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Putting Faith Back Into Constitutional Scholarship: A Defense of Originalism

Kathleen A. Brady

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PUTTING FAITH BACK
INTO CONSTITUTIONAL
SCHOLARSHIP: A
DEFENSE OF
ORIGINALISM

KATHLEEN A. BRADY*

INTRODUCTION

In one of the most enduring and seemingly intractable debates in modern constitutional scholarship, interpretivists and noninterpretivists argue over the proper task of the judiciary in its exercise of judicial review. Judicial review has been a settled feature of the American political system ever since Justice Marshall outlined and defended this power in Marbury v. Madison.¹ In his landmark opinion Marshall argued that the judiciary's duty to interpret and apply the law gives it a special responsibility to protect the system of government that the Constitution establishes against infringement by other branches of government: the Constitution is the supreme and fundamental law of the land and, hence, the judiciary must enforce this law against deviant actions by state and federal governments.² Of course, in order to apply the Constitution against deviant state actions, judges must have some notion about how to go about reading or, in other words, giving meaning to the text. The debate between interpretivists and noninterpretivists is essentially about how judges should go about interpreting the Constitution and developing their criteria for judicial review. On the one hand, interpretivists argue that judges exercising judicial review must confine their attention to the written provisions of the Constitution and be careful not to go beyond what is explicit or clearly specified by the language of these provisions or

¹ Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
² Id. at 175-77.
their legislative histories. Interpretivists range from strict textualists who advocate a literal reading of the document to originalists who direct judges to the original intentions of its founders as well. On the other hand, noninterpretivists argue that judges exercising judicial review may seek constitutional meaning beyond the language and history of particular constitutional provisions. Some noninterpretivists look to the underlying purposes of the Constitution while others suggest that judges have an affirmative duty to update constitutional principles in light of the changing values and ideals of the American people.

This Article engages the debate between interpretivists and noninterpretivists and argues for an originalist method of interpreting the Constitution. Part I begins by outlining Robert Bork’s defense of originalism, which is one of the most familiar and well developed articulations of the originalist position. The Article then moves on to consider three major critiques of originalism in order to highlight the major weak-

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3 Accounts of the difference between interpretivism and noninterpretivism abound in constitutional scholarship. See, e.g., JOHN H. ELY, DEMOCRACY AND DISTRUST 1 (1980) (Interpretivism means that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, [while noninterpretivism means] that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."); Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 1064 (1981) (drawing the distinction between those who would limit judicial review to enforcing "explicit constitutional provisions" and those who would enforce principles not "specified by the text or original history of the Constitution" but found instead in conventional morality, moral philosophy, etc.). It is important to note, however, the ways in which this Article’s use of the term “interpretivism” may differ from some common definitions in scholarly literature. Ely suggests that the term “interpretivism” is broad enough to cover any constitutional theory which commands judges to find their criteria for judicial review in the text: interpretivist judges may go beyond the explicit content of specific clauses and enforce the underlying structure or meaning of the Constitution as well. Ely, supra, at 12, 87-88. Indeed, Ely suggests that he is the “ultimate interpretivist” when he calls upon judges to construe open-ended textual provisions in a way that protects the inclusiveness and fairness of democratic political processes because, for Ely, these political processes are the underlying purpose of the constitutional text. See Ely, supra, at 87-88. Douglas Laycock follows a similar approach when he argues that judges should interpret open-ended constitutional provisions in light of values which underlie more explicit provisions. See Douglas Laycock, Taking Constitutions Seriously: A Theory of Judicial Review, 59 TEX. L. REV. 343 (1981) (reviewing JOHN H. ELY, DEMOCRACY AND DISTRUST (1980)).

4 However, this Article uses the term “interpretivism” more narrowly to cover only “clause-bound” forms of interpretivism. Ely uses this term to describe interpretivist theories which allow judges to strike down government actions only when these actions violate principles which are clearly specified by the text or history of some particular constitutional provision(s). See Ely, supra, at 12-13. Constitutional theories which would also permit judges to dig beneath the constitutional text in order to enforce more general constitutional values are, according to this Article’s terminology, noninterpretivist.

4 See discussion supra note 3.
nesses of Bork's argument. Part II constructs a defense of originalism which meets these three critiques. This will mean rejecting many aspects of Bork's defense of originalism, and developing a defense of originalism along different lines than those of Bork. Finally, Part III applies this alternative understanding of originalism to review the Supreme Court's privacy decisions under the Fourteenth Amendment.

I. Bork's Defense of Originalism

Bork's defense of originalism is multilayered. In the first place, Bork argues that an "orthodox" understanding of the American system of government demands an originalist approach to judicial review. One of the principal foundations of the American design of government is the separation of powers. The authority to make law is lodged within popularly accountable legislative bodies, and the acts of these bodies gain the legitimacy of law as they are enacted according to prescribed procedures. The judiciary, on the other hand, is barred from policy making. The judicial "task," "commission," "role" or "function" is limited to expounding and applying the "original meaning" of the law. Bork defines the original meaning of the law as what the lawmakers understood themselves to be enacting when they passed the provisions. In order to discover this original understanding of the text, judges must refer to what the public would have understood the law's words to mean.

According to Bork, the Constitution is law and, thus, the exercise of judicial review must be limited to enforcing the original meaning of its written provisions. In other words, judges must discern and apply the intentions of the ratifiers as they are manifested in the words of the Constitution and the meaning these words would have had for the public of the founding era. The moment judges depart from the original understanding of the provisions of the Constitution in order to dig beneath or outside the text for additional constitutional meaning, a "heresy" enters

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6 Id. at 4.
7 Id. at 4-5, 143, 173-74.
8 Id. at 178.
9 Id. at 150.
10 Bork, supra note 5, at 160.
11 Id. at 4, 147.
12 Id. at 144-45.
13 Id. at 5, 144-45.
14 Id.
16 Id. at 144-45.
the American system.\textsuperscript{17} Where a constitutional provision is open-ended or its original understanding lost, judges are not licensed to go beyond the text in search of meaning as some scholars have argued. Rather, in such cases, judges have, in effect, no law to work with and must refrain from acting altogether.\textsuperscript{18}

According to Bork, the appeal of originalism as the appropriate model for judicial review is not exhausted by its orthodox pedigree. Bork also argues that the legitimate exercise of judicial review requires that there be neutral principles to guide judges in constitutional cases, and the original meaning of the constitutional text is the only available source of these principles.

Bork begins his argument from neutral principles with a description of the function of constitutional adjudication in the American system. The Constitution establishes the American political system as a Madisonian democracy.\textsuperscript{19} In other words, our constitutional system contains two countervailing principles: popular government through majority rule and the protection of individual rights against encroachment by these democratic majorities. Bork labels the tension between these two fundamental values of American government the "Madisonian dilemma."\textsuperscript{20} The role of constitutional adjudication in this political system is to "resolve"\textsuperscript{21} the Madisonian dilemma by striking and enforcing the appropriate balance between majority rule and individual rights.

If the balance that courts strike between majority rule and individual rights is to be legitimate, judges must be guided by "exterior"\textsuperscript{22} or "neutral"\textsuperscript{23} principles. In other words, they must follow standards that have their source outside the judges' personal views about the proper resolution of the Madisonian dilemma and have a meaning sufficiently discoverable or "known" so that it can "control" judicial decision making.\textsuperscript{24} In addition to deriving their standards neutrally from some source outside themselves, judges must also define and apply these principles neutrally.\textsuperscript{25}

Constitutional decision making must proceed according to neutral or external standards because, without a fixed source of constitutional

\textsuperscript{17} Id. at 6-7. By "heresy," Bork means, "[t]he dislocation of some complete and self-supporting scheme by the introduction of a novel denial of some essential part therein." Id. at 4 (quoting Hilaire Belloc).
\textsuperscript{18} Id. 165-67.
\textsuperscript{19} BORK, supra note 5, at 139-41; Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 2-4 (1971).
\textsuperscript{20} BORK, supra note 5, at 139; Bork, supra note 19, at 2-3.
\textsuperscript{21} BORK, supra note 5, at 139-40.
\textsuperscript{22} Id. at 265.
\textsuperscript{23} Id. at 145-46.
\textsuperscript{24} Id. at 2.
\textsuperscript{25} Id. at 145-53.
meaning, judges will end up using the power of judicial review as an opportunity to enforce their own political preferences or values against the judgments of democratic majorities. Consequently, the exercise of judicial review will degenerate into a judicial “autocracy” in which judges remake the constitutional structures of American government in their own image. In his recent book, The Tempting of America, Bork spends a considerable amount of time demonstrating that whenever the Supreme Court has departed from the neutral standard of original understanding, it has ended up importing the agenda of its members into the Constitution. Whereas the Court’s decision in *Lochner v. New York*, and its progeny, protected the conservative freedom of contract, the political stripes of those who control the Court have changed and the Court’s constitutional decisions have mirrored this shift: “the abandonment of original understanding in modern times means the transportation into the Constitution of the principles of a liberal culture that cannot achieve those results democratically.” According to Bork, “[t]he truth is that the judge who looks outside the historic Constitution always looks inside himself and no where else.”

For Bork, judicial autocracy is not merely the unhappy result of power-hungry judges who abuse the power of judicial review in order to impose their own values upon the nation. Rather, judges cannot help but wind up enforcing their own values every time they go beyond the limits of external principles. Once they are cut loose from the island of fixed principles, judges are “at once adrift on an uncertain sea of moral argument” where there can be no certain, universally acknowledged moral truths to legitimize their decisions. According to Bork, contemporary moral arguments proceed from hopelessly controversial visions of human good, and, hence, disagreement about such issues as the proper scope of individual freedom and government power is inevitable and unsolvable. Because judges cannot appeal to some noncontroversial theory of human rights or natural law as they seek to balance majority power and individual rights, whatever principles they articulate as the basis of their decisions will merely be a reflection of their own moral preferences.

Bork does not claim that moral knowledge is impossible to attain or that there is no correct morality which could properly resolve the Madisonian dilemma. Indeed, the opinions of nine Supreme Court justices

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26 Bork, supra note 5, at 185.
27 Id. at 19-132.
29 Bork, supra note 5, at 9.
30 Id. at 242.
31 Id. at 252.
32 Id. at 256.
33 Id.
may, in fact, come closer to the truth than the judgments of elected legislatures. However, the problem is that human reason cannot know for certain where the truth lies, and, hence, judges have no way of checking different opinions for accuracy. Thus, unless judges are guided by neutral principles which have authority beyond their own preferences,

the choice [is] either rule by judges according to their own desires or rule by the people according to theirs [and] under our form of government, under the entire history of the American people, the choice between an authoritarian judicial oligarchy and a representative democracy can have only one outcome.

Bork turns to the “original meaning” of the Constitution as a source of neutral, external principles to guide constitutional decision makers. When judges follow the original meaning of the text, they are enforcing choices made by the founders rather than their own preferences. Thus,

[w]hen a judge finds his principle in the Constitution as originally understood, the problem of the neutral derivation of principle is solved. The judge accepts the ratifiers’ definition of the appropriate ranges of majority and minority freedom. The Madisonian dilemma is resolved in the way that the founders resolved it.

According to Bork, the original meaning is the only legitimate source of neutral principles to guide judges. In the first place, it is the obvious source of neutral principles because Bork understands the orthodox meaning of law in the American system to be the original intentions of the lawmakers. Other standards that contemporary constitutional scholars have proposed for constitutional decision making do not qualify as neutral principles because they have been purposefully constructed in order to circumvent the results of originalism and generate more liberal outcomes. By contrast, the philosophy of original understanding is not motivated by any such “political intentions.” Original understanding directs judges to resolve the Madisonian dilemma according to decisions that were made “long ago” and, thus, is not an instrument of either the conservative or liberal agenda.

Furthermore, the original meaning of the text is the appropriate neutral base line for constitutional decision making because it is the pop-

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34 *Bork*, *supra* note 5, at 256 (Moral arguments “start from different premises and [we] have no way of convincing each other as to which are the proper premises . . . . If we have no way of judging rival premises, we have no way of arguing to moral conclusions that should be accepted by all.”).
35 *Id.* at 160.
36 *Id.* at 143-46, 241-42, 265.
37 *Id.* at 146.
38 *Id.* at 6, 9, 241.
39 *Bork*, *supra* note 5, at 177.
40 *Id.*
ular understanding of constitutional meaning. The founders’ resolution of the Madisonian dilemma is the one that our society has consented to be governed by. Indeed, “popular support for judicial supremacy rests upon the belief that the court is applying fundamental principles laid down at the American founding.” Hence, originalism is the only method of constitutional interpretation which can claim democratic legitimacy.

It is important to note that, for Bork, originalist constitutional interpretation does not require judges to discern and rigidly apply exactly what the ratifiers did or would have thought about the outcome of a particular case. Rather, judges must merely search for the principle or value that the founders wished to enact in a certain provision, define it at the level of abstraction which the founders intended (this constitutes the neutral derivation of principle), and do their best to implement this value as new cases present changing circumstances (this is the requirement of the neutral application of principle). Sometimes this method will require judges to go against outcomes the founders envisioned if these outcomes are inconsistent with the principle or goal the founders intended to enact. Furthermore, constitutional doctrines may need to evolve as new circumstances require unforeseen accommodations to old principles. Nor should originalists expect a single completely determinate answer in every case.

