A PHILOSOPHICAL INVESTIGATION INTO METHODS OF CONSTITUTIONAL INTERPRETATION IN THE UNITED STATES AND THE UNITED KINGDOM

Louis E. Wolcher *

Most constitutional theorists in America and Britain are primarily interested in the contents of their respective constitutions. They pay less attention (and in Britain far less attention) to the methods that judges employ to derive those contents, and almost no attention to the philosophical aspects of judges' interpretive methods. This article attempts to redress this imbalance by giving a distinctly philosophical description of the principal methods of constitutional interpretation that judges are inclined to follow in these two countries, and by developing the important distinction between the interpretation and the reception of a constitutional text.

The act of interpretation is active and rational; the event of reception is passive and pre-rational. In a sense, the phenomenon of reception makes every judge into a kind of "strict textualist" at some point in the interpretive process. Rather than seeking to criticize the many competing methods of constitutional interpretation, or to decide which one is "best," this article merely seeks to understand them for what they are. The result is a comparative law exposition that is simultaneously legal and philosophical.

I. INTRODUCTION: THE CONCEPT OF "METHODS OF CONSTITUTIONAL INTERPRETATION"

As the highest level of positive law within the state, a "constitution" in the general sense of the word prescribes and establishes the basic structures of government, including the organs and processes of law

* Charles I. Stone Professor of Law, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, Washington 98195-3020, USA. E-mail address: wolcher@u.washington.edu.

creation and law enforcement. The constitution also can, and usually does, prescribe or preclude the contents of future statutes and other types of governmental action in three distinct ways: (1) by allocating competencies amongst the different branches of the national government (*balance of powers*); (2) by establishing the boundaries which separate the authority of the national government from that of sub-national units of government (*federalism*); and (3) by codifying certain individual (and even group) rights and liberties that government is bound to respect and enforce (*human rights*).[1] Although the distinction between method and result is sometimes difficult to discern and maintain, this article does not concern itself so much with the *contents* of the constitutions of the United States and the United Kingdom as with the *methods of interpretation* that are used to produce specific contents from the texts that comprise the constitutions. The article's goals are twofold: first, to give concise philosophical descriptions (or interpretations) of these methods, primarily from a Wittgensteinean point of view;[2] and second, to advance our understanding of the problem of judicial methods in general by comparing the practices of constitutional interpretation followed in the United States with those followed in the United Kingdom. Of course, many different social actors have occasion to interpret the constitution for a variety of public and private purposes: for example, several U.S. Presidents have publicly defended their vetoes of certain pieces of legislation on the ground that they regarded the measures in question to be unconstitutional. That said, however, we will focus in this article on judicial methods for interpreting the constitution, inasmuch as they are more readily accessible and transparent than the methods used by non-judicial actors, as well as more significant in terms of their impact on the legal system.

The most obvious formal difference between the Constitution of the United States and that of the United Kingdom is that the former is

---

[1] HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 64-65 (Bonnie Litschewski Paulson & Stanley Paulson trans., Oxford Univ. Press 1992) (1934).

[2] One of the greatest philosophers of the twentieth century, Ludwig Wittgenstein has had a considerable influence on legal theory and the philosophy of law in America, especially when it comes to thinking about what it means to "follow" a legal rule. His masterwork is PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., photo. reprint, MacMillan Co. 1964) (1953) [hereinafter WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS], and one of his most powerful discussions of rule following is contained in pages 80e-88e of that work. For a representative collection of articles about the relevance of Wittgenstein's philosophy to legal problems, see generally WITTGENSTEIN AND LAW (Dennis Patterson ed., 2004).

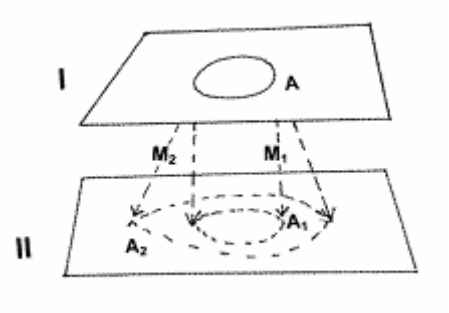
codified in a single text, whereas the latter is derived from a large number of sources: statutes, common law, royal prerogatives, unwritten customs and conventions, and treaties such as the European Convention on Human Rights. From the standpoint of the theory of interpretation, however, this difference is not as significant as what the judiciaries of both nations have in common: namely, American and British judges alike always take something as their *object* of interpretation when they are engaged in the project of construing the constitution. Whether this constitutional "object" is a discrete and well-defined document (as in the U.S.) or the widely accepted expression of a traditional set of written and unwritten institutional arrangements (as in the U.K.), the event of judicial interpretation always exhibits three formally distinct elements: (1) a constitutional "text" — an object of interpretation — in the largest sense of the word; (2) a second text — the interpretation as such — which the judge wishes to derive from the canonical constitutional text; and (3) the explicit or implicit method of interpretation with which the judge makes the passage from (1) to (2).

It almost goes without saying that constitutional interpretations are also a product of history, including the social factors that make the interpreter the person that she is and that predetermine the realm of legal answers that she experiences as plausible. To pursue this line of thinking, however, is to adopt what Ronald Dworkin calls the "external point of view of the sociologist or historian" rather than the "internal point of view" of the judge who must decide a case.[3] In other words, the causes of a decision are not the same as its grounds, even if the very project of justifying judicial results can be interpreted as biased or ideological from certain political points of view. Thus, while the concept of *history* imputes judicial decisions to their causes, in this article the concept of *methods of interpretation* gives an internal account of the different techniques that judges employ to justify and ground their decisions. Of course any given court decision may or may not make its interpretive method explicit. Indeed, judicial opinions sometimes deploy several logically distinct methods in the same case, without discussing how the methods work together or even whether their premises are consistent with one another. For reasons of analytical clarity, therefore, this article will separately describe the most important methods of constitutional interpretation as *ideal types* — logical tools for identifying

[3] RONALD DWORKIN, LAW'S EMPIRE 13 (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

and classifying the various interpretive strategies that can be found in the reports of real cases.

As Wittgenstein was the first to notice,[4] the discipline of projective geometry is an apt metaphor for thinking about the important distinction between the method and the contents of an interpretation. Think of the linguistic expression of a particular constitutional text — one that has not yet undergone interpretation in a particular case before a judge — as if it were a two-dimensional shape lying on a plane. Imagine, for example, that the phrase "due process of law," which appears in both the Fifth and Fourteenth Amendments to the Constitution of the United States, were like figure A in plane I in the following drawing:



The sense of the metaphor, in a nutshell, is just this: understanding how a judge has interpreted (or will interpret) the meaning of "due process of law" is analogous to the task of understanding how a geometer might project figure A onto plane II. Just as there are, in principle, infinite methods of projection in projective geometry (both orthogonal and non-orthogonal), so too there is at least a plenitude of methods for interpreting the meaning of the linguistic signs "due process of law": original intent, the plain meaning of the language, the underlying purpose of the words, following precedent, and so forth. In the case of geometry, it is easy to see that the shape of the figure that is projected onto plane II from plane I depends on which method is used: as the drawing shows, hypothetical method M_1 (which is orthogonal) produces figure A_1, whereas hypothetical method M_2 (which is non-orthogonal) yields the different figure A_2. The same kind of thing holds true in the case of interpreting legal language. A phrase like "due process of law" will receive one kind of interpretation if the judge adheres to the method

[4] LUDWIG WITTGENSTEIN, PHILOSOPHICAL GRAMMAR 205 (Rush Rhees ed. & Anthony Kenny trans. 1974) [hereinafter WITTGENSTEIN, PHILOSOPHICAL GRAMMAR].

of ascertaining and following the text's "original intent," and a different kind of interpretation if the judge decides to follow well-established precedent without regard to whether past cases are consistent with what the first interpreter would call the text's original intent. And even if the ultimate legal result of a particular case happens to be the same regardless of which theory of interpretation is used, the process of getting there and the judge's explanation of the result are both functions (in a quasi-mathematical sense) of the method she uses.

For present purposes, the most important thing to notice about the metaphor of projection is that one cannot infer or judge the nature of figure A just by looking at its projections (A_1 and A_2) alone. Instead, one also needs to know the *method of projection*, and only with this information in hand can one infer the nature of figure A from figures A_1 or A_2. Just as it would be mathematically naive to ask whether figures A_1 and A_2 are "accurate projections" of figure A without knowing the techniques according to which they were produced, so too it is philosophically naive to ask whether a given statement about the meaning of the constitution is "correct" without knowing the technique according to which it was produced and applied.

This procedure for thinking about constitutional interpretation has the advantage of focusing attention on the political and jurisprudential issues associated with a judge's *selection* of an interpretive method — issues which logically precede, shape, and can even predetermine the results of constitutional litigation. To illustrate: whether there are such things as non-enumerated rights in the U.S. Constitution (including the so-called "right to privacy" that lies at the legal heart, so to speak, of the abortion controversy in America) cannot logically depend on what the constitutional content "says" when considered apart from any method of reading or hearing what it says. So long as there is a category difference between a legal rule and its application there will always be a human being who "listens" to what the text has to say according to *some* method, however rudimentary it may be. The main point is that disputes about the meaning of the constitution in a given context very often cover over and obscure the existence of more fundamental disagreements about the appropriate method or methods for determining meaning.

II. JUDICIAL VERSUS LEGISLATIVE SUPREMACY ON THE MEANING OF THE CONSTITUTION

Ever since Chief Justice John Marshall declared, in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is,"[5] Supreme Court interpretations of the United States Constitution have enjoyed a very high level of immunity from revision by legislation and executive action. While the Supreme Court derives its institutional authority to interpret the Constitution solely from the existence of a concrete case or controversy within the meaning of Article III,[6] almost all legislative and executive officials at both the federal and state levels have come to accept the Court's constitutional holdings as authoritative, almost as if they were extensions of the constitutional text itself. Among other things, this implies that the Court has (or has been ceded) the power to hold federal and state statutes unconstitutional in cases within its jurisdiction that properly present the question of constitutionality, and when the Court does so the implementation of the legislative program in question is frequently stopped cold in its tracks. Indeed, the Supreme Court has invalidated more than 150 statutory provisions during the past hundred years alone.[7] Of course there are some cases in which the Court itself will defer to another branch of government on questions of constitutional interpretation (the judicially created "political question" doctrine), and every now and then commentators and public officials have asserted that there is really no authoritative interpreter of the Constitution in the United States, and that each branch of government has a co-equal duty and right to interpret the Constitution as it sees fit in the performance of its official duties.[8] Other commentators claim, more cautiously and with greater plausibility, that there is simply no definitive *theoretical* answer to the question whether there is a single authoritative interpreter of the Constitution in the United States.[9] Theory aside, however, it is widely accepted as a matter of custom and legal culture that only the cumbersome and lengthy amendment processes specified in Article V of

---

5 5 U.S. 137, 177 (1805).

6 U.S. CONST. art. III, § 2.

7 Martha Neil, *Cases & Controversies: Some Decisions Are All the Rage — Literally*, ABA J. 41 (Oct. 2005).

8 Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985-86 (1987).

9 Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 32 (2d ed. 2002).

the Constitution can overturn a Supreme Court decision that renders a specific and unqualified constitutional interpretation.[10]

It is obvious that the relative degree of finality of Supreme Court decisions on the meaning of the Constitution must be distinguished from their infallibility, for as Justice Robert Jackson famously remarked in *Brown v. Allen*, "We are not final because we are infallible, but we are infallible only because we are final."[11] Nevertheless, the fact of finality raises the stakes, both politically and jurisprudentially, on the question of *how* the Supreme Court does or should go about the task of interpretation. In the United Kingdom, on the other hand, the stakes are much smaller than in the United States on the question of which methods of interpretation judges do or should employ in deciding cases that raise constitutional issues. This is because the British Constitution consists of a polyglot of texts and arrangements that can always be supplemented, revised, and even repealed by Parliament.[12] In short, in the United Kingdom the contents of the Constitution (as interpreted by the courts) are subordinate to the principle of legislative supremacy, whereas in the United States it is the other way around. This is why it is often said, albeit with some overstatement, that in the United States the Constitution is what the Supreme Court says it is, but in Britain the Constitution is what Parliament says it is. It is no wonder that American lawyers, judges, and legal academics pay a great deal of attention to methods of constitutional interpretation: as a practical matter these methods replace the political process as the primary external (or "objective") constraint on judicial authority to say what the law of the Constitution is. As a consequence of the foregoing factors, questions concerning the proper method of constitutional interpretation occupy a much greater role in American academic and political thought than they do in the United Kingdom, and, not surprisingly, the American literature on the subject is significantly larger. To the extent that questions of constitutional interpretation do arise in Britain, they tend not to be different in principle than questions of statutory interpretation or common law development generally. For that reason this article will devote most of its attention to the various interpretive methods used and debated within the United States, and will return to the case of the United Kingdom only

---

[10] *See generally* U.S. CONST. art. V.

[11] 344 U.S. 443, 540 (1953).

