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## Further Reflections on Not Being "Not an Originalist"

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## ARTICLE

**FURTHER REFLECTIONS ON NOT BEING  
“NOT AN ORIGINALIST”**

H. JEFFERSON POWELL

There are two issues on which I have come to a clearer view of my own position, benefitted by the very thoughtful responses by Professors Michael Stokes Paulsen and Robert J. Delahunty, the ensuing general discussion, and subsequent conversations with others.<sup>1</sup> I have not been persuaded—as yet!—that I am mistaken in my overall argument, but perhaps this supplementary essay will indicate more clearly than I was initially able to do what the basic questions are, and how I (and those who disagree with me as well) might best answer them.

**(1) Objection: The problem to which originalism is the proposed solution is non-existent, and thus one ought to be “not an originalist.” My response is that originalism stemmed from the correct perception that (a) the Supreme Court was systematically failing to make constitutional decisions in a professionally responsible fashion, and (b) the Court has an obligation to make its decisions in that manner. Contrary to the anti-originalists, then, originalism identified an important problem. However, (c), the originalists’ own formulation of their critique suffers from an internal contradiction.**

A great many lawyers and others interested in constitutional issues dismiss originalism because in their view it was, and is, an unnecessary response to a feature of recent constitutional law that is neither novel nor troubling.<sup>2</sup> I have argued that the initial and ongoing impetus for

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1. In particular, I should mention Ralf Michaels, Sarah Powell, and James Boyd White.

2. Actually, some people who reject originalism go much further than that, and think the originalist project an intellectually dishonest pseudo-answer to a contrived pseudo-problem. That there have been people who endorsed originalism, or opposed it, for insincere or strategic reasons, I do not doubt, but the ever-present possibility of hypocrisy is simply one of the moral circumstances of all intellectual debate. What one should do about it, if anything, in this or other contexts is a distinct question from a debate on the merits. My interest, in the lecture and this

originalism has been the strong sense that something was, and is, seriously awry with the Supreme Court's execution of its task of constitutional adjudication and exposition.

For many anti-originalists (let's call them), there was nothing wrong in principle with the ways in which constitutional law developed in the period from the appointment of Earl Warren to the appointment of William Rehnquist as Chief Justice. On this view, while there were individual constitutional decisions that were wrong (perhaps many such decisions) and the Court at times drove some way down a path of analysis that turned out to lead to a dead end,<sup>3</sup> such occasions were of no broad significance. The Court, they reason, has always made constitutional decisions in ways similar to those that provoked the sharp attacks launched against Chief Justices Warren and Burger and their colleagues. It is a consistent and no doubt irremediable characteristic of constitutional law that, at times, the Court makes mistakes, a failing from which the Warren and Burger Courts were not exempt, but their occasional lapses provide no justification for a general objection to their work product based on the claim, or fear, that their errors were unusual or systemic.

I have considerable sympathy with this, the apologist's perspective: as I noted in my lecture, I think much of the constitutional law the Warren Court made was well made.<sup>4</sup> Nevertheless, I think the systemic criticism that motivates originalism is so substantially justified that I side with the critics rather than the apologists.

Consider Charles Fried's version of the broad critique (I do not suggest that Professor Fried is an originalist himself). "[I]t was not the so-called activism" that was the Warren Court's perceived sin, Fried has suggested, "but the suspected lack of professional discipline and principle."<sup>5</sup>

[T]he Court was not only willing to strike out clearly and boldly for some great principle of liberty, as in *Brown v. Board of Education*

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essay, is in addressing others who share my concern on the merits with the questions of how we should do constitutional law, and whether originalism is a cogent answer.

3. A good example might be the Court's brief flirtation with a special constitutional doctrine addressing irrebuttable presumptions. Compare *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (holding that "permanent irrebuttable presumptions" presumptively violate due process) with *Weinberger v. Salfi*, 422 U.S. 749, 770-72 (1975) (effectively abandoning the doctrine). Most observers then and since have thought the Court's retreat in *Weinberger* was wise.

4. See Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 3-16 (1970), reprinted in CHARLES L. BLACK, JR., *THE HUMANE IMAGINATION* 140-55 (1986) (evaluating the Warren Court's constitutional decisions). Professor Black's laudatory conclusions rested not simply on his moral and political approval of the major themes in the Warren Court's constitutional jurisprudence but also on his judgment that the work of the Warren era, taken as a whole, was "good law" in which "reason support[ed] justice" and thus satisfied the demands of what Black called "the art of law." *Id.* at 14-16; see also BLACK, *supra*, at 26 ("responsibility to reason, even to technical reason, is the soul of the art of law").

5. Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 75 (1995).

or perhaps *Reynolds v. Sims*, but also [seemed to be] implementing a diffuse and omnivorous project to further a partisan agenda in every field it touched. Carrying out this project, the Court was unwilling to be held back even by the need to offer good reasons for what it was doing, to state the facts, to distinguish the precedents, to parse the statutes in a professionally responsible way.<sup>6</sup>

The Burger Court, Fried thinks, “offered no relief at all” from these faults.<sup>7</sup>

On the contrary, it piled incoherence on incoherence. It neither carried forward and rationalized the left-liberal thrust of the Warren Court nor resolutely dismantled it. . . . [Many of its] decisions, although in practical terms significant, were so cryptic, so redolent of compromise, or so incoherent in statement, that they convinced no one and settled nothing.<sup>8</sup>

This all seems to me admirably and accurately put, but I expect that many eminent and highly intelligent anti-originalist commentators would reject it as essentially wrong-headed because it rests on a faulty premise. It makes sense to label a discernible substantive thrust to the Court’s decisions a partisan agenda, pillory its opinions as professionally irresponsible, or ridicule a period of ad hoc outcomes as incoherent *only* if there is some standard of behavior or performance by which to judge non-partisanship, professionalism, and coherence. Such a standard exists only if there is a persuasive argument, not only that the Court can live up to the standard proposed, but also that the Court is under a definable obligation to do so. It is precisely the existence of any such standard that is doubted by many anti-originalists.

This skepticism about the presuppositions of Fried’s (or my, or the originalists’) critique is not an attribute shared only by Warren and Burger Court apologists. A few years ago, I heard an academic lawyer—a most distinguished person—comment that “the law, of course, has no method of its own.” This was said with the air of one making an observation so obviously true as to need neither explanation nor justification. I believe that this is a view shared very widely in the legal academy and, perhaps less self-consciously, among more than a few practicing lawyers and judges.

If the law has no method and, as I took the person I am quoting to mean, important or controversial legal decisions must or should be reached

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6. *Id.* at 75–76. In form, Professor Fried is stating what he believes “the country” thought to be true about the Warren Court, but I think the judgments are clearly his as well. *Id.* at 75. I do not believe that Fried is charging the Warren era justices, or most of them, with being intentionally partisan (or the justices of the Burger era with being knowing incompetents!).

7. *Id.* at 76.

