entire state of New York in 1790, *compare* C. MORRIS, THE COST OF GOOD INTENTIONS 114 (1980) (average population of 30 community school districts in New York City in 1967 would have been 275,000), *with* U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES pt. I, at 32 (1975) (1790 population of New York State was 340,000), the "states" protected by *National League of Cities* are not the same as the entities the framers had in mind, even though the geographical borders of some of them have not changed since 1789.

Similarly, H. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* (1981), suggests that, in trying to understand the framers' debates over the dangers of a standing army, modern readers should substitute the word "bureaucracy" to appreciate the framers' concern over "rigid rule of a large and varied republic by the force of government." *Id.* at 84 n.12; *see also infra* note 62 (noting significance of changing visions of political structure).

[55] For another example, consider how interpretivists deal with a problem considered earlier — that of innovations in tyranny, such as wiretapping. *See supra* p. 788. The prototypical defense of interpretivism is that the framers had in mind a prohibition on governmental intrusions on privacy that they then described by the word "searches." If wiretapping is "different in no significant respect" from what the framers thought of as searches, it is unconstitutional. Perry, *supra* note 18, at 281. But here again defending the theory by relying on functional equivalences between contemporary and past practices weakens the theory to the point of collapse: the interpretivist is unable to give a content to the idea of functional equivalence sufficiently determinate to enable us to know which contemporary practices are enough like past ones to fall under the framers' ban.

[56] H. WECHSLER, *supra* note 4, at 46–47.

[57] *See, e.g.*, R. BELLAH, THE BROKEN COVENANT at x–xi, 76–83 (1975).

point is established. Interpretivists claim that their approach is at least able to limit judges, but, by allowing judges to look hermeneutically for functional equivalents, interpretivism reintroduces the discretion that it was intended to eliminate.

But the difficulty runs deeper than the indeterminacy of identifications of functional equivalents. The hermeneutic tradition tells us that we cannot understand the acts of those in the past without entering into their mental world. Because we live in our own world, the only way to begin the hermeneutic enterprise is by thinking about what in our world initially seems like what people in the past talked and thought about. Usually we begin with a few areas in which we and they use the same rather abstract words to talk about apparently similar things.[58] Thus, we and the framers share a concern for democracy, human rights, and limited government. But as we read what the framers said about democracy and limited government, we notice discontinuities: they described their polity as a democratic one, for example, when we would think it obviously nondemocratic. As we examine this evidence, we adjust our understanding and attempt to take account of the "peculiarities." With a great deal of imaginative effort, we can indeed at the end of the process understand their world, because we have become immersed in it. But the understanding we achieve is not the unique, correct image of the framers' world. On the contrary, our imaginative immersion is only one of a great many possible reconstructions of that segment of the past, a reconstruction shaped not only by the character of the past, but also by our own interests, concerns, and preconceptions.[59] The imagination that we have used to adjust and readjust our understandings makes it impossible to claim that any one reconstruction is uniquely correct. The past shapes the materials on which we use our imaginations; our interests, concerns, and preconceptions shape our imaginations themselves.

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[58] An alternative route to hermeneutic understanding begins with the most concrete terms, whose significances are relatively unlikely to vary with cultural change. *See, e.g.*, W. QUINE, WORD AND OBJECT 28–29 (1960). Such an approach, however, has not been favored by contemporary constitutional scholars.

[59] The possibility of multiple equally faithful renderings of the framers' world does not, of course, suggest that their world is in any sense unreal or less determinate than our own. The indeterminacy of our reconstructions simply reflects the fact that their world — like every human world — was largely a product of the significances that its participants attached to it — that is, it was a meaningful world. To make those significances meaningful to us requires that we relate them to our own significances; indeterminacy arises because there are many different ways to build these relationships. *See* J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 140–60 (J. Shapiro trans. 1971).

Robert Gordon has offered a similar, but significantly different account of the hermeneutic problem that faces us when we try to uncover the world of the framers:

> The old text will be rendered almost wholly archaic if it can be shown to embody a set of conceptions — about human nature, property, virtue, freedom, representation, necessity, causation, and so forth — that was a unique configuration for its time and in some ways strikingly unlike what we believe to be our own. One naturally thinks in this connection of the remarkable recent work that has made the thought of this country's founders more intelligible by locating its terminology and major preoccupations in a Whig "republican" ideology with a foundation in Renaissance political thought. The lawyer who turns to the best available perspectives on the thinking behind the American Constitution may find herself in the position of the French humanist lawyers who hoped to uncover the universal basis for their own jurisprudence by freeing the Roman *Corpus Juris* from medieval corruptions, and then did such thorough scholarly work as to persuade many of them of Rome's irrelevance.[60]