[12] *See* CONSTITUTIONS OF MODERN STATES: SELECTED TEXTS AND COMMENTARY 182 (Leslie Wolf-Phillips ed., 1968).

after the main problems and lines of controversy concerning the interpretation of the American Constitution have been clarified.

III. METHODS OF CONSTITUTIONAL INTERPRETATION IN THE UNITED STATES

It is of course factually possible for a judge consciously to manipulate the techniques of constitutional interpretation so as to justify a result that she has reached on purely personal grounds, and undoubtedly this has occurred more than a few times during the long history of American constitutional law. But pretending to interpret is not the same as interpreting, and this article is concerned with describing and evaluating only the latter activity, leaving for another day the task of developing a philosophically robust account of the phenomenon of pretence in the American judicial system. Thus, we will henceforth focus our attention on the paradigmatic situation of a judge who seeks *in good faith* to determine what she takes to be the "command of the Constitution" and to apply the meaning of this command to a particular dispute without *consciously* attempting to smuggle in her own personal values and preferences. Although it is obviously true that such values and preferences affect the result through psychological and social mechanisms of which the judge who acts in good faith is unaware, it bears repeating that this article seeks to analyze the internal point of view of judges who wish to ground their interpretations and not the external point of view of social scientists and historians who wish to explain judicial behavior by its causes.

As the previous remarks may suggest, the purely psychological hallmark of a genuine act of judicial interpretation is the judge's conscious submission to an authority that is external to herself — in this case, the text of the Constitution as mediated through one or more methods of interpretation that the judge employs to construe it. Indeed, the formula *Legal Text + Method of Interpretation + Good Faith Judicial Work = Legal Meaning* formally describes none other than the structure of the much-vaunted value, in democratic societies at least, of the rule of law itself. In the United States, primarily because of the earlier-noted general acceptance of judicial supremacy on matters of constitutional interpretation, the subject of judges' interpretive practices in construing the Constitution looms large both in political discourse and in legal theory. Just as American political rhetoric frequently opposes

the figure of the "strict constructionist" to that of the "judicial activist," so too the theory of interpretation opposes "originalism" and "textualism" to another set of methods that can be called, simultaneously, both "non-originalist" and "constructivist." Given that submission to an external constraint on the determination of meaning is both a logical and psychological precondition of the activity known as "legal interpretation," the debate in America about which method is best or most appropriate in a constitutional democracy is not, strictly speaking, about a choice between lawfulness and lawlessness in judicial decision making. Rather, this debate refers to a choice amongst interpretive constraints, *all* of which are external and law-like in Herbert Wechsler's precise sense of the term "neutral principles": rational criteria of sufficient neutrality and generality to cover many other cases in the future, as opposed to naked "act[s] of willfulness or will" that seek only to establish a particular result in one case.[13] That a judge's submission to a particular interpretive constraint can (and usually does) produce a variety of social and political consequences is obvious; but it must be stressed again that this article seeks to understand the interpretive process *as such* — i.e., as a *phenomenon* — rather than to subject it to social criticism.

A. Strict Textualism

Since we have left the phenomenon of judicial pretense for another day, it behooves us to ask what a judge who in good faith employs a "textualist" method of interpretation *actually does* in the course of generating constitutional meaning. In this article we are interested in understanding the activity that certain judges *call* "textualism," leaving to more metaphysically inclined minds the task of deciding whether textualism is "really" possible or true. With Wittgenstein, we will not try to specify the act of interpretation by means of the *object* that is interpreted, but rather by the *technique of interpretation*.[14] I must emphasize that an investigation of common methods of interpretation is not the same as an investigation of the common opinions of those who follow them. The "truths" of law are not determined by a consensus of opinion, for the opinion that "X" means Y, however widespread, does not tell us how the sign "Y" itself is interpreted and applied. As

---

[13] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9, 11 (1959).

[14] LUDWIG WITTGENSTEIN, WITTGENSTEIN'S LECTURES ON PHILOSOPHICAL PSYCHOLOGY, 1946-47, at 48 (P.T. Geach ed., Univ. of Chi. Press 1989) (1988).

Wittgenstein puts it, an answer to the question "How is that meant?" merely "exhibits the relationship between two linguistic expressions."[15] No, what is called a technique or method of constitutional interpretation is not determined by a consensus of opinion, but rather by a consensus of *action*:

> There is no opinion at all; it is not a question of opinion. They [the truths of logic] are determined by a consensus of action: a consensus of doing the same thing, reacting the same way. There is a consensus but it is not a consensus of opinion. We all act the same way, walk the same way, count the same way.[16]

Thus, if we notice that there are two methods of interpreting the same expression in the Constitution, we should not take this to mean that the expression has "two meanings"; *rather, we should take it to mean that in applying the same expression people just proceed according to different methods*. Period. To put our motives succinctly, we simply draw attention to what judges are really doing and refrain from making any grand claims about the meaning of the Constitution.[17]

To begin our investigation of textualism, it should be noted that although it is quite common for judges in constitutional cases to read one provision of the constitution in light of another, this kind of intra-textual hermeneutics is not what most American lawyers mean when they speak of "strict textualism" in constitutional law. What is more, although textualism and originalism are often conflated, sometimes under the label "interpretivism," they are nonetheless analytically distinct methods. To be sure, it is possible to identify a mode of "textual" interpretation at work in decisions that inquire into the meaning that the words of the Constitution had for "the framers" or for the "average person in the street in 1789." But the latter method is best called originalism rather than textualism, because in its purest form strict textualism is inconsistent with *any* kind of interpretation, including even interpretation according to the original intent of the framers. In a nutshell, strict textualism is the belief that:

---

[15] WITTGENSTEIN, PHILOSOPHICAL GRAMMAR, *supra* note 4, at 45.

[16] LUDWIG WITTGENSTEIN, WITTGENSTEIN'S LECTURES ON THE FOUNDATIONS OF MATHEMATICS: CAMBRIDGE, 1939, at 183-84 (Cora Diamond ed., Univ. of Chi. Press 1989) (1976).

[17] *See* FRIEDRICH WAISMANN, WITTGENSTEIN AND THE VIENNA CIRCLE 186 (Brian McGuinness ed., Joachim Schulte & Brian McGuiness trans., 1979).

> [I]t is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one — no matter what his or her situation or point of view — can ignore.[18]

For a judge who employs this method there is no occasion to interpret any words and sentences that she receives as being absolutely pellucid in relation to the dispute that she must decide. When, for example, Article II, Section 1 of the Constitution specifies that the President's term of office is "four Years," the strict textualist just receives and knows, without experiencing the slightest doubt, that the word "Year" refers to the amount of time that it takes the planet Earth to make one circuit around the Sun, as opposed to, say, the amount of time that it takes the planet Jupiter to make such a circuit, even though the linguistic sign "Year" does not on its face "say" that the former interpretation is correct.[19]

The first step towards any philosophically sophisticated understanding of textualism is to recognize that there is a fundamental sense in which we are all textualists, for there is an important distinction between the *interpretation* and the *reception* of a text — *any* text. At its most basic level, interpretation is the activity of transforming one linguistic sign into another linguistic sign according to some method of transformation. Reception, on the other hand, is the activity of using a linguistic sign without experiencing any doubt about the sign's role in one's actions. It is possible to notice the distinction between interpretation and reception by paying close attention to what actually happens when we respond to authoritative legal texts; if we do this, Wittgenstein notes that "in some cases you will find that you do something which might be called interpreting before obeying, in some cases not."[20] For example, most native English speakers would *receive* the word "Year" in Article II, Section 1 without consciously reflecting on the possibility that it is ambiguous or vague: they would simply see

---

[18] Stanley Fish, *The Law Wishes to Have a Formal Existence*, *in* THE FATE OF LAW 159, 161 (Austin Sarat & Thomas Kearns eds., 1991).

[19] U.S. CONST. art. II § 1.

[20] LUDWIG WITTGENSTEIN, THE BLUE AND BROWN BOOKS 3 (2d ed. 1969) [hereinafter WITTGENSTEIN, THE BLUE AND BROWN BOOKS].

"Year" and apply it conventionally — in an "automatic" way[21] — without any prior reflection or rational calculation. In such cases it would be misleading to say that people "interpret" the word, or even recognize its "meaning," for both interpretation and meaning-recognition are conscious processes in which a linguistic sign is seen as representing or signifying something other than itself. Formally speaking, "Whenever we interpret a symbol in one way or another, the interpretation is a new symbol added to the old one."[22] Hence the interpretation or meaning of the sign "X" is always some other sign, "Y," which itself can (and indeed must) be unreflectively received in a certain way in order to constitute the ground of subsequent human action. Another way to put this is to say that the task of interpretation depends on an antecedent state of doubt, regardless of the basis on which the doubt rests, and that where there is no doubt there is also no interpretation.

Consider a native German speaker trying to discover the length of an American President's term of office: imagine that she consults the text of the Constitution but does not immediately understand the word "Year" in Article II, Section 1 because she has little or no competence in English. In this case she would need to translate the English word "Year" into the German word "*Jahr*" (by using an English-to-German dictionary, for example) before being able to understand or apply the Constitution's meaning on this point. Her act of interpretation would consciously transform one linguistic sign ("Year") into another linguistic sign ("*Jahr*") by means of a method of transformation (a dictionary). It is important to recognize that the linguistic sign comprising the translation itself (in this case "*Jahr*") normally is not then further interpreted; rather, it is simply received as a basis for action without any further reflection. However long the act of interpretation takes, and however detailed its product may be, there will eventually come a point in time at which the linguistic sign that constitutes the *final* interpretation of the original linguistic sign is simply understood without more ado. Wittgenstein aptly summarizes the important distinction between interpretation and reception by saying that one can keep on interpreting a linguistic sign like "Year" — or for that matter any other provision of the United States Constitution — for as long as one wants,

---

[21] See H.L.A. HART, THE CONCEPT OF LAW 123 (2d ed. 1994) [hereinafter HART, THE CONCEPT OF LAW].

[22] WITTGENSTEIN, THE BLUE AND BROWN BOOKS, *supra* note 20, at 33.

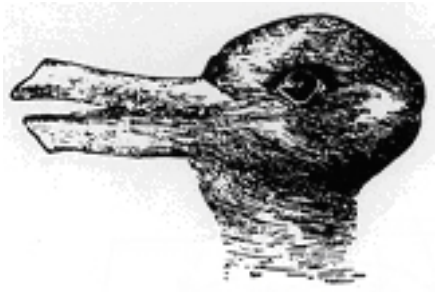
"[b]ut adopt whatever model or scheme you may, it will have a bottom level, and there will be no such thing as an interpretation of that."[23]

The distinction between interpretation and reception transcends the distinction between the external and internal points of view on law. To be sure, the way someone receives a text can always be viewed, from the external standpoint of an observer, as being a function of history, culture, and personal circumstance, and therefore as radically relative to the context of the one who receives it. And it is undeniably true that the deeds that depend upon reception, such as the application of the law to a particular case, are at least in some sense contingent on the receiver's concrete social and psychological position. Nevertheless, the interpretation/reception distinction bridges the gap between the internal and external points of view on law by demonstrating the limits of legal interpretation, or rather, of what is called "legal interpretation." It is not a contradiction, and still less a reproach, to say that a judge's interpretation of a legal text is simultaneously well founded *and* unfounded, for being well founded means that the interpretation follows from the original text according to this or that accepted method of transformation, whereas being unfounded means that the judge simply knows how to go on — how to *act* — with the signs that make up the interpretation itself without feeling the need for any additional grounding. If the distinction between the external and the internal points of view on law rightly draws attention to the difference between the *causes* and the *grounds* of a judge's decision, then the distinction between the interpretation and the reception of a legal text stays within the realm of grounding as such in order to avoid mythologizing it. The latter distinction merely provides a phenomenological description of what the judicial act of giving grounds for an interpretation actually is — how it is lived as a phenomenon — and, in doing so, it also shows or suggests the most that any act of grounding could possibly be.