8. *Id.*

on the basis of considerations with no intrinsic relationship to legal reasoning or argument,<sup>9</sup> it makes no sense to criticize the justices' constitutional decisions for their professional deficiencies. Professionalism involves, at most, a set of conventions about the verbal forms in which the Court's constitutional decisions should be announced. The justices must make the decisions themselves on other grounds of policy, political expediency, or morality. An anti-originalist holding this view thus would have a good reason for criticizing Warren Court liberalism if she thought a conservative slant would have been preferable, or even Burger Court incoherence if she thought that era's inconsistencies had been harmful. Such criticisms, however, rest on different grounds than the critique of the Court that lies at the root of originalism, and that Professor Fried and I share in substantial measure.

To sustain this latter form of critique, one must, in principle, be ready, as I have suggested, to state an account of constitutional law that is a realistic description of what the Supreme Court could be imagined doing when it decides constitutional cases, and an explanation of why the Court might be thought to have an obligation to make decisions in the described fashion. This account and explanation clearly require a fuller statement than I can provide in these reflections (or perhaps at all!), but let me indicate what I would give as the basic lines of argument.

**(a) *The concept of a professionally responsible constitutional decision.***

First, constitutional law is, or should be, law—not just as a matter of the verbal forms in which decisions are clothed but in the decisional process itself. How we ought to think of law itself is, to be sure, hotly debated: one need only think of Hart versus Fuller or, coming closer to today, Dworkin versus all his critics (including Dworkin versus Hart!<sup>10</sup>). I don't think we need to settle or even address those debates to give some meaning to the assertion that constitutional law ought to be law.

Legal reasoning and argument, in this legal culture, have certain features, regardless of the specific jurisprudential theories (or instincts) of the lawyers who employ them, that render law a unique form of social decision making.<sup>11</sup> Legal reasoning is centrally “characterized by authority-

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9. There might be good reasons for someone who thinks this way to accept formalistic legalism as an appropriate means for resolving controversies that are unimportant, or unimportant to anyone but individual litigants. If no one else cares whether John or Mary inherits Blackacre, and there is a formalistic argument that Mary should have it, one might as well let Mary do so. Even there, note, the actual reason Mary wins is not because her victory proceeds from the authority of the law but because running the formalistic calculus is efficient or for some other extra-legal reason.

10. See RONALD DWORKIN, *JUSTICE IN ROBES* 140–86 (2006).

11. See, e.g., FREDERICK SCHAUER, *THINKING LIKE A LAWYER*, at xii, 11 (2009) (“[T]here is, descriptively, something we can accurately characterize as ‘thinking like a lawyer,’” and “those

based reasoning—taking the source of a directive rather than the reasons behind it as a justification for following it,”<sup>12</sup> and by the particular regard legal reasoners give to both authoritative texts and judicial decisions (many of the latter, of course, being themselves interpretations or applications of such a text).<sup>13</sup> Legal decisions thus differ sharply from those reached in other settings, where the decision maker’s own individual and substantive views on what it is wisest or best to do are typically decisive: “only rarely do judges engage in the kind of all-things-considered decision-making that is so pervasive outside of the legal system.”<sup>14</sup> Excellence in making legal decisions depends on the exercise of a particular “social capacity: the ability to reason from a body of shared experiences with normative significance to solutions for new practical problems.”<sup>15</sup>

Constitutional-law decision making is decision making of this particular, legal variety, characterized by the axiomatic authority of the text,<sup>16</sup> the defeasible but weighty claims to authority of judicial precedent, and the argument over the meaning of text and precedent that is couched in the familiar modalities of the common law and subjected to the test of legal debate and deliberation.<sup>17</sup> This is in fact what constitutional law has been, as a descriptive matter, since Americans first began dealing with the existence of written constitutions that claim their authority directly from the notional sovereign, and thus can be law for the government and not just law for the governed.

Since the Constitution was a written law, it had to be construed, and this was to be done according to the prevailing methods of legal construction. The ways in which Americans interpret the Constitution could have been different; indeed the forms of

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aspects of legal reasoning that are somewhat formal” are critical parts of “law’s unique contribution to social decision-making.”); DWORKIN, *supra* note 10, at 186 (“Don’t tell the judges that they should exercise their discretion as they think best. They want to know how to understand the [Human Rights] Act as law, how to decide, and from what record, how freedom and equality have now been made not just political ideals but legal rights.”). Dworkin had in mind, I suppose, the U.K. Human Rights Act of 1998, but he might equally have been talking about the U.S. Constitution. My assertions about the identifying characteristics of law are concerned, it is perhaps needless to say, with American law, as a particular variant in the broader common law tradition.

12. SCHAUER, *supra* note 11, at 6.

13. *See id.* at 44 (“[F]ollowing the past without regard to its rightness is pivotal to how law operates.”).

14. *Id.* at 67.

15. Gerald J. Postema, *Classical Common Law Jurisprudence* (Part II), 3 OXFORD UNIV. COMMONWEALTH L.J. 1, 9 (2003).

16. To say that the text has axiomatic authority is not to say that textual arguments always do, or always should prevail. There is more to constitutional law than argument over the Constitution’s words. The words, however, are always relevant and, I would think, presumptively decisive.

17. The traditional common-law understanding of reason put great weight on accountability to “the public forum of forensic deliberation and argument.” *See* Postema, *supra* note 15, at 7–11.

constitutional discourse are very different in other societies. For Americans, however, these ways have taken the forms of common law argument, those forms prevailing at the time of the drafting and ratification of the US Constitution. Thus the methods hitherto used to construe deeds and wills and contracts and promissory notes, methods confined to the mundane subjects of the common law, became the methods of constitutional construction once the state itself was put under law.<sup>18</sup>

To say that constitutional law ought to be law is to say that constitutional decisions, if they are to be constitutional decisions in *this* society, interpreting *this* Constitution, are to be debated and justified through the authority-based reasoning and the forms of common law argument that are the identifying characteristics of law in this society. It is to reject the view, for example, that a constitutional decision should be whatever the decision maker thinks would be the wisest or most desirable decision for society—“what should be done, all things considered”—as opposed to what the Constitution’s text, and the relevant constitutional precedents and practice, might be thought to command.<sup>19</sup>

This account of what law, and thus constitutional law, ought to be is of course overtly normative as well as descriptive. An argument does not become law in the sense I mean simply by using legal terms or citing cases. In my lecture, I quoted Professor John Hart Ely’s famous comment that the Court’s opinion in *Roe v. Wade* was “bad . . . because it is not constitutional law” (legal terminology and citations notwithstanding), although perhaps it would be better to say, as Ely first suggested, that the mere piling up of the forms of legal talk can amount to law, though if that is all there is to it what one has is an example of “bad law.”<sup>20</sup>

However we choose to frame our judgments, the account of law I am proffering is prescriptive. Ely’s criticism of the *Roe* opinion was not that it failed some definition of literary genre but that its use of law-talk seemed to him almost wholly disconnected from the decision the Court was announcing or the Court’s reasons for reaching that decision: the Court showed “almost no sense” that the justices had felt obliged to reason, as opposed to talk, in legal terms. The cogency of Ely’s criticism can be seen in the almost complete absence of any attempt to defend the opinion of the Court on the part of the many lawyers and scholars who think the decision correct. There is, in effect, a consensus on the judgment that the opinion was a failure, unpersuasive, and unprofessional, which demonstrates the normative function of the common-law description of law generally shared

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18. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 5 (1991) (emphasis omitted).