The conclusion for the French lawyers was that Rome was irrelevant, and Gordon apparently would have us draw the same conclusion about the framers. In fact, the conclusion for a hermeneutic interpretivism in constitutional law is weaker, but more interesting. The gap between the framers and us is not nearly as wide as the gap between Rome and the French humanists. The intellectual world of the framers is one that bears some resemblance, which is more than merely genetic, to ours. A hermeneutic interpretivism would force us to think about the social contexts of the resemblances and dissimilarities.[61] It would lead us not to despair over the gulf that separates the framers' world from ours, but rather to the crafting of creative links between their ideals and our own. But in recognizing the magnitude of the creative component, we inevitably lose faith in the ability of interpretivism to provide

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[60] Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1021 (1981) (footnotes omitted).

[61] The recent exchange between Owen Fiss and Paul Brest exemplifies this task. Fiss relies on the possibility of identifying and relying on a broad "interpretive community." Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745–50 (1982). Brest points out that the existence of such a community cannot be assumed but must be established and that the discontinuities between the framers' world and ours, and those within "our" society, are large enough to make a prima facie case against the existence of that community. Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982).

the constraints on judges that liberal constitutional theory demands.[62]

Nonetheless, the hermeneutic tradition does identify something that constitutional theory should take seriously. The point is not, as some fanatic adherents of hermeneutic method might have it, that, because the world of the past is not the world in which we have developed our ways of understanding how others act, we can never understand that past world.[63] That view would go too far. We can gain an interpretive understanding of the past by working from commonalities in the use of large abstractions to reach the unfamiliar particulars of what those abstractions really meant in the past. The commonalities are what make the past *our* past; they are the links between two segments of a single community that extends over time.[64] The commonalities are both immanent in our history and constructed by us as we reflect on what our history is. Interpretivism goes wrong in thinking that the commonalities are greater than they really are, but we would go equally wrong if we denied that they exist. The task is to think through the implications of our continued dedication to the large abstractions when the particulars of the world have changed so drastically. That project will lead us to face questions about the kind of community we have and want.

## III. NEUTRAL PRINCIPLES AND THE RECOGNITION OF RULES

The hermeneutic tradition suggests that historical discontinuities are so substantial that interpretivism must make incoherent claims because it can achieve the necessary determinacy of past intentions only at the cost of an implausible claim about consistency of meaning across time. The theory of neu-

[62] The die-hard interpretivist might acknowledge how different our world is from the framers' and concede that hermeneutic history reveals the indeterminacy of constitutional *limitations* on power, but still contend that the constitutional *grants* of power remain sufficiently clear and determinate to provide meaningful constraints. *Cf.* Perry, *supra* note 18, at 282–84 (suggesting differential treatment of power-granting and power-limiting provisions). That cannot be so. The framers thought of the government that they were creating as an integrated system of grants and limitations, set in a society animated by civic virtue. The Congress that exists when the limits are conceded to be indeterminate, or when civic virtue has been lost, is not the Congress that the framers created, even though it has the prescribed two houses and so on. Interpretivism itself then proves indeterminate.

[63] *See, e.g.*, P. WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 86–91 (1958).

[64] I must, however, note the obvious ethnocentricity of this statement. Clearly, the history of kingship in Central Africa, *see* J. VANSINA, KINGDOMS OF THE SAVANNAH (1966), is as much a part of our past as is the history of the Constitution.

tral principles fails for similar reasons. It requires that we develop an account of consistency of meaning — particularly of the meaning of rules or principles — within liberal society. Yet the atomistic premises of liberalism treat each of us as autonomous individuals whose choices and values are independent of those made and held by others. These premises make it exceedingly difficult to develop such an account of consistent meaning. The autonomous producer of choice and value is also an autonomous producer of meaning.

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.[65] 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.[66] Neutral content for Bork might mean a similar indifference, but now within the case: the principle

[65] Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6–7 (1971).

[66] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11–12, 15 (1959).

governing the case should be developed 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.[67] 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.[68]

### *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.

One preliminary difficulty should be noted. All versions of the demand for neutral application of principles ultimately rest

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[67] *Cf.* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (no bill of attainder problems result from definition that identifies a category of one person). Philosophers of language have long been aware of the close and complex relationship between proper names and "definite descriptions" composed of general terms. *See, e.g.*, Russell, *The Philosophy of Logical Atomism*, 29 MONIST 190, 206–12 (1919), *reprinted in* B. RUSSELL, LOGIC AND KNOWLEDGE 175, 241–45 (R. Marsh ed. 1956).