41 Bork, supra note 19, at 2-4.
42 Id.
43 Bork, supra note 5, at 16.
44 Id. at 162.
45 Id. at 162-63, 146-53, 167-70.
46 For example, although the authors of the Fourteenth Amendment contemplated segregation in schools, Brown v. Board of Education, 347 U.S. 483 (1954), was correctly decided because the authors mistakenly believed that segregation was consistent with the equality principle that they were enacting. See Bork, supra note 5, at 81-82.
47 Bork, supra note 5, at 167-70. What is impermissible, however, is for judges to respond to changing circumstances by creating new constitutional principles. Id. at 169-70.
48 Many scholars attack originalism for failing to provide the fully determinate principles for constitutional decision making that it promises. See further discussion infra pp. 187-89. For Bork, however, no theory of constitutional interpretation can provide fully determinate principles in every case nor does originalism claim the impossible. According to Bork, “two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake [in a case] and so arrive at different results.” Bork, supra note 5, at 163. However, as long as the evolution of constitutional doctrine is part of a sincere effort to better understand and implement the original meaning of the text rather than to create new principles, judges will not be making the kind of value choices that delegitimize constitutional decision making.
A. The First Critique of Originalism: The Judge as Heroic Creator of Constitutional Meaning

The first critique considered in this Article attacks originalism for tying the exercise of judicial review to fixed, neutral principles (the "First Critique"). Bork would restrict constitutional interpretation to the original meaning of textual provisions in order to prevent judges from imposing their own controversial values on the American people. However, according to the First Critique, by reducing the scope of judicial review to a set of discrete, outdated rules, originalism chokes off the development of constitutional meaning and prevents the Constitution from functioning as a meaningful moral foundation for American government. Rather than envisioning the policy making judge as a tyrant, the authors considered in this section glorify the creative judge as a hero who performs a critical role in engaging contemporary debate about what the Constitution should be.

Ronald Dworkin's argument for "law as integrity" in *Law's Empire* expresses the First Critique well. According to Dworkin, the function of law is to provide principles for ordering community life. If judges are going to respect the principled character of law, it is not enough for them to implement rules as they were enacted by past legislative bodies. Rather, judges should seek to weave together legal norms into a coherent vision for government that expresses these norms in their "best light" from the standpoint of contemporary political morality. Dworkin calls this model of judicial interpretation "law as integrity." According to this model, the interpretation of law becomes an evolutionary process in which judges are continuously reevaluating past rules and judicial decisions in light of changing values and needs and, in this way, constructing "an ongoing political narrative." For Dworkin, judges do not merely...

49 RONALD DWORKIN, LAW'S EMPIRE (1986).
50 Id. at 263.
51 For a discussion of law as integrity, see id. at 164-275. For a good summary, see id. at 254-55.
52 Id. at 225, 228-32. Justice Brennan has defended a similar model of constitutional interpretation:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.
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accommodate old principles to new times as they do for Bork, but judges are also involved in the evolution of legal principles.

Dworkin recognizes that as judges interpret the law in a way that best justifies past legal rules and decisions, they will be making judgments of political morality that involve controversial value choices. For Dworkin, the “best” interpretation of a law is not that which corresponds to some absolute, noncontroversial truth but, rather, is a judgment internal to a community’s legal traditions and about which different members of a legal culture may disagree. However, for Dworkin, the judge is not, therefore, a tyrant as Bork would insist but is, rather, the heroic “Hercules” who preserves the vitality and meaningfulness of law by continuously reinterpreting it in light of changing concerns and values. If judges were bound by the original meaning of the constitutional text, the meaning of law would be reduced to outdated principles of political morality and, hence, would be unable to provide a meaningful moral foundation for our political life today. Tying judges to the intentions of the founders, rather than permitting them to seek the best version of the founders' efforts, is “tantamount to denying that the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman’s time, imagination, and interest stopped. The Constitution takes rights seriously; historicism does not.”

Furthermore, according to Dworkin, originalism cannot yield the coherence of principle that is required of law. The clause-bound originalist approaches the Constitution as a series of discrete textual provisions, and the acts of other branches are only struck down if they violate one or more of these several provisions. For Dworkin, when constitutional meaning is thus fractured into discrete rules, it cannot function as a principled moral foundation for our political institutions. An activist judiciary is required to knit the various constitutional provisions together into a coherent vision of American government.

The purpose of this section has not been to defend the activist judiciary as a viable alternative to originalism. The notion of an activist judi-


54 Id. at 78-83, 266-67.
55 Id. at 239.
56 Id. at 89. Though “[d]ifferent judges belong to different and rival political traditions . . . law gains in power when it is sensitive to the frictions and stresses of its intellectual sources . . . [On the other hand,] law would stagnate . . . if it collapsed into . . . runic traditionalism.” Id.
57 Dworkin, supra, at 369.
58 Id. at 368.
59 Id.
ciary which engages debate about what the Constitution should be and evolves principles in light of changing values and circumstances is subject to a familiar critique. The American system of government is a representative democracy, and it is "the People," through popularly elected bodies, who have the authority to make law. Consistent with the democratic character of our political institutions, our constitutional tradition is founded upon the notion of popular sovereignty: the preamble to our Constitution declares "the People," not the judges, to be the proper author of fundamental law. Hence, it is "the People" who have the right and responsibility to develop and evolve new constitutional values. "We the People" are the heroes of our constitutional system, not some nine judges. Indeed, if the function of constitutional law is to provide a meaningful foundation for our political community, the people, rather than the small judiciary, is a better place to turn for the creation and evolution of these values.

Nevertheless, the value of the activist model of judicial review lies in its powerful critique of originalism. The originalist must explain how the Constitution can provide a meaningful moral foundation for American government when its meaning is tied to a set of discrete principles which were enacted long ago. Those who reject originalism emphasize how difficult it is to update the Constitution through the formal amendment processes. The amendment process is slow and demanding, and the original meaning of the Constitution may have lost its significance for our contemporary community long before a new vision is sufficiently crystallized to survive the amendment process.

Bork would probably respond to this critique by arguing that the original meaning of the Constitution is not a set of outdated principles but, rather, is the resolution of the Madisonian dilemma that contemporary American society consents to be governed by. Originalism is, according to Bork, the model of judicial review supported by the American

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60 Justice Marshall expressed the notion of popular sovereignty well in his opinion in Marbury v. Madison:

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.


61 See, for example, William Draper Lewis, Interpreting the Constitution 48 (1937), for a discussion of the inadequacy of the formal amendment process as the sole avenue for constitutional change.

62 See Bork, supra note 19, at 2-4. See discussion supra pp. 142-43.
people.\textsuperscript{63} However, even if Bork is correct that Americans expect judges to enforce the founders' vision of government, the original meaning of the Constitution may still be unable to provide a foundation for our political institutions which engages and reflects our contemporary political values and concerns. Indeed, for Bork, the original understanding of the Constitution is the appropriate source of neutral principles to guide judicial decision making precisely because the founders' vision of government was decided upon "long ago" and is not the product of contemporary political arguments, liberal or conservative.\textsuperscript{64}

\textbf{B. The Second Critique of Originalism: Original Meaning is Not the Only Source of Neutral Principles to Guide Judicial Review}

Unlike the First Critique of originalism, the following critique (the "Second Critique") does not dispute Bork's claim that the legitimate exercise of judicial review requires neutral principles to guide judicial decision making. Nor does it challenge Bork's insistence that these principles be derived from the Constitution. Rather, the point of this critique is that the original meaning of the text is not, as Bork insists, the only available source for these principles. The noninterpretivist arguments reviewed in this section also propose plausible external guidelines for constitutional decision making in sources such as shared national ideals or the underlying purposes of the constitutional text.

For Bork, the original meaning of the constitutional text is the obvious source of neutral principles for judicial review because he understands the Constitution to be "law" and the orthodox interpretation of law proceeds according to the intentions of the lawmakers. Any other standards which would require judges to depart from the original meaning of the text cannot qualify as neutral principles because they have not been fairly derived from the Constitution. According to Bork, noninterpretivist theories of judicial review are all deliberate efforts to circumvent the results of orthodox originalism in order to generate more liberal or conservative outcomes.\textsuperscript{65}

However, Bork's claim that the Constitution is "law" like any other law is not as self-evident as he presumes. On the contrary, the Constitution is a very unique form of law which plays a special role in the American system of government; the Constitution is "fundamental law" which functions to order all the rest of our political institutions and lawmaking bodies. If one approaches the Constitution primarily as fundamental law rather than as ordinary law, one may argue that interpreting the Constitution at the level of the original meaning of its various clauses cannot do

\textsuperscript{63} Bork, \textit{supra} note 5, at 16.
\textsuperscript{64} \textit{Id.} at 177.
\textsuperscript{65} Id. at 6, 9, 241.
justice to its full meaning and role for American political life. While originalist interpretation may be appropriate for statutes, noninterpretivist neutral principles are required for constitutional adjudication.

For example, one may argue that the underlying vision of American political society that the founders had in mind as they designed the Constitution should be considered by judges in the exercise of judicial review as well as the particular provisions that they enacted. John Hart Ely supports such a model of judicial review in his book *Democracy and Distrust*. According to Ely, the founders designed the Constitution in order to perfect democratic structures of government so that substantive political values could be fairly derived through ordinary political institutions. When open-textured provisions of the Constitution invite judges to go beyond the original meaning of the text, judges should implement the founders’ underlying concern with fair and democratic government processes.

Ely is not suggesting that judges depart from originalist principles in order to enforce their own moralities upon the constitutional text. Nor is he proposing a standard for constitutional adjudication that does violence to the nature of the Constitution. Rather, he is merely arguing that one important level of constitutional meaning is the vision of government which underlies and animates its various clauses. If one focuses upon the role of the Constitution as the very foundation of our political society, a model of judicial review which permits judges to enforce the underlying constitutional vision as well as particular provisions of the text is very appealing. Certainly, this model qualifies as an additional available source of neutral principles for judicial review.

Several other standards for judicial review which have been proposed by noninterpretivists can also be defended as legitimate alternative sources of neutral constitutional principles. For example, one may argue that principles of natural law should be enforced through judicial review if one believes that the vision which animated the founders as they designed the Constitution was not so much Ely’s picture of perfect democracy as government according to the principles of natural justice. According to this view of the Constitution, Ely distorts the founders’ understanding of the constitutional design when he reduces the entire document to a matter of perfecting democratic processes rather than substantive values. Again and again in the literature of the founding era, the protection of natural rights such as life, liberty and property and the

67 *Id.* at 88-101.
68 *Id.* at 11-41. As examples of open-ended provisions, Ely points to the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment as well as the Ninth Amendment. *Id.* at 22-41.
69 *Id.* at 101-03.
promotion of the common good are re-echoed as the proper goals of government and, hence, any legitimate constitution.\(^7\) Thus, if one considers the underlying visions of the founders in constructing the Constitution to be a critical aspect of constitutional meaning which should be included in the exercise of judicial review, one can construct a plausible argument that judicial review should involve the founders' principles of natural law as well as the original meaning of textual provisions.\(^7\)

Alternatively, one may argue that what is really critical to the Constitution and its role as fundamental law in American society is not the specific vision of government which underlies its clauses but, rather, the fact that the founders were designing the Constitution in order to reflect and enforce shared national values about the role of government in American life. If one believes that the primary role of the Constitution is to organize our political institutions according to shared national values, it seems plausible to argue that judges should look to these values when they exercise judicial review. Because our shared national values are continuously changing, judicial review would not be tied to the founders' plan for government when that plan becomes outdated. In this view, the

\(^7\) Indeed, one of the great concerns of the founders was to protect natural rights and the common good against overweening democratic majorities which had emerged in many state legislatures. See Gordon S. Wood, The Creation Of The American Republic, 1776-1787, at 403-413 (1969). In Federalist 10 and 52, James Madison demonstrates that the principles of federalism and the checks and balances provided for in the Constitution will secure the protection of "private rights" and the promotion of the "common good" against democratic factions. The Federalist Nos. 10, 52 (James Madison). When the Anti-Federalist, Brutus, writes in opposition to the Constitution, he agrees with Madison that a good constitution is one that is calculated to "preserve the invaluable blessings of liberty, to secure the inestimable rights of mankind and promote human happiness." Brutus, To the Citizens of the State of New York, Oct. 18, 1787, reprinted in The Complete Anti-Federalist 108, 109 (Herbert J. Storing ed., 1981). Where Brutus disagrees with Madison and the other Federalists is over whether the Constitution of 1787 will actually serve to further these ends.

It is not, however, the purpose of this section to prove that natural law, rather than democratic processes, was the vision of government underlying the constitutional design. Indeed, it will be argued later that both democratic processes and natural law theory were important strains in the formation of our Constitution. See discussion infra pp. 166-67. Rather, the point here is merely that natural law principles can be viewed as an important part of the underlying principles of the Constitution and, hence, judicial review.

\(^7\) Many theorists have argued along similar lines when invoking the "underlying purposes" or "spirit" of the Constitution in order to justify constitutional protection for unenumerated fundamental rights. See, e.g., J. Harvie Wilkinson III & G. Edward White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 611 (1977) (arguing that, though "lifestyle freedoms" are not explicitly protected by the Constitution, the "spirit of the Constitution" or, in other words, "the basic purposes of the Constitution" operate to protect them); David A.J. Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 Hastings L.J. 957, 958-64, 1016 (1979) (stating that courts must protect the background concept of human rights which underlies the written constitutional provisions and constitutes the "unwritten Constitution").
judge who goes beyond the founders’ constitution in search of shared national values is not the creative, policy making judge envisioned by Dworkin. Rather, he is merely involved in monitoring the national pulse: his decisions are guided by outside principles, but to be true to the Constitution, he must include the changing fundamental values of the community among the neutral principles guiding his decision making.\(^\text{72}\)

On the other hand, one may believe, as Bruce Ackerman does, that the most significant thing about the Constitution is the fact that it represents “the considered judgments of the mass of mobilized citizens.”\(^\text{73}\) According to Ackerman, in contrast to the “apathy, ignorance, and selfishness”\(^\text{74}\) which characterize “normal politics,”\(^\text{75}\) the Constitution is a product of “higher lawmaking” by “the People themselves.”\(^\text{76}\) In Ackerman’s view, incidents of “higher lawmaking” or, to use another of Ackerman’s terms, “constitutional moments”\(^\text{77}\) are not limited to the original constitution and its several formal amendments. For example, the re-election of Franklin Roosevelt in 1936 was another constitutional moment when the people engaged in higher lawmaking.\(^\text{78}\) According to Ackerman, in order to capture all incidents of constitutional law, the exercise of judicial review must take account of these extratextual constitutional moments.\(^\text{79}\) Again, Ackerman is not arguing that judges go beyond the constitutional text in order to import their own political agenda

\(^{72}\) Several noninterpretivist theorists have argued that judges should look to shared national values as well as the written constitutional text when they exercise judicial review, although their defense of this form of noninterpretivism does not always follow along the lines proposed above. See, for example, the writings of Harry H. Wellington. Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 243-51, 266-67 (1973) (stating that common law judicial reasoning should proceed from society’s moral principles or, in other words, “conventional morality,” and that this model of judicial decision making is appropriate for constitutional interpretation as well); Wellington, Interpreting The Constitution: The Supreme Court And The Process Of Adjudication 86 (1990) (arguing that “public morality” is an appropriate source of law for constitutional decision making).

