The American Constitution and the Debate over Originalism

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Contents

Preface *page* ix

Introduction 1

1 The Politics of Originalism 20

2 The Concept of a Living Constitution 55

3 Interpretivism and Originalism 90

4 The Paradox of Originalism 122

5 The Problem of Objectivity 154

6 The Epistemology of Constitutional Discourse (I) 176

7 The Epistemology of Constitutional Discourse (II) 208

8 The Ontology of Constitutional Discourse (I) 235

9 The Ontology of Constitutional Discourse (II) 263

10 Conclusion: The Political Character of Constitutional Discourse 281

Index 301

Introduction

Despite its apparent remoteness from everyday politics and its often esoteric character, constitutional theory in the United States is never a matter of purely abstract, disinterested speculation. As the legal expression of essentially political conflict, controversies in American constitutional theory are, rather, the theoretical and principled expression of intensely partisan, practical concerns. Stimulated by the Warren Court and its jurisprudential legacy, the dominant controversy in contemporary American constitutional theory for some fifty years has been the conflict over the merits of the interpretive paradigm known as "originalism," "the theory that in constitutional adjudication judges should be guided by the intent of the Framers."[1] As a work of constitutional theory, this book seeks to explore the nature of American constitutionalism through an analysis of the nature of constitutional interpretation. Specifically, its guiding premise is that a reconsideration of the originalism debate will illuminate the essentially constitutive character of the Constitution, and, in turn, that an understanding of that constitutive character will cast a fresh light on the familiar originalism debate.

Although the originalism debate brewed quietly in academic and intellectual circles throughout the 1970s, the general public's awareness of it was stimulated by the determined and single-minded jurisprudential agenda of the Reagan administration during the 1980s. "The most basic issue facing constitutional scholars and jurists today," stated a 1987 report of the Office of Legal Policy in the Reagan Justice Department, "is whether federal courts should interpret and apply the Constitution in accordance with its original meaning."[2] With the passing of the Reagan years and, in particular, the failed

[1] Earl Maltz, "Forward: The Appeal of Originalism," 1987 *Utah Law Review* 773, 773.

[2] *Original Meaning Jurisprudence: A Sourcebook* (Report to the Attorney General by the Office of Legal Policy, United States Department of Justice, 12 March 1987), 1. Although not a scholarly work in the strict sense of the term, this booklet is a handy compilation of the major theses of originalism and a prime example of the constitutional dimension of contemporary

nomination of Judge Robert Bork to the Supreme Court,[3] the originalism debate moved back out of public awareness and even out of most law reviews.[4] Nevertheless, the debate is reignited every time a nomination to a seat on the Supreme Court goes before the Senate. For example, in his opening statement at the confirmation hearings for Justice Ruth Bader Ginsburg in the summer of 1993, Senator Orrin Hatch set forth the standard originalist position:

> The role of the judicial branch is to enforce the provisions of the Constitution and the laws we enact in Congress as their meaning was originally intended by the Framers. Any other philosophy of judging requires unelected Federal judges to impose their own personal views on the American people in the guise of construing the Constitution and Federal statutes.[5]

The claim that in constitutional adjudication we necessarily face the interpretive choice between the intentions of the Framers and the personal views of unelected federal judges, and that the former have a democratic legitimacy that the latter do not,[6] is central to originalism, and it is a claim that this book will examine in detail.

For now, however, the question is, why does the originalism debate over the proper standards of constitutional interpretation recur? The answer, I suggest, is twofold. First, as Chapter 1 will note, the contemporary originalism debate springs from an immediate, historically specific political context: the cultural struggle over the meaning and legacy of the 1960s waged by liberals and conservatives in the final third of the twentieth century. Yet,

American political conflict to which I just referred. It is a useful illustration of originalist themes, and I shall refer to it henceforth as *Sourcebook*.

[3] On the Bork nomination, see, among others, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990); Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: W. W. Norton and company, 1989); and Patrick B. McGuigan and Dawn M. Weyrich, *Ninth Justice: The Fight for Bork* (Washington, DC: Free Congress Research and Education Foundation, 1990).

[4] See, however, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1997). The major symposia dealing with originalism in the 1990s have included the following: "Originalism, Democracy, and the Constitution," 19 *Harvard Journal of Law & Public Policy* 237–531 (1996); "Fidelity in Constitutional Theory," 65 *Fordham Law Review* 1247–1818 (1997); and "Textualism and the Constitution," 66 *George Washington Law Review* 1081–1394 (1998). During the early stages of the presidency of George W. Bush, the Federalist Society returned to the topic of originalism on a 2002 symposium panel entitled "Panel II: Originalism and Historical Truth," in "Law and Truth: The Twenty-First Annual National Student Federalist Society Symposium on Law and Public Policy," 26 *Harvard Journal of Law and Public Policy* vii–x, 1–237 (2003), at 67–107.

[5] *New York Times* (national edition), July 21, 1993, C26.

[6] For example, *Sourcebook* argues at 4 that "if the courts go beyond the original meaning of the Constitution, if they strike down legislative or executive action based on their personal notions of the public good or on other extra-constitutional principles, they usurp powers not given to them by the people."

second, while this debate may have been set off by a particular political context, its roots lie in the very nature of the American constitutional system itself. The contemporary originalism debate is a particular formulation of an ongoing concern with the nature of constitutional interpretation that stems from the fact that in the United States we live under a written constitution. Fundamental political conflict in the United States comes to constitutional expression not simply because of the peculiar feature of American political culture captured in Alexis de Tocqueville's famous dictum that "scarcely any political question arises in the United States which is not resolved, sooner or later, into a judicial question."[7] The truth of de Tocqueville's observation rests not on a mere idiosyncrasy of American political culture, but rather on what I suggest is the central feature of the American polity: We are a society constituted, which is to say ordered, by our fidelity to a fundamental text. The common bond of American society, as so many people have recognized, is not race, ethnicity, language, or religion, but the Constitution.