[68] 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.

on the claim that, without neutrality, a decision "wholly lack[s] . . . legitimacy."[69] Legitimacy, though, has at least two possible meanings. One is common in the sociological literature on government. Legitimate actions are those that are accepted by the relevant public.[70] Decisions that lack legitimacy in this empirical sense are undesirable, because a court's critical resource in effectuating its decisions is public acceptance and illegitimate decisions deplete the court's limited capital.[71] It is implausible, however, that the neutral application of principles is an important source of public acceptance of judicial decisions. The general public is, I suspect, unlikely to care very much about a court's reasoning process, which is the focus of the neutral principles theory; the public concern is with results. Of course, to the extent that influential publicists — columnists for the *New York Times*, for example — accept the theory, they might invoke it to criticize the court. The criticisms might then affect elite readers, from whom the effect might, so to speak, trickle down to the public.[72] The extent to which such criticisms affect the general public is an empirical question, however, the investigation of which would require us to distinguish between the trickle-down effects of views about reasoning and the direct effects of views about the merits of decisions. I know of no studies that do more than point to the areas of interest.[73]

The second meaning of legitimacy is more normative and conceptual. Wechsler claimed that neutral principles are an essential component of the practice of judging in our society.[74] To the extent that it is not a mere throwback to the sociological concept of legitimacy, such an appeal to the essence of a social practice draws on a vision of how ideal courts act, a vision stimulated by reflection on the proper place of the courts in our social fabric. In this second sense, legitimacy is a matter of concordance with the demands of this ideal. In the ensuing inquiry, it is this second sense of legitimacy that is of interest:

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[69] Perry, *supra* note 6, at 1127.

[70] For a brief discussion, see Tushnet, *Perspectives on the Development of American Law*, 1977 WIS. L. REV. 81, 100–02.

[71] Conceptually, this point applies to courts generally. The point is most commonly made, however, when discussing the Supreme Court. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

[72] *See* Monaghan, Book Review, 94 HARV. L. REV. 296, 310–11 (1980) (discussing "'elite' theories of democracy"). Because priority claims have some significance, I note that I made this point in Tushnet, Book Review, 22 AM. J. LEGAL HIST. 177, 179–80 (1978).

[73] The evidence is summarized in Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 438–41, 466–69 (1977).

[74] Wechsler, *supra* note 66, at 15.

the claim that neutrality is a prerequisite for legitimacy means that, in our society, institutions must use neutral principles if we are to regard them as courts. This demand, however, ultimately proves empty, for rather than constrain the proper role of courts, the concept of neutrality instead presupposes a shared understanding and acceptance of any constraints.

*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.[75] 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 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.[76]

*(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.[77] 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

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[75] *Id.* For an application of Wechsler's approach, see, for example, *id.* at 29–30.

[76] A second, and crucial, conceptual problem — the difficulties in determining what uses of a rule count as proper applications of it — is deferred until the discussion of the backward-looking version of neutral application theory. *See infra* pp. 814–18.

[77] Of course, the degree to which that norm constrains the Court may vary. *Cf.* B. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979) (documenting recent attitudes within the Court).

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.[78] 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.[79] 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 principles ought to affect (although perhaps not determine) the outcome in any later case.[80] 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.

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[78] Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1007–08 (1978).

[79] *See* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815–16 (1982).

[80] Indeed, we measure an advocate's skill precisely by seeing how well that advocate is able to reveal the relevance of apparently irrelevant cases or lines of decision.

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.[81] 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.[82]

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.[83] 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.[84] That defense may lead us to conclude that the judge is not terribly competent, but it defeats the charge of nonneutrality.[85]

*(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

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[81] If the requirement is said to state an ideal toward which judges should strive, we have the puzzling situation in which judges are told that they ought to behave in a certain way even though they cannot in fact do so.

[82] This point is to some extent mitigated by the fact that the better judge will be more adept at constructing supple principles that can minimize the constraints. *See infra* pp. 820–21.

[83] Wechsler, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY 290, 298 (S. Hook ed. 1964).

[84] Another problem also arises when the demand of prospective neutrality is restricted to the future cases foreseeable by the judge. What we are left with is that, when case 1 arises, the judge formulates a principle, imagines three other cases (some of them, perhaps, presented — and thus rendered unquestionably foreseeable — by the parties), and decides that the principle initially formulated yields the correct result in cases 2 and 3 but the wrong result in case 4. The judge then reformulates the principle to generate the correct result in case 4 as well. If the theory is to do any work, it must demand that this modification not be purely ad hoc. But this demand proves easy to satisfy. Because the judge is accommodating an imagined case, stripped of a great deal of the information that would be available in a real case, the modified principle surely can be stated in general terms. And if we try to push harder the demand that the modification be truly principled rather than ad hoc, we find ourselves again embroiled in the incoherences of content neutrality. *See supra* pp. 805–06.