If the phenomenon of reception proves that everyone eventually becomes a textualist at *some* point in the interpretive process (if only at the last point), then someone who calls herself a *strict* textualist simply stops the interpretive process before it begins, without pursuing the white rabbit of doubt down the interpretive rabbit hole. The words of the Constitution mean exactly what they "tell" the strict textualist they mean in an initial event of reception that is devoid of all doubt and that is missing any self-conscious extraction of meaning. This event of

[23] *Id.* at 34.

reception can be profitably compared to the phenomenon of seeing only one aspect of an ambiguous figure. In the context of a well-known gestalt drawing called the duck-rabbit, for example, it is possible to see what the picture represents in at least two different aspects. If you look at it one way, it appears to be a rabbit; but if you look at it another way, it appears to be a duck:



In the *Philosophical Investigations*, Wittgenstein notes that there may be certain people who have always seen this figure as, say, a rabbit, and have never seen it in any other way.[24] For them the figure would clearly be the picture of a rabbit and only a rabbit. Indeed, Wittgenstein also observes that there could even be people who are "blind" to the possibility of seeing the figure as a duck despite having the figure's ambiguity pointed out to them in no uncertain terms. The twin phenomena of *seeing-as* and *aspect blindness* are perfect metaphors for understanding the event of reception as it is experienced by the strict textualist: she is like someone who is capable of seeing the figure of the duck-rabbit in only one of its aspects, and who goes on to insist that it "clearly and plainly means" only this one thing. Such a person would suffer from an absence of imagination (or any sense of ambiguity) that is analogous to aspect blindness. She would tend to judge non-standard interpretations of what she calls clear linguistic signs like duck-rabbits as plainly wrong and irrational rather than as just plain different. To borrow Catherine MacKinnon's extremely apt phrase, strict textualists

[24] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, at 194e.

usually represent their own point of view on the meaning of the Constitution as the "standard for point-of-viewlessness."[25]

If called upon to justify the resulting decision, the strict textualist will assert that her method is the quintessential example of judicial restraint, inasmuch as it follows the explicit words written down by the framers of the Constitution itself rather than attempting to alter the meaning of those words by an act of interpretation that by definition supplements the authoritative language of the Constitution with language written by unelected judges.[26] In this respect strict textualism can profitably be compared to those forms of religious fundamentalism whose adherents believe that holy texts are the words of God that do not need to be interpreted by human beings in order to be immediately understood. That strict textualists, like religious fundamentalists, sometimes (or often) *disagree* among themselves about what the canonical text "says" is of course a function of the fact that history touches everyone at least somewhat differently in distributing its effects, just as a widespread *consensus* about meaning shows that history often produces similar effects amongst similarly situated people. That said, however, it is important to understand that any subsequent agreements or disagreements about the contents of received meanings are not, strictly speaking, ingredients of the phenomenon of reception itself, without which no text could ever become an element of human behavior. If, as some of their critics say, strict textualists are uncritical and linguistically naive in approaching the *beginning* of the judicial process, then the point of bringing out the difference between interpretation and reception is to show that in the *end* they behave just like everyone else. As Wittgenstein puts it, "When I obey a rule, I do not choose. I obey the rule *blindly*."[27]

B. Originalism

The so-called "strict originalist" determines meaning according to two and only two criteria: (1) the literal text of the Constitution; and (2)

---

[25] Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 635, 638-39 (1983).

[26] *See, e.g.*, Raoul Berger, *Ely's Theory of Judicial Review*, 42 OHIO ST. L.J. 87 (1981) ("[A]ctivist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people's representatives."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3-4 (Fall 1971).

[27] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, at 85e.

the specific intent of those who drafted and/or ratified that text. The origin of this attitude towards legal interpretation can be traced to Aristotle, who argued in the *Nicomachean Ethics* that in cases of doubt about the meaning of a law a judge should endeavor "to say what the legislator himself would have said had he been present, and would have put into his law if he had known."[28] Thus, from the standpoint of strict originalists like dissenting Justice George Sutherland in *Home Building & Loan Ass'n v. Blaisdell*, "[t]he whole aim of construction, as applied to a provision of the Constitution, is…to ascertain and give effect to the intent of its framers and the people who adopted it."[29] For judges like Sutherland, the surest guide to authorial intent is to read the words of the Constitution for the norms that they state or clearly imply,[30] and in this respect most strict originalists are also textualists, at least with respect to those portions of the Constitution that they receive (without doubt) as being clear in meaning. As for those provisions of the Constitution that virtually everyone admits are vague or ambiguous ("equal protection" and "necessary and proper," to cite two examples), the strict originalist looks solely at the written historical record of the context in which the text in question was proposed and ratified in order to determine what the framers and/or those who ratified the provision must have had in mind as its specific purpose.[31] For example, a perfectly consistent strict originalist construing the Equal Protection Clause of the Fourteenth Amendment would find it highly relevant, if not conclusive, that the congressmen who ratified this provision in 1866 also approved of formal legal segregation by race in the public schools of the District of Columbia. She might very well say that this evidence of Congress's specific intent in 1866 does not allow the Supreme Court to declare (as it did in *Brown v. Board of Education*), that public school segregation violates the Equal Protection Clause, even if it is true that general

---

[28] Aristotle, *Nicomachean Ethics*, *in* THE COMPLETE WORKS OF ARISTOTLE 1729, 1796 (Jonathan Barnes ed., 1984).

[29] 290 U.S. 398, 453 (1934).

[30] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980).

[31] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 9-11 *passim* (1997). Although it is important to distinguish the specific intent of the drafters of a constitutional provision (Berger's point of reference) from the historical practices and understandings of the time from which one may deduce authorial intent as a general matter (Scalia's point of reference), in the end these two approaches both proceed on the assumption that the meaning of the Constitution is fixed once and for all by the historical intent of the framers. *See* Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L.REV. 385 (2000).

American attitudes about the legitimacy of racial apartheid have changed since the nineteenth century.[32] From the standpoint of strict originalism the meaning of the Constitution is immutably fixed by its language and its specific historical intent, and the only legitimate way for constitutional meaning to change is through the process of formal amendment.

The strict originalist, like the textualist, believes that her method for interpreting the Constitution is the only one that is consistent with the democratic value of majority rule: if "We the People" (i.e. propertied white male citizens) made most of the basic constitutional rules in 1789 and 1791, then the different "we the people" of 2005 have no alternative but to live with their predecessors' choices unless and until they are able to assemble the legislative supermajorities necessary for a constitutional amendment.[33] To be sure, the Constitution contains numerous constraints on the democratic principle of majority rule, and numerous protections of individual rights and liberties against majoritarian abuse. Yet from the point of view of a strict originalist the scope of these constraints, rights, and liberties is the product of what the text says and what those who adopted it intended it to mean. In *Wilson v. Arkansas*, Justice Clarence Thomas furnished an excellent example of how this method works in practice when he ruled for the Court that police officers must "knock and announce" before searching a residence, *not* because the right to privacy outweighs the needs of law enforcement in such cases, or because such a result follows from precedent, but because this particular requirement happens to have been the state of the law in 1791, when the Fourth Amendment was ratified.[34] Since federal judges are not elected but rather appointed for life, the strict originalist thinks that federal judges have no duty and no right to make value choices that are different from those the framers made.[35] Whenever the Supreme Court declares an area of social or individual life "off limits" to legislative

---

[32] 347 U.S. 483 (1954).

[33] *See* U.S. CONST. pmbl. For an explanation of the strict originalist viewpoint, see, e.g., Bork, *supra* note 26, at 3-6 (Originalism is democratic because the "people" consented to the adoption of the Constitution, and "a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society."); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1482, 1484-85 (1985).

[34] 514 U.S. 927 (1995).

[35] *See* Bork, *supra* note 26, at 4-6. *See also* Edward J. Melvin, *Judicial Activism: The Violation of an Oath*, 27 CATH. LAW. 283, 284 (1982) ("[W]hen a judge takes his oath to uphold the Constitution he promises to carry out the intention of its framers.").

interference, its decision *pro tanto* chills or annihilates the normal exercise of democratic processes in that area. Hence the theory of strict originalism also maintains that when the constitutional text is silent on the question of whether a particular legal right exists the courts have no business declaring that it does, and must defer to the action (or acquiesce in the inaction) of Congress and state legislatures concerning the subject matter in question.

Not all self-identified originalists adhere to every tenet of strict originalism. It is possible to identify a kind of *moderate originalism* in American jurisprudence that, although it agrees with strict originalism on the proposition that the meaning of the Constitution is fixed by its language and the framers' historical intent, takes a broader view of what constitutes that intent.[36] Since judges always deal with constitutional rules that are meant to be general in scope, and since the original intent of the framers must be described at *some* level of generality, this means that the judge's choice of the relevant level of generality will usually determine the result of a case or line of cases. That judges have discretion to choose the level of generality with which they characterize *precedent* is a feature of the interpretive process that has been well known at least since the early days of American Legal Realism.[37] Moderate originalists simply apply this basic insight to the context of characterizing the *intent* of the framers. To combat the apparently unbridled judicial discretion that the choice of the level of generality seems to entail, strict originalists like Justice Antonin Scalia have called for the framers' intent to be determined at the most specific level of abstraction, so as to leave open the largest possible space for subsequent legislative discretion.[38] However, it is precisely at this point that moderate originalism distinguishes itself from the strict form of this method: the former stands ready to construe authorial intent more generally than the latter, at least in certain cases, especially those involving the protection of individual rights.

Thus, for example, a moderate originalist might reject an interpretation of the Fourth Amendment such as that given by the Court

---

[36] *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980) (Claiming that moderate originalists are "more concerned with the adopters' general purposes than with their intentions in a very precise sense").

[37] *See* Herman Oliphant, *A Return to Stare Decisis*, 14 ABA JOURNAL 71, 72-73 (1927).

[38] Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J.) (plurality opinion); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (1997).

in *Olmstead v. United States*, which permitted the government to place warrantless wiretaps on telephones primarily on the ground that the technologies of telephones and wiretapping were completely unknown in 1791 and hence are not mentioned in the text of the amendment or in its historical record.[39] Instead, the moderate originalist might favor an interpretation that describes the framers' intent as keeping "the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed."[40] If it is true, as the Court in *Olmstead* observed, that the framers of the Fourth Amendment intended to protect "material things" such as persons, houses, papers, and effects from unwarranted governmental intrusion, it is no less true that they *also* intended to protect certain "areas of private life": the former was their intended means, while the latter was their intended end. The difference between these two descriptions does not consist in the one being true and the other false, but rather in the level of generality that is chosen to describe (accurately in *both* cases) what the framers' intent was. To borrow Ronald Dworkin's important distinction, the moderate originalist relies on the framers' general "concepts" rather than their particular "conceptions,"[41] thereby allowing judges to interpret the meaning of the Constitution so as to respond to changing historical circumstances without precipitating the need for a constitutional amendment every time a hitherto unforeseen technology or social phenomenon arises. In this respect moderate originalism shares with non-originalist modes of interpretation at least a certain degree of acceptance of Chief Justice Marshall's well-known dictum, in *McCulloch v. Maryland*, that "we must never forget that it is a *constitution* we are expounding…a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[42]

Finally, it should be noted that there is another kind of originalism that agrees with the general premise that the determination of constitutional meaning should be guided by original intent, but that

---

[39] 277 U.S. 438 (1928).

[40] Berger v. New York, 388 U.S. 41, 59 (1967) (effectively overruling *Olmstead*, 277 U.S. 438 (1928)).

[41] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977). *See also* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063, 1091-92 (1980-81) ("The fact is that all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral.").

[42] 17 U.S. 316, 407, 415 (1819).

distinguishes itself from the positivistic bent of strict originalism by appealing to the alleged *natural law* underpinnings of the Constitution. Despite the fact that the founders had to make certain compromises that were inconsistent with natural law in order to induce the slave-holding states to ratify the Constitution, "natural law originalists" observe that the general intellectual milieu of the educated elite in the late 1700s, as well as important founding documents such as the Declaration of Independence, the Preamble to the Constitution, and the Federalist Papers, are all replete with explicit and implicit references to natural law.[43] From this evidence of the intellectual history surrounding the adoption of the Constitution they draw the conclusion that the original intent of the framers was to write a text the ultimate purpose of which was to achieve the ends of government as described by a certain enlightenment conception of natural law — one which embraces fundamental values such as the consent of the governed, the rule of law, separation of powers, and individual rights.[44] Therefore, natural law originalists believe that courts can and should interpret the text of the Constitution in light of its natural law purposes — not because (or just because) this is the morally right thing to do, but because this was how the authors of the Constitution themselves conceived of the text's meaning.[45]

It is obvious that to be of any use in interpreting the text of the Constitution, original intent in any of its many forms must be *expressed* in language. That is, "original intent" must find its way into another text, exterior to the primary constitutional text, which judges consult in order to ascertain the meaning of the latter. Once a judge determines it, the linguistic expression of "original intent" — whether in its strict, moderate or natural law form — will lead to different outcomes depending on the method by which *it* in turn is interpreted. In other words, the legally relevant constitutional text "X" can indeed be interpreted in light of original intent "Y," but the passage from the latter to the application of the Constitution in a real case creates a brand new problem of interpretation. Indeed, one might even be tempted to suppose that the process of interpretation according to the tenets of

---

[43] *See generally* U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE (U.S. 1776); THE FEDERALIST (Alexander Hamilton).

[44] *See* Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 S. CAL. INTERDISC. L.J. 549, 557 (1996); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L.REV. 277, 393-96 (1985).