Indeed, in his article Do We Have an Unwritten Constitution?, Thomas Grey argues that the traditional form of constitutional interpretation in the history of our country has involved judges in discerning and enforcing “basic national ideals.” Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 706-710, 715-16 (1975). The interpretivist determination to keep judges within the four corners of the constitutional text is the fruit of a modern skepticism about whether there are, in fact, any immutable natural rights or shared national values in our pluralistic age. Id. at 716-18.

\(^{73}\) Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1046 (1984).

\(^{74}\) Id. at 1051.

\(^{75}\) Id. at 1029-31.

\(^{76}\) Id. at 1050.

\(^{77}\) Id. at 1055.

\(^{78}\) Ackerman, supra note 73, at 1052-56.

\(^{79}\) Id. at 1055-70.
into the Constitution. Rather, he is merely proposing guidelines for judicial review which follow naturally from this understanding of the nature and essence of constitutional law.

The review of all these positions has served to illustrate that, depending upon one's starting point for understanding the nature and essence of the Constitution, one can generate a whole range of appropriate neutral principles for judicial review. Bork has not demonstrated, but merely assumed, that the Constitution is most appropriately understood in the same manner as ordinary law, and it is this assumption that leads him to defend the original meaning of the text as the only source of neutral principles for constitutional decision making. However, if one focuses instead upon the unique role of the Constitution as the fundamental law of our political institutions, then shared national values, underlying constitutional meaning, and other incidents of higher lawmaking can also be justified as relevant sources of meaning to guide judges in the process of judicial review.

Of course, while there may be several available sources of neutral principles to guide the practice of judicial review, this does not mean that none of these sources is better than the others. The point of this section has been to demonstrate that Bork must provide a convincing argument to defend the original meaning of the text as the best source of neutral constitutional principles. Actually, Bork has suggested several such arguments. For example, Bork suggests that understanding the Constitution according to the original meaning of the text is the orthodox method of constitutional interpretation. However, much of Tempting of America seems to prove just the opposite; Bork demonstrates that from the beginning of our constitutional history, through the Lochner era and to the present, originalist interpretation has been repeatedly abandoned in favor of alternative methods of judicial review. Bork points out that in Calder v. Bull and Fletcher v. Peck, Justices Chase and Marshall assumed that principles of natural justice, which are the underlying purpose of legitimate constitutions, can be invoked in the exercise of judicial review. Later, during the Lochner era, unenumerated conservative economic rights were enforced under the Due Process Clause, and today the Due Process Clause has been invoked to protect personal liberty interests. Indeed, after perusing the same history of constitutional interpretations, Thomas Grey has argued that noninterpretivism, rather than interpretivism, is American orthodoxy. Furthermore, in all the volu-

80 See Bork, supra note 5, at 15-128.
82 Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).
83 Bork, supra note 5, at 19-20, 25.
84 Grey, supra note 72, at 706-717. See discussion supra note 72.
ominous contemporary writings about constitutional interpretation, originalism is the minority voice. Thus, if ever it was the orthodox form of constitutional interpretation, originalism seems to be the heresy now.

However, Bork has additional arguments on behalf of originalist principles. While the underlying purposes of the constitutional text, shared national values, or higher lawmaking may be plausible, and perhaps even orthodox constitutional principles, Bork suggests that the original meaning of the text is the preferable standard because the choice of this standard will not be motivated by impermissible “political intentions.” The original meaning of the text represents choices that were made long ago by persons who were not party to our contemporary political debates, and, hence, the original meaning is the truly nonpolitical choice of neutral principles. By contrast, noninterpretivist principles require judges to engage contemporary political debates in order to locate constitutional meaning. For example, in deciding a case like Roe v. Wade, the originalist judge need only ask whether any of the provisions of the written Constitution, defined at the level of abstraction the founders envisioned, were intended to give protection to “privacy” rights such as a woman’s right to choose an abortion. The answer for Bork is clearly, no. On the other hand, the noninterpretivist who seeks to enforce the vision or purposes underlying the various constitutional provisions must engage modern debates about the nature and scope of so-called privacy rights in order to see whether any formulation of this right fits with the founders’ vision of our political community. Similarly, judges who search after shared national values will have to occupy themselves with modern debates about constitutional values in an effort to locate contemporary national ideals. Likewise, judges in search of Ackerman’s constitutional moments will have to engage modern debates about what the Constitution should be in order to discover where higher lawmaking is taking place. For Bork, noninterpretivists propose standards that require judges to engage contemporary political debates in order to locate constitutional meaning on purpose: noninterpretivist theories are really disguised endeavors to import liberal or conservative political agendas into the Constitution. One can escape the problem of these impermissible political motivations if one adopts the original meaning of the text as the source of neutral principles for constitutional interpretation.

Bork’s defense of originalism as the truly neutral, nonpolitical source of neutral principles for constitutional decision making can be

85 Bork, supra note 5, at 177.
87 Bork, supra note 5, at 112-13.
88 Id. at 177-78.
met with a powerful objection. Some noninterpretivist theories may well be efforts to import liberal or conservative agendas into the Constitution. However, more charitably, and perhaps more accurately, noninterpretivism has been born and grown to orthodoxy because of the concern that originalist principles cannot function as adequate constitutional standards in today's world. Our contemporary world is characterized by different conditions and values than prevailed in the eighteenth century, and it is precisely because the original meaning of the text is limited to choices made long ago, by persons not in touch with our contemporary circumstances and debates, that it fails as an adequate source of neutral principles for constitutional decision making. Seen in this light, noninterpretivist theories are less an endeavor to force certain political agendas on the Constitution than an endeavor to read the Constitution in a way that is able to engage and speak to modern concerns. The scholars discussed in the previous section preferred to address the problem of the outdatedness of the founders' choices by proposing a creative judiciary with responsibility for formulating new principles for our times. Another, far less radical, route is followed by the scholars discussed in this section. With a view to the important role of the Constitution as the fundamental law of our political community, these scholars turn to deeper levels of constitutional meaning in order to find more relevant neutral principles for today's world than those furnished by originalism. For example, Ely looks to the underlying purpose of the constitutional text in order to clear the channels of political change and remedy incidents of prejudiced legislation which manage to sneak past the provisions enacted by the founders. Fundamental rights theorists invoke the underlying spirit of the Constitution to protect "privacy" rights which the founders did not expressly include in the Bill of Rights but which have assumed increasing importance in the twentieth century.  

Indeed, Grey runs through a parade of horribles as he identifies all the constitutional doctrines that would have to be abandoned if judges were to confine the exercise of judicial review to originalist principles. For theorists who support noninterpretivist constitutional principles because these principles are better able to tie constitutional meaning to today's circumstances and values, Bork's defense of the original meaning of the text as the most nonpolitical, indeed the most out of touch, of neutral principles will fall on deaf ears.

89 See supra note 71 and accompanying text.
90 See Grey, supra note 72, at 710-714. Grey points to the Court's substantive due process decisions, much equal protection doctrine, and any interpretations of the Bill of Rights which refer to evolving notions of fundamental values as examples of Court doctrines which are inconsistent with originalism. Id.
However, Bork may raise still other arguments in favor of originalism as the appropriate source of neutral principles. For instance, Bork can argue that standards such as shared national values, higher law-making, and the underlying purpose of the constitutional text are too general and their content too controversial to provide sufficiently determinate principles to guide judicial review. While no standard for judicial review can be fully determinate, in order for a standard to function as neutral constitutional principles, it must be sufficiently determinate so that it can work to control judicial decision making. If the standard is too pliable, it will become a vehicle which judges can use to import their own preferences into the Constitution. Of course, originalist principles have not been immune to this critique. Though the original meaning of the constitutional text may well be more determinate than noninterpretivist proposals, it is a favorite sport in contemporary constitutional scholarship to expose the indeterminacy of originalist principles.91

Furthermore, Bork will also argue that the original meaning of the Constitution is the appropriate neutral baseline for constitutional decision making because it is the standard which is backed by the consent of the American people.92 However, even assuming that most Americans have some sort of feeling or conviction about this matter, their consent has not been honed and expressed through a process of public debate followed by a formal democratic vote. The consent that Bork speaks of as supporting originalism has far less claim to authority than the deliberate, formal act that was involved when the American people adopted the Constitution in 1787.93

However, Bork's arguments for the relative determinacy and popular authority for originalist principles would be strong, and the foregoing objections rather minor, were it not for the counterargument that originalism is an inadequate model of judicial review for our contemporary world. Ultimately, any advantages to originalism will be weighed, and probably unfavorably, in the minds of noninterpretivists against the need for a meaningful Constitution for contemporary American society. No matter how determinate or consent-based the original meaning is, it is not an adequate source of neutral principles for the exercise of judicial review because it does not adequately reflect and engage our contemporary circumstances and values.

C. The Critical Legal Studies Critique of Originalism

The preceding section contested Bork's claim that the original meaning of the text is the only available source of neutral principles for the

91 See infra pp. 187-89 for a brief consideration of this critique.
92 Bork, supra note 19, at 2-4; Bork, supra note 5, at 16. See discussion supra pp. 142-43.
93 Paul Brest has made a similar argument. See Brest, supra note 3, at 1101-02.
exercise of judicial review. It was argued that Bork must provide a convincing argument to defend the original understanding as the best standard for constitutional decision making. Originalism is, however, vulnerable to the critique that its principles are inadequate in a world whose conditions and values have changed radically since the founding era. The work of Critical Legal Studies scholars presents a very different critique of originalism.94 The Critical Legal Studies critique (the "CLS Critique") claims that no choice of neutral principles can possibly have legitimacy given the assumptions of "liberal constitutionalism." Like Bork, liberal constitutionalism assumes a world where there are no certain, universally acknowledged moral or political truths. According to the CLS Critique, neutral principles may be able to prevent judges from imposing their values on the American people and, thereby, control the threat of judicial tyranny. However, insofar as any set of constitutional principles prefers some ends over others in a world where there can be no independent standard of truth or right to legitimize these preferences, tyranny and oppression will be built into constitutional decision making.

The purpose of the CLS Critique has been to demonstrate that the assumptions and goals of conventional "liberal" constitutional scholarship are irreconcilable. Bork shares many of these liberal premises and goals. Like Bork, liberal constitutionalism posits a world where no certain, universally acknowledged moral truths exist to establish a standard or criteria by which the value claims of individuals can be measured and evaluated.95 The CLS Critique depicts such a world as a place where individuals exist as "isolated islands of individuality," "autonomous individuals, each guided by his or her own idiosyncratic values and goals, none of which can be adjudged more or less legitimate than those held by others."96 The state exists to keep these individuals from oppressing one another.97 On the one hand, the principle of majority rule protects against "unconstrained private power."98 On the other hand, because majorities are also capable of tyranny when they enforce shared ideas against dissenters, the liberal state provides for the protection of individual rights as well.99 The liberal state looks to judges to balance

94 This discussion will focus in particular upon the work of Mark Tushnet.
97 Id. at 783-85; Tushnet, Darkness on the Edge of Town, supra note 95, at 1060-61.
98 Tushnet, Following the Rules Laid Down, supra note 96, at 783.
99 Tushnet, Darkness on the Edge of Town, supra note 95, at 1061; Tushnet, Following the Rules Laid Down, supra note 96, at 784.
majority rule and individual rights in the context of constitutional adjudication. Thus, liberalism envisions the Madisonian democracy Bork has described. Like Bork, liberal constitutionalism recognizes that judges are also capable of tyranny; if judges balance majority rule and minority rights with regard to their own values or ideals, then the exercise of judicial review will become no more than a "mere exercise[ ] of individual will" on the part of judges. Consequently, liberalism demands "neutral principles" or, in other words, determinate external standards to guide and control judges in their exercise of judicial review.

According to the CLS Critique, neutral principles which can guide judges in the exercise of judicial review are not sufficient to protect against tyranny in a liberal world. As long as judges follow external standards rather than their own preferences in their exercise of judicial review, judicial tyranny will be constrained. However, if there are no criteria of truth or right to serve as the pattern for these neutral principles, these principles cannot involve value judgments which prefer some ends over others lest they build tyranny and oppression into constitutional decision making. In other words, constitutional principles must be "value free." The problem with finding value-free standards for judicial review is that the moment constitutional principles are "given substantive content, it would require that the will of some individual be

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100 Tushnet, Darkness on the Edge of Town, supra note 95, at 1061; Tushnet, Following the Rules Laid Down, supra note 95, at 784.
101 Mark V. Tushnet, A Note on the Revival of Textualism in Constitutional Theory, 58 S. Cal. L. Rev. 683, 684 (1985) [hereinafter Tushnet, Textualism]. See also Tushnet, Following the Rules Laid Down, supra note 96, at 784-85; Tushnet, Darkness on the Edge of Town, supra note 95, at 1061.
102 Tushnet, Following the Rules Laid Down, supra note 96, at 784, 793; Tushnet, Textualism, supra note 101, at 684-85.