[85] The desire for competence, to be sure, does sometimes limit what a judge does. But that consideration is a point about the social psychology of those who happen to be selected as judges, *see infra* pp. 818–21, and not a point about law.

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.

I draw my example from Michael Perry's discussion of the abortion funding cases.[86] Perry, in the best recent application of the theory of neutral principles, attempts to identify the operative principle in *Roe v. Wade*, a highly abstract principle concerning the relationship between governmental powers and constitutional protections, and to criticize the Court's later ruling in *Harris v. McRae* for inconsistency with that principle.

In 1973, the Supreme Court held in *Roe v. Wade* that state criminal statutes restricting the availability of abortions are unconstitutional.[87] Seven years later, it upheld legislation that denied public funds for abortions to those otherwise qualified for public assistance in paying for medical care.[88] Perry contends that the abortion funding decision is "plainly wrong" because it "is inconsistent with the narrowest possible coherent reading" of *Roe*.[89] Perry extracts that reading as follows: the Court struck down the statutes in *Roe* because the pregnant woman's interest in terminating her pregnancy was adjudged to be weightier than the government's interest in preventing the taking of the life of the fetus. According to Perry, this conclusion entails that "*no* governmental action can be predicated on the view that . . . abortion is per se morally objectionable."[90] Perry's premise is that government is permitted to use a factor as a predicate for restrictive legislation only if that factor is entitled to no constitutional protection.

Perry rejects as "deeply flawed" and "fundamentally confused" the position taken by the Court in the funding cases

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[86] Perry, *supra* note 6.

[87] 410 U.S. 113 (1973).

[88] Harris v. McRae, 448 U.S. 297 (1980).

[89] Perry, *supra* note 6, at 1114, 1120.

[90] *Id.* at 1115–16.

and repeated by Peter Westen.[91] That position is that *Roe* barred the government from criminalizing abortions only because criminal sanctions placed an *undue* burden on the woman's interest in termination of the pregnancy; refusing to fund abortions does not similarly burden that interest. Perry claims that *Roe* is coherent only if it precludes the government from taking *any* action predicated on the view that abortion is wrong. To allow the government to take such action would force us to the "rather strange" position that the Constitution simultaneously both permits the government "to establish a legal principle" and "protect[s] a person's interest in disregarding that principle once established."[92]

I confess that I have thought about this supposed paradox as hard as I can and that I do not see anything terribly strange about it; whether we think the position is strange in fact depends on how we define principles and interests. The governing general principle might be that the government can take all actions predicated on any given moral view except insofar as they unduly burden some individual interest. Perry presumably thinks that such a principle is inconsistent with other areas of constitutional law, for it recognizes a kind of acceptance of civil disobedience that is not recognized elsewhere in the Constitution.[93] But Westen gives the example of *Coker v. Georgia*, in which the Supreme Court held that, although Georgia could make unaggravated rape — if such there be — a crime because it is morally wrong, a state could not constitutionally make it a capital offense.[94] And even if Perry is right in thinking that we do not use the principle in other areas, it remains open to say that abortion is special

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[91] *Id.* at 1117; *see* Westen, Correspondence, 33 STAN. L. REV. 1187, 1188 (1981).

[92] Perry, *supra* note 6, at 1116–17.

[93] Perry rejects the "counterexample" of Brandenburg v. Ohio, 395 U.S. 444 (1969), in which the Court protected certain kinds of advocacy from criminal prosecution even though it acknowledged that states could "take [other] action predicated on the view that such advocacy is morally objectionable." Perry, *supra* note 6, at 1118. He argues that the advocacy in *Brandenburg* is protected in order to avoid a chilling effect on truly protected speech. *Id.* at 1119. Thus, *Brandenburg*'s real protection is given to "interests *distinct from*" the interest in advocating unlawful activity. *Id.* The same argument can be developed in the abortion context, however, and in fact in any other context as well. Consider the narrow principle that government may not predicate actions on the view that abortions are immoral in cases in which the woman has not consented to the sexual contact that caused her pregnancy. *Roe v. Wade* might then be defended on the ground that governmental inquiries into whether consent had been given, particularly in light of the obvious controversy over what consent might mean, would intrude on an independent interest in informational privacy. Because refusal to fund abortions does not intrude on that interest, such refusal is permissible on this interpretation of *Roe*.