[45] Kesler, *supra* note 44, at 563-64.

original intent logically leads to an infinite regress, with new symbols together with new methods for interpreting those symbols being generated every time an act of interpretation adds words to those that are contained within the four corners of the object of interpretation as such. However, this temptation should be resisted. As the previous discussion of the phenomenon of reception shows, the process of interpretation *in fact* always comes to an end at some point — the point at which there is no doubt remaining about what the words that make up the interpretation itself require the actor to do.[46] Although many philosophers have noticed this fact, none has expressed it more beautifully than Pascal:

> Nothing, according to reason alone, is just in itself; all changes with time. Custom creates the whole of equity, for the simple reason that it is accepted. It is the mystical foundation of its authority; whoever carries it back to first principles destroys it.[47]

Take a look at Supreme Court opinions discussing the original intent of the Constitution and you will find that reason's end-point — the place where all doubt and interpretation ceases — usually comes very soon after the author expresses what she takes to be "original intent."[48] The terminus of any given empirical application of the methods discussed in this section is characterized by a judge "just knowing" (without any further reflection) what original intent "Y" requires her to do in the case at hand. Reason is active, while reception is passive: if the one actively transforms "this" into "that," the other passively accepts "that" for what it is. Reason's interpretations are to the phenomenon of reception as being awake is to sleeping: one might even say that reception allows reason to get its much-needed beauty sleep. Moreover, neither the faculty of reason nor the reasonable could be what they are without the

---

[46] *See supra* pp. 12-16.

[47] BLAISE PASCAL, PENSÉES: THE PROVINCIAL LETTERS 101 (1941).

[48] *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 931-34 (arguing that a survey of history leads to the conclusion that the original intent of the Fourth Amendment requires police to "knock and announce" before entering site to be searched and then immediately concluding, "We now so hold"); Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (referring to a survey of historical antipathy to homosexual acts and concluding that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching"); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 24-40 (1991) (Scalia, J., concurring) (relying upon a long survey of history regarding punitive damages in civil actions to conclude that "[s]ince jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity.").

assistance of a primordial phenomenon (reception) that in itself is neither reasonable nor unreasonable, but rather constitutes the condition of the possibility of the linguistic opposition that we draw between the "reasonable" and the "unreasonable."

C. Non-Originalism

In order to avoid confusion, we will say in this article that the term "non-originalism" refers to any purely *negative* theory that adopts a posture of critical opposition to the premises and practices of originalism and textualism. We will use the word "constructivism" to name a number of different *positive* methods for interpreting the Constitution, all of which also distinguish themselves from originalism and textualism by giving one or more critiques of them. In other words, a non-originalist judge does not just reject originalism and textualism — for this alone would leave her own constitutional interpretations theoretically rudderless — she also necessarily accepts a different positive method for interpreting the Constitution. In this section we will take up the critique of originalism and textualism first, and then, in the next section, we will discuss the three most important varieties of constructivism: following and incrementally adapting the doctrine laid down in precedent (*evolutionism*), construing the Constitution in accordance with contemporary values (*moral readings of the constitution*), and judicial policy-making (*pragmatism*).

The non-originalist critique of originalism and textualism begins by noting that a truly radical purging of Supreme Court precedent would be required in the event that these methods were to be *consistently* applied to all questions of constitutional interpretation. Literally hundreds of cases and lines of authority would have to be revisited and reconstructed from the ground up.[49] For example, over the past century and a quarter the Supreme Court has repeatedly "incorporated" several provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, thereby requiring state governments to respect certain fundamental individual rights such as freedom of speech and religion that were binding only on the federal government prior to the adoption of the amendment.[50] Moreover, the Court has done this largely without

[49] *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-13 (1975).

[50] *See, e.g.*, Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) (right to just compensation under Fifth Amendment); Fiske v. Kansas, 274 U.S. 380 (1927) (freedom of speech under First Amendment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free

the benefit of any explicit authority in the text of the Fourteenth Amendment or in the historical record of its adoption — a method of proceeding that is obviously dubious, if not illegitimate, from the points of view of both textualism and originalism.[51] Nevertheless, non-originalists claim that the uncertainty and profound disruption of settled expectations that would follow upon a truly radical change of these and other precedents according to the strict tenets of originalism and textualism would give affront to one of the most cherished values underlying the rule of law: namely, maintaining judicial continuity in the present with the official acts performed by judges in the past.[52]

As for the alleged imperative to "strictly construe" the language of the Constitution, non-originalists also point out that numerous difficulties and absurdities would arise if this kind of textual formalism were applied to all parts of the Constitution. For example, are women currently ineligible to become President of the United States because the text of the Constitution refers to the president as "He" and because the framers plainly intended that presidential candidates be male?[53] As this example suggests, non-originalists assert that although originalism and textualism both claim to be democracy-enhancing (inasmuch as they try to preclude constitutional evolution through "loose" interpretations made by unelected judges), in practice they can operate in an anti-majoritarian way by rigidly tying the law of the present to an outdated set of assumptions and preferences that the vast majority of people in the current society do not share.[54] Lawrence Lessig, a non-originalist academician, implies that there is no easy answer to the question of which approach — originalism or non-originalism — is more consistent with democracy when he asks, "What does fidelity [to the Constitution]

---

exercise of religion under First Amendment); Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment right to be free of unreasonable search and seizure); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel under Sixth Amendment); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment right to be free of cruel and unusual punishments).

[51] U.S. Const. amend. 14. *See also* CHEMERINSKY, *supra* note 9, at 18 (noting that the framers of the Fourteenth Amendment did not intend to apply the Bill of Rights to the states); Grey, *supra* note 49, at 711-12.

[52] Grey, *supra* note 49, at 710.

[53] U.S. CONST. art. II, § 1, cl.1 ("He shall hold his Office . . . ."); *see* Richard B. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 795-97 (1983).

[54] Lawrence Lessig, *Fidelity in Constitutional Theory: Fidelity as Translation: Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1416 (1997); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 379 (1982) (noting the "problem of explaining why intentions of long-dead people from a different social world should influence us").

require when what they [the framers] presupposed is no longer presupposed by us?"[55] It has even been argued that a certain degree of Supreme Court "activism" can be democratically justified by the fact that under Article III, Section 2 of the Constitution, Congress possesses the power to make "Exceptions" to the Court's appellate jurisdiction, thereby ensuring at least some degree of democratic control over the ability of the Court to impose values that the People's representatives reject.[56]

Other non-originalists point out that there is no unambiguously knowable "intent of the framers" that *could* be followed, even if it were desirable to do so.[57] Determining a single intent of the framers concerning a given provision of the Constitution is often extremely difficult if not impossible, inasmuch as the historical record is frequently incomplete, inaccurate, and sometimes self-contradictory. What is more, the entities that ratified the Constitution and its amendments were not a single author — they were *collections* of a large number of individuals (for example, state legislatures and Congress). Non-originalists point out that a collectivity cannot rightly be said to possess the attribute of intentionality except in a purely metaphorical sense.[58] Yet originalists seem to think or pretend otherwise, thereby unjustifiably reifying collectivities as a person-with-an-intent based on the model of a single author.[59] Some non-originalists have also noted that there is absolutely no evidence that the framers and ratifiers of the original Constitution believed that subsequent interpretations of their work would or should rely on documentary sources between 1787 and 1789 to determine constitutional meaning, and that there is, on the contrary, positive evidence that they believed that the meaning of the Constitution would and should only become evident over time, in response to changing

---

[55] Lessig, *supra* note 54, at 1416.

[56] U.S. CONST. art. III, § 2; MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 125-39 (1982).

[57] *See* CHEMERINSKY, *supra* note 9, at 24.

[58] *See* Levinson, *supra* note 54, at 379 (1982) ("Even literary critics most committed to the existence of objective meaning through recovery of authorial intent . . . admit that their approach applies only to individually authored works, and therefore cannot be used to analyze a document like the Constitution."); John Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L.REV. 502, 508-09 (1964).

[59] *Compare* Brest, *supra* note 36, at 214 (arguing that "an intentionalist must necessarily use circumstantial evidence to educe a collective or general intent") *with* Levinson, *supra* note 54, at 379 (noting that the concept of authorial intent applies only to works written by a single author).

historical circumstances.[60] This evidence of the original understanding of original intent gives rise to a strange kind of logical reversal or paradox: strictly speaking, the tenets of originalism would require judges to be non-originalists if the framers themselves intended that future judges would *not* be bound by their specific intentions and conceptions. If, as one constitutional historian has said, the prevailing rules of interpretation in the late eighteenth century "did not yet permit the recourse to historical evidence that a sound theory of originalism would require,"[61] then it would seem that originalism is left hanging in the air without any foundation other than the political will (and discretion) of the judge who chooses to apply its methods regardless of what the framers may have thought of them.

Another philosophical critique of textualism and originalism claims that these methods rest on mistaken views of what I will call here the *metaphysics of interpretation*. For one thing, the theory that constitutional provisions can have a "plain meaning" and that the historical record can be consistent with a single "clear intent" seems to flounder on the reality that equally competent and rational readers are able, in good faith, to disagree about what those meanings are. Moreover, there appears to be an ontological confusion at work in textualism's and originalism's minimum premise that if there is a widespread (or even universal) consensus among judges on how to decide "easy" constitutional cases, then this implies, at least in *these* cases, that there must be a "plain meaning" to which the words of the Constitution or the historical records refer.[62] For instance, H.L.A. Hart correctly observes that human communication, including the regulation of conduct by legal rules, requires a consensus in the use of language that is broad enough to cover a large number of standard instances — a host of "familiar, generally unchallenged cases," as he puts it.[63] However, a non-originalist would say that Hart all too readily leaps from this simple fact to the ambiguous and doubtful conclusion that when people use linguistic signs in a standard and unproblematic way this is

---

[60] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

[61] Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 175 (1996).

[62] *See* Louis E. Wolcher, *Ronald Dworkin's Right Answers Thesis Through the Lens of Wittgenstein*, 29 RUTGERS L.J. 43, 48 (1997).

[63] HART, THE CONCEPT OF LAW, *supra* note 21, at 123.

because there is a "core of settled meaning" to which the signs refer.[64] If Hart's thesis that legal words have "core" meanings asserts the psychological or phenomenological claim that people always *experience* something called "the meaning" of a linguistic sign before they use it, then the claim is false, as the previous discussion of the distinction between interpretation and reception shows, and as Hart's own reference to "automatic" responses to easy cases appears to admit.[65] On the other hand, if Hart's thesis holds that regularities of behavior in easy cases *must* be explained by some invisible metaphysical meaning that is a property or referent of the rule itself — as opposed to an aspect of how it is received — then his reasoning appears to conflate the phenomenon of grounding with the phenomenon of causal explanation.

This last point needs a bit of explanation. Although judges frequently ground their constitutional decisions in statements about what the Constitution means, this does not imply that the Constitution *has* a metaphysically determinate "meaning" that causes them to decide as they do. Hart commits something akin to the genetic fallacy by assuming that regularities of behavior within a historically similar group of people (Supreme Court justices unanimously agreeing in "easy" cases, for instance) must be based on something more important or real (the "meaning" of the Constitution) than the plain fact that these people belong to a group all of whose members simply receive the constitutional text the same way in deciding the cases in question. If a group of people were all to look at the sky and exclaim in unison, "There's a bird," we would have criteria for deciding both what their words refer to (a small winged creature with feathers and a beak, etc.) and where to look for it (the sky). But Hart's *only* criterion for a legal text's meaning-the-same to many judges is that they behave the same way in response to it. He thus provides no criterion and no evidence that there is such a thing as the "core meaning" of a text which exists independently of its use. It is as if I were to say that when I have a sensation the sensation itself is a private object that I have inside my mind — a Humean thesis that Wittgenstein rebuts decisively by giving this famous "beetle in the box" example in the *Philosophical Investigations*:

---

[64] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614 (1958).

[65] HART, THE CONCEPT OF LAW, *supra* note 21, at 123.

> Suppose everyone has a box with something in it: we call it a "beetle." No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* beetle — Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing. — But suppose the word "beetle" had a use in these people's language? — If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a *something*: for the box might even be empty. — No, one can "divide through" by the thing in the box; it cancels out, whatever it is.
>
> That is to say: if we construe the grammar of the expression of sensation on the model of "object and name" the object drops out of consideration as irrelevant.[66]

These remarks are directly relevant to Hart's philosophical claim that constitutional provisions "have" something called a "core meaning": if the words "core meaning" have a use in legal practice (as they undoubtedly do) this is not because there is some *thing* — some *object*, whether mental or otherwise — to which they refer. They just have a use — period.

Nor can Hart's thesis be rescued by calling it a Kantian *regulative idea* — that is, by moving the hypothesis that constitutional language has a "core meaning" from the realm of metaphysics to the realm of science.[67] Regulative ideas orient science to its various fields of inquiry, and allow scientists to frame hypotheses that can, in principle, be tested, if only with great difficulty. Thus, the law of gravity is a regulative idea that allows us to say that a boulder would tend to fall down (not up) on

---

[66] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, at 100e.

[67] Paul Guyer and Allen Wood describe Kant's notion of regulative ideas (or principles) as follows:

> [T]he ideas of reason have an important function in the conduct of natural science if they are understood *regulatively*, that is, if they are taken to represent not metaphysical beings or entities whose reality is supposed to be demonstrable, but rather goals and directions of inquiry that mark out the ways in which our knowledge is to be sought for and organized.