19. SCHAUER, *supra* note 11, at 76.

20. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 947 (1973).

by American lawyers.<sup>21</sup>

This then is the standard of evaluation and critique that Professor Fried and I (and, with a reservation to be noted, the original originalists) would apply to the Supreme Court of the Warren and Burger eras, or any other. The justices'—or anyone else's—handiwork in constitutional cases should be held to the standards of professionalism, responsibility, intellectual coherence, and intellectual honesty that have applied to the decisions of courts in the common-law tradition on “the mundane subjects” of the law, which include, of course, statutory construction as well as common law in the narrower sense:

[E]ven in constitutional cases, precedent and analogy are the stuff of legal argument and . . . legal argument is what moves the Court—or moves it when all involved are doing their work right. Certainly the Justices sometimes ignore or run over or through the arguments, but when this happens it is felt as unfair and wrong. And judges too must feel that precedent and analogy are the straw out of which their bricks are made. A brief to the Court is largely analogy and precedent. . . . This has been the texture of common lawyers' reasoning for centuries.<sup>22</sup>

There are, of course, intramural debates over how to define a “good”—professional, responsible, intellectually honest—opinion or series of opinions in the common-law tradition, but these debates are, I believe, exactly the sort of debates one would expect to find in a living intellectual tradition.<sup>23</sup> Their existence does not preclude the existence of substantial degrees of agreement over whether a given decision is well reasoned, or a given judge or advocate professionally admirable. Most constitutional lawyers respect the second Justice Harlan as an exemplary constitutional judge even if they disagree very strongly with his conclusions on some or even many issues, and I need not name names to remind most readers that parallel but negative judgments are widely shared with respect to some other justices of the recent past.

Let me briefly note a potential objection to this statement of the

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21. I think that any such description is inherently normative, but for present purposes nothing rides on this further claim.

22. CHARLES FRIED, *ORDER AND LAW* 66 (1991); *see also* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 44 (2010) (“The common law approach [to constitutional law] is what we actually do.”).

23. The reader will observe, no doubt, the pervasive influence of Karl Llewellyn. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). I believe that William Twining is persuasive in identifying Llewellyn's concern with professionalism and tradition in that great book as of a piece with his earlier, Legal Realist-era work on juristic method rather than as a late-in-life retreat from the critical insights of Realism. *See* WILLIAM TWINING, *Karl Llewellyn's Unfinished Agenda: Law in Society and the Job of Juristic Method*, in *THE GREAT JURISTIC BAZAAR: JURISTS' TEXTS AND LAWYERS' STORIES* 149–200 (2002).



standard of “good” constitutional law decision making to which I am proposing the Court can be held.<sup>24</sup> I suggest we put to one side the general, jurisprudential question about the extent to which some of the Legal Realists were right to see non-legal factors as the crucial determinants of legal decisions in all circumstances. If that view is correct, then the anti-originalists might be right to reject the critique of the Warren and Burger Courts that I accept, but at the risk of giving up on law more generally. This hyper-Realist position is not a tenable one, I believe,<sup>25</sup> but, in any event, the anti-originalists can make their case with a narrower and arguably more plausible argument: that constitutional decision making by the Supreme Court of the United States in general has not and will not conform to the account of law I am putting forward whatever may be the truth about law in other venues.<sup>26</sup> Consider empirical research into the role of ideology in controversial Supreme Court decisions, the attitudinal model of judicial decision making, and even the ease with which journalists and bloggers can sort justices into “liberal” and “conservative” camps—does not everything point to the conclusion that the Court is and has always been political in a sense not admitted or acceptable under the traditional understanding of law? Is not the idea that “legal argument is what moves the Court” an exploded superstition, a self-delusion or (at best—or is it at worst?) a fiction?

The answer to these questions is, I think, no, for several reasons that I shall list rather than prove: (1) the increasingly sophisticated and interesting empirical study of the Court’s work is leading, unexpectedly from some perspectives, to a more complicated picture of what seems to account for the Court’s constitutional decision making rather than to the complete triumph of the attitudinal model: “the justices just vote whatever they want” is likely to prove almost as crude and inexact a description as “the justices rigidly follow an entirely determinate, external set of legal rules”;<sup>27</sup> (2)

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24. I will deal with a second objection (or misunderstanding) more briefly. I do not think that judicial opinions are supposed to be records of how the judge came to her conclusions, and a commitment to what I am calling the traditional understanding of law is fully consistent with seeing the function of the opinion, particularly on contentious or difficult issues, as an explanation of how the decision is coherent with the law as a whole that is after-the-fact with regard to the judge’s initial sense of what the decision should be.

25. For my reasons, see H. Jefferson Powell, *The Humanity of Law*, 55 VILLANOVA L. REV. (forthcoming 2010).

26. On the plausibility of the hyper-Realist viewpoint in general, and especially with respect to the Supreme Court, see the discussion (with which I agree) in SCHAUER, *supra* note 11, at 138–42.

27. See, e.g., Thomas Brennan, Lee Epstein & Nancy Staudt, *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L.J. 1191 (2009) (criticizing not only the “legal” but also the “political” model of Supreme Court decisionmaking and presenting support for a model in which decisions are driven largely by the justices’ responses to macroeconomic issues). The important, broad-ranging symposium of which this article is a part generally supports the proposition that it is an error to think that the empiricists have “proven” the hyper-Realist position. See generally Jeffrey M. Chemerinsky & Jonathan L. Williams, *Foreword: Measuring Judges and*

leading students of the judicial process who subscribe to models of that process stressing the role of extra-legal factors recognize the salience of formal legal reasoning;<sup>28</sup> and (3) most importantly, as I pointed out in my lecture, since John Marshall, sophisticated constitutional lawyers have recognized the enormous role that moral and political considerations play in the resolution of difficult constitutional issues. The traditional understanding of law, and more specifically of constitutional law, is entirely consistent with acknowledging the inescapable presence of politics and morality, even if some formulations of that understanding, particularly of late by its critics, are not. One can argue, of course, that the whole tradition has been one of continuous self-deceit or *mauvais foi*, but, like all global cynicisms, this contention is ultimately unanswerable and, I think, deserving of no answer.