[94] 433 U.S. 584 (1977); *see* Westen, *supra* note 91, at 1188.

because, for example, it imposes on us an agonizing dilemma between terminating (potential) life and eliminating unique demands on the pregnant woman.[95] It may be that the two horns of this dilemma pose problems more difficult than those posed in other areas of constitutional law. Thus, if the entire area of abortion is relevantly different from other areas of constitutional law, it would not be nonneutral to adopt a special rule in abortion cases.

I have developed the argument this far by accepting Perry's identification of the "narrowest possible coherent principle" justifying *Roe*. But I could have attacked directly his specification of the narrowest principle. Here are two other candidates: (1) *Roe* rests on the principle that the state may take no action that would strongly influence a woman's decision to have an abortion. (2) *Roe* rests on the principle that the decision to have an abortion is entitled to special constitutional protection, the precise contours of which will vary depending on the circumstances.[96] The funding cases are arguably consistent with both principles, and, strikingly, the first of these principles might make it unconstitutional for a state to subsidize abortions. Both principles would of course have to be fleshed out before they could be put to work.[97] But the point is that Perry in fact has identified neither the only nor the narrowest principle on which *Roe* could be justified.

The argument that I have just made can be generalized. 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 only when a court in case 2 states

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[95] *See, e.g.*, Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979); Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

[96] In other words, *Roe* would be treated as if it were a case like Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), which established a general standard that could be applied only by "sifting facts and weighing circumstances," *id.* at 722. It might be thought that such a flexible principle would not be accepted as a principle at all by neutral principles theorists, but the suggested principle is properly seen as a kind of balancing test, a type of rule commonly favored by proponents of neutral principles. *See, e.g.*, P. FREUND, THE SUPREME COURT OF THE UNITED STATES 44 (1951).

[97] The first principle requires us to distinguish between laws criminalizing the abortion decision and those criminalizing theft, so that we can explain why the state is not injecting itself into the abortion decision when it prosecutes a poor woman — a Jeanne Valjean — who steals money to pay for an abortion. The second requires us to explain why the special protection is great enough to prohibit criminalization but is not enough, for example, to prohibit a requirement that parents of some minors be informed of their daughters' decisions to have abortions. *See* H.L. v. Matheson, 450 U.S. 398 (1981).

it. Behind the court's statement of what case 1 meant lies all the creativity to which the hermeneutic theory of historical understanding directed our attention. When *Roe* was decided, we might have thought that it rested on Perry's principle, but the funding cases show us that we were "wrong" and that *Roe* "in fact" rested on one of the alternatives spelled out above. 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.[98] 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 of the sort that Perry produced. 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.[99] Thus, to decide a new case, a judge must take some

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[98] *But cf.* Wechsler, *supra* note 66, at 31 (stipulating that neutrality is not a matter of adhering to precedents).

[99] Indeed, if a new case did not so depart, we ought to wonder why the later case was litigated at all.

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 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*. Just as hermeneutic interpretivism emphasizes the creativity that is involved when judges impute to the framers a set of intentions, so the retrospective approach to neutral principles must recognize the extensive creativity exercised by a judge when he or she imputes to a precedent "the" principle

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[100] 381 U.S. 479 (1965).
[101] 268 U.S. 510 (1925).
[102] 262 U.S. 390 (1923).
[103] *Id.* at 401.

that justifies both the precedent and the judge's present holding.

A second example is *Brandenburg v. Ohio*.[104] The state of Ohio had prosecuted a leader of the Ku Klux Klan for violating its criminal syndicalism statute, which prohibited advocating the propriety of violence as a means of political reform. The Court held that the conviction violated the first amendment, which, according to the decision, permits punishment of advocacy of illegal conduct only when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[105] Remarkably, the Court derived this test from *Dennis v. United States*, in which the Court had upheld convictions of leaders of the Communist Party for violating a federal sedition law.[106] This reading was, to say the least, an innovative interpretation of *Dennis*, which explicitly stated a different test — "the gravity of the 'evil,' discounted by its improbability" — that left the decision largely to the jury.[107] Putting aside the obvious effects of cold war hysteria on the 1951 decision in *Dennis*, a dispassionate observer would find it hard to reconcile the results in *Dennis* and *Brandenburg*. But again the requirement of retrospective neutrality may be satisfied if we interpret *Brandenburg*'s use of *Dennis* as the creative reworking of precedents within fair bounds.

My final example is *Bullington v. Missouri*.[108] Bullington was convicted of murdering a woman whom he had abducted. Rejecting the prosecution's request for imposition of the death penalty, the jury that found him guilty also sentenced him to life imprisonment. Bullington was granted a new trial on the ground that Missouri's system of jury selection violated his right to a jury drawn from a cross section of the community by permitting women to claim an automatic exemption from jury service. Before the new trial, the prosecution notified Bullington that it would again seek the death penalty. The question for the Court was whether imposing the death penalty in this situation would violate Bullington's constitutional right not "to be twice put in jeopardy" for the same offense.[109]

Bullington's claim faced many precedential problems, counterbalanced by one clear advantage. *Stroud v. United States*,

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[104] 395 U.S. 444 (1969).