Paul Guyer and Allen Wood, *Introduction*, *in* IMMANUEL KANT, CRITIQUE OF PURE REASON 18 (1998).

planets in other galaxies, even though we have no assurance that we will ever be able to determine that this is true by observation. Likewise, the idea of a "self" stimulates us to search for a unified psychology, and thus is a regulative idea for any science that takes an individual human consciousness as its object of study. In Hart's case, however, there appears to be no imaginable method for testing the physical or metaphysical hypothesis that legal language refers to a "core meaning" other than just observing whether there is a consensus of use. But core meanings are supposed to *explain* consensus of use rather than the other way around. Moreover, even experimental evidence has shown that people can hold fundamentally different ideas about how their language describes the world and still be able to communicate effectively and coordinate their behavior.[68] It takes but a moment's reflection to observe that if someone claims that a consensus of use is "explained" by a core meaning that is itself demonstrated *only* by the fact that there is a consensus of use, then such a claim is the equivalent of saying, rather unhelpfully, that what is to be explained is explained by what is to be explained.

It is almost a truism to say that legal rules do not apply themselves but rather are applied by human beings who must perform work on them to make them yield "answers" to concrete cases. Some more radical forms of non-originalism draw from this truth, and from the premise that no two events or cases are ever exactly the same, the conclusion that *every* act of applying the Constitution is a new and creative act that necessarily adapts the law to what the present requires of it.[69] On this

---

[68] *See Looking for a Sign*, ECONOMIST, Nov. 12, 2005, at 86 (summarizing experimental research by cognitive scientists showing the effectiveness of communication and coordination of behavior between people who lack a common set of linguistic meanings or references).

[69] *See* Louis E. Wolcher, *Thinking Critically About Human Rights*, *in* HUMAN RIGHTS, MINORITY RIGHTS, WOMEN'S RIGHTS: PROCEEDINGS OF THE 19TH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION FOR PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY (IVR), NEW YORK, JUNE 24-30, 1999, 11, 14 (Alexander Brostl & Marijan Pavcnik eds., 2001) (noting the "Derridaean critique of rights" which takes the form of a "deconstruction of any discourse that pretends rights are 'present' as the endowments of stable, rights-bearing 'individuals'"). Contrast this argument with FRIEDRICH NIETZSCHE, THE WILL TO POWER 298 (Walter Kaufmann, ed., Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 1968) (1967), which states:

> "[T]ruth" is therefore not something there, that might be found or discovered — but something that must be created and that gives a name to a process, or rather a will to overcome that has in itself no end — introducing truth, as a *process in infinitum*, an active

view, a general constitutional rule can be *extended* by a judicial act of will that tries to follow some method of interpreting and applying it, but it would be a misuse of language to say that the rule's "meaning" consists in a demonstrable *reference* to every discrete happening in the world to which the rule has been applied in the past and will be applied in the future. In any case, non-originalism's metaphysical critique of originalism and textualism includes the argument that what the latter theories take to be the "meaning" or "content" of a constitutional rule is only the hypostasis of a finite number of random images of possible application that happen to float through the mind of the person who is expressing the rule's meaning or content.[70] To quote Wittgenstein, whose philosophy of language has influenced many of the most radical critiques of textualism and originalism, "there is an understanding of the rule which is not an interpretation, but which is exhibited in what we call 'obeying the rule' and 'going against it' in actual cases."[71] Among other things, this critique implies that the real meaning of a constitutional rule can only be *shown* in its applications, and that it cannot be articulated "once and for all" without absurdity or arbitrariness.[72]

D. Three Positive Methods of Non-Textualist and Non-Originalist Interpretation

We now turn to three influential modes of constitutional decision-making that reject textualism and originalism in favor of something else. We earlier called this "something else" *constructivism* (as opposed to *interpretivism*) because of its inclination to admit to the fact that it constructs rather than finds meaning in the Constitution. One might say that constructivism is to interpretivism as legal realism is to formalism: the first sees the act of interpretation as inescapably grounded in a historical dialectic between text and reader, while the second imagines (as we have already seen) that reading is simply an exercise in discovering a meaning that is already contained in the text – a meaning that is in principle immune to any contamination by history. Without further belaboring this comparison, the specific modes of constructivism that we will consider in this section are *evolutionism*, *moral readings of the Constitution*, and *judicial pragmatism*.

---

determining — not a becoming-conscious of something that is in itself firm and determined It is a word for the "will to power."

[70] *See* LOUIS E. WOLCHER, BEYOND TRANSCENDENCE IN LAW AND PHILOSOPHY 108-14 (2005).

[71] WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 2, at 81e.

[72] *Id.*

1. Evolutionism

Perhaps the most obvious and widespread constructivist method is what might be called *evolutionism*. Evolutionists view the Constitution as a "living document" capable of changing over time in response to new conditions. On this view, the best explanation of the actual state of constitutional law in America is that it represents a common law process of development in light of understandings that evolve over time, and that Article III of the Constitution represents a kind of delegation to federal judges of the power to develop constitutional meaning (including even the creation of "new" rights) in accordance with the common law method.[73] Evolutionists subscribe to a sort of "adverse possession" theory of constitutional law (to borrow Sanford Levinson's clever phrase), according to which a proper reading of well-established Supreme Court precedents on the meaning of any given constitutional provision trumps both the text of that provision and the intent of its framers.[74] In response to the originalist claim that this method cedes too much discretion to judges, and therefore is anti-democratic, evolutionists point out that the common law method has been with us for nearly a thousand years and that when it is applied in good faith it puts or can put very real constraints on judicial discretion.[75] What is more, at least one proponent of the common law method of constitutional adjudication, Professor Cass Sunstein, has responded to originalism's concern with the democratic legitimacy of evolutionism by advocating what he calls judicial "minimalism."[76] This is the view that judges should say as little as possible in explaining their decisions in constitutional cases — just enough to justify the result, in fact, without making the kind of broad pronouncements about the meaning of the constitution that look "legislative" in a way that offends the democratic sensibilities of originalists and textualists.[77]

From legal realism and critical legal studies we have learned much about the purely logical indeterminacy of the common law, including the common law process as applied to constitutional decision-making.[78] But

---

[73] U.S. CONST. art. III; *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

[74] Levinson, *supra* note 54, at 379 n.19.

[75] *See* DWORKIN, LAW'S EMPIRE, *supra* note 3.

[76] CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 70 (1999).

[77] *Id.* at 71.

[78] *See* JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 268-74 (1964).

remember: the prototypical judges in whom we are interested in this article conceive of themselves as bound by their chosen methods of interpretation to achieve the legally "correct" (or the legally "best") outcome in every case they decide. Considered from their own subjective standpoint, at the very end of the process of interpreting precedent these judges no longer doubt that the "law" requires them to do what they are about to do.[79] One does not have to subscribe to Ronald Dworkin's elaborate "Hercules" theory of the judging[80] to believe that a real judge might follow that theory's precepts in order to hunt down[81] the "right answer" in the case before her, and that once the judge finds what she believes in good faith to be the right answer she would experience no doubt about her conclusion. In other words, the distinction between interpretation and reception applies no less to evolutionism as a theory of constitutional interpretation than it does to strict textualism: if the latter reads constitutional text "X" to mean that "Y" must be done, then the former reads precedents "Z" to mean that "A" must be done, and in both cases the sense of the *interpretation as such* ("Y" and "A") is simply received without any further questioning or doubt. To paraphrase Pascal, reception is the "mystical foundation,"[82] if you will, of *every* genuine event of interpreting the Constitution, regardless of the method that is used.

2. Moral Readings of the Constitution (Descriptive Ethics)

Many of the Supreme Court's decisions, most notably those interpreting the "cruel and unusual punishments" clause of the Eighth Amendment, employ a method of interpretation that is best described as a kind of *descriptive ethics*. Thus, for example, the Court in *Trop v. Dulles* held that the Eighth Amendment should be interpreted in light of society's "evolving standards of decency."[83] The Court has since employed this interpretive method in numerous death penalty cases, including *Gregg v. Georgia*, which upheld the constitutionality of the death penalty for adult murderers largely on the ground that "contemporary community values" did not morally condemn the practice

---

[79] *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 556-59 (1986) (referring to the phenomenon of the "perceived objectivity of the field" in adjudication and discussing the consequences of this phenomenon for a judge's freedom of action).

[80] DWORKIN, LAW'S EMPIRE, *supra* note 3, at 238-75.

[81] This is Dworkin's metaphor. *See id.* at viii-ix.

[82] PASCAL, *supra* note 47, at 101.

[83] 356 U.S. 86, 101 (1958).

as a general matter;[84] *Atkins v. Virginia*, which held that executing the mentally retarded is unconstitutional because of a change in community values;[85] and *Roper v. Simmons*, which struck down the death penalty as applied to juveniles on the ground that contemporary community values in America (and, controversially, elsewhere in the world) had sufficiently hardened against it to justify an interpretation of the Eighth Amendment to preclude the practice.[86] In response to the originalist claim that interpretations such as these impermissibly inject the personal values of judges into the constitutional process, advocates of giving a moral reading to the Constitution reply that they are only trying to determine what the *Gregg* majority called an "objective index" of what most Americans do in fact hold to be cruel and unusual punishments.[87] After all, to locate and follow a deeply embedded moral consensus in society as the basis of one's interpretations is not logically the same as following one's personal moral values.[88] Once the relevant index of community values is ascertained — for example, by means of counting the number of jurisdictions that have adopted or rejected the practice in question — this method binds even those non-originalist judges who personally disagree with the current state of American moral sentiment to apply their findings to the case at hand. On the other hand, it is also true that as a general matter courts do not possess the kind of popular mandate and investigative resources that Congress has when it comes to determining what "the people" believe and want. Most originalists and textualists take this important difference in institutional resources and competencies to be a sufficient argument against the "social scientific" method of interpretation that is displayed in decisions like *Gregg*, *Atkins* and *Roper*.

Beyond the domain of Eighth Amendment law, theories and decisions that give moral readings to the Constitution sometimes determine and construct a set of basic national "ideals" surrounding the notions of liberty, equality, fair treatment, and federalism — ideals that stand outside of (and behind) the four corners of the text, and that serve as touchstones for determining concrete disputes about constitutional meaning. One of the most influential of these approaches has been Professor John Hart Ely's theory that the Supreme Court should (and

---

84 428 U.S. 153, 181, 190 (1976).
85 536 U.S. 304 (2002).
86 543 U.S. 551 (2005).
87 *Gregg*, 428 U.S. at 181.
88 *See* Simon, *supra* note 33, at 1505-07.

largely does) follow the meta-constitutional moral value of "procedural fairness in the resolution of individual disputes," as well as the general background value of "ensuring broad participation in the processes and distributions of government."[89] Similarly, Justice Stephen Breyer's recent book, evocatively entitled *Active Liberty*, describes his own interpretive method in certain cases as relying on the unwritten (but to him implicit) constitutional principle of enhancing the ability of ordinary people to participate in the processes of government.[90]

In addition, numerous Supreme Court decisions over the past two centuries also reflect what can only be called a values-based approach to constitutional interpretation. One notable example is *Principality of Monaco v. Mississippi*, where the Court expanded the scope of the Eleventh Amendment beyond its literal meaning on the ground, as Chief Justice Charles Evans Hughes famously put it, that "behind the words of constitutional provisions are postulates which limit and control."[91] A more recent example in the same general area of law is *Seminole Tribe of Florida v. Florida*, where even some of the Court's most ardent textualists and originalists joined forces with the majority to hold that a "background principle of state sovereign immunity" lurks behind the words of the Eleventh Amendment — a principle that determines under what circumstances Congress may legitimately abrogate the immunity of state governments from suit in federal court.[92] The result of this reasoning was to impose a limitation on Congressional power that cannot be found in the text or history of the amendment itself.[93] Along the same lines, no survey of values-based constitutional interpretation should fail to mention the famous (or infamous) method of "penumbral reasoning," which characterizes many of the Warren Court's decisions expanding the constitutional scope of individual rights and liberties against governmental interference. This method was first announced by Justice William O. Douglas in *Griswold v. Connecticut*, a case in which the Court struck down a state ban on the use of contraceptives by married couples.[94] It relies on the moral premise that the Constitution as

89 ELY, *supra* note 30, at 87.
90 STEPHEN BREYER, ACTIVE LIBERTY 5-6 (2005).
91 Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)
92 Seminole Tribe of Florida v. Florida, 517 U.S. 44, 123 (1996).
93 *See* U.S. CONST. amend. XI.
94 Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

a whole creates what Douglas called a "zone of privacy" that goes beyond the specific list of rights enumerated in the Bill of Rights.[95]

By now it should be clear what kind of response consistent strict textualists and strict originalists are inclined to give to values-based methods of constitutional decision making such as those mentioned in this section. From their point of view, respect for democratic processes requires judges to obey the constitutional balance that is established once and for all by what they receive to be the meaning of the Constitution's words and its authors' intent, and to forbear from making new law by giving Olympian (and democratically illegitimate) readings of value-terms that are almost by definition as vague as they are lofty. Some textualists and originalists hope to retrieve what the commentator Jeffrey Rosen calls the "Constitution in Exile" — the Supreme Court's late nineteenth and early twentieth century decisions giving a narrow reading to constitutional provisions like the commerce clause and the Bill of Rights, before they were allegedly hijacked by "activist judges" who sought to expand the power of Congress at the expense of the states and to establish their own (elite and doctrinaire) conceptions of individual liberty.[96] Those who advocate a values-based approach to constitutional interpretation reply to this attack by revisiting the realist insight that most legal doctrine is by its very nature inherently malleable and indeterminate, and by arguing that neo-formalist decision making of the kind advocated by textualism and originalism is therefore both disingenuous and potentially anti-democratic. Justice Breyer, for example, points out that his method has the advantage of making judicial opinions *transparent*, inasmuch as it requires judges to give rational and persuasive accounts of the relationship between the widely shared background value of participatory democracy and particular judicial outcomes; whereas textualists and originalists are able to disguise their reasoning (and thus secretly implement their own political preferences) by appearing to derive the result of a case mechanically from alleged constitutional "facts" that may *in fact* be highly doubtful and contested.[97]

3. Judicial Pragmatism

Finally, judicial pragmatism is a form of constitutional interpretation that attempts to produce results that are "good" for the present and the

---

[95] *Id.*

[96] *See Constitution in Exile*, Wikipedia, *at* http://en.wikipedia.org/wiki/Constitution_in_exile, (last visited Feb. 11, 2006).