***(b) The Court's obligation to make professionally responsible constitutional decisions.***

So much then for the standard to which I think the Supreme Court's constitutional decisions can and should be held. But why should the justices, or anyone else, think them obliged to pay it heed, even granting *arguendo* that they could? The Constitution is a matter of life and death (sometimes literally); it concerns power and the limits of power, justice,

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*Justice*, 58 DUKE L.J. 1173 (2009) (introducing the symposium's themes and conclusions). Compare Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONSTITUTIONAL COMMENTARY 461, 462 (2009) ("Ironically, political science scholarship is now moving away from attitudinalism—as usual, law professors are ten or twenty years behind the discipline from which they are borrowing ideas.") with Paul Horwitz, *Judicial Character (And Does it Matter)*, 26 CONSTITUTIONAL COMMENTARY 97, 105 n.25 (2009) ("The attitudinalist [sic] model is still the prevailing model in political science, if we count strategic models of judging as a more nuanced subset of attitudinalism.").

28. I have in mind, above all, Judge Richard A. Posner, who is certainly one of the leading critics of anything resembling legal formalism to be found within the legal profession, but whose overall perspective is more difficult to characterize than his own language often suggests. Compare RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 145 (2001) (characterizing the issues in *Bush v. Gore* as calling for "legal-type judgments rather than for raw exercises of political power . . . a process of statutory (and constitutional) interpretation and application, the sort of thing that courts are equipped to do") with *id.* at 208 (characterizing the Constitution as "invit[ing], enabl[ing], and even compel[ing] the Justices to base many of their constitutional decisions on contestable personal values and ideological preferences" and constitutional law as "[a]n incoherent, deeply politicized body of case law"). Posner's recent analysis of judicial decisionmaking starkly concludes that the Supreme Court "is inescapably a political court when it is deciding constitutional cases." RICHARD A. POSNER, *HOW JUDGES THINK* 323 (2008). Posner's explanation of what he means by "political" in the context of discussing judicial decisions, however, is considerably more nuanced than the word itself might lead a reader to expect. See, e.g., *id.* at 13, 73, 94–95 (discussing what he means by the term), and *id.* at 253 (stating that "[t]he pragmatic judge must play by the rules of the judicial game, just like other judges" in referring to *Bush v. Gore*); see also SCHAUER, *supra* note 11, at 67 n.19 (noting that Posner "accept[s] the largely authority-based nature of legal reasoning").

equality, and liberty—the greatest of human social questions. It is by no means idle to wonder why the folkways of common lawyers should play any significant role in resolving the controversies over these questions that inevitably arise.

The negative conclusion that it is idle or foolish to think that lawyers' thinking should play such a role can be put in a couple of different ways. For many people, running constitutional decisions through the gauntlet of lawyers' reasoning amounts to moral cowardice or indifference. Why should someone possessed of the enormous power to do good or ill that belongs to the Court's members in their exercise of judicial review willingly circumscribe that power, or permit its direction toward evil ends, simply because of arguments that arise out of an elitist, hot-house, professionally self-congratulatory rhetoric? Someone who sees the good and has the power to do it, and who fails to do so on such a ground is, surely, a moral reprobate.

For other people, the problem with allowing legal reasoning to constrain constitutional choice is that doing so is mindless, a kind of intellectual superstition. The Court's purpose in deciding the sort of big-ticket issues that come before it with a constitutional label ought to be to achieve the best social outcomes (the most efficient, the most-widely accepted, etc.). Objections that the Constitution doesn't allow for those outcomes for legal reasons ignore the fact that "the Constitution" has a malleable wax nose. It would be "legalistic," or a lapse into sheer "formalism," to stop short of the outcome with the highest utility value because of lawyers' talk about what constitutional law requires or prohibits. These would-be realists (they often call themselves pragmatists) usually look down on the moral enthusiasts of the first group, but they share with the enthusiasts a profound scorn for the law as a discursive practice. They are both, in their very different ways, supporters of King James I and "natural reason" in his struggle against Lord Coke's exaltation of the "artificial reason" of the law and the lawyers.

The "natural reason" objection to bringing constitutional decision making under the traditional standard of law is hardly an idle one, and there are distinguished persons who advocate or act on one version or the other of it. It is, however, quite wrong, in my judgment, and the Court is under an obligation to make constitutional decisions in accordance with the traditional, common law standard. A systemic failure to follow that standard—what the first originalists feared or accused the Court of doing—thus would undercut the legitimacy of the Court. The Court's obligation to do law (as we might put it) stems from three sources.

First, what the Supreme Court has always claimed to be doing when it decides constitutional cases is deciding them in accordance with the traditional account of law that I have just sketched. The justices have never

laid claim to the power to impose their views of what is just (or moral or efficient or desirable) unfettered by the demands of legal reasoning. The social practice in the United States by which we resolve controversies over a wide range of political issues by subjecting them to decision by the Court (and indeed leaving the question of which issues will be so resolved up to the Court) incorporates as one of its features that the Court makes its decisions as decisions *of law*, explained and applied *as law*, and, in situations that are amenable to formulation as cases *in law*.

There are certainly other ways to imagine handling the societal necessity of resolving such controversies, including by leaving them to an institution much like our high Court, yet charged with making decisions based on what would be best, all things considered,<sup>29</sup> but that is not our system. Chief Justice Hughes did indeed write, extra-judicially and much to his later regret, that “the Constitution is what the judges say it is,” but what he meant was essentially 180 degrees from the “natural reason” position. Precisely because one’s views on great constitutional questions are heavily influenced by his “wishes, affections, and general theories,”<sup>30</sup> Hughes thought it essential for the justices to bring their individual intuitions and preferences on constitutional matters to the bar of legal analysis because their role is the specifically legal (or better, lawyers’) job of deciding cases according to law. Latter-day King Jameses, whether enthusiasts or realists, are proposing that the Supreme Court stop doing what it has always said it is doing, and do something else. Constitutional law, however, must be law because that is, as a matter of social practice and definition, just what it is.

But why should not the Court do exactly that—change the rules of the game from abiding (or pretending to abide) by an immoral or mindless legalism to a robust matter of doing whatever is right? Constitutional history is replete with change, sometimes momentous, ordained or heralded by the Court; why not here, with respect to the Court’s own role? Indeed, is not the progress of the Court from a very secondary role to center stage in American public life an example of the Court transforming its own role?

In his commentary on my lecture, Professor Delahunty rightly pressed this issue of change,<sup>31</sup> and I think his point an important one: one recalls, with a sense of astonishment, that John Jay declined reappointment as Chief Justice because the Court’s role in national life was too trivial. Nonetheless, I believe that it does not lie within the Court’s rightful authority to put aside

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29. The council of revision that Madison among others hoped to make a part of the federal government would have been somewhat along these lines.

30. 4 JOHN MARSHALL, LIFE OF GEORGE WASHINGTON 243 (Chelsea House 1983) (1805).

31. See Robert J. Delahunty, *Originalism and Legitimacy: A Reply to Professor Powell*, 7 U. ST. THOMAS L.J. 281, 285 (“[t]he role of constitutional review in American public life has surely become far more pervasive than it was at the beginning of the Republic . . . . I think that Professor Powell’s emphasis on the continuities of the American constitutional tradition tends to discount the importance of this vast expansion of the judicial role.”).

legal reasoning as the matrix for its constitutional decision, and still less is it proper for an individual justice to do so on his or her own. The justices are public servants, bearers of a public trust. Their authority is not inherent in them as individuals, or unlimited by the position to which they have been appointed, but stems entirely from their good-faith execution of the particular task that is theirs. This is a political and moral obligation, as well as a legal one signified by their oath of office.