This common bond, however, is of a very special sort. The Constitution is a written document, but it is a written document with social reality. In philosophical terms, the Constitution is not just linguistic, but ontological. This is what we mean when we say, with deceptive simplicity and apparent redundancy, that the Constitution *constitutes*. The Constitution has a social reality in that it is not simply a legal document, as are so many written constitutions around the world that may or may not be in force. Rather, its social reality lies in the fact that through it we actually define who we are as a people. The Constitution certainly defines who we are as a people in a symbolic sense, as do the flag and other symbols of American nationhood. Yet to say that the Constitution constitutes is to argue that it defines who we are as a people not just in a symbolic sense, but, more significantly, in a substantive sense. We Americans are, I suggest, a people who live textually.

Given this special character of the Constitution, therefore, political conflict over principles basic to and definitive of American society quite naturally finds expression in conflict over interpretation of the fundamental text that formalizes those principles and renders them authoritative. As Gary McDowell has written, "the fact that the Constitution orders our politics means that, politically, a great deal hangs on the peg of interpretation; to change the Constitution's meaning through interpretation is to change our

[7] Alexis de Tocqueville, *Democracy in America* (New York: Vintage Books, 1990), Vol. 1, 280. De Tocqueville's observation continues to ring true: Political controversies often do become constitutional controversies, as evinced by the issue of flag burning in the 1980s, and constitutional controversies often become political controversies, as with the issue of criminal procedure in the 1960s and after. For flag burning, see, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989). As to the politicization of criminal procedure, see, e.g., Theodore H. White, *The Making of the President, 1968* (New York: Atheneum Publishers, 1969), passim, for the Republican assault on *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Miranda v. Arizona*, 384 U.S. 436 (1966) in the 1968 presidential election.

politics."[8] "By controlling the meaning of a text," he says, "one can control – shape, mold, and direct – the affairs of that society bound by that text."[9] While I will proceed in this book with an argument against much of what McDowell intends by such a claim, I strongly affirm the claim itself.[10] The idea of controlling American society by controlling the meaning of its fundamental constitutive text is, I submit, precisely the core of the claim that we Americans are a people who live textually. And, no less important, this same idea explains the controversial nature of the originalism debate in contemporary American constitutional theory. As an argument about controlling the meaning of our fundamental constitutive text, the originalism debate is an argument about controlling the affairs of our society. That fact is what gives an apparently abstract jurisprudential controversy its concrete, partisan passion.

The originalism debate, however, is often erroneously conflated with the other, longer-standing debate traditionally occurring in constitutional theory: the debate over the legitimacy of judicial review, which subsumes within it the argument over judicial activism and judicial restraint.[11] The common thread between the two is their derivation from the proposition – the first principle of the American political system – that the Constitution is fundamental law. To grasp that principle, the central logic of American constitutional reasoning can be formulated in terms of what I call our "constitutional syllogism":

P_1: If X is contrary to the Constitution, then X is null and void.
P_2: X is contrary to the Constitution.
C: Therefore, X is null and void,

where X is an act of a federal, state, or local legislative, executive, or judicial body.[12] P_1 is the major premise of the constitutional syllogism and expresses

[8] Gary McDowell, "Introduction," in Gary L. McDowell, ed., *Politics and the Constitution: The Nature and Extent of Interpretation* (Washington, DC: National Legal Center for the Public Interest and The American Studies Center, 1990), xi.

[9] Ibid., x.

[10] Indeed, the intelligibility of this distinction between a written claim and what the author intended by the claim is central to the analysis that follows.

[11] In "Judicial Review and a Written Constitution in a Democratic Society," 28 *Wayne Law Review* 1 (1981), for example, Joseph Grano discusses many of the themes of the originalist debate but does so under the rubric of the justification and proper scope of judicial review. Michael Perry also appears to conflate the two questions, to some extent out of despair over the exhaustion of the debate over constitutional theory. See *The Constitution in the Courts: Law or Politics?* (New York: Oxford University Press, 1994).

[12] Much constitutional conflict, it should be noted, occurs around what we can call a "subsyllogism":

P_1: If X is contrary to the Constitution, then X is null and void.
$P_{1.1}$: If X fails test Q, then X is contrary to the Constitution.
$P_{1.2}$: X fails test Q.
P_2: X is contrary to the Constitution.

the proposition that within the American political system the Constitution counts as fundamental law. More than merely the major premise of the constitutional syllogism, however, P_1 is the first premise of the American political system itself, and throughout all constitutional controversies it remains unchallenged. P_2, for its part, is the minor premise of the syllogism and expresses the claim that a particular act of government is inconsistent with the powers granted by the Constitution. Given the major and minor premises of the constitutional syllogism, the conclusion necessarily follows that the particular act of government in question is null and void. What, then, is the source of controversy in constitutional interpretation if the conclusion necessarily follows from the premises of the syllogism? The problem is P_2, for it raises two central questions: First, who in the American political system is authorized to determine that X is contrary to the Constitution? Second, how – that is, by what criteria – does the authorized interpreter(s) determine that X is indeed contrary to the Constitution?[13] The question as to who in the American political system is authorized to determine that X is contrary to the Constitution initiates the debate over the legitimacy of judicial review and the complementary debate over judicial activism and judicial restraint.[14] By contrast, the question as to the criteria by which one determines that X is contrary to the Constitution is the foundation of the originalism debate.[15]

That is, much constitutional debate has to do with the proper tests to be applied to determine constitutionality, such as the various levels of scrutiny at issue in equal protection cases or the *Lemon* test at issue in many establishment clause cases.