[105] *Id.* at 447.

[106] 341 U.S. 494 (1951).

[107] *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand, J.), *aff'd*, 341 U.S. 494 (1951)).

[108] 451 U.S. 430 (1981).

[109] U.S. CONST. amend. V.

which one is obliged to note is the case of the Birdman of Alcatraz, is almost exactly like *Bullington*: conviction with life imprisonment, new trial, reconviction, and imposition of the death penalty.[110] In *Stroud* the Supreme Court upheld the power of a judge to impose the death penalty after retrial. *North Carolina v. Pearce* explicitly refused to hold that a judge's sentence of a term of years is an implied determination that a longer sentence would not be appropriate, even though a conviction for a lesser offense is an implied acquittal of greater charges.[111] Thus, though the double jeopardy clause prohibits reprosecution for the greater *charge*, it does not prohibit the imposition of a longer *sentence*. *United States v. DiFrancesco* found no violation of the double jeopardy clause in a scheme that allowed the government to appeal the sentence that a judge imposed on a person found to be a dangerous special offender.[112] All of these cases seemed to support Missouri's position that a new trial nullifies the first conviction, wipes the sentencing slate clean, and permits the defendant to receive whatever sentence would have been lawful at the first trial.

Bullington, however, relied on a pair of factors that distinguished his case from those just discussed. First, Bullington was sentenced by a jury, not by a judge. Still, the principle of *Pearce* had been extended to jury sentencing.[113] Second, though, *Bullington* was a capital case, and that fact, the defendant argued, made all the difference. Double jeopardy analysis has as one of its concerns the unfairness of keeping an accused in suspense after an apparently final action has occurred. Capital sentencing by a jury is peculiarly final and tightly constrained: the sentencer must find specific aggravating circumstances; the jury — at least in Missouri — must be convinced beyond a reasonable doubt that the death penalty is appropriate.[114] Therefore, the fact that a tightly constrained jury has refused to impose the death penalty, with all of the relief from terror that such a refusal would produce, is a relevant difference between *Bullington* and noncapital cases. It seems fair to say that the precedents were as close to equipoise as can be imagined. A decision for Bullington would depart from *Stroud* and *Pearce*; a decision for the state would depart from the cases considering jury sentencing in capital

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[110] 251 U.S. 15 (1919).

[111] 395 U.S. 711 (1969).

[112] 449 U.S. 117 (1980).

[113] Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

[114] *See Bullington*, 451 U.S. at 432–35.

cases to be special.[115] The Court held for Bullington, but the theory of neutral principles can do nothing to explain why it did so.

Once again the examples illustrate a general point. In a legal system with a relatively extensive body of precedent and with well-developed techniques of legal reasoning, it will always be possible to show how today's decision is consistent with the relevant past decisions. Conversely, however, it will also always be possible to show how today's decision is inconsistent with the precedents. This symmetry, of course, drains "consistency" of any normative content. Just as we were forced to abandon content neutrality and prospective neutrality of application, we are now also forced to abandon retrospective neutrality of application as a source of meaningful constraints in a mature legal system like ours.

The difficulties with this variety of neutral principles theory are on a par with the problems in understanding interpretivism that were noted earlier. Understanding the intentions of the framers required a special kind of creative re-creation of the past; the creativity involved in such a re-creation dashed any hopes that interpretivism could effectively constrain judicial decisions, because many alternative re-creations of the framers' intentions on any given issue are always possible. In the same way, the result of the inquiry into retrospective neutral principles theory indicates that, though it is possible to discuss a given decision's consistency with previous precedents, requiring consistency of this kind similarly fails to constrain judges sufficiently and thereby fails to advance the underlying liberal project.

*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

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[115] *See* Westen, *Death and Double Jeopardy*, LAW QUADRANGLE NOTES, Spring 1981, at 32.

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 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."[116] 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.[117] 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.[118] 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.[119] 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.

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[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. 1033 (1981) (tracing delicate balance between faithfulness to the constitutional text and accommodation to the needs of the time).

[117] *See, e.g.*, Dershowitz & Ely, Harris v. New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

[118] C. BLACK, *supra* note 116, at 82.

[119] The significance of this claim, of course, turns on the definition of "interesting." It seems certain that all cases decided by the Supreme Court would fit any reasonable definition. Given constitutional theory's focus on the role of the Supreme Court, that certainty might be enough. I suggest, however, that the claim holds even if an "interesting" case is defined as one that some lawyer finds worthwhile to pursue. If this suggestion is correct, the craft interpretation cannot constrain courts at all.