Just to observe this is not, of course, to say what it is they have a political and moral obligation to do, but as to that there can be, I think, only one plausible answer. As their job is a public and societal one, so its definition is public and societal—the Court is a court of law and its members are judges whose authority begins and ends with decision according to law. For the justices to announce that they are henceforth going to do something else would be a violation of their oaths and grounds for impeachment.

Our latter-day King Jameses silently concede the force of this argument by their failure to counsel the Court to announce publicly that it decides constitutional cases on extra-legal grounds, as a council of enthusiasts or realists. The justices themselves acknowledge the obligation by their unflinching attempt to explain their decisions in legal terms. Advice that they should do otherwise without disclosing the fact is, however well intended, a species of subornation that, if heeded, leads to a fraud on the Republic.

This then is the second source of the Court's obligation to abide by the standard of traditional legal argument in making constitutional decisions: the personal obligation of the Court's members to carry out, in good faith, the duties of the office they hold as the society that empowers them understands both duties and office, and as they themselves acknowledge by the forms in which they announce and justify their decisions. As long as that understanding holds, society is entitled to rely on the justices' sworn commitment to act in accordance with it.<sup>32</sup>

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32. The question of what American society thinks the Court does and ought to do is ultimately empirical. There is significant evidence supporting what I would suppose that most of us would assume is true, that the public believes that the Court ought to "follow the law" in its decisions although it often suspects the justices of being too "political." See, e.g., Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897 (2005); John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Public Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAV. 181 (2001); John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000). I do not suggest, of course, that the public at large understands, or thinks it understands, traditional legal reasoning in any depth or detail. This raises interesting questions about the viability of currently fashionable notions of popular constitutionalism, see Gewirtzman, *supra*, at 924–27, but I do not think it poses a serious problem of legitimacy for the traditional understanding of law. The public at large (the present writer emphatically included) has no deep understanding of pharmaceutical chemistry but generally acts—I think rationally—in reliance on the doctors, the chemists, and the

Jefferson wrote that, while a “strict observance of the written laws is doubtless one of the high duties of a good citizen,” it is nonetheless “not the highest,” and Lincoln echoed him when he asked whether “all the laws, but one, [are] to go unexecuted, and the Government itself go to pieces, lest that one be violated.”<sup>33</sup> In light of the changes in the Court’s role in American life that Professor Delahunty underlined, perhaps it is time to push society to reconsider how it expects the Court to make decisions. Perhaps the traditional understanding of legal argument is too narrow to account for the Court’s necessary and desirable role, or to permit the justices to reach just resolutions in the controversies they address without intellectual dishonesty or distortion due to the limitations of legal process. The lesson of history, one might add, is that the Court has, at times, significantly reshaped society’s expectations about the constitutional system in ways that have come to seem, at least in retrospect, entirely legitimate exercises of its authority.<sup>34</sup>

The reader already knows that I reject as indefensible the suggestion that individual justices should undertake, unannounced, such a radical change in the terms of their performance, but I reject as well the argument that they should do so openly in a bid for public agreement that, as a general matter, the Court no longer should approach constitutional issues as questions of law. My reason stems from the third source of the Court’s obligation to do law in constitutional cases: the social value of the Court doing so.

Consider for a moment the proposition that the Court should reach the best result for society in every constitutional case that it decides without regard to whether that result can be justified in traditional legal terms. Leave aside the important, and sometimes unknowable, factual concern about what the consequences of a given decision will actually be. If you are

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FDA. Elitism is an empty accusation when there are good reasons for relying on an “elite” defined by actual expertise. Critics of traditional legal reasoning, to be sure, often deny the existence of those reasons and expertise with respect to the law, but that is in the end simply another way to restate the hyper-Realist view of law.

33. Letter from Thomas Jefferson to John Colvin (Sept. 20, 1810), in 4 THE FOUNDERS’ CONSTITUTION 127 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis omitted); Abraham Lincoln, Message to Congress in a Special Session (July 4, 1861) in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953) (emphasis omitted).

34. *Brown v. Board of Education* is the most obvious candidate but there are no doubt others. I think, for example, that many of the hotly-criticized Warren Court criminal procedure decisions were rightly decided *and* that they played a highly important role in changing social expectations about police behavior, not least among police officers themselves. We need not pause to review the debate about the actual impact of the Court’s decisions on public opinion since I am not persuaded that it would be desirable, even if it is legitimate, for the Court to attempt to persuade the country to abandon the general expectation that the Court sits in constitutional cases to say what the law is. Cf. MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1991) (discussing circumstances in which it is legitimate for a common law court to lead rather than follow social expectations about conduct).

a justice, to what sources, and with what modes of thought and consideration, are you to decide what is “best”? Does best mean most just and, if so, under whose views of morality? Does best mean most politically desirable? But then, intelligent people often disagree fundamentally over what that is. Most economically efficient? But even if we can get the economists to agree on an answer, economics does not answer the question of which goals we want to reach most efficiently unless it becomes, overtly or by slight-of-hand, another (contestable) moral or political position. Best pragmatically? But that is even less than no answer, since it has no content at all.<sup>35</sup>

The historical King James did not confront this problem with any “natural reason” argument, at least in (his) theory, since he was the monarch and could determine for himself both what kind of considerations count in figuring out what is best for society and also how to know when one has chosen rightly among the relevant considerations.<sup>36</sup> A twenty-first century American justice is not a monarch, and enjoys no such privileges. The justices are, and in any realistically imaginable world they will continue to be, sharply divided on hugely important issues of political and social policy, morality, economics, and the most suitable way to understand the relationship among all of these factors.<sup>37</sup> This is neither unique to the Court nor a fault: fundamental disagreement over moral, political, and economic issues is one of the moral circumstances of any modern, complex society.<sup>38</sup> As a society, the United States is riven with disagreement over all of these issues, and the Court’s divisions only mirror this fact. If *per impossibile* the justices achieved agreement on which metric to use across the board in

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35. DWORKIN, *supra* note 10, at 64–65 (“In law and morals, particularly, the admonition to avoid thorny questions by seeing ‘what works’ is not just unhelpful. It is unintelligible.”).

36. The conflict between the King and the common lawyers represented by Coke was, of course, in part a cultural one in which the Scottish James held views of the monarch’s role that Coke and many of his other English subjects rejected in theory. The historical results of James’s son and successor Charles’s attempts to push James’s constitutional views even further provide an interesting commentary on the relationship between theory and practice in constitutionalism. *See generally* RICHARD CUST, CHARLES I: A POLITICAL LIFE (2007) (discussing relationship between Charles’s political and constitutional views and the cases of the English Civil War).