[13] In *American Constitutional Interpretation* (Mineola, NY: Foundation Press, 1986), Walter Murphy, James Fleming, and William Harris point to a third central question of constitutional interpretation beyond "Who interprets?" and "How does one interpret?" – "What is the Constitution to be interpreted?" While it is helpful initially to distinguish between asking how and asking what, they are in fact two sides of the same question. To determine what counts as the Constitution is already to have committed to a particular "how," and to determine how one interprets the Constitution is already to have committed to a particular "what."

[14] As every first-year law student learns, in *Marbury v. Madison*, 5 U.S. 137 (1803), Marshall actually begged the central question at issue in the case. He argued for the validity and necessity of the status of the Constitution as fundamental law (P_1), which was not in dispute, whereas he merely asserted the validity and necessity of judicial review (the "Who?" question of P_2), which was at issue.

[15] These questions are related in that the former flows into the latter. Briefly, the controversy over the legitimacy of judicial review is often characterized in terms of the notions of "judicial activism" and "judicial restraint." Judicial activism and judicial restraint have to do with the willingness of courts to overturn the actions of elected bodies and officials. If one argues, as Alexander Bickel famously did, that insofar as it is a countermajoritarian force in our political system, judicial review "is a deviant institution in the American democracy (Alexander Bickel, *The Least Dangerous Branch* [New Haven, CT: Yale University Press, 1986], 18), then any exercise of judicial review would be presumptively illegitimate. If Congress passed a law appropriating funds for, say, operating expenses of cabinet departments, then, all things being equal, a court would be remiss if it failed to exercise restraint and allow the law to stand. However, if Congress passed a law mandating, simply and explicitly, that adherence to a particular religion is a condition of full participation in American citizenship, then, all

As the structure of constitutional reasoning, the constitutional syllogism as a whole expresses the idea of binding the future at stake in the concept of fundamental law. Behind all the various provisions of the American Constitution there stands a fundamental and widely acknowledged premise: The

things being equal, a court would be remiss if it failed to be activist and strike down the law. The propriety of judicial activism or judicial restraint is not an independent matter, therefore, but rather depends upon the more fundamental issue of the norms on the basis of which courts decide to overturn or ratify the actions of elected bodies and officials.

It is those norms of judicial review that implicate the originalism debate. Given what some consider the presumptive illegitimacy of judicial review, the precise determination of relevant norms becomes central to curbing judges' discretion in their exercise of such a countermajoritarian function as judicial review in matters affecting individual rights and liberties. Federal courts, and especially the Supreme Court, are regularly charged with invalidating state policies in these areas not on constitutional grounds, but rather on grounds that at bottom are nothing but the personal policy preferences of electorally unaccountable judges. Speaking for the Reagan administration's view of the 1984–5 Court's decisions in the areas of federalism, criminal justice, and religion, former Attorney General Edwin Meese claimed that "far too many of the Court's opinions were, on the whole, more policy choices than articulations of constitutional principle. The voting blocs, the arguments, all reveal a greater allegiance to what the Court thinks constitutes sound public policy than a deference to what the Constitution – its text and intention – may demand" (Edwin Meese III, Speech before the American Bar Association, July 9, 1985, Washington, DC, reprinted in Paul G. Cassell, ed., *The Great Debate: Interpreting Our Written Constitution* [Washington, DC: The Federalist Society, 1986], 9). At the more academic level of analysis, Michael Perry argued more broadly that "virtually all" of the Court's modern individual-rights decision making "must be understood as a species of policymaking, in which the Court decides, ultimately without reference to any value judgment constitutionalized by the framers, which values among competing values shall prevail and how those values shall be implemented" (Michael J. Perry, *The Constitution, the Courts, and Human Rights* [New Haven, CT: Yale University Press, 1982], 2). The conservative critique of contemporary Supreme Court jurisprudence argues that such policymaking is possible only to the extent that judges stray from the original meaning of constitutional provisions.

At the same time, however, we must bear in mind that if one were to reject judicial review in favor of some type of legislative review, one would still be faced with the distinct question of how one determines whether or not X is contrary to the Constitution. That is, if we argue that legislative judgments as to the constitutionality of bills under consideration are deemed to be final and not subject to judicial review, we still face the problem of how legislators, rather than judges, determine constitutionality. After all, legislators, no less than judges, are committed to the proposition that if X is contrary to the Constitution, then X is null and void. Had the Jeffersonian position that the legislature, rather than the Hamiltonian position that the judiciary, is authorized to make the determination that X is contrary to the Constitution won out, the question of criteria for making that determination remains. Thus, while the originalism debate and the debates over the legitimacy of judicial review and judicial activism are related in that they both derive from the Constitution's status as fundamental law, they are distinct in that they derive from different questions that arise in the basic constitutional syllogism. If most of the constitutional theory of the 1980s and early 1990s was devoted to the "How?" question, much of the theory since then, perhaps due to the apparent exhaustion of the debate, has been devoted to the "Who?" question. See, for example, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999), and Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

purpose and very nature of a constitution – especially a written constitution – is its capacity to bind the future. Sanford Levinson explains this idea nicely:

> Constitutions, of the written variety especially, are usefully viewed as a means of freezing time by controlling the future through the "hardness" of language encoded in a monumental document, which is then left for later interpreters to decipher. The purpose of such control is to preserve the particular vision held by constitutional founders and to prevent its overthrow by future generations.[16]

Walter Berns likewise adverts to this premise when he writes that the Framers "provided for a Supreme Court and charged it with the task, not of keeping the Constitution in tune with the times but, to the extent possible, of keeping the times in tune with the Constitution."[17] The concept of "binding capacity" is truly a strong point of originalism, for binding the future is, in American political thought, the very purpose of a written constitution in the first place. "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually," Hamilton wrote in Federalist 78.[18] Marshall echoed him in *Marbury*:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.[19]

Similarly, Raoul Berger points to Jefferson's comment that the purpose of a constitution is to "bind down those whom we are obliged to trust with power," doing so "by the chains of the Constitution."[20]

[16] Sanford Levinson, "Law as Literature," 60 *Texas Law Review* 373, 376 (1982). Similarly, Barry Friedman and Scott Smith write: "The search for the 'history' and 'traditions' of the people is precisely the right one for constitutional interpreters. The goal is always to identify in our history a set of commitments more enduring and less transient than immediate popular preference. This is the single most important function of a constitution – to limit present preferences in light of deeper commitments." "The Sedimentary Constitution," 147 *University of Pennsylvania Law Review* 1, 65 (1998).