Part of the CLS Critique of liberal constitutionalism involves demonstrating that all the standards which liberal scholars have proposed for guiding judicial decision making are indeterminate and, hence, invite judicial manipulation and tyranny. See, e.g., Brest, supra note 3. Brest argues that the various fundamental values or freedoms which have been proposed as constitutional standards by fundamental rights theorists are indeterminate and manipulable. Id. at 1089. Brest then extends the same criticism to the constitutional principles advocated by opponents of fundamental rights theory such as Ely and Bork. Id. at 1089-96. Tushnet takes on interpretivism in his essay Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, supra note 96, at 793-804. According to Tushnet, the original understanding of the constitutional text cannot function as a determinate standard to guide judicial review: "[w]here the interpretivist seeks clarity and definiteness, the historian finds ambiguity." Id. at 793. This Article will return to this attack on the feasibility of originalism below. See discussion infra pp. 187-89.
103 Tushnet, Darkness on the Edge of Town, supra note 95, at 1038, 1061.
104 Id.
subordinated to that of others, in contradiction of the principle that there are no criteria by which desires can be evaluated.\textsuperscript{105}

Thus, in an originalist model of judicial review, tyranny occurs when the value choices of the founders are invoked to draw the balance between majority rule and minority rights. Judges may not be imposing their own controversial value choices upon the American people, but the founders' value choices are equally controversial and unsupportable in a world where certain knowledge of truth and right is inaccessible. Indeed, any choice of neutral principles to resolve the Madisonian dilemma, whether it be shared national values, principles of higher law-making or underlying constitutional purposes, will involve controversial value choices and, hence, be illegitimate.\textsuperscript{106} In short, in a liberal world, there can be no correct resolution of the Madisonian dilemma: the entire project of liberal constitutionalism is "incoherent"\textsuperscript{107} and collapses under the weight of its own premises.

Bork is not without a response to the CLS Critique. Bork suggests that the original understanding of the Constitution may not correspond to any true pattern for resolving the Madisonian dilemma, but it is a legitimate source of constitutional principles because the American peo-

\textsuperscript{105} Id. at 1061.

\textsuperscript{106} One may dispute the CLS claim that every proposal for resolving the Madisonian dilemma involves a controversial choice of some ends or values over others. For example, John Stuart Mill envisioned a state in which individuals are free to pursue their own ends as long as they do not harm others; the role of the state is not to support any vision of the good life but, rather, to protect individual freedom against encroachment by those who would use their own freedom to harm others. \textit{John Stuart Mill, On Liberty} 10-11 (David Spitz ed., W.W. Norton & Co. 1975) (1859). Constitutional principles which merely facilitate the individual's freedom to pursue his or her own choice of ends would seem to be value-free and, hence, pass the test of legitimacy in a liberal state.

However, the notion that there can be a value-free framework for organizing society and resolving the Madisonian dilemma has been attacked by scholars. For example, in his article, \textit{The Right of Privacy}, 102 Harv. L. Rev. 737, 758 (1989), Jed Rubenfeld lays out two critiques of the Millian vision of the state. Rubenfeld notes that, in the first place, few, if any, acts are completely "self-regarding" and do not negatively impinge upon others in some way. \textit{Id.} at 758. Furthermore, he points out that for some individuals, pursuing their own vision of the good life requires a community of shared values and, hence, restrictions upon the freedoms of dissenters. \textit{Id.} at 759-763. Thus, because individuals' pursuits of their own visions of the good are bound to clash with one another, a state cannot protect all value claims equally and must make some choice among ends.

In any event, whether or not there is a way to resolve the Madisonian dilemma without making controversial value choices, clearly Bork does not believe that the original meaning of the text is value-neutral. On the contrary, for Bork any set of constitutional principles must involve choosing among competing ends. \textit{Bork, supra} note 5, at 257-59. Originalism means resolving the Madisonian dilemma according to the value choices of the founders. \textit{Id.} at 177-78.

\textsuperscript{107} Tushnet, \textit{Darkness on the Edge of Town}, supra note 95, at 1061.
people have "consented" to organize their political community along these lines.\textsuperscript{108}

Ackerman suggests a similar argument to defend incidents of higher lawmaking as a legitimate source of constitutional principles. According to Ackerman, the process of constitutional formation involves a process of "higher lawmaking" in which "the mass of American citizens mobilizes itself in a collective effort to renew and redefine the public good"\textsuperscript{109} and "principles of national identity."\textsuperscript{110} When Americans awake from the apathetic and selfish slumbers of normal politics, move onto this plane of higher lawmaking and begin speaking in the name of "the American people,"\textsuperscript{111} the constitutional principles they produce have "earned the right"\textsuperscript{112} to represent our collective identity and to guide American public life.\textsuperscript{113} While moments of higher lawmaking cannot be legitimized by universal consensus\textsuperscript{114} or some independent standard of truth or right,\textsuperscript{115} the "heightened political consciousness,"\textsuperscript{116} "mass mobilization,"\textsuperscript{117} "considered judgments,"\textsuperscript{118} "collective effort"\textsuperscript{119} and high costs of "sustained debate and struggle"\textsuperscript{120} which are involved in higher lawmaking all combine to give its results their special authority and legitimacy over American political institutions.

At first glance, Bork and Ackerman's suggestion that societal consent or mobilized mass decision making can provide legitimacy to constitutional principles strikes one as plausible. However, if one examines why the considered judgments of many people so readily elicit our trust, one will probably discover that it is the belief that considered group judgments will come closer to the truth than the rash or unilateral decisions of a minority. However, Bork accepts the liberal premise that there is no independent standard of truth which can be used to evaluate value claims in our world, and Ackerman makes no attempt to demonstrate a link between the products of higher lawmaking and such a standard of

\textsuperscript{108} Bork, supra note 19, at 2-4; Bork, supra note 5, at 16. See discussion supra pp. 142-43.
\textsuperscript{109} Ackerman, supra note 73, at 1029.
\textsuperscript{110} Id. at 1032.
\textsuperscript{111} Id. at 1027, 1022.
\textsuperscript{112} Id. at 1049, 1067, 1070.
\textsuperscript{113} Id. at 1038-39, 1049-50.
\textsuperscript{114} Ackerman, supra note 73, at 1049 ("universal consensus is not to be found this side of Final Judgment").
\textsuperscript{115} BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 23 (1991) (products of higher lawmaking do not correspond to some ahistorical truth but represent "the kind of situated understanding one might reach after a good conversation").
\textsuperscript{116} Id. at 1022.
\textsuperscript{117} Id. at 1030.
\textsuperscript{118} Id. at 1038.
\textsuperscript{119} Id. at 1029.
\textsuperscript{120} ACKERMAN, supra note 115, at 1039, 1041.
A Defense of Originalism

truth. Hence, it cannot be said that the constitutional principles which are identified by the consent or considered judgment of the American people come closer to the truth any more than the views of nine justices, a simple majority, or the lone individual. In Bork and Ackerman's models of judicial review, tyranny is not averted but, rather, the tyranny of mass collectivism comes to supplant the tyranny of judges, simple majorities or minorities. A tyranny of mass collectivism may appeal to those who would build our constitutional order upon shared, collective values; however, the liberal in ourselves and our political consciousness will retort that, ultimately, collective values do not correspond to any independent standard of truth or right that all people can or must accept, and, hence, they have no authority to restrict the freedom of the dissenter to pursue his own idiosyncratic will.

Perhaps Bork or Ackerman may argue, though, that consent-based standards are the best choice for constitutional principles because they will be more stable and conducive to peace than other standards or because they correspond to the wishes of the greatest number of Americans. While any set of constitutional principles will rest upon controversial value claims and, thus, involve some tyranny, we can all agree that some forms of tyranny are worse than others: the tyranny of mass consent is preferable to the tyranny of nine judges, a simple majority or minorities. The problem with this argument, however, is that even determinations about which forms of tyranny are worse than others rest upon controversial value judgments and, hence, are subject to intractable disagreement. For example, one may argue that although constitutional principles founded upon general societal consent may be more stable than alternatives and represent the views of the greatest number, the American political system would be better off if it were guided by the judgment of heroic judges. Alexander Bickel suggests such an argument when he describes the special fitness of judges for developing constitutional principles. Indeed, Bickel's fear that groups can lose sight of higher principles in the "moment's hue and cry" reminds one of the downsides of mass mobilized, collective decision making and presents a good case for entrusting the articulation of constitutional principles to judges who have the "leisure, the training, and the insulation" of the "scholar." Ultimately, however, the case for the judicial creation of constitutional principles will not appeal to the democrat who believes that it is the consent of the people, rather than the views of a small elite, which should provide the foundation of our political system. The debate

121 See parenthetical comment supra note 115.
123 Id. at 26.
124 Id. at 25.
about whether the tyranny of the people or judges is preferable will boil down to a value judgment about whether the people or a smaller group of professionals should determine the fundamental structure of American political society.

However, the purpose of this section is not to engage in any prolonged discussion of which constitutional principles would be more or less desirable if, ultimately, none can claim the legitimacy of truth. The next section of this Article disputes the liberal premise that there is no independent standard of truth or right which can guide our choice of constitutional principles as it endeavors to offer a defense of originalism which can respond to the foregoing three critiques.

Before developing this alternative defense of originalism, however, it is worth mentioning one final response to the CLS Critique which Bork might make upon his own terms. As noted above, Bork defends the original meaning of the Constitution as the truly neutral and nonpolitical choice of neutral principles because it represents value choices made by persons long ago who were not party to our contemporary political debates. Hence, Bork may argue that while originalist principles involve controversial value judgments, because they do not involve any intention to favor one side over another in our contemporary disputes, they can, nevertheless, supply a legitimate resolution to the Madisonian dilemma. However, this argument amounts to buying legitimacy at the expense of meaningful principles which can engage and reflect contemporary conditions and values and, hence, plays into the hands of those who condemn originalism for being an outdated and, thus, inadequate source of constitutional principles. Furthermore, insofar as the original meaning of the text does involve value judgments which prefer some ends over others, originalism cannot avoid tyranny. Indeed, insofar as originalist principles were determined long ago, an originalist method of judicial review may mean that the entire society is to be tyrannized by outdated value choices which no one accepts any longer.

II. AN ALTERNATIVE DEFENSE OF ORIGINALISM

The following portion of this Article develops a defense of originalism that can successfully respond to the three critiques outlined above. In order to do so, a defense along different lines than Bork's argument will be explored. For Bork, the fact that people will always disagree about moral and political truths means that truth is unavailable to ground a theory of constitutional interpretation. Instead, Bork turns to "neutral principles" to legitimize the exercise of judicial review. Neutral principles prevent judges from importing their own controversial values

125 Bork, supra note 5, at 177-78.
into constitutional decision making, and, according to Bork, the original meaning of the constitutional text supplies the only source of these neutral principles. The First Critique considered above argued that judicial review according to neutral principles deprives the Constitution of its relevance for contemporary political life. According to the Second Critique, even if one agrees that neutral principles are required to constrain judicial discretion in the exercise of judicial review, Bork has erroneously assumed that the original meaning of the text is the only available source of neutral principles. The CLS Critique delivers the most devastating blow to Bork’s defense of originalism. According to the CLS Critique, in a world where there is no certain knowledge of moral and political truths, neutral principles may be able to constrain judges from inserting their own values into constitutional decision making, but insofar as these neutral principles themselves have any substantive content, they will inevitably involve similar controversial value choices.

The following defense of originalism challenges Bork’s bleak assessment of the possibility of moral knowledge and with it Bork’s “liberal” assumption that truth is unavailable to ground a legitimate theory of judicial review. This Article will not argue that human reason can identify the full pattern of the ideal state or the precise balance between individual rights and majority rule which would definitively resolve the Madisonian dilemma. However, the fact of moral and political disagreements does not mean that human reason is incapable of attaining knowledge altogether. To the contrary, human reason can touch upon moral and political truths even while full knowledge of these truths remains beyond its ken. Thus, not all constitutional principles that involve value choices are equally controversial and, hence, illegitimate as the CLS Critique claims. This Article argues that constitutional interpretation can best reflect and promote truth and, hence, gain legitimacy if judges follow an originalist model of judicial review. This alternative defense of originalism will be outlined in response to the CLS Critique and further elaborated as the Article moves on to defend it against the other critiques as well.

A. Answering the CLS Critique

The springboard of the CLS Critique is the “liberal” assumptions about the possibility of moral and political knowledge. For Bork and his “liberal” counterparts, the process of moral argument is one of endless disagreement and controversy. Persons begin with hopelessly contradictory notions of human good and talk past one another in what is essentially an interminable cacophony leading nowhere. Bork may not deny that truth exists or that some opinions are closer to truth than

126 See id. at 256-57; See also discussion supra pp. 141-42.
However, when Bork denies that human reason can distinguish between true and false premises, reason is, for all intents and purposes, cut off from truth. Bork's world, according to the CLS Critique, becomes one in which "isolated" individuals are "each guided by his or her own idiosyncratic values and goals, none of which can be adjudged more or less legitimate than those held by others," and in such a world, any constitutional principles which involve value choices must be illegitimate.

The logic of the CLS argument may be sound. However, one can escape this critique if one abandons Bork's bleak assumptions about the possibility of moral and political knowledge. Bork and other scholars of "liberal" constitutionalism are certainly correct to point out that considerable disagreement exists concerning moral and political truths. Nor have even the most astute moral and political philosophers been able to agree upon a true pattern of government and the appropriate resolution of the Madisonian dilemma. The notion that such an ideal pattern for political institutions can be discovered with certainty and applied by judges in constitutional decision making is, indeed, both naive and dangerous.

However, the fact that there will always be some uncertainty and disagreement concerning moral and political truths does not mean that moral discourse is tantamount to interminable cacophony. There is an additional and more accurate alternative to the naive belief that human reason can attain certain knowledge about all the details of the ideal state. According to this alternative, while disagreement certainly characterizes the history of moral and political philosophy, this history is less an interminable cacophony than a progressive dialogue. Human reason is not essentially cut off from moral and political truths so that debate becomes a clash among hopelessly contradictory premises. Rather, through sustained debate and discussion, reason can touch upon basic truths even while full and complete knowledge remains beyond its ken. This more optimistic assessment of the possibilities of human

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127 Bork, supra note 5, at 256.
128 Id.
129 Tushnet, Following the Rules Laid Down, supra note 96, at 783.
130 When I say that human reason can touch upon truth, I do not mean to suggest that humanity's rational capacities are the sole avenue through which humans can recognize truth. Experience, sentiment, and even revelation are also involved in the processes through which humanity comes to know truth. It is not my purpose to develop an epistemological theory which can fully clarify these processes. My point here is simply that humanity has the capacity to reach limited knowledge about moral and political truths. Moral and political argument does not look like the ceaseless disagreement and cacophony that Bork describes. Rather, moral arguments often hover about values which most participants would recognize as being true even if these participants have different understandings of the precise contours of these values. Below I will argue that the American constitutional
knowledge has been eloquently defended by John Milton in *Areopagitica*. Milton speaks of truth as something divine, the full form of which remains beyond our limited human perspective until the Second Coming of Christ. In the meantime, however, through free debate and discussion, we can arrive at pieces of truth and begin the process of assembling these pieces into a harmonious form.