[97] BREYER, *supra* note 90, at 127.

future (according to some method of determining the good) without any sense of an absolute duty to adhere either to the text, to precedent, or to the original meaning of the Constitution.[98] Of course, this does not imply that a pragmatist judge will *never* follow what is called "precedent" or the "original intent" of the text; rather, she conceives of her decision to follow them as being solely a function of her judgment that this course of action produces net social gains which outweigh the net social gains of any other course of action. In short, a pragmatist judge thinks that adhering to past understandings and ways of doing things (including precedent) is a *means* rather than the *end* of the process of interpretation.[99] Perhaps the most visible and important modern method for producing judgments about which interpretation is pragmatically "best" is cost-benefit analysis, a social science technique that attempts to supplant both guesswork and a judge's personal preferences with a prediction (if not an objective calculation) of the social effects of competing interpretations of the law.[100] According to Richard Posner, the most vociferous defender of cost-benefit analysis, this kind of pragmatism encourages judges to doubt even their most cherished beliefs and understandings about the law in order to avoid the pitfalls of formalism, whereby a judge can lazily or mindlessly enact her own unthought prejudices about the meaning of the Constitution under the guise of seeming to determine what the text or its history "objectively says" to her.[101]

Lacking the textualist's high level of confidence in the capacity of mere words on paper to constrain and determine the future, the pragmatist judge looks to other disciplines (primarily economics, sociology, and psychology) as a way of giving "objective content" to her decisions and thereby answering textualist and originalist critics who claim that her interpretations are but a pretense for enacting her personal preferences. On the other hand, this kind of pragmatism, like all forms of consequentialist decision making, is open to the philosophical criticism that it is insufficiently respectful of legal rights simply because they *are* legal rights that officials are bound to respect regardless of the consequences.[102] In addition, since the pragmatic method is a function

---

98 Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996).

99 *Id.*

100 *See, e.g.*, CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 123-28 (2002).

101 *See* Posner, *supra* note 98, at 18.

102 DWORKIN, LAW'S EMPIRE, *supra* note 3, at 152.

of the values that the judge herself assigns to the variables that she employs to decide the best outcome, this method can be criticized as being subjective if not arbitrary in many if not most cases. The critique of judicial pragmatism thus asserts that it impermissibly usurps a policy-*making* function that the Constitution specifically assigns to the people's elected representatives in Congress and in state legislatures.

E. The Choice Among Competing Methods of Constitutional Interpretation

In the end it would be useful to know what material the Court actually does consult (and follow) in order to reach results in constitutional litigation. Does it decide cases based on the "plain meaning" of the text? — The "original intent" of the framers and/or those who ratified the original Constitution or its amendments? — The "purpose" of the constitutional provision in question as inferred from its relations with other parts of the Constitution and/or history? — The "American ethos" that is reflected in an evolving sense of public opinion (or morality) about the meaning of the text? — A pragmatic balance of the costs and benefits that would flow from the implementation of competing constitutional interpretations? — The Court's prior case law regardless of the precedent's alleged fealty (or lack thereof) to the constitutional text?[103] The truth is that at one time or another during its long history the Supreme Court has employed *every one of these methods*, sometimes even in the very same case. And as the foregoing survey suggests, each method has its advocates in what has become, at the beginning of twenty-first century, an extremely heated political and philosophical debate over the proper role of the judiciary in public and private life.

A judge's choice among textualism, strict originalism, moderate originalism and any of the other methods of constitutional interpretation that this article has surveyed would be purely a matter of unbridled judicial discretion if there were no accepted meta-principles or meta-values that could act as objective criteria of that choice. In this respect the question of which method of interpretation judges "ought" to follow reproduces a familiar problem from the debate between positivism and natural law theory: namely, the enigma of why a positivist judge *ought* to apply only the law as it is rather than the law as it ought to be. To

[103] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) (noting a similar list of what the author calls six "constitutional modalities").

paraphrase Lon Fuller's well-known description of the "dilemma of positivism": on the one hand judges have before them an amoral datum called the Constitution, which has the peculiar property of creating a moral duty to obey it; and on the other hand they have a moral duty to do what they think is just, right, and decent.[104] Under these circumstances just what does the widely valued premise that judges should be faithful to the Constitution mean? The judicial value of fidelity to the Constitution, which is arguably made binding by the judge's personal oath of office, is not a sufficient criterion to answer this question since different interpretive methods yield different answers to the question of what fidelity to the Constitution means in the first place. Likewise, the requirement of maintaining internal consistency in the application of judicial method may be a laudable enough value according to some accounts of the rule of law — Ronald Dworkin's "law as integrity," for example[105] — but it provides no criterion for selecting the very interpretive method that one proposes to apply consistently. It is obvious, therefore, that the criterion for choosing an interpretive method must be found either wholly outside the realm of positive law (including the text of the Constitution) or else within a kind of nether-realm of "values" that are widely or universally held to be quasi-constitutional in nature.

It can be said without too much risk that in the United States mainstream originalists and non-originalists alike largely agree on a list of meta-values that are not exactly "constitutional," but that nonetheless represent a widespread consensus about the moral and political foundations of the Constitution. Without attempting to be comprehensive, the following list of meta-values captures the most important elements of that consensus: "freedom," "equality," "the balance of powers," "our federalism," "representative democracy," and "protecting individual rights against majoritarian abuse." Judging from the pronouncements of courts and commentators, these meta-values seem to provide the ultimate criteria for selecting the method of interpretation that judges *should* follow in interpreting the Constitution, and for criticizing or valorizing the methods that they *do* follow. The problem is that the meanings of these meta-values in their own right are hotly contested, with various "camps" of constitutional interpretation disagreeing about what inferences can or should be drawn from them, as

---

[104] Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 656 (1958).

[105] *See* DWORKIN, LAW'S EMPIRE, *supra* note 3, at 95-96.

well as about which of them should take precedence in those cases in which they conflict with one another.[106] Unfortunately, there is no objective and binding *Grundnorm*, to borrow Kelsen's term, which settles once and for all what the foregoing meta-values mean for the judicial practice of interpreting the Constitution.[107] As is true in every instance of genuine interpretation, there are many competing meta-methods (primarily political philosophies) for interpreting the meaning and implications of the foregoing list of meta-values, and of projecting those meanings down to the more mundane level at which judges must choose some method or other for interpreting the Constitution. Since the project of describing and evaluating the former methods belongs, strictly speaking, to the meta-theoretical sphere of political philosophy rather than the jurisprudential sphere of methods of constitutional interpretation *as such*, it lies beyond the scope of this article.

But even if this problem were to be addressed forthrightly, the question of what method of application a given meta-constitutional value "requires" is inherently pre-philosophical. In short, what constitutional "values" such as freedom require are always the product of interpretive methods (whether explicit or implicit) that generate an *expression* of that "requirement." To do the judge any good, this new "requirement"-text must be received by her in such a manner that it leaves no doubt about what she is supposed to do next. The best analogy here is to the word "Stop" on a stop-sign, which generally leaves no doubt in the minds of English-speaking drivers: they tend to receive it (without interpretation) as a kind of Pavlovian trigger for braking their automobiles to a stop. One might say that the question of what meta-constitutional values "require" simply reproduces the philosophical problem of interpretation at a different level, and cannot be answered independently of how one happens to receive the value in question.

---

[106] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710-11 (1976).

[107] *See* M.P. Golding, *Hans Kelsen*, *in* 4 THE ENCYCLOPEDIA OF PHILOSOPHY 328 (Paul Edwards, ed.), (1967). The German word *Grundnorm* is usually translated as "basic norm" in English language versions of Kelsen's work. *See* KELSEN, *supra* note 1, at 55 ("That a norm belongs to a certain system follows simply from the fact that the validity of the norm can be traced back to the *basic norm* constituting this system.") (emphasis added).

IV. METHODS OF CONSTITUTIONAL INTERPRETATION IN THE UNITED KINGDOM

A. The New Supreme Court of the United Kingdom

On March 21, 2005, Parliament passed the Constitutional Reform Act,[108] one of a relatively small number of Acts of Parliament in the last two hundred years that have made direct changes to the Constitution of the United Kingdom. The Act provides for a "Supreme Court of the United Kingdom" to take over both the preexisting functions of the law lords and certain powers of the Judicial Committee of the Privy Council.[109] Although the law lords currently sitting in the House of Lords will become the first members of the new court, the Act does provide for a new Supreme Court building (not yet selected) that will be separate from the Houses of Parliament, where the House of Lords currently sits when exercising its judicial functions.[110] The impending physical separation is not just cosmetic, however — it also symbolizes a deeper functional separation. Prior to the Constitutional Reform Act, the law lords could (and often did) speak in legislative debates in the House of Lords on such sensitive topics as the legitimacy of the death penalty and whether legal aid should be afforded to indigent criminal defendants; they also regularly chaired Royal Commissions and departmental committees.[111] Reversing this traditional blending of powers and functions, the new Act reforms the office of Lord Chancellor to remove his ability to act as a judge in addition to being a government minister, disqualifies Supreme Court judges from sitting or voting in the House of Lords (in addition to their existing disqualification from the House of Commons), and creates a special commission to make appointments to the bench based solely on the criterion of merit (albeit mediated by diversity considerations) instead of political connections.[112] Rejecting the clever argument that the law lords need to keep one foot in the legislative arena so as to better defend the independence of the judiciary,[113] the legislative history of the Constitutional Reform Act

---

[108] Constitutional Reform Act, 2005, c. 4 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2005/20050004.htm.

[109] *Id.* at §§ 23-60.

[110] *Id.* at §§ 148(4)-(5).

[111] Robert Stevens, *Government and the Judiciary*, *in* THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY 333, 348-49 (Vernon Bogdanor ed., 2003) [hereinafter Stevens, *Government and the Judiciary*].

[112] *See* Constitutional Reform Act, 2005, *supra* note 108.

[113] ROBERT STEVENS, THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION 160-61 (2005) [hereinafter STEVENS, THE ENGLISH JUDGES].

shows that its primary motivation was to bring the judicial system of Britain more into conformity with the requirements of the European Convention on Human Rights and the modern constitutional theory of separation of powers, both of which stipulate that judicial officers should not also exercise legislative or executive powers.[114]

While it is too early to predict all of the practical (including psychological) consequences that these reforms will have for the actual content of legal interpretations — and for the general principle of judicial independence — it is clear that the Act's principal achievement is to sever the link, which was forged in its present form in the constitutional compromise of 1876, between the highest court of appeal in Britain and the House of Lords as a legislative body.[115] Although the Consultation Papers that preceded and informed the adoption of the Act repeatedly emphasize the virtues and advantages of the separation of powers, they also expressly affirm that the Act does nothing to change the traditional principle of parliamentary sovereignty over the *content* of British law, including constitutional law.[116] Writing with a distinct tone of disappointment, one leading commentator recently summarized the basic premise of the new scheme as follows: "the new Supreme Court would operate in much the same way as the old House of Lords — the same law lords doing the same old thing."[117] Whether or not this ultimately turns out to be the case, it would appear, at least as of this writing, that the Constitutional Reform Act does not attempt to change either the preexisting rules of parliamentary sovereignty with respect to the contents of the Constitution or the methods that British judges have traditionally employed to interpret statutes and develop the common law.

B. The Relationship Between British Parliamentary Sovereignty and Judicial Methods of Constitutional Interpretation

It must be acknowledged at the outset of our review of the British Constitution that the concept of *judicial methods of constitutional*

---

[114] *See Constitutional Reform Act 2005*, Wikipedia, *at* http://en.wikipedia.org/wiki/Constitutional_Reform_Act_2005. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, *reprinted in* HUMAN RIGHTS TODAY: EUROPEAN LEGAL TEXTS 12 (1999) (establishing the right to a fair and public hearing before an "independent and impartial tribunal").