[17] Walter Berns, *Taking the Constitution Seriously* (New York: Simon & Schuster, 1987), 236.

[18] *The Federalist Papers*, Clinton Rossiter, ed. (New York: New American Library, 1961), 470.

[19] *Marbury v. Madison*: 5 U.S. 137, 176 (1803). "The constitution," Marshall continued in the same place, "is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." Because the Constitution is indeed "superior, paramount law," it is binding on future generations because it cannot be changed easily or for light and transient causes.

[20] Cited in Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977), 252. Referring to this same idea

While the binding capacity of the Constitution comes into play in the area of structural principles such as federalism and the separation of powers, perhaps the prime example of that capacity is its role in the problematic relation between majority rule and individual rights. As fundamental law, the Constitution, supposedly above politics, is always drawn into political controversies between majority rule and individual rights precisely because of its binding function. Through this function the Constitution establishes the distinction, central to American political culture, between the sphere of matters subject to decision by majority rule, regardless of individual preferences to the contrary, and the sphere of matters subject to individual choice, regardless of majority preferences to the contrary. The Constitution binds contemporary majorities to respect this distinction and thereby not to act in certain ways, however democratically decided, vis-à-vis individuals. Robert Bork aptly distinguishes between these spheres in terms of what he has famously called the "Madisonian dilemma":

> The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty. . . . We have placed the function of defining the otherwise irreconcilable principles of majority power and minority freedom in a nonpolitical institution, the federal judiciary, and thus, ultimately, in the Supreme Court of the United States.[21]

As it attempts to reconcile these contending spheres, to police the boundary between two principles "forever in tension,"[22] the judiciary, which itself is never to make policy decisions, is always drawn into politics because it puts procedural and substantive limits on the policy decisions that can be made. It is the binding capacity of the Constitution that grounds the obligation of an otherwise democratic polity to accept and respect these limitations. Given the framework of a sphere of majority rule and a sphere of individual choice, the traditional problem, of course, is to decide what falls within each sphere. In analytical terms, the political question in such instances is always, does the Constitution bind a contemporary democratic majority to cede

of "the chains of the Constitution," Berger elsewhere makes the standard originalist argument about the binding capacity of the text: "In carrying out their purpose to curb excessive exercise of power, the founders used words to forge those chains. We dissolve the chains when we change the meaning of the words." See "Originalist Theories of Constitutional Interpretation," 73 *Cornell Law Review* 350, 353 (1988).

[21] Bork, *The Tempting of America*, 139.

[22] Ibid., 139.

decision-making power to the individual? The nature and extent of the Constitution's binding capacity, however, turn directly on the interpretation of the text. That is why Jefferson cautioned: "Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction."[23]

Jefferson's statement here returns us, therefore, to our initial point – viz., that while the contemporary originalism debate arose in a particular political context, its roots and recurrence lie in the very nature of the American constitutional system itself. That nature is quite simply the fact that "Our peculiar security is in the possession of a written constitution." The concern that we not make the Constitution "a blank paper by construction" illustrates the corollary fact that as long as we have a written constitution, we are going to have arguments over the nature of constitutional interpretation. Originalism is an interpretive theory advocated precisely as a way – indeed, the only way – to ensure that the Constitution will not be made a blank paper by construction. Its focus on the concept of original meaning is the crux of the theory: Whatever complexities it might involve and whatever forms it might take, originalism at its simplest holds that a constitutional provision means precisely what it meant to the generation that wrote and ratified it, and not, as nonoriginalism would contend, what it might mean differently to any subsequent generation. Originalists themselves, we will see, differ as to evidence of original meaning. For some, the original meaning is grounded in the intentions of the writers – the authors – of the Constitution, the position I shall call "hard originalism"; for others, the original meaning is grounded in the understanding of the ratifiers – the first readers – of the Constitution, the position I shall call "soft originalism." Both versions, however, subscribe to the more general principle that in constitutional interpretation the normative context of interpretation is that of those who wrote and ratified the language in question rather than that of any later interpreters.[24]

[23] Cited in Berger, *Government by Judiciary*, 364.

[24] This question of the proper normative context of constitutional interpretation has been with us from the ratification debates on and featured prominently in several early classic decisions of the Supreme Court. When Chief Justice Marshall writes in *Gibbons v. Ogden* that "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said," *Gibbons v. Ogden*: 22 U.S. 1, 187, 188 (1824), the normative interpretive context seems to be that of those who wrote and ratified the Constitution. Madison, for example, wrote that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers." Cited in Berger, *Government by Judiciary*, 364. Justice Scalia writes that "I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1990) (Scalia, J., concurring). On the other hand, when Marshall says in *Ogden v. Saunders* that the words of the Constitution "are to be understood in that sense

This principle manifests the interpretive problematic endemic to American constitutionalism, a problematic that involves the nature and authority of written texts and their interpretation. The political theory of American constitutionalism rests equally on two fundamental premises, the premises of constraint and consent. The first premise is that the purpose of a constitution, especially a written one, is to bind future generations to the vision of its founders, that is, to constrain the American people – individuals and institutions, citizens and government officials alike – to follow the principles of the Constitution rather than anything else. The second premise is that the binding of future generations to the vision of the founders is a democratically grounded and legitimated act of We the People, that is, that in some sense We the People have consented to be governed – bound – by the principles set forth in the Constitution. To speak of the Constitution's capacity to bind the future crucially presupposes the capacity of language, and especially the capacity of written texts, to structure human action, and this is to point to an important intersection between the social sciences' traditional interest in investigating social phenomena and the humanities' traditional interest in investigating language. That intersection is the grounding of human texts in human activity and the structuring of human activity by human texts, an interrelation I call "textuality."[25] Thus, an explanation of the binding capacity of the Constitution involves a theory of constitutional textuality – a theory of the ontology of language, if you will – because such binding capacity consists of a particular relation between the Constitution and American society.