The emergence of the notion of individual freedom as a critical aspect of human fulfillment and an important goal of good government is an instance of the capacity of human reason to touch upon elements of truth even as full knowledge remains beyond its grasp. The idea that each individual human life is an end in itself and that human fulfillment requires the individual to reflect upon, be convinced of and make a free, uncoerced choice of the purposes and goals of one's life is at least as old as Christianity. The strength of this idea has grown to command almost universal acceptance in Western culture since the writings of Milton, John Locke, and John Stuart Mill embraced the idea and initiated what has become known as the "liberal" tradition in Western political tradition is about the value of human freedom. Most Americans would recognize freedom as the true goal of good government, but where they disagree is about the precise contours of this ideal.

According to Tushnet, the goal of "liberal constitutionalism" is to remove controversial value choices from constitutional decision making, and the achievement of this goal requires value-free constitutional principles. The problem with the project of liberal constitutionalism, argues Tushnet, is that there is no such thing as value-free constitutional principles. See supra pp. 155-57 for a review of Tushnet's critique. Jed Rubenfeld points out that even those principles which are intended to guarantee a large scope of autonomy for the individual to make and pursue his or her own value choices involve controversial value judgments because these principles frustrate the values of those who look to the state as an important conduit of community morality. See discussion supra note 106 and accompanying text.

By contrast, when I refer to the liberal tradition, I am speaking of a long line of philosophers and political philosophers, as well as ordinary Americans, who affirm individual freedom as an important, indeed, true political value. Liberalism, in this sense, does not mean the effort to remove values from constitutional decision making but, rather, means a commitment to a certain set of political values. When "negative" liberals favor the protection of a broad sphere of individual autonomy from state interference and advocates of "positive" liberty insist that genuine human freedom requires education in community values, they are disagreeing about the particulars of a value which bears the authority of
thought. In the development of this notion of individual liberty, human reason has hit upon an element of moral and political truth. No one would doubt, for instance, that the First Amendment’s protection of freedom of speech and religion is preferable to state-led inquisitions or persecutions.

However, though most Americans would agree that individual freedom is a critical requirement of human fulfillment and one of the most important goals of legitimate political regimes, there remains much disagreement about the precise nature and requirements of this freedom and the proper relationship between community, state and individual. On the one hand, the term “negative liberty” has been used with reference to those who insist that government best promotes individual freedom when it does not interfere with an individual’s choice and pursuit of his own goals. Under this view, the role of government is limited to protecting a broad sphere of individual autonomy from outside interference by other individuals or the larger society. In contrast to “negative liberty,” the term “positive liberty” has been used with reference to those who worry that unfettered individual autonomy does not promote genuine human freedom if the individual is, consequently, left alone and unguided in a moral vacuum. Hence, some argue that the state has an important role in educating the individual about community values so that the individual’s capacity for reflection and free choice will be supplied with some meaningful content. Within these larger categories of posi-truth. Their disagreements reflect the fact that full knowledge of the requirements of this value of human freedom remains beyond our ken. See the discussion following this note for an elaboration of these points.

137 Isaiah Berlin coined the term “negative liberty” and contrasted it with theories of “positive liberty” in his essay Two Concepts of Liberty. ISAIAH BERLIN, Two Concepts of Liberty, in Four Essays on Liberty 118 (1984). John Locke and John Stuart Mill advocate theories of “negative” liberty. For Locke, individuals should have broad freedoms to dispose of their persons and possessions as they please and to worship God and pursue eternal life as they see fit. The role of government is limited to protecting these rights of life, liberty and property from infringement by powerful transgressors. See Locke, Second Treatise, supra note 134, at 70-73; Locke, Tolerance, supra note 134, at 17-20. Similarly, for Mill, “[t]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.” Mill, supra note 106, at 14. The role of the state is limited to protecting this broad freedom from infringement by society and other individuals. Id. at 10-11.

138 For instance, Michael Sandel has argued that the individual who is free from “the dictates of nature and the sanction of social roles” and left to construct his own ends is “less liberated than disempowered.” MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982), reprinted in Liberalism and Its Critics 159, 170 (Michael J. Sandel ed., 1984). It is only as a member of a community with shared self-understandings that the individual has a meaningful identity and the capacity to make meaningful choices. Id. at 166-67, 173-76.
tive liberty and negative liberty, there are many further variations in the understanding of individual freedom and the role of good government.\textsuperscript{139}

Further disagreements about the proper role of the state in promoting individual freedom cut across negative-positive liberty lines. For instance, some Americans believe that the state has an important role in supplying all individuals with a certain threshold of goods and services so that the poor or disadvantaged individual's freedom to choose and pursue a vision of the good life is not a vain and empty promise.\textsuperscript{140} Others fear that an expansive welfare state threatens individual freedom by draining its beneficiaries of a genuine capacity for free and independent choice.

There is also disagreement about what areas of human life are critical to the exercise of individual freedom. The Bill of Rights reflects the belief that speech, thought, religious belief and worship are important areas of free choice,\textsuperscript{141} and the Bill of Rights also protects the individual's person and property from unwarranted state action.\textsuperscript{142} In the late nineteenth century and early twentieth century, \textit{Lochner v. New York}\textsuperscript{143} and its progeny revealed the Supreme Court's special concern to protect the economic freedoms of property and contract from state infringement. By the 1960's, however, the Court gave few special protections to economic rights and turned instead to privacy in marriage, the family and sexuality as critical areas of individual freedom.\textsuperscript{144} In both lines of

\textsuperscript{139} For example, some of those who advocate a theory of positive liberty expect the state to educate individuals in a particular understanding of morality that they believe to be correct. In contemporary American politics, Christian groups advocating prayer and other moral instruction in schools share this expectation. By contrast, other proponents of positive liberty believe that moral standards are relative to different eras, and, hence, the proper role of the state is to protect whatever values are the shared values of contemporary society. \textit{See, e.g., id.}, at 166-67, 173-76.

\textsuperscript{140} \textit{See, e.g., William K. Frankena, The Concept of Social Justice, in Social Justice 1, 21} (Richard B. Brandt ed., 1962). According to Frankena, the concern of the just society is not limited to protecting members from outside injury and interference. In addition, it seems reasonable to assign to the just society a more positive interest . . . by saying that it must, so far as possible, provide equally the conditions under which its members can by their own efforts (alone or in voluntary associations) achieve the best lives of which they are capable. This means that the society must at least maintain some minimum standard of living, education, and security for all its members.

\textit{Id.}

\textsuperscript{141} \textit{See U.S. Const. amend. I.}

\textsuperscript{142} \textit{See U.S. Const. amends. III-VIII.}

\textsuperscript{143} \textit{Lochner v. New York, 198 U.S. 45} (1905).

\textsuperscript{144} \textit{See, e.g., Griswold v. Connecticut, 381 U.S. 479} (1965) (holding statute prohibiting contraceptive use by married couples unconstitutional). I will be discussing this and other privacy cases at Part III, \textit{infra}. 
cases, the Supreme Court has encountered heavy opposition to its understanding of the core aspects of individual freedom.

The point of discussing the emergence of the notion of individual freedom in Western thought at such length has not merely been to provide an illustration of this Article's claim that human reason has a limited capacity to recognize moral and political truths. In arguing that the emergence of this idea is an instance where reason has touched upon, even if it cannot fully comprehend, an important aspect of truth, this Article has been pointing to a basis of constitutional legitimacy. Those who drafted and ratified the Constitution shared the Enlightenment's faith in the capacity of reason to discern a true conception of human good and the proper ends of government. Indeed, they viewed constitution writing as a process of embodying these truths in a written form which could then be used as a standard for structuring America's political institutions. The founders were also heirs to the liberal tradition in Western thought, and what their reason had discovered and their efforts at statecraft were designed to achieve was an understanding of government which placed the individual, his or her freedom and fulfillment at the center of attention. This is not meant to suggest that all of the founders were strict Lockeans who limited the role of the state to protecting individual rights to life, liberty and property. Locke's "negative" understanding of liberty existed as one important strain in late eighteenth century American political thought, but so did republicanism, which involved a more "positive" understanding of individual freedom. According to republican thought, the state exists not only to protect private rights but also to promote the common good and to provide an opportunity for citizens to develop and exercise virtue by participating in collective self-government for the common good. The American Constitution synthesizes republican notions of self-government and the common good with a

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145 See ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 65-67, 118 (1983). See also MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 28-34 (1987) (arguing that, for Madison and Hamilton, the law of nature, which was understood as the proper end of government, is manifest to human reason as "self-evident truth").

146 See KELLY ET AL., supra note 145, at 65-67, 118.


148 See KELLY ET AL., supra note 145, at 68-71, 117-18; Isaac Kramnick, supra note 147, at 168.
Lockean concern to protect natural rights from overweening democratic majorities.\footnote{See, e.g., Kelly et al., supra note 145, at 68-71, 117-18; Pangle, supra note 147, at 116-18; Yarbrough, supra note 147, at 63.} When Bork observes that our Constitution is essentially about balancing individual liberties with majority rule, he is picking up on the two notions of human freedom which underlie the Constitution.

Because the Constitution is the product of a political and philosophical tradition which has touched upon truth in its recognition of human freedom as the primary goal of good government, the American Constitution has an authority and legitimacy which other constitutions may lack. Bork’s claim that there are no discernible political truths and the CLS conclusion that any constitutional principles must, therefore, be equally illegitimate are too facile and ignore the remarkable achievement of our Constitution. The founders did not follow a route all too common in political history and endeavor to establish a despotic or totalitarian regime, or even just use the Constitution as an instrument to aggrandize their own power at the expense of the public. Rather, the founders consulted reason, deliberated, discussed and hammered out political institutions with a view to truth and the ideal state.\footnote{See Kelly et al., supra note 145, at 65-67, 118.} Their concern with
human freedom as a primary end of good government indicates that they
did not labor in vain but that their efforts were onto something. The CLS
Critique is correct to point out that the choices that the founders made in
constructing the Constitution were not value-free; however, this critique
fails to recognize the special authority and legitimacy of the founders’
values.

Given that the Constitution is about important moral and political
truths and, hence, has an authority and legitimacy which the CLS Cri-
tique would deny it, the question remains how judges are to go about
interpreting this document. Should judges enforce the original meaning
of constitutional provisions as Bork would argue? Should they seek, on
the other hand, to reflect changing understandings of individual freedom
in their exercise of judicial review, or follow one of the other models of
constitutional decision making which were discussed above? While this
question will be answered more fully in response to the First and Second
Critiques, the following is a preliminary defense of originalist review.

If the Constitution gains its authority because it is about truth and
the ideal state, the appropriate method of constitutional interpretation is
the one that best reflects and promotes this truth. As noted above,
human reason cannot attain full knowledge of the precise details of the
ideal state. While individual freedom is certainly an important goal of
good government, Americans cannot agree on what constitutes genuine
human freedom and the proper relationship between individual and
state. Because our knowledge is limited in this way, constitutional deci-
sion making must not be about enforcing any one of these various, con-
flicting theories of individual freedom. Any single effort to define the re-
quirements of human freedom and the pattern of ideal government,
whether it be that of a respected founding father, John Locke, or a mod-
ern scholar such as John Rawls, will be an imperfect and inadequate
understanding of truth. To enforce any particular vision of the ideal
state would be tantamount to cramping American political institutions
into a flawed mold.

However, if judges enforce the original meaning of constitutional
provisions as Bork suggests, they will be able to shape American political
institutions according to the true pattern of government even while full
knowledge of the ideal state remains beyond our grasp. The original
meanings of these provisions do not reflect any single and, consequently,
imperfect understanding of individual freedom and government but,
rather, incorporate a variety of different viewpoints. The American Con-
stitution was the product of intensive public discussion and argument,
and the document emerged through a demanding process of accommoda-
tion and consensus building. Among the various viewpoints that went into this process were a Lockean emphasis on natural rights and the republican emphasis on virtue and self-government. The provisions that the founders finally settled on had to command wide support, and, hence, the original meaning of these clauses represent points of overlap among these various political theories. For example, the provisions which provide for the composition and powers of the legislative branch were hammered out to satisfy the concerns of small states as well as large states, southern interests as well as northern interests, the republican principle of self-government and the Federalist insistence upon protections against overweening democratic majorities. The formal procedures for constitutional amendment provided for in Article V ensure that any later amendments will also have been forged through an equally demanding process of public discussion, debate and consensus building involving a variety of viewpoints.

Because the provisions of the Constitution are the product of intense public debate and argument and represent points at which a variety of different understandings of freedom and good government overlap, the choices that the founders reached and embodied in these provisions have a special status as pieces of a larger truth whose full contours remain hidden. The demanding process of formal constitution making is like a crucible in which various views are tested and refined in order to produce a few gems which mirror truth. Thus, if judges follow originalist principles and enforce the choices that are embodied in the Constitution's provisions, they will be shaping American political institutions according to the true pattern of government even as they lack a clear and comprehensive vision of this ideal. By enforcing areas of consensus which reflect pieces of a larger, ungraspable truth about human ends and ideal government, originalist constitutional review opens constitutional decision making out onto this larger truth without falling into the trap of imposing a single, controversial vision of the ideal state upon our political institutions. Originalism is the preferable model of judicial review because it best promotes the ideal state in a world where moral and political truths are neither wholly inaccessible nor wholly accessible to human knowledge.

151 See id. at 118; cf. Ackerman, supra note 73, at 1038-39. Ackerman describes the constitution making process as higher lawmaking in which the American people engage in intensive public debate and reach "considered judgments" about national principles and values. Id.