37. I assume, with considerable though not perfect confidence, that American politics is unlikely to generate a situation in which a president is able to make over the entire Court in his or her desired image. Even if that were to happen, history strongly suggests that the result would not be to create a lasting intellectual consensus on the Court, but only to shift the lines of disagreement. The Stone Court, the only modern example of a Court reconstituted by a single president, was notoriously contentious. Neither President Nixon’s four appointees nor the five chosen by Presidents Reagan and Bush managed to cohere sufficiently to eliminate sharp divisions among themselves or on the Court as a whole.

38. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 33 (2001) (“[W]e assume the fact of reasonable pluralism to be a permanent condition of a democratic society.”). Rawls did not actually intend to limit the assertion to democracies as a descriptive matter. His point was that what he called a democratic society ought to accept such disagreements rather than attempt to eliminate them.

determining the “best” outcomes in constitutional cases, they would be establishing, in effect, an orthodoxy of value in American public life that would be neither consistent with our constitutional tradition nor reflective of contemporary American society.<sup>39</sup>

At least in the absence of a successful totalitarianism that all would agree is not acceptable under the Constitution, American government does rely on general agreement about certain moral commitments, for example, that it is morally and politically unacceptable for someone entrusted with public authority intentionally to misuse that authority.<sup>40</sup> Beyond these general agreements, however, the Constitution, as Justice Holmes wrote long ago, “is made for people of fundamentally differing views,”<sup>41</sup> and a primary social function of federal constitutional law is to provide a shared means of addressing fundamental disagreements when those cannot be avoided or resolved through the majoritarian political process. “Alongside conflicting moral traditions within a single society there can at the same time be a shared political culture within shared institutions.”<sup>42</sup> “The institutions and their rituals hold society together, insofar as they are successful and well established in the resolution of moral and political conflicts according to particular local and national conventions: ‘this is our peculiar form of governance and we cling to it.’”<sup>43</sup> As the philosopher Stuart Hampshire has argued persuasively, such institutions and their modes of dispute resolution can play this role only insofar they can draw on, and themselves embody, “respect for locally established and familiar rules of procedure.”<sup>44</sup>

In the United States, the Supreme Court has proven able to serve as “both the setting and the mechanism of the conflict resolution” over “very bitter conflicts of moral principle” only because “[t]he Court and its procedures have in fact acquired authority and have established a tradition of respect among bitter adversaries contesting substantive issues of justice.”<sup>45</sup> The basically common-law forms of legal argument and legal decision that Americans inherited from England are among the particular conventions or procedures that, through their perceived success and undeniable longevity, have given the Court the deep reservoirs of public respect that enable it to exercise authority even in the teeth of profound

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39. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”).

40. On this essential, but exceedingly thin and mostly procedural morality, see generally STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2000).

41. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting opinion).

42. HAMPSHIRE, *supra* note 40, at 44–45.

43. *Id.* at 26.

44. *Id.* at 97.

45. *Id.* at 95.



disagreement with individual decisions on the part of many Americans. If this “respect for custom breaks down and ceases to operate, we should expect catastrophe.”<sup>46</sup>

The Supreme Court is an agency of government and its members have, from any reasonable perspective, a presumptive obligation to preserve its efficacy in the system of government, not just out of institutional self-interest, but as a corollary of their duty to act in accordance with their offices. A declared intent on the part of the justices to decide cases not on the basis of the legal tradition with its general, long-standing social acceptance, but through the invocation of particular moral, political, or economic commitments that many Americans reject, might well destroy the Court’s social value as a setting and a mechanism of dispute resolution.

***(c) The problem with the originalist version of the critique that sparked originalism.***

Some readers, I expect, find it a curious feature of both my lecture and this essay that, in describing the problem that sparked originalism and that fuels much of its ongoing appeal, I have invoked lawyers who would not describe themselves as originalists—Bickel, Ely, Fried—rather than the founding fathers of originalism, figures such Edwin Meese, Robert Bork, and Raoul Berger. To some extent, this reflects a substantive judgment about the quality of constitutional argument presented by the particular lawyers on these two short lists,<sup>47</sup> but the more important reason is that originalism itself suffers from a serious internal flaw that ultimately makes originalists less than ideal proponents of their own critique.

As I have argued, the justification for the attack the first originalists advanced against the constitutional work of the Supreme Court of the 1960s and ‘70s, that it was all too often professionally deficient, necessarily rests on the existence of a standard of professionalism that the Court itself ought to have recognized. Unfortunately, in offering their solution for the Court’s deficiencies, the early originalists abandoned the allegiance to traditional legal method that provided the basis for their critique: instead of recalling the justices to the duty to do law, traditionally understood, in deciding

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46. *Id.* at 98.

47. Fried is, and Bickel and Ely were, outstanding figures in the intellectual history of constitutional scholarship. In contrast, Attorney General Meese’s role in the story was, of course, political rather than intellectual, and Berger, whom I believe to have been a very smart lawyer in practice, was intellectually unsuited to the scholarly tasks he undertook. For substantiation of this unfortunately harsh evaluation, see Hans W. Baade, “*Original Intention: Raoul Berger’s Fake Antique*,” 70 N.C. L. REV. 1523 (1992). Judge Bork is, of course, a distinguished antitrust scholar, but his scholarly writing on constitutional law has been more limited, and his most important and interesting constitutional opinion as a judge was thoroughly traditional in its reasoning. See *Ollman v. Evans*, 750 F.2d 970, 993–1010 (D.C. Cir. 1984) (en banc) (Bork, Cir. J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

constitutional cases, they asserted that the justices should adopt a substantively novel approach to decision making that would have replaced legal reasoning with a blend of historical research and textual analysis.

Of course, the first originalists never put it quite that way but generally claimed that “original intent” argument, in their sense, *was* the traditional mode of constitutional interpretation, but for anyone unconvinced by this historical claim about the forms of constitutional-law argument, originalism is a critique without a firm basis in any proposition that the justices being criticized had any reason to accept as legitimate. Since I am among the unconvinced on the historical claim, I think originalism fails to provide a sound basis on which to ground the originalists’ criticism of the Court that I largely share. One cannot convincingly indict the justices for a failure to observe traditional standards of legal decision while rejecting those very standards oneself.<sup>48</sup>

**(2) Objection: Judicial review on any basis other than originalism cannot avoid, in either theory or practice, lapsing into the illegitimate substitution of judicial policy preferences for those of the legislature (or executive), and thus one ought to be an originalist. My response is that originalists do not agree on what approach to use, all versions of originalism are novel and untested, and the originalist search for a theory-based constraint on judicial waywardness is fatally flawed.**

In his remarks, Professor Paulsen noted the very substantial overlap between the concerns motivating originalists like himself and my insistence that the judiciary’s lawful authority to overturn political-branch decisions for constitutional reasons exists only insofar as the judiciary acts in accordance with law rather than as a political actor parallel to the legislature or executive. Since, as he sees it, originalism alone provides a non-political