If textuality is the key to binding capacity, then interpretation is the key to textuality. Whatever else it might be, in formal terms "constitutional interpretation" means interpretation of the Constitution, a statement that, far from being merely a banal tautology, implies the important substantive proposition that the constitutional text regulates – governs – the range of possible interpretations and thus constrains the interpreters. Interpretation must occur *in* the terms of the constitutional text – in the sense that the constitutional text provides the language of interpretation – and *within* the terms of the constitutional text – in the sense that the constitutional text constrains the range and substance of interpretation. An interpreter must

in which they are generally used by those for whom the instrument was intended," 25 U.S. (12 Wheat.) 213 (1827), 332, the normative interpretive context could be taken to be not that of those who "intended the instrument," but of those to whom the Constitution was addressed – and this category certainly includes future generations as well as the founding generation.

[25] In *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993), Will Harris refers to the phenomenon I label textuality as "interpretability": "I will call the systematic connection between document and polity the interpretability of the Constitution, with the explicit claim that when we refer to constitutional interpretation we are invoking this connection" (5).

in principle be able to say, "Regardless of – indeed, at times contrary to – my own personal values, popular opinion, or any other factors, in my best judgment the Constitution requires X." In and of itself, the claim that in constitutional interpretation we should be bound by the text of the Constitution is an unobjectionable statement of the idea of binding the future at the very core of the concept of a constitution. To be a constitutionalist of the American variety, therefore, is necessarily to be a "textualist" in the broad sense that one ascribes authority to a particular written text.

Yet how does one guarantee that constitutional interpretation occurs in the terms and within the terms of the constitutional text? Originalism is a regulative theory of constitutional interpretation whose purpose is to provide such a guarantee; should there arise a distinction between the original understanding and a current understanding of a particular constitutional provision, the original understanding is the only authoritative, democratically legitimate, and legally binding understanding. That is, originalism argues that the necessary check on our understanding of the text of the Constitution is the original understanding of the text of the Constitution, and that in the absence of this – and *only* this – check there could be no fixed meaning, and thus no democratically legitimate way of binding future generations to the structure of the polity created by the founding generation. In this way originalism points to binding capacity as its very essence, and that is why there is such strength in its appeal.

However, the characteristic move of originalism is to conflate what, I will argue, are two distinct claims. Originalism translates the uncontroversial claim that in constitutional interpretation we should be bound by the text of the Constitution into the controversial claim that the original understanding of the constitutional text always trumps any contrary understanding of that text in succeeding generations. The reason this translation is controversial is that, to its proponents, originalism is synonymous with constitutionalism itself, such that to reject originalism is to reject constitutionalism. Underlying these claims is the relation between two propositions that I will explore in detail in the course of the book but that I can introduce here:

P_1: What binds the future is the constitutional text.
P_2: What binds the future is the original understanding of the constitutional text.

Originalism denies the possibility of distinguishing between P_1 and P_2. The proposition that what binds the future is the constitutional text and the proposition that what binds the future is the original understanding of the constitutional text are, for originalism, identical,[26] such that the denial of

[26] Justice Antonin Scalia, for example, asserts this identity by writing that it is "a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." Scalia, concurring, in *Minnesota v.*

the latter necessarily amounts to a denial of the former. In other words, to deny the authoritativeness of the original understanding of the constitutional text is, for originalism, to deny the authoritativeness of the Constitution per se, and to deny the authoritativeness of the original understanding is to undermine the binding capacity of the Constitution. Thus, as a claim about the nature of constitutionalism, this is to argue that to reject originalism is to reject constitutionalism itself.

The position I seek to develop here, by contrast, is that P_1 and P_2 are in fact and necessarily separable. That is, the proposition that what binds the future is the constitutional text is a broader proposition than the narrower proposition that what binds the future is the original understanding of the constitutional text, such that we can uphold the former without being forced to accept the latter.[27] Crucially, I contend that we have to understand these propositions as distinct and separable if we are to account for both the democratic and binding character of the Constitution. The surprising paradox of originalism, I will argue, is that originalism, due to its assumptions about language and interpretation, in fact cannot explain the democratically grounded binding capacity of the Constitution on which it stakes its claim to theoretical and political validity. The purpose of a constitution may well be to get everything down on paper, in language, in order to bind future generations, but originalism's focus on the original understanding – that is, the writers' intentions or the ratifiers' understanding – in fact presupposes a marked lack of trust in the capacity of language to bind. We must infer from originalism's focus on original understanding that, despite its emphasis on the constitutional text, what binds us is not the language of the text but rather the understanding of the people who wrote and ratified the language of the text. The paradox here is that if originalism truly believed in the binding capacity of language that it affirms, it would lose its raison d'être: Originalism can claim to be a necessary guide to constitutional interpretation only because it denies the binding capacity of language that it purports to affirm.

At bottom, then, my purpose here is to "take the Constitution seriously," in the phrasing of Walter Berns,[28] and it is my perhaps surprising suggestion that doing so requires defending originalist goals – and constitutionalism generally – from originalism itself. Language, I will argue, simply does not function in the way originalism presupposes. Originalism's premises in both political and literary theory, I will argue, create a paradox: To the extent that

Dickerson, 113 S. Ct. 2130, 2939 (1993). Originalism, in other words, is the very essence of constitutionalism.