152 KELLY ET AL., supra note 145, at 86-106.
B. Answering the First Critique

The defense of originalism outlined above can provide a response to the First Critique of originalism as well as the CLS Critique. One prong of the First Critique condemns the originalist judge for interpreting the Constitution as a set of discrete provisions rather than creatively knitting these provisions together into a coherent vision for our political institutions. According to this critique, the function of law is the expression and enforcement of values or principles for ordering community life, and the Constitution, in particular, serves the critical role of providing a moral foundation for ordering our political institutions. By interpreting the Constitution as a set of discrete rules, originalism frustrates this function by fracturing constitutional meaning and preventing the Constitution from expressing a coherent vision for our political community.

However, if the Constitution is about political truths which are only partially accessible to human knowledge, any endeavor by judges to interpret the Constitution in a way that ties its various clauses together into a coherent, principled vision for American politics is understandable but inappropriate. As argued above, any single, coherent vision of the ideal state will necessarily be imperfect and incomplete because full knowledge of the true pattern of government is beyond our ken. Hence, interpreting the Constitution according to such a vision will cramp our political institutions into an inherently flawed mold. Furthermore, interpreting the Constitution as a series of discrete rules does not prevent the Constitution from functioning as the moral foundation of our political life. Quite the contrary. Because the original choices reached by the founders and embodied in constitutional provisions have a special authority as pieces of truth, clause-bound interpretivism gives constitutional law a special depth as it moves our political institutions toward the ideal state even while full knowledge of this ideal is beyond our grasp. Thus, one should not be disturbed if the various provisions of the Constitution do not seem to hang together into a coherent theory of government; this is because the various clauses of the Constitution are parts of a larger, ungraspable truth. Rather than enriching our Constitution, prematurely imposing coherence and order upon the Constitution shrinks its potential meaning instead of expanding it to reflect this truth.

The temptation to read the Constitution in terms of a coherent vision for American politics is essentially the error of "idolatry." "Idolatry" consists in attributing ultimate significance to what is merely provisional, ephemeral and finite rather than to what is truly divine, absolute,
A Defense of Originalism

perfect or infinite. One form of idolatry is to mistake what is merely provisional and imperfect with what is ideal. Scholars who purport to offer an ideal vision for American politics to which constitutional decision makers should strive, fall into this form of idolatry. These scholars fail to appreciate the inadequacy of their own visions of American political society, nor do they fully appreciate the insights contained in other visions.

Dworkin makes the mistake of another form of idolatry. Dworkin directs judges to impose a coherent sense of meaning and purpose on the Constitution because he does not believe that any transhistorical ideal or truth is relevant to constitutional decision making. For Dworkin, moral and political arguments take place within traditions that humans create and evolve over time. Arguments refer to values which gain their meaning and authority within these traditions and not from some external, absolute standard of truth "out there" in "the fabric of the universe." Hence, it is natural that he believes the Constitution succeeds in providing a meaningful moral foundation for our political life when judges give it the coherent meaning which best expresses contemporary values. However, as the CLS Critique points out, if values are merely human artifacts and none can be said to bear the authority of some absolute truth, any constitutional principles must be illegitimate. In that case, even principles which reflect prevailing community values are tyrannical to the dissenter, who becomes the victim of mass collectivism. Affirming

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153 This definition of the term "idolatry" appears frequently in contemporary philosophy, political philosophy and theology. See, e.g., Paul Tillich, Dynamics Of Faith 44, 52 (1957); Roberto Mangabeira Unger, Knowledge And Politics 236-37 (1984).

154 For example, Milner Ball makes this mistake when he argues that the ideal to which our nation and its fundamental law are striving is self-evident and consists of a vision of the "body politic" in which the strong nurture the weak and powerless. According to Ball, judges should promote this ideal in their constitutional decision making. Milner S. Ball, Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law, 59 Tex. L. Rev. 787, 806-09 (1981). Most people would agree with Ball that it is good for the strong to nurture the weak. However, there is much disagreement, particularly within the Christian tradition that Ball draws from, about whether the state is the appropriate instrument of that ethic. Many will argue that the primary responsibility for helping the weak belongs to individuals and voluntary religious/ethical societies, and, hence, they will be wary of a state which co-opts these important religious duties for itself.

155 Dworkin, supra note 49, at 78-83, 266-67. Dworkin is not interested in arguing that absolute, transhistorical truths do not exist. Rather, he insists that whether or not the skeptic is correct, it does not make much of a difference: when people argue about moral and political issues, they are not making "metaphysical points" about truths "out there" in the universe, but, rather, they are making claims about what is the best interpretation of an existing social practice or tradition. These latter claims are made from a perspective internal to the practice and its values and assumptions, not from some external, transhistorical perspective of truth. Id. at 78-86.
the existence of moral and political truths and tying constitutional mean-
ing to these ideals is necessary if the Constitution is to have legitimacy. Once one accepts that constitutional legitimacy depends upon truths whose full contours are beyond our understanding, any endeavor to impose a coherent political vision upon the Constitution stifles the capacity of the document to reflect and promote this truth.

The other prong of the First Critique of originalism claims that the Constitution cannot function as a meaningful moral foundation of our political community if the exercise of judicial review is limited to enforcing the outdated perspective of the founding era. Unless judges engage in contemporary debates about what the Constitution should be, and creatively evolve constitutional principles in light of contemporary needs and values, constitutional law will lose its vitality and meaningfulness for our contemporary political community. Those who make this argument against originalism are impatient with the formal amendment process as the sole avenue for constitutional change: the original meaning of our Constitution may have lost its significance before a new consensus is sufficiently crystallized to survive the amendment process.

According to this Article's understanding of originalism, however, limiting the scope of judicial review to the original meaning of the constitutional text except where there has been a formal amendment does not deprive constitutional law of its meaning and significance for contemporary society. Rather, it ensures that constitutional principles have a special claim to truth. Scholars who complain that original understanding of the Constitution can become outdated and call upon judges to evolve constitutional meaning discount the value of originalist principles. The original meaning of constitutional provisions represents choices which have been forged through a demanding process of public discussion, argument and consensus building. Hence, there is a strong presumption that these original choices represent valuable pieces of truth about the ideal state which should not lightly be dismissed. Of course, mistakes may be made even through the demanding process of formal constitution making, and experience and further reflection may teach the American people more perfect understandings of the true pattern of government. However, in either of these situations, to cast aside choices which have been forged through processes of formal constitution making in favor of judge-made law would be, to use the proverbial expression, throwing the baby out with the bathwater. The more sensible approach to changing circumstances and values in American society is to look to the amendment process to crystallize a new consensus on political principles. The formal amendment process will ensure that any textual amendments respond to and incorporate a variety of viewpoints on contemporary issues and, hence, have the special claim to truth that the original constitutional provisions do. Judges may endeavor to ensure that their evolu-
tions of constitutional provisions reflect and receive wide support, but the formal amendment process is a far more reliable way of ensuring that a variety of viewpoints are considered and accommodated and true consensus reached.

C. Answering the Second Critique

The Second Critique of Bork's defense of originalism does not advocate an activist, policy making judiciary and agrees with Bork that the exercise of judicial review should be limited to enforcing neutral constitutional principles. Instead, the Second Critique attacks Bork's assumption that the original meaning of the text is the only source for such neutral principles. By reading the Constitution at different levels than Bork does, proponents of the Second Critique hope to generate neutral constitutional principles which can better address and reflect changing circumstances and values than can originalist principles but without giving judges discretion to evolve constitutional principles on their own. Ely reads the Constitution in terms of the underlying purpose of the founders to perfect democratic structures of government. Others approach the Constitution as primarily an expression of shared national values, and, hence, they permit judges to enforce new national values even if these values are not embodied in the original meaning of any specific textual provision. Ackerman sees the Constitution in terms of "higher lawmaking," which, he argues, is not limited to moments of formal constitutional change. Bork's problem is that he does not provide a convincing argument for why judges should read the Constitution at the level of the original meaning of the text rather than any of these other levels.

This Article's alternative defense of originalism can supply a convincing argument for reading the Constitution at the level of the original meaning of the text. Bork is vulnerable to the Second Critique because, for him, the legitimacy of originalism consists primarily in its being able to supply neutral standards for judicial review, and, thus, it would seem that any of the other neutral principles listed above could perform that function as well. In this Article's alternative defense of originalism, it is also important that judges do not make policy or evolve constitutional principles. However, this Article does not argue that originalist principles are the proper standard for constitutional decision making solely because they offer fixed, neutral principles to constrain the exercise of judicial review. Nor does it defend originalism as the orthodox method of interpreting ordinary law. Rather, judges must not go beyond the original meaning of the text because originalist principles have a special claim to truth that other standards cannot match. It is because the original meaning of the constitutional text represents pieces of a truth whose full shape eludes our grasp that originalism is the appropriate model of
judicial review. No other set of neutral constitutional principles reflects and promotes the true pattern of government as well as originalist principles.

In the first place, digging beneath the surface of the constitutional text for the underlying purposes or vision of the founders, as Ely does, suffers from the same defects as Dworkin's endeavor to knit together the various constitutional provisions into a coherent, contemporary political vision. As noted above, any vision of the ideal state will suffer from the inadequacies of our limited human perspective and fall short of the truth. This is as true of the founders' vision of American politics as it is of a more contemporary perspective. In fact, however, the founders did not share any one monolithic vision of American political society, and different strains, such as Lockean natural law theory and republicanism, went into the decision making process. Thus, there is no single set of purposes underlying the Constitution which judges can appeal to in the exercise of judicial review. Ely's tendency to see the Constitution in terms of democratic process values focuses upon the republican strain while this Article's attention to the Constitution's substantive natural law values points to the Lockean strain. Indeed, it is precisely because the various constitutional provisions represent points of overlap between these various understandings of individual freedom and visions of the ideal state that they have authority as pieces of truth which can provide the basis of a legitimate mode of judicial review.

Secondly, shared national values and moments of higher lawmaking which are not embodied in a specific textual provision do not have the same claim to truth as do the original meanings of such provisions. Noninterpretivists who would permit judges to enforce extratextual shared national values may argue that these values are backed by the same sort of widespread consensus that gives originalist principles their special authority as truth. Similarly, according to Ackerman, when the American people engage in moments of higher lawmaking, they forge considered judgments which are backed by a high degree of consensus even when they do not avail themselves of formal amendment procedures. However, the problem with permitting judges to go beyond the original meaning of the text in order to enforce extratextual national values or "constitutional moments" is two-fold. In the first place, while it is easy to identify the products of formal constitution making, disagreements about what in fact qualify as shared national values or moments of higher lawmaking are common. In the face of such uncertainty, Ackerman and proponents of judicial review according to shared national values would give the relatively small and elite judiciary considerable power and discretion to identify community values. In such a situation, zealous judges might easily overlook the existence and weight of minor-
ity views and fall into the trap of proclaiming shared national values whenever a value seems self-evident to them.

In addition to being a far more reliable proof of truly national values, the formal amendment process will produce results that come closer to the truth than "shared national values" or products of "higher lawmaking" which have not been forged through the demanding process of formal constitution making. Unlike some of the more subterranean ways in which extratextual national values develop, the amendment process is a highly visible process which serves as a focal point for public discussion and encourages a high degree of public participation by a wide range of interested individuals and groups. Furthermore, as the amendment process proceeds, Americans realize they are engaged in a serious business because they are aware that they are engaged in making constitutional law. This self-consciousness, which is absent in moments of higher lawmaking that do not proceed through formal constitutional channels, further heightens the level of political argument and ensures that constitutional change will not take place without a genuine consensus. For example, if the American people had known that they were engaged in constitution making when they reelected FDR in 1936, as Ackerman suggests, their response may have been very different and more conservative.\textsuperscript{156}

Surely, originalist review will not permit constitutional law to respond as quickly to changes in values and circumstances as will other noninterpretivist theories. However, those who would bypass the demanding process of formal constitution making in order to keep the Constitution in step with changing times would eviscerate our constitutional tradition by preferring a quick fix over the assurance that constitutional principles continue to reflect and promote the true pattern of government which alone gives our tradition its legitimacy.

\textsuperscript{156} Ackerman claims that when the people reelected FDR in 1936 in spite of the Court's resistance to his New Deal program, they were signaling their "ratification" of new constitutional principles. Ackerman, \textit{supra} note 73, at 1052-56. However, the American people were not on notice that they were, in fact, engaging in a constitutional convention as Ackerman argues. For all the people knew, they were electing a president rather than engaging in constitutional change. Many voters could have reelected Roosevelt with the expectation that he would carry forward his New Deal program within existing constitutional limits. Others might have hoped that FDR's programs would be sustained regardless of their constitutional imperfections but, nevertheless, still have been unwilling to enact any sort of permanent constitutional change. Thus, it is not at all clear what the results of the 1936 election would have been if voters had been aware that they were engaged in full-fledged constitution making.
D. Putting Faith Back Into Constitutional Scholarship

There are several important ways in which the defense of originalism outlined above depends upon "faith." The use of the term "faith" is not meant to disparage this alternative defense. Quite the contrary. The term "faith" is used in a Biblical sense. On the one hand, faith refers to the belief in things "unseen" and unseeable. Because our human perspective is limited and we "see in a mirror dimly," neither belief nor doubt about what is presently unknowable can be proved. However, there is a difference between faith and doubt; while doubt leaves one unable to legitimize any constitutional system, faith bears fruit that gives one further reasons for believing.

1. Faith in the Existence of Moral and Political Truths, to Which Human Reason has Limited Access

In the first place, this defense of originalism involves faith that a true conception of human good and a true pattern of government which conforms to this good ground the world and are part of the end towards which it strives. One cannot prove definitively that moral and political truths exist or that reason has touched upon them in the notion of individual freedom. When looking at the history of philosophy, progressive consensus on matters such as the value of individual liberty seems a plausible indication of the capacity of human reason to discover knowledge, albeit limited, about moral and political truths. So too, when consensus is forged through the formal process of American constitution making, that is a good indication that the American people are "onto something." Of course, it is possible to interpret these events differently. Significant disagreement remains, and perhaps what consensus has been reached on matters of politics merely reflects the fact that we share a similar "language game" or discourse, not the existence of some absolute truth to which our consensus corresponds. This latter interpreta-

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158 1 Corinthians 13:12.