The debate over the propriety of the result in *Roe v. Wade*[120] 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.[121] 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."[122] And that was it. I will provisionally concede that this "argument" does not satisfy the requirements of the craft.[123]

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.[124] For example, John Ely argues that, although *Roe* is beyond acceptable limits, *Griswold* is within them, though perhaps near the edge.[125] 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

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

[121] *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 2–5 (1973).

[122] Roe v. Wade, 410 U.S. at 153.

[123] A bit later, I want to question even this concession. *See infra* p. 821.

[124] We have seen that one version of the requirement of prospective neutrality constrains only judges who are good enough to anticipate a large diversity of similar cases in the future. *See supra* pp. 809–10. Now we see that the craft interpretation of neutrality constrains only judges who are not good enough to impose persuasive, novel meanings on precedents. The divergence here is merely apparent: both approaches in fact constrain — to the extent that they do so at all — only the mediocre judges who can see the problems of attaining consistency but cannot resolve them.

[125] Ely, *supra* note 121, at 929–30.

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.[126] And even if *Griswold*'s logic is rejected, skilled lawyers could still rewrite *Roe* to defend Justice Blackmun's outcome.[127] There is in fact a cottage industry of constitutional law scholars who concoct revised opinions for controversial decisions.[128] 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 *Finnegan's Wake*, and Mailer writing *The Executioner's Song*.[129] 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

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[126] Roe v. Wade, 410 U.S. at 209 (Douglas, J., concurring).

[127] *See, e.g.*, Regan, *supra* note 95.

[128] *See, e.g.*, Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Pollak, *Racial Discrimination and Judicial Integrity*, 108 U. PA. L. REV. 1 (1959).

[129] Dworkin observes that a person asked to add one chapter "in the best possible way" to a collaborative novel-in-progress faces limits similar to those that precedents place on judges. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 167 (1982). He fails to appreciate that, by disrupting our expectations about what fits best, the creative author may force us both to reinterpret all that has gone before and to expand our understanding of what a "novel" is.

judges who could 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."[130] 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.[131] 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.[132] 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

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[130] This example is suggested by P. WINCH, *supra* note 63, at 29–32, which draws on L. WITTGENSTEIN, *supra* note 51.

[131] One possible rule is the following: $f(1) = 1$; for n greater than 1, if n is divisible by 5, $f(n) = n^2$; 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).

(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.[133] 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.

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,[134] 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.[135] 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.[136]

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[133] *But see* P. WINCH, *supra* note 63, at 30–31 (assuming that the problem is for practical purposes unambiguous).

[134] Tushnet, Book Review, 78 MICH. L. REV. 694, 696–98 (1980).

[135] An alternative hypothesis is that, although they see the sense that such arguments make, judges also recognize that it is not their place to attempt dramatic social change. It is also worth noting that our judicial institution as a whole is so structured that no lawyer would confront a judge with such an argument, because every lawyer knows what judges are likely to see as the range of legitimate options open to them.

[136] A central theorem of public choice theory — the Arrow Impossibility Theorem — establishes that no mechanism of social choice can simultaneously satisfy a set of

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.[137] 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.

## IV. CONCLUSION

The critiques of interpretivism and neutral principles have each led to the same point. To be coherent, each theory requires that our understandings of social institutions be stable. Interpretivism requires that judges today be able to trace historical continuities between the institutions the framers knew

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apparently uncontroversial premises, such as the premises that people's preferences are transitive and that a mechanism of social choice must not value one person's preferences above everyone else's ("the premise of nondictatorship"). *See* D. MUELLER, PUBLIC CHOICE 185–88 (1979). But if we restrict the range of choice or allow someone to specify the order in which choices get on the agenda for public discussion, the other premises can be satisfied. *See id.* at 196–99. This area is one of several in which public choice theory and Marxist theory converge. In Marxist theory, "agenda control" would be called hegemony or selection. *See, e.g.*, Offe, *The Theory of the Capitalist State and the Problem of Policy Formation*, in STRESS AND CONTRADICTION IN MODERN CAPITALISM 125, 135 (L. Lindberg ed. 1975).

[137] *See, e.g.*, L. FULLER, THE MORALITY OF LAW 53–62 (1964).

and those that contemporary judges know. The theory of neutral principles requires that judges be able to rely on a shared conception of the proper role of judicial reasoning. The critiques have established that there are no determinate continuities derivable from history or legal principle. Rather, judges must choose which conceptions to rely on. Their choice is constrained, but explaining the constraints demands a sociological explanation of the ways in which the system within which they operate is deeply entrenched and resistant to change. If this sociological explanation is to have not merely descriptive validity, but normative force as well, we find ourselves drawn into the domain of conservative social theory, in which variable individual conceptions are seen to be derivative from — and subsidiary to — an underlying societal perspective.