[27] This is the position, as Barry Friedman and Scott B. Smith aptly cite Alexander Bickel, that "fidelity is owed to the Constitution rather than to the Framers." "The Sedimentary Constitution," 147 *University of Pennsylvania Law Review* 1, 6 (1998). For originalism, by contrast, fidelity to the Constitution is necessarily fidelity to the Framers.

[28] Berns, *Taking the Constitution Seriously*.

the Constitution is binding, it is not democratic, and to the extent that it is democratic, it cannot be binding. While originalism sees binding character and democratic character as consistent, they are in fact, on originalism's political and literary premises, contradictory. I will argue, then, that originalism simultaneously affirms and denies the democratic and binding authority of the Constitution because it simultaneously affirms and denies the binding capacity of language. As the foundation of constitutionalism, originalism insists on the capacity of language to bind, yet originalism considers itself necessary because of (what it does not recognize as) its disbelief in the binding capacity of language. That is, originalism claims to be the only interpretive paradigm by which the Constitution democratically binds the future, but my contention here will be that the theory's *necessary* – if not always admitted – distinction between the constitutional text and the original understanding of that text actually undermines the democratic and binding character of the Constitution.

With an eye toward the truly voluminous literature on the originalism debate that has appeared since the mid-1970s, Michael Perry, one of our most consistently thoughtful constitutional theorists, claimed as long ago as 1991 that "the debate about the legitimacy of particular conceptions of constitutional interpretation – originalist, nonoriginalist, and nonoriginalist-textualist – is now largely spent."[29] Arguing that the originalism–nonoriginalism distinction has collapsed, that we should conceive their relation as "both/and" rather than "either/or," Perry wrote that

> originalism entails nonoriginalism, that although we should all be originalists, we must all be nonoriginalists too: The originalist approach to constitutional interpretation necessarily eventuates in nonoriginal meanings; over time an originalist approach to the interpretation of a constitutional provision whose present meaning is different from – in particular, is fuller than – its original meaning, whose present meaning goes *beyond* the original meaning.[30]

As I will explain in the course of this book, I think Perry was right in saying that the originalism–nonoriginalism debate is spent, but he was right for the wrong reasons. We will do well to reconstruct and take another, closer look at the seemingly familiar dimensions of this debate,[31] a debate that will likely

[29] "The Legitimacy of Particular Conceptions of Constitutional Interpretation," 77 *Virginia Law Review* 669, 673 (1991). I explore his terminology *infra*. For another argument in the same direction, see Eric J. Segall, "A Century Lost: The End of the Originalism Debate," 15 *Constitutional Commentary* 411 (1998).

[30] Perry, "Legitimacy," 710.

[31] One commentator writes as recently as 2002 that "[t]he originalist debate has progressed without a clear statement of the doctrine or an adequate account of the different versions in which it can manifest itself." Aileen Kavanagh, "Original Intention, Enacted Text, and Constitutional Interpretation," 47 *American Journal of Jurisprudence* 255, 3 (2002). Indeed, despite the voluminous literature over the years, Kavanagh states, at 34, that "[m]uch of the confusion in the constitutional theoretical discussion of originalism has been caused by

reignite immediately – and ferociously – when one of the current justices announces his or her retirement and thus offers President George W. Bush his first opportunity to shape the Supreme Court. I will argue that originalism can neither be nor accomplish what its own self-understanding claims it is and does; the concept of original or Framers' intent[32] cannot function as the check on interpretation in the way originalists maintain. The mistaken argument of originalism is that *we* do not – and, indeed, cannot – decide

unclear terminology." However familiar, therefore, the originalism debate certainly can bear further examination.

[32] A terminological issue arises immediately when we mention the word "Framers." Raoul Berger maintains that the "intent of the Framers" is "the explanation that draftsmen gave of what their words were designed to accomplish, what their words mean." See "Originalist Theories of Constitutional Interpretation," 73 *Cornell Law Review* 350, 350–1 (1988). Leonard Levy writes that the term "original intent" "is commonly used and widely understood to mean what the Constitutional Convention understood or believed about the Constitution." *Original Intent and the Framers' Constitution* (New York: Macmillan Publishing Company, 1988), xiv. Strictly speaking, the term Framers should refer to those who wrote the original Constitution or its subsequent amendments, as distinct from those who ratified the original Constitution or its subsequent amendments. As Jack N. Rakove writes:

> *Intention* connotes purpose and forethought, and it is accordingly best applied to those actors whose decisions produced the constitutional language whose meaning is at issue: the framers at the Federal Convention or the members of the First Federal Congress (or subsequent congresses) who drafted later amendments. . . . Original intention is thus best applied to the purposes and decisions of its authors, the framers.

Original Meanings: Politics and Ideas in the Making of the Constitution (New York: Vintage Books, 1997), 8. By contrast, Rakove continues, "understanding" "may be used more broadly to cover the impressions and interpretations of the Constitution formed by its original readers – the citizens, polemicists, and convention delegates who participated in one way or another in ratification" (Ibid). Most sophisticated commentators accept James Madison's assessment of the Convention's interpretive importance vis-à-vis that of the actual ratifiers: "As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character . . . [t]he legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must not be in the opinions or intentions of the Body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. all the Authority which it possesses." Cited in Christopher Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, 1986), 34. The various sets of notes recorded at the Philadelphia Convention are thus taken to serve as guides to the way the Constitution was probably understood at the various state conventions.