159 Philippians 1:11, 3:9; Galatians 5:22-24; Romans 8:1-23; Colossians 1:21-23.

160 The notion that there is no realm of "truth" underlying moral and political debates has become popular among many contemporary philosophers and political philosophers. Ludwig Wittgenstein speaks of moral discourse as a "language game": truths are internal to the game and do not correspond to some external, transhistorical standard. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 3d ed. 1958). Similarly, Richard Rorty claims that Western philosophy has sought in vain for some "objective," "transhistorical" "truth." According to Rorty, "there is only the dialogue," only us, and [consequently we must] throw out the last residues of the notion of 'trans-cultural rationality.'" Richard Rorty, *Solidarity or Objectivity?, in POST-ANALYTIC PHILOSOPHY 3, 15 (John Rajchman & Cornel West eds., 1985). Thus, whatever moral or political consensus
tion is, however, is a less plausible account of our capacity for engaging in reasoned arguments and reaching at least limited agreement than is the belief that humanity has some sort of access to a higher realm of truth. Nevertheless, neither belief nor disbelief in this truth can be proven: such proof would require the perfect knowledge and "God's-eye point of view" that we certainly do not have. However, doubt about the existence and accessibility of moral and political truths leaves the constitutional scholar unable to legitimize any set of constitutional principles. Any value choices in such a world can only be experienced as tyranny by the dissenter even if they receive wide consensus in one's community. By contrast, faith in the existence of an ideal state and humanity's limited knowledge of it bears fruit. On the basis of this faith, a legitimate model of constitutional decision making can be constructed.

2. Faith in the Reconcilability of Individual Freedom and Community

Another strain of the CLS Critique, which has not been discussed above, does not so much deny the existence or accessibility of moral and practical truths but, rather, argues that the truth of human nature and politics is a hopeless contradiction. According to Duncan Kennedy and Paul Brest, human nature is riven by a "fundamental contradiction" between the two irreconcilable values of individual liberty and community. They argue that humanity's capacity and desire for free, autonomous choice is incompatible with humanity's social needs as a communal being. On the one hand, the individual experiences freedom as a primarily "negative" "absence of restraint on the individual's choice of ends." On the other hand, the individual yearns to be part of a group where values are determined and enforced collectively, even as the individual resists the threat of self-annihilation which is involved in such a collec-
tive existence. According to these scholars, this fundamental contradiction in human nature means that there is no ideal or true pattern of government which can successfully balance individual liberty and community. The Lockean and republican strains in our own constitutional tradition and at the core of what Bork calls the Madisonian dilemma are not different insights into a larger, ungraspable truth which involves them both but, rather, reflect two horns of an unresolvable dilemma. Because the requirements of negative and positive liberty compete against each other and cannot be reconciled, any constitutional tradition dedicated to the promotion of human freedom must be illegitimate.

This Article's defense of originalism rests upon faith that individual liberty and community are not irreconcilable human needs but, rather, two compatible elements of human nature which can both be balanced in an ideal state. Disagreements about what human freedom really consists in and what is the proper relationship between community, state and individual are an indication that humanity does not yet fully understand the truth about ourselves and the true pattern for government, and not proof that humanity is riven by two contradictory tendencies. Negative liberty's emphasis upon individual freedom from outside interference and coercion, and positive liberty's recognition that free choice is only meaningful in a communal context, need not be seen as irreconcilable views but, rather, as two insights into a single truth. Indeed, from a Christian perspective, it is somewhat surprising and perplexing that Brest and Kennedy see individual liberty and community as two irreconcilable values. For the Christian, it is natural to regard them as two sides of the same coin, which is love. In Christianity, individual freedom from outside coercion is not valued as some sort of end in itself but, rather, is necessary for genuine communities of love: love is not genuine unless it involves the voluntary choice of the persons involved. Similarly, a genuine community of love, which is the telos of human life, will not swallow up the individual by forcing conformity but, rather, will respect free agency and a diversity of gifts and talents. The original meaning of the American Constitution is a legitimate foundation for government because it reflects and incorporates concern for both individual liberty and community.

One cannot prove that the values of individual liberty and community are ultimately harmonious. The Christian knows that he or she and the world are merely on the way towards perfection and that perfect love

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164 Kennedy, Blackstone's Commentaries, supra note 162, at 211-12; Kennedy, Form and Substance, supra note 162, at 1774-75; Brest, supra note 3, at 1108. "[W]e can achieve real freedom only collectively, through group self-determination. We are simply too weak to realize ourselves in isolation." Kennedy, Form and Substance, supra note 162, at 1774.

165 Brest, supra note 3, at 1108.

166 See 1 Corinthians 12.
is only possible in heaven. It may be that there is no heaven and that
human nature is in fact riven by an insoluble contradiction. The un-
happy consequence of doubt, however, is the view that no constitutional
principles can have legitimacy. Faith in the harmony between individ-
ual freedom and community, on the other hand, permits one to construct
a legitimate constitutional system which takes account of both values.

3. Faith in the Capacity of the American People to Sustain a
Reasoned and Principled Process of Democratic
Constitution Making

This Article's defense of originalism also depends on faith in demo-
cratic constitution making. It has been argued that what gives the origi-
nal meaning of textual provisions their legitimacy as constitutional stan-
dards is the fact that the original meaning of the text represents choices
which have been forged through a rigorous process of public discussion,
argument, accommodation and consensus building. The original docu-
ment was created through such a process, and Article V is designed to
ensure that constitutional reform will proceed according to similarly de-
manding democratic processes. Principled and reasoned decision mak-
ing on the part of a dedicated populous is, therefore, the dynamism be-
hind this Article's understanding of the American Constitution, and
without it, constitutional reform through Article V will stagnate or veer
away from the truth. Thus, this alternative defense of originalism de-
pends upon faith in the capacity of the American people to live up to
these expectations and to make a democratic process of constitution
making work.

However, many contemporary scholars seem to doubt the fitness of
the American people for these weighty constitutional responsibilities.
These scholars have lost faith in the interest and capacity of the Ameri-
can people to protect important values through the formal amendment
process provided for in Article V. According to Paul Brest, contemporary
scholars look to the courts rather than to the citizenry to define and pro-
tect "fundamental rights" because these scholars share "a profound skep-
ticism about the possibility of public discourse about issues of prin-
ciple."167 "The scholars' implicit message is that if the Supreme Court
does not take rights seriously, no one will."168 Similarly, in The Least
Dangerous Branch, Alexander Bickel argues that the American people
are prone to neglect principles as they act "in the moment's hue and
cry."169 Bickel looks to the judiciary rather than to the American people
to articulate constitutional principles because "judges have, or should

167 Brest, supra note 3, at 1107.
168 Id. at 1106.
169 BICKEL, supra note 122, at 26.
have, the leisure, the training, and the insulation to follow the ways of
the scholar in pursuing the ends of government."\textsuperscript{170} Those who share
this distrust of the American people and have a preference for an activist
judiciary are quick with examples: if judges did not take the initiative in
protecting important values, there would be no right to privacy, much of
the Court's Equal Protection doctrine, and the list goes on.

However, such widespread skepticism about the capacities of the
American people to engage in dedicated and principled constitution mak-
ing is unfounded. As Brest suggests, much of the criticism which is lev-
eled against the competence of the American people comes from scholars
who are frustrated with the tepid reception, or rejection, that large num-
ers of the American people have given to what these scholars believe
are core political values. Again, the familiar examples are the right to
privacy, including a woman's right to choose abortion, and expansive un-
derstandings of the Equal Protection Clause. The conclusion of these
scholars is that the American people are either apathetic or unconcerned
about important political values or, worse yet, downright hostile to im-
provement. However, the more likely explanation is that the American
people are, as a whole, just less sure of the correctness of these values
than are constitutional scholars. For example, while many scholars are
convinced that a woman's right to abortion and other aspects of the right
to privacy are self-evident requirements of individual liberty, many
Americans who have seriously considered this issue simply disagree. In-
deed, the debate between those who favor a constitutional right to abor-
tion and those who oppose such a right on the grounds that it permits the
taking of innocent human life is an outstanding example of the capacity
of the American people to engage in fervent and principled debate about
constitutional principles. The positions of ordinary Americans on both
sides of the debate often possess a subtlety that escapes many contempo-
rary legal scholars (and lest the reader laugh, most members of the press
as well).

Furthermore, even when a large percentage of Americans do favor
constitutional change, formal constitutional change will take time. Nor
should the zealous scholar become impatient or frustrated with the for-
mal amendment process. The amendment process is designed to ensure
that issues will be exhaustively considered and choices carefully con-
structed in order to take account of a variety of viewpoints. In this way,
when decisions are finally reached, they will better reflect and promote
truth than the ideas that any one person, group or scholar began with.

Even so, it is always possible that on some issues which merit atten-
tion, the American people will be apathetic or may even make the wrong
choice. Such apathy or misdirection is probably far less prevalent than

\textsuperscript{170} \textit{Id.} at 25-26.
many constitutional scholars believe. However, to the extent that the American people do fail in their constitutional duties, the proper response of the constitutional scholar should be to stimulate public debate and heighten the level of public discourse with their own ideas rather than to preempt democratic decision making by going to the judiciary for support. As argued above, constitutional principles which are forged through democratic processes are far more likely to reflect and promote truth and, hence, to be legitimate than those defined by judges. Thus, constitutional scholars have an important duty to see that democratic constitution making functions well, and they should always be involved in a constant process of rethinking constitutional values and engaging the public in a similar process. If scholars lose faith in the public and take their ideas to judges rather than seek to inspire and inform public debate and democratic constitutional reform, they may well be confirmed in their low expectations of the American people and democratic constitution making. However, if they keep faith in democratic constitution making and do their best to contribute to lively public debate, their faith will bear fruit. As Bickel writes, “the sin [of cynicism] is mortal, because it propagates a self-validating picture of reality. If men are told complacently enough that this is how things are, they will become accustomed to it and accept it. And in the end this is how things will be.”

Of course, when scholars go to the public with their ideas, they must not always expect that they will encounter agreement. Rather, they may become one voice in a great debate whose dimensions far exceed their own single point of view. However, as long as public debate is vibrant and principled, a diversity of viewpoints is not a sign of failure on the part of the scholars but, rather, a sign that when a public choice is finally reached, it will be closer to the truth.

4. Faith in the Willingness of the American People to Open Up Democratic Political Processes to Participation by All Segments of the American Population

The defense of originalism presented in this Article rests upon one additional aspect of faith in American democracy. In addition to faith in the capacities of the American people to sustain dedicated and principled public discussion and argument about constitutional issues, this defense depends upon faith in the willingness of the American people to open up democratic political processes to effective participation by all segments of the American population.

It has been argued that the original meanings of textual provisions gain their authority as pieces of truth because they reflect and incorporate different points of view. Wide participation by various segments of

171 Id. at 84.
the American population in the processes of formal constitution making is, therefore, critical to the legitimacy of originalist review. Generally speaking, political processes in the United States are broadly democratic. Certain voices, such as those of African-Americans and women, have been excluded in the past from public decision making processes. However, constitutional amendments now ensure that these previously excluded groups have the right to vote and hold office.

Nevertheless, some scholars argue that even after these constitutional amendments, there remain considerable barriers to full and effective participation by all groups in American democracy which are not addressed by the original meaning of any specific constitutional provision. For example, John Hart Ely points to state laws imposing voter qualifications such as the poll tax and malapportionment of legislative districts as examples which were struck down by the Warren Court. According to Ely, a broad reading of the First Amendment's speech clause is also necessary to ensure that unpopular groups are not excluded from public discussion and argument. Thus, one may argue that this Article's defense of originalism breaks down unless judges are permitted to go beyond the original meaning of the constitutional text when it is necessary to clear obstacles blocking participation in the processes of political change.

However, a modified version of originalism which would confine the exercise of judicial review to implementing the original meaning of the text except when it comes to protecting democratic process values would be unworkable and ultimately incompatible with this Article's understanding of constitutional legitimacy. In the first place, it is far from clear what sorts of measures would be required to ensure full and effective participation in American democracy. Ely focuses upon laws directed at suppressing speech and laws which deny the right to vote or give unequal weight to different votes. However, one may argue that even though they may have a formal right to speak and vote, some segments of the American population may be effectively excluded from public discussion and decision making. For instance, poorer people may lack the education, time and money to make their voices heard. Thus, one may argue that opening public discussion and decision making to the poor requires affirmative action on the part of the state to guarantee these prerequisites. Other groups may be disadvantaged and prevented from effective participation in other ways. Jed Rubenfeld has argued that even if they have a formal right to vote, individuals cannot meaningfully participate in the process of democratic self-government if they are subject to laws which channel their lives into standardized molds or

172 Ely, supra note 3, at 116-25.
173 Id. at 105-16.
functions. Rubenfeld points to laws prohibiting abortion as an example of laws which channel women into traditional maternal roles. Even though women have the right to vote, "[p]eople do not meaningfully govern themselves if their lives are subtly but pervasively molded into standard, rigid, normalized roles. They simply reproduce themselves and their social institutions." Thus, if the judiciary were permitted to depart from originalist principles in order to protect the democratic processes of political decision making, judges would become embroiled in controversies over what is, in fact, necessary for a fully inclusive democracy. In the midst of this uncertainty, judges would have considerable discretion to choose among competing views about democratic process values. At first glance, this prospect may not seem very troubling. In theory, the discretion of judges would be limited to the area of process values and would not extend to substantive constitutional principles, which would remain the province of democratic decision making. In the area of democratic process values, one would expect that as the judiciary struggled with controversial issues, it would, over time, develop fairly settled constitutional principles in a common law fashion.