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48. Judge Bork was well aware of the historical complications with a history-based justification for originalism, see, for example, his attack on *Calder v. Bull*, 3 U.S. 386 (1798), as an example of the Court violating the principles that ought to govern judicial review in ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 19–20, 31–32 (1990). He put the case for both the critique and the proposed originalist solution primarily on the ground that originalism would serve the principle of respect for democratic decision by the self-imposition of judicial restraint. Bork’s concern with the problem of reconciling judicial review and democracy long predated his embrace of originalism, see Robert H. Bork, *The Supreme Court Needs a New Philosophy*, *FORTUNE*, Dec. 1968, at 138 (“What, after all, justifies a non-elected committee of lawyers in overriding the policies of the elected representatives of the people?”), and probably owed a great deal to his close association with Bickel, whose views on constitutional interpretation were not static but were not primarily concerned with originalist-style arguments, see Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985). This is a far more tenable justification for originalism in my judgment but one that fails in the end to respond to the counter-criticism that it provides no non-arbitrary baseline for determining when a judicial decision invalidating a statute is restrained and respectful of democracy. In practice, it would lead to the virtual elimination of judicial review altogether.

method for setting legal constraints on political-branch actions, my own premises require me to adopt originalism.

One approach to making this argument is conceptual: (a) all legal interpretation of an authoritative text is originalist, because that is what it means to *interpret a text*, and, therefore, (b) constitutional law must be originalist because constitutional law is, by universal concession, the interpretation of an authoritative text. Unfortunately, this argument runs into difficulties at the very beginning, with its definition of interpreting a text. Leave to one side sophistications such as reader-response theory that ascribe to the reader (complete?) freedom to make up meaning and ascribe it to the document being “interpreted,” and grant the assumption that the meaning of an historical document must be tied in some sense to the past in which it was created:<sup>49</sup> where do we go from there?

In my lecture, I expressly declined to get involved in the internecine conflicts among originalists over how to do originalist interpretation, but the existence and nature of those conflicts are directly relevant to the claim that only originalism can serve as a properly legal mode of interpreting the Constitution, for the originalists do not agree, and often reject, one another’s interpretive methods with almost as much vigor as they criticize the justices. Professor Paulsen, for example, insists that “no ‘normative’ argument is necessary to justify original-public-meaning textualism as the sole, legitimate, correct method of constitutional interpretation. . . . If what one is *doing* is ‘constitutional interpretation,’ original-meaning textualism is the only enterprise consistent with that description.”<sup>50</sup> On the other hand, Professor Walter Benn Michaels assures us that “you can’t (coherently and non-arbitrarily) think of yourself as still doing textual interpretation as soon as you appeal to something beyond authorial intention – for example, the original public meaning.”<sup>51</sup> Michaels is no doubt in the grip of “the originalist-intentionalist fallacy” in Paulsen’s view, while Michaels thinks an original public meaning approach like Paulsen’s is no more an *interpretation* of the text than an overtly non-originalist one.<sup>52</sup> And so it

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49. An assumption I happily make. See H. Jefferson Powell, *Grand Visions in an Age of Conflict*, 115 YALE L.J. 2067, 2072 n. 15 (2006) (“the existence of a written Constitution necessarily makes a moderate originalism an indispensable starting point for anything that can plausibly claim to be American constitutional law: A refusal to use original meaning to establish the starting point for the words the document uses would render the text infinitely manipulable.”).

50. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 918 (2009).

51. Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21, 21 (2009).

52. Compare Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113 (2003), and especially *id.* at 1141 n.96 (“crude intentionalism”) and *id.* at 1145 n.114 (intentionalism as a “fallacy”) with Michaels, *supra* note 50, at 35 (original public meaning approach is “not a kind of textualism [and] it is not a kind of originalism either. . . . So we cannot really prefer [original public meaning] to non-originalism

goes, leaving even a willing convert to originalism wondering where to turn.

The problem, of course, is not simply that there are too many flavors of originalism to choose among. More fundamentally, the disputes among originalists demonstrate the fact that there is no basis in existing constitutional practice, or in assumptions generally shared among constitutionalists, that grounds the argument for any particular species of originalism as over against the rest. Those of us who defend traditional legal reasoning as the proper approach to constitutional decision have just such a basis: as Professor Fried has written, from the founding era on American lawyers have “taken for granted that the Constitution, like other legal texts, would be interpreted by men who were learned in the law, arguing cases and writing judgments in the way lawyers and judges had done for centuries in England and its colonies.” As it has actually been practiced, constitutional law has always displayed “the texture of common lawyers’ reasoning,” and this fact about the practice puts the onus on those who would change it.<sup>53</sup>

In contrast, an originalist must argue for whichever version of originalism she advocates from the ground up, and against not only Fried’s and my invocation of the “normative power of the actual” but also the critical claim of other originalists that his argument rests on fallacy or faux originalism. In practice, originalist arguments regularly depend on claims about the definition of their terms, which invites the response that definitional assertions have no persuasive power on their own: they gain purchase on the mind only if one has some good reason to accept the definition being proffered other than the reiteration in a louder voice of the circular or lexicographic claim that X is Y. Smart originalists like Professors Paulsen and Michaels know as much and offer reasons supporting their definitions,<sup>54</sup> but those reasons too are contested and contestable. Originalism, which bids for our acceptance with the promise of rescuing constitutional law from the grip of willful choice, ends up presenting us with choices that may not be willful but certainly seem intractable.

Assume, counterfactually, that we find general agreement on what it means to interpret an authoritative text, and now turn to the second half of the conceptual argument, that constitutional law is, by universal concession, the interpretation of an authoritative text. At first glance, this may sound

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on the grounds that it is looking for what the Constitution originally meant; after all, the hypothetical plain meaner is just hypothetical.”).

53. FRIED, *supra* note 22, at 66.

54. Respectively, that the Constitution’s text ordains original public meaning interpretation, and that a resort to authorial intention is necessary even to establish the language and genre of a document.

plausible or even obviously correct: after all, it really is agreed on all sides that the authority of the text of the Constitution is axiomatic.<sup>55</sup>

As part of an argument for originalism, however, the statement begs the question it is meant to answer. The text is indeed authoritative, although not always in any simple way,<sup>56</sup> but what the Court and other constitutional decision makers have been doing for the past two centuries has never been limited to textual arguments in any narrow sense, whether based on the dictionary or (in originalist fashion) on original public meaning, original understanding, or makers' intentions. The actual practice of constitutional law has always involved textual argument—and, for that matter, invocations of original meaning—but, just as invariably, it has included other modalities of argument as well.<sup>57</sup> Even if one agrees that those other modalities of constitutional argument ought not to be termed “interpretations” of the constitutional *text*, they have still been, as a descriptive matter, part of the discourse that everyone has been calling constitutional *law*.

It is, of course, entirely legitimate for an originalist to argue that such arguments are constitutionally illegitimate and that the lawyers and judges have been wrong to use them, that they make *bad* constitutional law. But it makes very little sense to say that *x* is not part of a social practice when the central participants in that practice have been doing *x* for over two hundred years, saying all the while that they were engaged in the practice. As I argued in my lecture, the originalist argument that constitutional law should become a narrower practice than it has been is an argument for quite radical change. Originalism is, in fact, a bid to change the definition of constitutional law, and as such it can gain no support from the sort of conceptual argument originalists so often deploy.