In the interest of accuracy and precision, I have considered using the term "Founders" to refer generically to those who wrote and those who ratified the Constitution and its amendments, leaving "Framers" to refer to those who wrote – as in the foregoing citations from Berger and Rakove – and "ratifiers" to those who ratified the text. Nevertheless, such precision flies in the face of conventional usage. Consequently, I shall use Framers to refer collectively to those who wrote and ratified the Constitution or its subsequent amendments, clearly distinguishing between writers and ratifiers when necessary, and I shall use "original understanding" to refer to what both the writers and ratifiers of a constitutional provision considered it to mean.

what the Constitution means; rather, the Framers and/or the ratifiers decide, and our obligation is but to obey. Otherwise, goes the argument, the Constitution would have neither its necessary binding character nor its necessary democratic character. My goals in this book, then, are (1) to show why originalism makes such an argument, (2) to show why that argument does not work, and (3) to show why it does not matter to a successful account of the binding and democratic character of the Constitution that the originalist argument does not work. *We* – always and necessarily *we* – decide, and that is what grounds *both* the binding and democratic character of the Constitution.

That said, my argument against originalism thus may appear to be an argument for nonoriginalism, but it is my hope to contribute here to breaking out of that either–or dichotomy. It is neither the purpose nor, I hope, the consequence of my analysis here to make a case for nonoriginalism as conventionally understood. My suggestion is that the critique of originalism I offer amounts to the critique of nonoriginalism as well. That nonoriginalism is named and conceived in terms of originalism is not, I suggest, just coincidence.[33] If we in fact are *not* able to choose between reading the Constitution in original terms and reading it in contemporary terms, if in fact we can read the Constitution *only* in contemporary terms, then we cannot be originalists as opposed to nonoriginalists or nonoriginalists as opposed to originalists. Rather, while grounded in political conflict, they are bound together in their mutual opposition because their opposition is generated by a particular set of metatheoretical premises, premises about the nature of language, interpretation, and objectivity.[34] My argument will be that both originalists and

[33] As Lawrence Lessig has written:

> While originalists sometimes say that we must apply the principles of the Framers and Ratifiers to the circumstances of today, they more often behave as if the question were simply (and always), "How would the originals have answered this question then?" And while non-originalists usually claim that weight should be given to the historical meaning of the Constitution, rarely do they suggest just how this should be done. Thus, the extremism of the strict originalist (decide cases now as they would have been decided then) invites the extremism of the non-originalist (decide cases now as would be now morally the best), and in between these extremes is lost our understanding of what fidelity might be.

"Fidelity in Translation," 71 *Texas Law Review* 1165, 1171 (1993) (footnotes omitted). I discuss Lessig's notion of translation in Chapter 2.

[34] Let me be clear when I say that an argument over differing conceptions of language, interpretation, and objectivity underlies the originalism debate. At the beginning of this Introduction, I stated that controversies in American constitutional theory, as the legal expression of essentially political conflict, are the theoretical expression of intensely partisan, practical concerns. By that I mean to make a claim that avoids two types of reductionism. On the one hand, I do not take a Platonist position that sees politics as an epiphenomenon of abstract theory. On the other hand, I also reject what might be called a "legal-realist" position that sees theory as nothing more than an epiphenomenon of politics. Instead, while I see controversies in constitutional theory as grounded in political concerns, I consider those theoretical controversies to have an integrity of their own that makes them worth examining in their own right.

nonoriginalists, due to shared assumptions about the way language works, seem to think – at least unconsciously – that we need to impose a structure on constitutional discourse or else risk what I will call "semantic" – and thus political – anarchy. Consequently, a successful critique of originalism does not require that we opt for nonoriginalism. Instead, I hope to show that a critique of the fundamental premises of originalism dissolves the nonoriginalist alternative as well and forces a retheorization of the nature of constitutional interpretation as already and always structured.[35] If the concept of Framers' intent cannot function in the way that originalism requires, because it relies on misconceived assumptions about the nature of language, interpretation, and objectivity, then the conventional distinction between originalism and nonoriginalism can no longer stand.[36]

Instead, on the retheorization of constitutional interpretation I propose here, I will describe the Constitution not as originalist or nonoriginalist or, as Perry suggests, both, but as constitutive.[37] My project here is to argue that the constitutive character of the Constitution is the key to accounting successfully for both the democratic character and the binding capacity of the Constitution, and that it is what I will call an "interpretive" theory of constitutional textuality, rather than what I will call the "positivist" theory of textuality presupposed by originalism, that can explain that constitutive character satisfactorily.[38] The interpretive approach enables us to resolve the paradox of originalism in the broader concept of constitutive character, which is in the end the true political character of constitutional discourse, for only the interpretive approach allows us to explain the statement that we

[35] As David Couzens Hoy has written, "If originalism cannot be stated acceptably, then the need to formulate an explicitly anti-originalist theory disappears." "A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction," 15 *Northern Kentucky Law Review* 479, 480–1 (1988). In other words, while originalism, as a self-conscious interpretive approach, can be said to have arisen historically in opposition to what its adherents believe to be the errors of nonoriginalist jurisprudence, nonoriginalism derives *logically* from premises it shares with originalism.

[36] There are, one might argue, three possible positions here: (1) constitutionalism (and law generally) necessitates originalism, (2) constitutionalism allows for originalism, but for nonoriginalism as well, and (3) constitutionalism is actually inconsistent with originalism and nonoriginalism. The originalist position is (1), the nonoriginalist position is (2), and my position is (3).

[37] Think of two football coaches and a third figure independent of the former two: One of the two coaches could advocate a run on the next play, while the other could advocate a pass. If they asked the third figure to settle the matter, and he said, "Okay, bunt," we would have a clear sense that the third figure has changed the game. That is the burden of my enterprise here – to change the game.

[38] I will, of course, define and explain these theories in detail, but I must sound a note of caution at the outset. Legal scholars are familiar with the term "interpretivist," but the term "interpretive" I employ here is quite distinct from and not at all equivalent to the former. I strongly urge the reader to bear that in mind while reading this book and resist the temptation to elide the two.

are a people who constitute ourselves as a people in and through the terms of a fundamental text.