[115] Stevens, *Government and the Judiciary*, *supra* note 111, at 362.

[116] *See* DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM, 2003, CP 11/03, at 8; DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES, 2003, CP 10/03, at 8.

[117] STEVENS, THE ENGLISH JUDGES, *supra* note 113, at 184.

interpretation, as defined in this article, is fraught with obscurity in the United Kingdom. Partly this is because there simply is no "Constitution of the United Kingdom" in the narrow sense of a codified and comprehensive set of legal rules that define governmental structures and procedures as well as the government's relations with its citizens. As one commentator has put it, the most that one can sensibly say on the subject is that "over the centuries there has been an incidental accumulation of *ad hoc* measures and political arrangements, judicial decisions, customs of Parliament, conventional assumptions and enactments of successive Parliaments which in sum could be said to form the 'Constitution of the United Kingdom.'"[118] One consequence of the fact that constitutional development in the United Kingdom has proceeded both randomly and at a glacial pace is that constitutional theory in today's Britain is, as Geoffrey Marshall puts it, "a somewhat disconnected heap of activities."[119] Since the common law makes up a large portion of the British Constitution, it is perhaps understandable that English writers have traditionally used metaphors such as "evolution," "growth," "fluidity" and "change" to describe their constitutional arrangements,[120] and that the American concept of a historically determinate object called the "original intent of the Constitution" sounds so odd to British ears. According to classical nineteenth century theory, the rule of law is the most fundamental principle of the British Constitution, with statutes being not the source but the consequence of the rights of individuals as defined and enforced by judges interpreting and applying the common law.[121] In the United States it makes sense for a judge to say that a well-established constitutional precedent is nonetheless in conflict with the meaning of the Constitution, because there are *two* texts involved, one of which is extra-judicial and hierarchically superior to the other. But this sort of standard positivistic account of the constraints placed on judges in constitutional cases — constitutional text X constrains precedent Y — is inapplicable to thinking about the common law elements of the British Constitution. In the latter case the question of "methods of constitutional interpretation" tends to get submerged or lost in the more general problem of how

---

[118] CONSTITUTIONS OF MODERN STATES: SELECTED TEXTS AND COMMENTARY, *supra* note 12, at 182.

[119] Geoffrey Marshall, *The Constitution: Its Theory and Interpretation, in* THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY 29, 35 (Vernon Bogdanor ed., 2003).

[120] *Id.* at 33.

[121] *See* A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 195-98 (photo. reprint 1964) (10th ed.1959).

courts do and should develop and apply what modern legal theory recognizes to be their own creation — namely, the common law.

A second reason for the relative obscurity of our topic in the British context is that the task of investigating and determining the sphere of judicial methods of constitutional interpretation has always been overshadowed by a certain theoretical obsession with the principle of parliamentary sovereignty and what that principle means for establishing the contents of the Constitution. The traditional British view on parliamentary sovereignty holds that "Parliament (defined as the Queen, Lords and Commons acting together) ha[s] the right to make or unmake any law [including constitutional law] and that no person or body ha[s] a right to override or set aside its legislation."[122] Among other things, this tradition of parliamentary sovereignty means that a breach of constitutional convention by Parliament produces no "illegal consequences" that the courts can address.[123] As Lord Reid put it in *Madzimbamuto v. Lardner-Burke*, although the courts might regard some things that Parliament does as unconstitutional, or even morally reprehensible, "[this] does not mean that it is beyond the power of Parliament to do such things," and moreover, "[i]f Parliament chose to do any of them the courts could not hold the Act of Parliament invalid."[124] Nearly a hundred years have passed since Lord Halsbury remarked, in *Webb v. Outrim*, "[i]n the British Constitution, though sometimes the phrase 'unconstitutional' is used to describe a statute which…is contrary to the tone and spirit of our institutions,…the statute in question is the law and must be obeyed."[125] Nevertheless, that his point of view still commands widespread respect, if not support, is confirmed by a recent remark made by Lord Bingham as chief justice: "If Parliament were clearly and unambiguously to enact, however improbably, that a defendant convicted of a prescribed crime should suffer mutilation, or branding, or exposure in the public pillory there would be very little a judge could do about it — except resign."[126]

The principle that British courts are radically subordinate to parliamentary supremacy on the meaning of the Constitution — including basic human rights — is ultimately grounded in John Austin's

---

[122] Marshall *supra* note 119, at 42.
[123] *Id.* at 38.
[124] [1969] 1 A.C. 645, 723 (P.C. 1968) (appeal taken from S. Rhodesia).
[125] [1907] AC 81, 89 (P.C. 1906) (appeal taken from Vict.).
[126] Tom Bingham, Inaugural Pilgrim Fathers Lecture (Oct. 29, 1994), *in* THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES 239, 243 (2000).

theory that sovereignty by its very nature cannot be limited by law.[127] This point of view is encapsulated in the hackneyed yet oft-repeated saying that the King (or Queen) can do no legal wrong: a saying that possesses a great deal more legal truth-value in Britain than in America.[128] One can find this way of thinking about sovereignty most clearly and strongly articulated in the enormously influential work of the nineteenth century legal writer A.V. Dicey, who held that British democracy is ultimately protected by Acts of Parliament rather than by judges, and who believed that the concept of the rule of law leaves absolutely no room within it for judicial creativity.[129] Inasmuch as life in Britain during the first part of the twenty-first century is not demonstrably less democratic, less legal or less free than life in the United States, the historical absence of American-style judicial supremacy on the meaning of the Constitution ought to give one pause about whether it is or ought to be the *sine qua non* of any democratic society governed by the rule of law. In other words, judicial supremacy on constitutional questions may not be the only institutional arrangement that is consistent with the much-vaunted political value of separation of powers.

Be that as it may, however, it must be said that the British thesis of absolute parliamentary sovereignty over the contents of the Constitution gives rise to a troubling contradiction (or paradox): apparently the allegedly unlimited sovereign power of the Queen-in-Parliament is nonetheless somehow limited by the principle that Parliament may not enact unchangeable laws.[130] Here the best analogy is to the old theological paradox of whether an omnipotent God is powerful enough to create laws that even He cannot change. What is more, it should be noted that in theory and in fact the unlimited sovereignty of Parliament was indeed essentially (if quietly) negated by the Statute of Westminster, which in 1931 conferred sovereign authority on the parliaments of the dominion, reserving what can only be called a theoretical or nominal sovereignty in the United Kingdom.[131]

Despite the exceptions just noted, it remains the case that "[n]o [British] court…has claimed jurisdiction to set justiciable limits to an

---

[127] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 183 (David Campbell & Philip Thomas eds., 1998).
[128] *See* BLACK'S LAW DICTIONARY 1056 (3d ed. 1933).
[129] Stevens, *Government and the Judiciary*, *supra* note 111, at 336.
[130] *See* Marshall, *supra* note 119, at 42-47.
[131] *Id.* at 45.

Act of Parliament," although every now and then judges have opined, in dicta or in their extra-judicial writings, that there may be some rights that are so fundamental to the common law that they are not subject to disposition by Parliament.[132] In evaluating the meaning of this point a word of caution is due: in thinking about the issue of parliamentary sovereignty it is important to distinguish the role of the British courts *within* England from their role elsewhere in the United Kingdom or abroad. For example, although the old commonwealth was abolished in the 1970s, thereby substantially diminishing the appellate jurisdiction of the Privy Council, in 1994 that body nonetheless invalidated a sentence of death from Jamaica based on its interpretation of that country's written constitution.[133] Moreover, the British Constitution actually serves three systems — England and Wales, Northern Ireland, and Scotland — and the British courts do have (under an Act of the United Kingdom Parliament) the power to strike down statutes passed by the *Scottish* Parliament if they conflict with the Human Rights Act, which was passed by the United Kingdom Parliament in 1998 as a way of incorporating into the Constitution the most significant provisions of the European Convention on Human Rights.[134] Within the context of acts passed by the British Parliament the situation is otherwise: the Human Rights Act does not incorporate Section 13 of the Convention, which requires an effective remedy for violations, and it explicitly deprives the courts of the power to strike down incompatible legislation passed by the British Parliament.[135] Within Parliament, at least, the notion that a statute of Westminster on the subject of human rights might be "entrenched" (i.e., beyond the power of Parliament to modify or repeal) was widely felt to give too radical an affront to the theory of parliamentary sovereignty.[136] As a consequence, although section 3 of the Human Rights Act declares that future legislation should be interpreted as conforming to its provisions unless Parliament clearly decides otherwise, the Act also limits the courts' remedial powers to that

---

[132] *Id.* at 48-49.

[133] Pratt v. Attorney General for Jam. [1994] 2 A.C. 1 (P.C. 1993) (appeal taken from Jam.).

[134] *See* Human Rights Act, 1998, c. 42 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1998/19980042.htm. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

[135] *See* Marshall, *supra* note 119, at 60.

[136] *See* House of Lords Commission Report, H.L. 176 (1977-78).

of issuing a more or less toothless "declaration" of incompatibility that can (but need not) lead to curative legislation.[137]

In contrast with its treatment of the Human Rights Act, the British judiciary has interpreted the European Communities Act of 1972, which is also a part of the Constitution of the United Kingdom, as a declaration by Parliament that all future legislation should be interpreted to conform to community legislation, at least unless and until Parliament clearly declares otherwise.[138] As a consequence, a certain degree of what some commentators have called judicial "activism" has crept into British constitutional law, leading to a series of decisions that either suspended or held unenforceable Acts of Parliament that were deemed by judges to be in violation of community laws and directives. The first and most notable of these was the *Factortame Case*, which suspended the enforcement of a British statute while its constitutionality was tested before the European Court of Justice.[139] That decision was followed in relatively short order by *Regina v. Secretary of State for Employment, ex parte Equal Opportunities Commission*, which held, rather more boldly, that British legislation concerning part-time employees was unenforceable because it was in conflict with European Directives.[140] Although the latter decision led *The Times* of London to declare, on March 5, 1994, "Britain may now have, for the first time in history, a constitutional court," no British court has ever intimated that it is beyond the power of Parliament to repeal or modify the European Communities Act or even to abrogate the treaty on which it is based.[141] Thus, it would be a gross exaggeration to say that the *Factortame* line of decisions foreshadows the advent of American-style judicial supremacy on the meaning of the British Constitution. Rather, it seems at least equally plausible to interpret these cases conventionally, as Lord Mackay (then the Lord Chancellor) did: namely, as garden-variety instances of judges interpreting one British statute in light of another.[142]

---

[137] *See* Marshall, *supra* note 119, at 64; STEVENS, THE ENGLISH JUDGES, *supra* note 113, at 112.

[138] Marshall, *supra* note 119, at 50. *See* European Communities Act, 1972, c. 68, sched. 4 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1972/20068--g.htm.

[139] Regina v. Sec'y of State for Transp., ex parte Factortame (No. 2), [1991] 1 A.C. 603 (H.L. 1990).

[140] [1995] 1 A.C. 1 (H.L. 1993).

[141] *Profound Judgment*, TIMES (London), Mar. 5, 1994.

[142] STEVENS, THE ENGLISH JUDGES, *supra* note 113, at 46.