This leaves the argument that in hard fact originalism is the only realistic method available to constrain the ability of judges—but here we really mean the justices of the Supreme Court since lower-court judges act subject to reversal—to do whatever they want in the name of the

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55. See, e.g., Henry Paul Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383–84 (1981) (“The authoritative status of the written constitution is . . . an incontestable first principle . . . not in need of further demonstration.”).

56. Consider the double jeopardy clause’s application to criminal prosecutions in which neither life nor limb is at risk, or the very substantial disconnect between the text of the Eleventh Amendment and the constitutional law of state sovereign immunity from federal-law actions in federal and state courts.

57. Cf. L.H. LaRue, *Constitutional Law and Constitutional History*, 36 BUFF. L. REV. 373, 399–400 (1987) (“Law is a particular way of using texts and precedents, and there are many ways of using these tools. It is an empirical rather than a theoretical question as to which techniques of using precedent prevail in any particular historical context. In some contexts, lawyers and judges use texts to generate rules. In other historical contexts, the practice of using texts and precedents yields a process of practical judgments about what is good for social well-being. The determination of which practice actually occurs is a question for historical investigation.”).

Constitution. Originalism may be, at best, a “lesser evil,” as Justice Scalia famously termed it, but it is a lesser evil than rule by an imperial judiciary imposing its will by fiat. By insisting that the justices limit their exercise of the power of judicial review to cases in which originalist arguments justify such a decision, the argument goes, we can cabin the Court’s discretion and avoid a repetition of the excesses of the Warren and Burger eras. Originalism is, then, to be adopted for instrumental reasons, as a tool, a means of insuring that judicial review remains “law,” decision constrained by authority, and not “politics,” the willful imposition of policy preferences.

The concern to preserve the character of constitutional decision as a practice quite distinct from the policy-driven activities of the political branches of government is, I think, crucially important to the American system—here, once more, I part company with the anti-originalists who dismiss as entirely unfounded originalism’s uneasy view of the Court’s constitutional cases, although, in my view, the grounds for discomfort did not magically depart the Court when Chief Justice Burger retired. They may, in fact, be increasing.<sup>58</sup> But originalism, in this instance, offers neither a workable solution nor even an accurate diagnosis.

As I argued in my lecture, originalism proposes a thoroughgoing revision of the processes of argument and reasoning that lawyers and judges employ in constitutional cases, away from traditional legal method (which has included arguments based on original history) to a narrow focus on the results of historical investigation. I will not repeat most of my objections on that score here. I believe, however, that I failed to state adequately the problem with originalism’s diagnosis, which sees in traditional legal reasoning an inadequate constraint on judicial willfulness. To frame the issue in that manner is to begin with an error, for the issue is not one of constraint at all in the sense the diagnosis presupposes.

A judge bent on manipulating the intellectual tools allowed to reach conclusions he or she does not actually think justified by those tools can, and no doubt will, do so whether the tools include all those in the traditional lawyer’s toolkit or only the narrower and more exotic ones available to the originalist. As a practical matter, trying to control judicial misbehavior by tinkering with the forms of argument is useless. Worse, it mistakes the real and greatly valuable point of theoretical reflection on constitutional decision, which is to enable the decision maker acting in good faith to do her job better, more in accord with the societal understanding of her office and its duties. Legal method is a description of how to do law that presupposes an intention to act in good faith, somewhat as the scientific

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58. See H. Jefferson Powell, Footnote 27: Reasoning About the Irrational in Constitutional Law (May 10, 2010) (unpublished manuscript, on file with author) (analyzing the implications of the Court’s reasoning in two recent cases).

method is a description of how to do science rather than a (vain) attempt to stop dishonest experimenters from falsifying their data.

In the end, the most serious flaw in the originalist diagnosis is its implicit dualism, the underlying intellectual Manichaeism that leads originalists to try to create a *cordon sanitaire* between constitutional law and politics understood broadly. It is a mere assumption, not a truth woven into the fabric of the social universe, that decision makers can act in accordance with law only if we find some way to cleanse both decision and decision maker of any concern with the normative considerations that lie at the heart of politics.<sup>59</sup> Any attempt to do so will fail—Chief Justice Marshall was right to insist that judgments on difficult constitutional matters are inevitably influenced “by the wishes, the affections, and the general theories” of even the most conscientious constitutionalist—and it is wrong-headed in principle even to try.

The American founders, as Professor Bobbitt wrote, “introduced the modalities of legal argument into the politics of the state.” Two centuries of experience have shown that decision to be a success, overall and despite all the failures, some of which have been tragic and very serious indeed.<sup>60</sup> Constitutional law has afforded the Republic a social mechanism for making responsible decisions in the resolution of disputes under conditions of great political, moral, and economic disagreement, and for doing so without ignoring the presence of those disagreements. Originalism, with its underlying dichotomy between law and politics and, for that matter, the anti-originalism of the “law is politics” school of thought, obscure this accomplishment. As Professor Ralf Michaels has put it:

The advantage of law-talk over history-talk is . . . that it transcends the politics/formalism divide in a fruitful matter. . . . [T]he attractiveness of the law is that it has developed a technical language to deal with the political without making it disappear: we do not need to deny the politics of decisionmaking and can still make decisions.<sup>61</sup>

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59. Despite the genuine respect for democracy that motivates many originalists, I believe that originalism’s attempt to divorce constitutional law from politics has extremely negative implications for political-branch behavior. If the constitutional law-jobs which judges and lawyers execute need to exclude politics in the way that originalism assumes, it is easy to assume that those whose job is to do politics have no role or responsibility in the implementation of constitutional norms—the latter task is, after all, a law-job and thus apolitical! The theoretical and practical problems with accepting the sort of dichotomy between law and politics that originalism promotes are profound, but go beyond the scope of this essay. See Powell, *supra* note 58.

60. See H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS 200 (2002) (discussing the *Korematsu* case as showing “the potential” within the American constitutional system “for procedural and substantive regularity to coexist with, and even to validate injustice”).

61. E-mail from Ralf Michaels, Professor of Law, Duke University School of Law, to H. Jefferson Powell, Frederic Cleaveland Professor of Law and Divinity, Duke University School of Law (on file with author).

Constitutional law cannot address all of society's concerns, and as then-Justice Stone once wrote, "[c]ourts are not the only agency of government that must be assumed to have capacity to govern."<sup>62</sup> The law and the Court are limited in their efficacy and competence, and there is ample reason to fear that in recent years the Court has taken too little note of those limits. But it is equally important not to mistake or underestimate the real achievements of our constitutional tradition and thereby to endanger what is for all its flaws a vital part of the ongoing American experiment in making governmental authority worthy of respect, and governmental power an instrument of human good.

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62. *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).