The problem faced by both judge and constitutional theorist is how to find or construct the requisite shared conceptions. This problem is analogous to the interpretive difficulties that confront us in many aspects of our social experience. Consider an ordinary conversation between two people. Alice hears Arthur use the word "arbogast." She thinks she knows what he means, but as the conversation continues Alice realizes that Arthur is using the word in a way that comes to seem a little strange. She interrupts, so that Arthur can explain what he means. But things get worse. His explanation shows that his entire vocabulary rests on the way that he has lived until that moment. Because Arthur's life is by definition different from Alice's, Alice finds herself left with only an illusory understanding of what Arthur says.[138] Her task is then to identify the point at which she can, so to speak, think her way into Arthur's life, so that she can understand what he means through understanding how he has developed. In this story, "understanding what Arthur means when he says 'arbogast'" plays the role of "following the rule in *Roe v. Wade*" or "remaining faithful to the framers' meaning of 'due process.'"

The question in each case is how to overcome the gaps that reflection has revealed. Of course, we go along each day with some taken-for-granted understandings of the world. But anyone can disrupt what is taken for granted simply by placing it in question.[139] Courts are institutions in which challenges

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[138] *See generally* P. WINCH, *supra* note 63 (general exploration of problems of understanding). For a collection discussing the issues that Winch raises, see RATIONALITY (B. Wilson ed. 1970).

[139] Usually such challenges have a limited scope; thus, the challengers can be viewed by the rest of us as deviant in a limited way but otherwise as part of the

to the taken-for-granted may be made as a matter of course, and the individualist premises of the liberal vision both make such challenges inevitable and demand that they be heard. But if society is to be stable, those challenges must be rebuffed in ways that preserve the shared societal understandings.

Here the parable of the conversation is central. As experience has taught us, Alice and Arthur need not give up in despair; if they keep talking, they can build bridges between their two idiosyncratic dialects. Just as the historian can understand the past through hermeneutic efforts, so can we understand each other by creating a community of understanding. But the parable also reminds us that we cannot assume that people who talk to each other are part of such a community merely because they seem to be speaking the same language.[140] Similarly, communities of understanding are not defined by geographical boundaries or by allegiance to a single constitution. They are painstakingly created by people who enter into certain kinds of relations and share certain kinds of experiences.

Some have argued that such relations demand complete equality of power and of access to material resources; others identify the requisite experiences as confrontations with scarcity or similar natural kinds of human experience.[141] For my purposes, I need not identify exactly what the prerequisites for a community of understanding are. It is enough simply to recognize that we must develop a shared system of meanings to make either interpretivism or neutral principles coherent. But in developing such a system, we will destroy the need for constitutional theory, predicated as that need is on liberal

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community of understanding. Sometimes, however, the challenges are total; they then produce a sense that our world has come apart at the seams.

[140] Bruce Ackerman's recent book, B. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980), is flawed by, among other things, the assumption that one can think of a dialogue without having a prior understanding of the language in which the dialogue is conducted or, for that matter, of the society in which the dialogue occurs. Ackerman notices this difficulty, *id.* at 71–74, but assumes erroneously that he need not discuss it.

[141] *See, e.g.*, G. LAKOFF & M. JOHNSON, METAPHORS WE LIVE BY 56–60 (1980) (all experiences presuppose a vast cultural background); J. SARTRE, CRITIQUE OF DIALECTICAL REASON (1976) (community requires a shared context of experiences of overcoming obstacles); Habermas, *Toward a Theory of Communicative Competence*, in RECENT SOCIOLOGY NO. 2, at 138, 145–46 (H. Dreitzel ed. 1970) (community requires equality of political and economic power), *discussed in* A. GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD, *supra* note 46, at 65–69, *and* R. KEAT, *supra* note 46, at 180–90, *and* T. MCCARTHY, *supra* note 46, at 272–357; *cf.* McPherson, *Mill's Moral Theory and the Problem of Preference Change*, 92 ETHICS 252, 264–65 (1982) (criticizing Mill for failing to consider the social preconditions for human choices).

individualism; the problem identified by Hobbes, Locke, and liberal thought in general disappears in a society in which such a shared understanding exists. In the end we may decide to retrieve individualism in order to reaffirm its insistence on the otherness of other people, but we can do so only after we have thought through the implications of our dependence on each other.