C. The Connection Between Judicial Restraint and Textualism

One might think that judges in Britain would tend to be *more* creative or "activist" in constitutional cases than judges in the United States, precisely because their interpretations are always subject to more or less immediate revision by Parliament and therefore are potentially less enduring than those given by American courts. However, the dynamic formula *Less Power, Less Boldness* seems to have carried the day: it is well known that there exists a historically embedded *culture of judicial restraint* in the United Kingdom. Robert Stevens aptly summarizes the tenor of this culture when he writes that "[j]udicial claims to be guardians of fundamental laws are likely to be met with understandable hostility as a breach of the traditions of parliamentary supremacy."[143] Supporters of both major parties in Britain have traditionally sought to emphasize the value of judicial restraint, and this political fact has had important implications for the methods of interpretation that judges have employed to construe statutes and develop the common law. To be blunt about it, for most of its history the British judiciary has tended to maintain "the law-is-the-law approach" to legal language.[144] On this model of decision-making, the job of the judiciary is conceived of as positivistic and machine-like: judges are supposed to find out what the law *is* (eschewing any inquiry into what it *ought* to be) by consulting the "plain meaning" of statutory words and common law precedents.[145] In its purest form this theory of high formalism and positivism went so far as to exclude the practice of judicial gap filling by construing statutes according to Parliament's "intent."[146] Indeed, it was not until 1993 that the House of Lords overturned the age-old judicial rule that legislative debates are not admissible before courts trying to answer questions of statutory interpretation.[147]

We have already given a general account of strict textualism — the judicial method of interpreting constitutional law according to its "plain meaning." Postmodern critics of strict textualism, such as Stanley Fish, have claimed that "[f]ormalist or literalist or 'four corners' interpretation is not inadvisable…it is impossible," on the ground that every act of

---

[143] *Id.* at 68.
[144] *Id.* at 63.
[145] *Id.* at 62-63.
[146] See Lord Simonds' condemnation of the practice in IRC v. Ayrshire Employers Mut. Ins. Ass'n v. Inland Revenue, [1946] S.C. 1, 10 (H.L.) (Scot.).
[147] Pepper v. Hart, [1993] A.C. 593 (H.L.) (U.K.).

interpretation necessarily generates *some* conception of the purpose of its object, and therefore is inescapably creative.[148] Postmodern philosophy of language to the contrary notwithstanding, however, strict textualism is not *regarded* as impossible by those who follow it in good faith, as we saw earlier in the context of discussing the distinction between interpretation and reception.[149] The continuing attraction of textualism in the United Kingdom is partly explained by a very strong positivistic streak in mainstream British legal theory, which can be traced to Jeremy Bentham's extreme hostility to the common law process and his equally extreme faith in the power of the written word to constrain judicial discretion.[150] A more recent paean to positivism in Britain is H.L.A. Hart's very influential work, which develops the idea that law is a system of rules, analogous to the rules of games, and that judicial decision making is and ought to be merely descriptive of the law as it is and never prescriptive of the law as it ought to be.[151] The argument that the distinction between "Is" and "Ought" is untenable — because judges have values and political preferences that help shape their alleged "descriptions" of what the law is — would appear to be more readily accepted by Americans than it is by the British, who continue in large measure to trust in the law's objectivity and autonomy from politics.[152] To illustrate this difference in attitude, contrast the recent widespread obsession of the American media and the U.S. Senate with the political and moral values of President Bush's Supreme Court nominees with the following rather droll statement from the Consultation Papers of the Constitutional Reform Act of 2005: "It is essential that our systems do all that they can to minimize the danger that judges' decisions could be perceived to be politically motivated."[153]

Although our earlier exploration of the interpretation/reception distinction will not be repeated here, there are two additional factors that deserve special mention in the context of the modern British version of strict textualism. The first pertains to the purely technical quality of

---

[148] Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin*, *in* PRAGMATISM IN LAW AND SOCIETY 47, 56 (Michael Brint & William Weaver eds., 1991).

[149] *See supra* p. 12.

[150] *See* Martin A. Kayman, *A Memorial for Jeremy Bentham: Memory, Fiction, and Writing the Law*, 15 LAW AND CRITIQUE 207 (2004).

[151] HART, THE CONCEPT OF LAW, *supra* note 21.

[152] STEVENS, THE ENGLISH JUDGES, *supra* note 113, at 175.

[153] DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM, 2003, CONSULTATION PAPER 11/03, at 11.

legislation in the United Kingdom, where there exists a separate and formally apolitical institution — the Parliamentary Counsel Office — the main role of which is to draft legislation so as to give effect to government policy.[154] One consequence of the existence of this office is better draftsmanship, and it has been alleged (not unfairly, I might add) that "parliamentary legislation…lays down policies far more clearly than Congressional legislation in the United States."[155] The second notable factor pertaining to British textualism is what J.A.G. Griffith calls the "strikingly homogeneous collection of attitudes, beliefs and principles" that are held by most of the judges on the British bench — a set of cognitive attributes that Griffith characterizes as being both conservative and illiberal.[156] One might reasonably expect the plausibility, if not the attraction, of strict textualism to increase in proportion both to the clarity of statutory texts and to the homogeneity of the reactions of one's fellow judges to those texts. Robert Stevens notes that the idea that judges receive and interpret legal texts the way they do because they have "inarticulate premises" that have been caused and coordinated by historical influences is "a concept…that English lawyers have traditionally claimed does not apply in England," even if they are willing to admit that it does apply in the United States.[157] However naive or politically convenient this view may be, it has nonetheless influenced public policy in a variety of ways. Consider, for example, the way the newly created British Supreme Court will perform its functions under the Constitutional Reform Act of 2005.[158] It is arguable that the United States Supreme Court always sits *en banc* in part to minimize the effects of individual bias; but the Constitutional Reform Act authorizes the new British Supreme Court to sit in panels of three on the express theory that the adverse effects of selection will be minimal in England, where "the stiff upper lip of objectivity will prevail" regardless of who is sitting on the bench.[159]

---

[154] *See* Parliamentary Counsel Office, http:/www.parliamentary-counsel.gov.uk (last visited Feb. 11, 2006) (main web site); http:/www.parliamentary-counsel.gov.uk/history/pco.asp (last visited Feb. 11, 2006) (discussing history of the office, which was first established in 1869 by a Treasury Minute).

[155] STEVENS, THE ENGLISH JUDGES, *supra* note 113, at 73.

[156] J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY 275 (4th ed. 1991).

[157] STEVENS, THE ENGLISH JUDGES, *supra* note 113, at 182.

[158] *See* Constitutional Reform Act, 2005, *supra* note 108, c. 49, §§ 42-43 (allowing three-judge panels).

[159] STEVENS, THE ENGLISH JUDGES, *supra* note 113, at 183.

D. Evolutionism and Judicial Creativity

Despite what has just been said, it would be wrong to think that constitutional theory in Britain has completely failed to discover or appropriate the insights of American Legal Realism. In some of their more candid moments modern British judges have been willing to strip away the veneer of formalism that covers the event of judicial decision making, as in the following passage from an essay written by Lord Browne-Wilkinson on judicial reasoning: "The features of current judicial reasoning are…as follows: First, the actual decision is based on moral, not legal factors. Second, these moral reasons are not normally articulated in the judgment. Third, the morality applied in any given case is the morality of the individual judge."[160] Although Browne-Wilkinson fails to distinguish between individual morality as the *cause* of judicial behavior (the external point of view) and individual morality as the *ground* of decisions (the internal point of view), it is notable that during the past two decades British courts have shown a much greater willingness to depart from the ancient tenets of strict textualism in statutory construction and in common law development. Lord Steyn, for instance, declared in *IRC v. McGuckian* that old-fashioned literalism had finally given way to more "purposive methods" for construing Acts of Parliament, and that "[w]here there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it."[161]

Even more remarkably, in *R (Daly) v. Secretary of State for the Home Department*, all of the law lords accepted the test of "proportionality," according to which judges are supposed to make a substantive assessment of the "relative weight" of competing interests in human rights cases — almost as if the court had located a doctrine of substantive due process hidden somewhere in the dark interstices of the British Constitution.[162] Just as in the United States the implied "right to privacy" of the contraception and abortion decisions resonates historically with the now-discredited substantive due process reasoning of the Supreme Court's conservative *Lochner*-era decisions, so too the heightened attention of British judges to moral or political substance in human rights cases harkens back to their conservative judicial activism on matters of taxation during the 1930s, when the House of Lords

---

[160] *Id.* at 118.
[161] [1997] 1 W.L.R. 991, 1000 (H.L.).
[162] [2001] 2 A.C. 532, 547 (H.L.).

construed tax statutes narrowly in order to protect property rights from allegedly "socialistic" taxation.[163] These moralistic trends in recent British case law can be traced at least in part to the writings of Ronald Dworkin, which have proven to be very influential within mainstream British legal theory.[164] I am referring, of course, to Dworkin's well-known critique of H.L.A. Hart's positivism, and in particular to Dworkin's claim that judicial decision making is an interpretive process in which moral principles and moral reasoning — including the "purposes" of the legal system as a whole — must necessarily have a role to play.[165]

In a similar vein, many British courts have made use of what can only be called a *substantive* interpretation of the common law concept of the rule of law in order to curb or control abuses of the discretion exercised by agents of the state. The pace and the scope of this tendency have substantially increased in recent years, during which a series of judicial decisions has, as one commentator puts it, "significantly resisted unfettered discretion, narrowed official immunities and expanded the grounds of review."[166] It is possible, of course, to explain these decisions modestly, as garden-variety examples of courts implementing legislative intention under a modified form of the doctrine of *ultra vires*.[167] Such an interpretation would bring them into harmony with Joseph Raz's well-known claim that the rule of law is a purely formal concept, since otherwise it would have to be seen as a full-blown theory of justice, which it has never been.[168] However, it is also true that there is an unresolved academic debate in Britain today about whether these cases might stand for a much broader principle, namely, that the courts of the United Kingdom possess "an inherent common law function to set the bounds of legality" — subject, of course, to the right of Parliament to override their decisions by legislation.[169]

---

[163] IRC v. Duke of Westminster, [1936] A.C. 1 (H.L.). For U.S. right-to-privacy decisions, see generally Griswold v. Connecticut. 381 U.S. 479 (1965) (contraception) and Roe v. Wade. 410 U.S. 113 (1973) (abortion).

[164] Marshall, *supra* note 119, at 49.

[165] DWORKIN, LAW'S EMPIRE, *supra* note 3.

[166] Marshall, *supra* note 119, at 60.

[167] The doctrine of *ultra vires* refers to acts by corporations that are beyond the scope of their legal powers as defined in their charters or acts of incorporation. BLACK'S LAW DICTIONARY 1771 (3d ed. 1933).

[168] JOSEPH RAZ, *The Rule of Law and Its Virtue, in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 210-11 (1979).

[169] Marshall, *supra* note 119, at 60.

As for the common law elements of the Constitution in general, Lord Browne-Wilkinson recently expressed what some in Britain might call a shocking break with the traditional way of conceiving of judges' relationship with precedent in the following passage from his opinion in *Kleinwort Benson Ltd. v. Lincoln City Council*:

> The theoretical position has been that judges do not make law or change law: they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. . . . [But] in truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world.[170]

To keep the common law "relevant in a changing world" implies some method of interpretation according to which the task of keeping-relevant is to be performed and evaluated. From the standpoint of our topic, it is not enough to say that in the 1960's the House of Lords finally changed an age-old tradition by allowing itself to overrule its own earlier decisions; in addition, one is entitled to ask *by what method* the court will exercise its power to overrule (or retain) precedent. Nor is it enough to say, as Lord Chancellor Kilmuir did in 1954, that "the law 'must play its part in the modern scientific state…the law should be brought in to help in the solution of the great problems of the modern State;'"[171] in addition, one is entitled to ask *what method of "science"* the court will employ.

If it is true, as Robert Stevens says, that modern British courts have reclaimed some responsibility for keeping the common law in line with the needs of society,[172] it is also true (as Stevens himself acknowledges) that "English judges are adept at providing the fig leaf of judicial objectivity" in explaining their decisions.[173] To the extent that British judges *actually believe* that their fig leaf of objectivity is a full suit of clothes, they are following in good faith the method of constitutional interpretation that we have called textualism. On the other hand, to the

---

[170] [1998] 2 A.C. 349, 358 (H.L.).
[171] Stevens, *Government and the Judiciary*, *supra* note 111, at 351 (quoting, in part, Lord Kilmuir).
[172] *Id.* at 356.
[173] STEVENS, THE ENGLISH JUDGES, *supra* note 113, at 180.

extent that Lord Browne-Wilkinson is correct in implying that the personal morality of judges is both the cause and the ground of their decisions, then the fig leaf of objectivity is truly a fig leaf, with the result that British "law" is not law, properly speaking. To be an exercise of legal interpretation (as opposed to the implementation of personal preference) judges must follow, in good faith, *some* legally valid method of interpretation that they consider to be binding on them — whether this method is what we earlier described as "textualism," "originalism," "evolutionism," "moral readings of the Constitution," "judicial pragmatism," or something else.

On October 28, 1998, Lord Lester asserted in the House of Lords (col.1968) that judges in Britain had become a third branch of government during his time at the bar.[174] But if this is so, they have not become a third branch of government in the American sense, for as we have seen, in the United States the question of the legitimacy of judicial methods of constitutional interpretation occupies a leading position in legal theory and judicial practice. In contrast, it must be said that British law currently does not make its methods of interpretation into a *question* or *problem*. Wittgenstein once said, "What the eye doesn't see the heart doesn't grieve over."[175] Judicial and academic eyes in the United States see clearly (some might say too clearly) that the contents of constitutional interpretations are necessarily linked, if not determined, by the methods used to generate them. So far this has largely escaped the penetrating gaze of British judges and academics, who do not think explicitly "enough" about the problem of methods of interpretation: explicitly enough, that is, if one's goal is to isolate and think about them in their own right, considered apart from the more general problems of parliamentary sovereignty, judicial restraint in statutory interpretation, and the contents of the common law. But who knows? Perhaps the new British Supreme Court will begin to generate the kind of political controversy over its methods of interpretation that the United States Supreme Court has generated over the past forty years. To achieve that result, all it needs to do is begin rendering decisions that Parliament acknowledges to be beyond its power to change, thereby stirring up the competing social forces whose oxen are either curried or gored, and directing the inevitably fervent attention of these forces towards the judiciary. If and when that happens, British constitutional theory will

---

[174] LORD LESTER STMT. IN HOUSE OF LORDS ON OCT. 28, 1998 (COL. 1968).

[175] LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS 205 (G.H. von Wright et al. eds., 3d ed. 1998).

become more like its American counterpart, and, if I may be permitted to say so, the world's many legal systems will become both less heterogeneous and less interesting.