My goal, therefore, is to engage and advance the literature of the originalism debate not by simply adding on to it but, rather, by working through that literature in order to reconceptualize it in a fundamental but hitherto largely unexplored manner. In other words, I will use a reexamination and critique of the originalism debate as a springboard for developing a positive theory of the nature of constitutionalism and constitutional interpretation. I will make an essentially philosophical argument here rather than a specifically legal one, because the originalism debate has been conducted – with rare exceptions, unknowingly – on the basis of philosophical assumptions about the nature of language, objectivity, and interpretation. More important, a reconsideration of the originalism debate in terms of the metatheory that underlies it will tell us something significant about what it means to live within the terms of a fundamental constitutive text. As a work of both analysis and synthesis, the plan of the book, specifically, is as follows. Chapter 1, "The Politics of Originalism," deals with the question of whether originalism is an essentially conservative approach to constitutional interpretation, concluding that this is not the case. Chapter 2, "The Concept of a Living Constitution," explores the question of whether the term "living Constitution" is, as originalism would argue, an oxymoron. Chapter 3, "Interpretivism and Originalism," traces the genealogy of the originalism debate back to the interpretivism debate and argues that the former is grounded in but not identical to the latter. Through reconstructing the genealogy of these debates, I shall map the logic of their interrelationship and argue that the conventional assumption of their conceptual equivalence itself rests on certain tacit and debatable premises about the nature of what I call constitutional textuality. Chapter 4, "The Paradox of Originalism," makes the argument that while originalism claims to be the only interpretive theory by which the Constitution can be seen to bind the future democratically, its premises in fact create a contradiction between the notion of binding the future and the principle of democratic consent. Chapter 5, "The Problem of Objectivity," explores the claim that the only guarantee of objectivity in constitutional interpretation is the anchor of original understanding, without which we are adrift in a sea of subjectivity. Chapter 6, "The Epistemology of Constitutional Discourse (I)," examines the deeper epistemological grounds of objectivity in constitutional interpretation, and Chapter 7, "The Epistemology of Constitutional Discourse (II)," takes a detailed and critical look at a recent sophisticated case for the literary theory that grounds originalism. The guiding theme of both chapters is the claim that, while originalism argues that we need a strong normative standard to prevent the Court from creating new rights unrelated to the text of the Constitution, there can be no such strong normative standard outside the discourse of constitutional interpretation. Rather, the discourse itself – the generation of arguments back and forth over particular

constitutional issues and assessments of the persuasiveness of those arguments – is its own normative standard. Constitutional interpretation is principled, with a normative bite, in the only way it can be – because we take it as our task to explain what *the Constitution* means and not what we mean, not what we would like it to mean, not what a popular majority wants, and so on. That normative standard and bite thus can be nothing other than the constitutive character of the Constitution, and Chapter 8, "The Ontology of Constitutional Discourse (I)," begins the task of grounding both the binding and democratic features of the Constitution in the constitutive character of the text by exploring how the legacy of legal realism undercuts the possibility of explaining those features. Chapter 9, "The Ontology of Constitutional Discourse (II)," completes the explanation of the constitutive character of the Constitution through the use of John Searle's distinction between the regulative and the constitutive. Both chapters argue that we structure our social reality through our articulation of constitutional principle, but we articulate constitutional principle through structuring our social reality. That is the sense of the constitutive character of the Constitution; constitutional principle and social reality are not two separate, independent, and externally connected items, but rather abstractions from our social ontology. Finally, Chapter 10, "The Political Character of Constitutional Discourse," maintains by way of conclusion that not the originalist but rather what I call the interpretive theory of constitutional interpretation allows us to understand the essential nature of constitutional discourse as classical political theory would have it – public deliberation over what constitutes the common good under a written constitution.

Located at the intersection of law, political science, philosophy, and literary theory, then, this book is intended to be a work of constitutional theory rather than, more narrowly, an argument about deciding cases.[39] It will not argue for some alternative normative theory or method for deciding cases – nor will it argue for or against a right to privacy, a right to abortion, the limits of national powers in a federal system, and so on – but instead will question the presupposition, on which originalism and nonoriginalism both rest, that we need a normative theory in the first place. It is thus a descriptive and analytical argument about the nature of constitutional interpretation, an argument about what constitutional interpretation is and cannot not be.[40]

[39] As Stephen M. Griffin writes: "There are important theoretical questions about American constitutionalism that have nothing to do with Supreme Court decisions. The nature of American constitutionalism, the validity of the doctrine of popular sovereignty, and the relationship of the Constitution to American political development are all examples. These questions do not normally arise in any court case because they concern the appropriate purpose and design of the constitutional system as a whole." *American Constitutionalism: From Theory to Politics* (Princeton, NJ: Princeton University Press, 1996), 4.

[40] Richard Posner argues that constitutional theory is essentially normative: "the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the

Additionally, it is a work that uses a reconsideration of the originalism debate to illuminate the nature of American constitutionalism rather than, more narrowly, a work that is simply another study of originalism. Ultimately, then, its goals are to examine the phenomenon of "binding the future" central to the purpose of a constitution and yet not directly addressed by other works, to provide a concept of interpretive constitutional theory more systematic than one finds scattered about the present literature, and thus to contribute to moving constitutional theory past the originalism debate, and, finally, by reasserting the essentially constitutive character of the Constitution, to contribute to recent calls to put constitutions back into the empirical concerns of political science and social theory.[41]

United States." Richard A. Posner, "Against Constitutional Theory," 73 *New York University Law Review* 1, 1 (1998). My goal is, to the extent that the distinction is truly intelligible, not normative but descriptive: to explain the way constitutional interpretation works rather than to propose another alternative.

[41] In "A Constitutionalist Political Science," for example, Dennis J. Coyle suggests that "constitutionalism is, or at least should be, virtually synonymous with political science." *The Good Society*, Vol. 9, No. 1 (1999), 76–81, 76.