However, the problem with this response is that there is no clear line between process values which are necessary to ensure full and effective democratic participation and the substantive political principles that must rest with the American people in order to be legitimate. In fact, democratic process values are inextricably linked with substantive questions about what sort of state action/inaction is necessary in order to promote true human freedom and the ideal state. This is so because at least when one goes beyond the relatively straightforward requirement of a right to vote, one's understanding of what is necessary for full and effective participation in American discussion and decision making will be related to and vary according to one's understanding of the nature and requirements of genuine human freedom. Thus, if the courts are permitted to go beyond the original meaning of the Constitution in order to protect democratic process values, the danger arises that judges may also end up giving resolution to many of the substantive value choices which properly belong to the people. This danger would become even more acute if the courts were to adopt a particularly expansive notion of what sort of state action/inaction is required to ensure genuinely inclusive democratic processes.

For instance, if the courts determined that full and effective democratic participation by the poor in American democracy required the government to guarantee the poor a threshold level of education, leisure.

174 Rubenfeld, supra note 106, at 805-07, 787-802.
175 Id. at 805.
time and income, the courts would end up enforcing a particular, controversial understanding of what state action is appropriate and necessary for genuine human freedom.\textsuperscript{176} Indeed, the judiciary would be radically restructuring the role of government in American life as well as the socio-economic face of American society. The consequence would be to override the views of many Americans who believe that an expansive state threatens individual freedom and that individual freedom consists primarily in the absence of state interference in the individual's life and to enforce, instead, a more "positive" theory of human freedom.

By contrast, if judges were to follow Rubenfeld in using the power of judicial review to strike down laws which channel lives into standardized patterns, they would be favoring a more negative conception of human freedom as against a more positive one. For instance, according to Rubenfeld, the zoning laws struck down in \textit{Moore v. City of East Cleveland}\textsuperscript{177} channel lives into traditional nuclear family models and related social institutions and, hence, impermissibly interfere with the capacity of affected individuals to meaningfully participate in democratic self-government.\textsuperscript{178} However, viewed from the perspective of substantive rather than process values, these laws reflect a belief that traditional family molds are necessary to genuine human freedom rather than a constraint upon it. This view has come under repeated attack in recent decades. However, whether traditional family structures nurture or stifle genuine human freedom is the sort of substantive question that should be reserved for democratic decision making rather than judge-made law.

The danger that judges enforcing process values may end up resolving many substantive political questions that properly belong to the American people will be particularly acute when there is heated public debate about an issue, such as the right to abortion, and the judge is particularly ardent in his support of one side over the other. In these circumstances, there is a temptation for the zealous judge to take the issue from the people and to resolve it judicially by turning the issue into a democratic process question. Indeed, this is perhaps what Rubenfeld intends to do when he argues that the right to abortion is critical to a woman's right to participate in American democracy. Ironically, the result is that a critical moral and political issue, which has galvanized the American public on both sides of abortion debate and, indeed, demonstrated just how powerful women are in American politics, would be taken from the very processes of self-government which Rubenfeld is at pains to protect.

\textsuperscript{176} See discussion \textit{supra} p. 165.

\textsuperscript{177} \textit{Moore v. City of East Cleveland}, 431 U.S. 494 (1977) (plurality opinion) (striking down laws which limit occupancy of dwellings to members of an immediate family).

\textsuperscript{178} Rubenfeld, \textit{supra} note 106, at 792-802.
Thus, the originalist seems to be left with an insoluble conundrum. On the one hand, unless judges are permitted to go beyond originalist principles in order to ensure the inclusiveness of democratic political processes, it would seem that democratic constitution making will not reflect the broad spectrum of viewpoints which is the key to their legitimacy. On the other hand, once judges are permitted to go beyond originalist principles to protect democratic process values, there is a risk that the judiciary will preempt democratic constitution making in the name of democracy.

There is, however, a way out of this dilemma. The way out is to have faith in the willingness and capacity of the American people to grapple with questions of what is required for full and effective democratic participation by all segments of American society and to purify infirmities in American political processes through democratic means. According to Ely, the tendency of democracies is for those who are presently “in” the system to endeavor to keep “out” those who are presently excluded from participation in the system.179 However, a review of the history of democratic government in America reveals greater cause for optimism than Ely would allow. During the Revolutionary era, many states were already moving quickly toward universal white manhood suffrage,180 and by 1825 all but three states had reached that goal.181 Furthermore, several constitutional amendments have since been passed in order to guarantee groups who were still excluded from suffrage under these regimes the right to participate in democratic political processes. The Fifteenth Amendment gave African-Americans the right to vote and prohibits states from abridging that right “on account of race, color, or previous condition of servitude.” The Nineteenth Amendment gave women the right to vote, and the Twenty-sixth Amendment prohibits governments from abridging the right to vote on account of age when citizens reach the age of eighteen. Rather than being a tight club in which “ins” have shut the door on “outs,” as Ely suggests, democratic forums in America have provided an opportunity for idealistic and progressive voices such as the abolitionist to expose the infirmities of the prevailing system, shame the national conscience, and press for greater inclusiveness in our democratic system. In that way, democratic institutions have had a tendency to unfold into ever more inclusive forms rather than to slam the doors on those who presently have no voice. For instance, the disadvantages which plague poor people have not gone unnoticed in state and national politics. Advocates on behalf of the poor have a considerable voice

179 Ely, supra note 3, at 120.
180 See Kelly et al., supra note 145, at 78.
182 U.S. Const. amend. XV, § 1.
in American politics and much has been done, however incomplete, to combat poverty and associated ills.

Of course, there is no guarantee that America's democratic institutions will be able to adequately address their own infirmities and tend towards greater inclusiveness on their own. Success, however, depends upon faith in this possibility. Such faith feeds the willingness of Americans who do perceive injustices to engage in public discussion and debate and to work for democratic change. If, on the other hand, these Americans were to abandon democratic processes and turn to the judiciary to protect democratic process values, the very democratic processes which they seek to perfect will be endangered.

III. APPLICATIONS

The final portion of this Article will further clarify the understanding of originalism developed above by applying originalist principles to review the Supreme Court's decisions regarding the right to privacy. Before considering this example, however, it is helpful to preface the discussion with a few points about the author's understanding of the mechanics of originalist review.

In the first place, for the most part Bork and I share a similar understanding of the mechanics of originalist review. Like Bork, I understand originalism to be about applying what the founders understood themselves to be enacting in a provision. Because, in my view, what the originalist judge is really after is the agreement that was hammered out by the authors of a provision and consented to by a large majority of the American people through the formal process of Article VII, or Article V in the case of amendments, Bork's suggestion that the originalist look primarily to the words of the Constitution and the meaning these words would have had for the public of the founding era makes sense. Like Bork, I believe that this "original meaning" of the text must be defined and applied at the level the founders intended. Furthermore, like Bork, I believe that the application of these originalist principles to contemporary circumstances may require judges to depart from the outcomes that the founders envisioned if the founders mistakenly believed that these outcomes were consistent with the choice they enacted.

183 Debates in the Congress or convention which drew up a provision are often the best indication of the public understanding of that provision. These debates will respond to and be shaped by public debates, and the decisions hammered out by the provision's authors will become the focus of the ratification process. Hence, unless the authors of a provision had a secret, unexpressed purpose in mind or the public discussion surrounding the enactment of a provision indicates an understanding at variance with that of the Congress or constitutional convention, the originalist should presume a correspondence between the founders' intentions and the public understanding of a provision.
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There is, however, one slight difference between Bork's description of the mechanics of originalist review and my own view. Bork defends originalism as the sole source of fixed, neutral principles to guide judicial decision making. Hence, it is not surprising that when Bork speaks of the mechanics of originalist review, he speaks in terms of applying the principles that the founders thought they were enacting. Bork envisions that the originalist judge will look at the text and its history, discern the principle or rule enacted therein and then apply that rule to the case before him. In contrast to Bork, this Article has argued that the primary value of originalism is not so much in its supply of fixed, neutral principles for judicial review but, rather, in its focus upon constitutional choices or agreements that have been reached through a democratic process of public discussion, agreement and consensus building. According to this view, it is not always necessary for a judge to be able to fully understand and delineate the principle or rule that the founders of a clause had in mind in order to apply the choices that they made to the case at hand. Deciding, for instance, whether or not the Free Exercise Clause was meant to grant exemptions to neutral laws of general application may not require judges to have a full understanding of the principle behind this Clause. The critical question is whether or not the founders reached a choice or decision that bears upon the case at hand. Originalist review, according to this alternative theory, is preeminently a matter of implementing the choices of the founders.

Finally, a few comments regarding the feasibility of originalist review are in order. One familiar line of attack upon originalism which has not been elaborated upon above endeavors to demonstrate that originalist review is impracticable. Critics argue that history does not give any clear answers regarding the founders' intent, and, even if it did, judges would have to exercise considerable discretion in "translating"

184 U.S. Const. amend. I.

185 In Sherbert v. Verner, 374 U.S. 398 (1963), the Court held that the scope of the Free Exercise Clause was not limited to protecting religious exercise from laws which intentionally burden religious activity or discriminate in favor of one religion over another. The Court also read the Free Exercise Clause to require that governments give exemptions to neutral laws which "indirectly" burden religious activities so long as that burden is not necessary to serve a compelling state interest. Id. at 398, 403-04, 406. In the recent Smith case, the Court essentially overruled Sherbert and held that the Free Exercise Clause does not require governments to grant such exemptions to neutral laws unless another constitutional right is also implicated. Employment Div. v. Smith, 494 U.S. 872, 879-82 (1990). The Court did not address, in either case, the question of whether the founders intended the Free Exercise Clause to require exemptions from neutral laws. However, had the Smith Court followed originalist principles and answered this question in the negative, it could have disposed of the case without having to determine fully what sorts of religious activities the founders did intend the Clause to protect.
this intent into modern language and circumstances. Others suggest that there is no single choice behind constitutional provisions; different participants in the constitution making process had different understandings of the meanings of constitutional provisions.

Careful consideration of this critique of originalism's feasibility would go beyond the scope of this paper. However, it is important to note that the critics' description of the impracticality of originalist review is considerably overwrought. Surely, different participants in the constitution making process may have had slightly different understandings of the meaning of a clause. However, in most cases there will be a core area of agreement, and that core is what is important for originalist review. For example, as will be argued below, while a few Congressmen may have intended the Due Process Cause of the Fourteenth Amendment to have substantive content, there was no core of agreement on this matter.

Likewise, if originalists expect history to give a clear, fully determinate and undisputed rendition of the founders' intent in every case, they surely will be disappointed. However, Bork does not have such expectations, and nor do I. Everywhere one goes in life one will face a certain amount of uncertainty and ambiguity. The important question for originalists is whether history can provide sufficient information so that what originalist judges will be arguing about and applying most of the time is something that comes very close to the founders' intentions rather than their own political preferences. I believe that as long as judges are willing to sincerely engage in originalist review and to avoid

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187 See, e.g., Brest, supra note 186, at 212; Powell, supra note 186, at 684-87, 690-91.
188 U.S. CONST. amend. XIV, § 1.
189 See discussion infra pp. 190-91.

With respect to some clauses, the core of agreement may have been relatively narrow. For example, the history surrounding the enactment of the Fourteenth Amendment suggests that participants held varying interpretations of its meaning. See, e.g., Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949) (discussing different understandings of the Privileges and Immunities Clause). Radical Republicans such as Representative Bingham favored a broad reading of the Amendment, while others supported a more or less limited construction. The originalist is interested in where these different interpretations overlapped.

It is possible that in some cases, the founders of a clause did not come to any areas of agreement at all. In this case, there are no legitimate constitutional principles for the originalist judge to enforce. Nor is it regrettable that such a clause will be without any constitutional effect. To the contrary, by refusing to act where no agreement has been reached by the founders of a clause, the Court will force future constitution makers to hone debate and come to some definite decisions before they pass a constitutional amendment.
190 See discussion supra p. 143 and accompanying note 48.
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the temptation to remake history and constitutional law according to their own political morality, history can provide such a guide to the exercise of judicial review. (Requiring that law students take courses in the history of American political thought and government would be important preparation for the originalist judge.) Indeed, according to the understanding of the mechanics of originalism described in this Article, many cases will not require judges to resolve the especially uncertain or controversial aspects of a particular provision. Judges need only resolve those aspects of a clause's original meaning which are relevant to the case at hand, and in many cases, the application of the founders' choices to the particular factual circumstances involved in the case may be fairly clear.

A. The Privacy Cases

In a series of cases beginning early in this century, the Supreme Court has relied upon the Due Process Clause of the Fourteenth Amendment in order to protect a "fundamental right to privacy" from state interference.\[^{191}\] The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."\[^{192}\] According to the Court's privacy decisions, the scope of the Due Process Clause is not limited to guaranteeing fair procedures, but it also has a substantive content. In other words, there are some liberties which are so fundamental that state laws cannot infringe upon them without a compelling state interest even if these laws are passed and enforced through appropriate procedures. While the Court in the *Lochner*\[^{193}\] era busied itself with protecting economic rights of contract, the Court has moved away from the special protection of economic rights toward the protection of privacy rights. The Court has defined this right of privacy in terms of activities relating to marriage, procreation, family relationships, and child rearing and education.\[^{194}\]

In reviewing the merits of the Court's privacy decisions according to originalist principles, the chief question is whether or not those who au-


\[^{192}\] *U.S. Const.*, amend. XIV, § 1.


thored and enacted the Fourteenth Amendment reached an agreement that the Due Process Clause provides special protections for liberties akin to the right to privacy. In approaching this inquiry, the originalist must first determine whether or not the Due Process Clause was meant to be read substantively at all or, rather, only procedurally.

Ever since the *Lochner* Court invoked the Due Process Clause of the Fourteenth Amendment in order to extend special protections to what it perceived as fundamental economic rights, scholars and members of the Court have argued about whether the Due Process Clause should be read substantively as well as procedurally. Those who support the theory of substantive due process have also disagreed about what sort of liberties are entitled to special protection. Justice Black sought to provide a fixed base line for judicial decision making by limiting the reach of the Due Process Clause to the incorporation of the Bill of Rights against the states.195 Many scholars and the Court, however, have not been so restrained. In any event, whatever the source of the temptation to read the Due Process Clause substantively, the historical evidence is fairly clear in establishing that those who authored and passed the Fourteenth Amendment agreed only upon a procedural meaning for the Due Process Clause.

In the first place, during the drafting and passage of the Fourteenth Amendment, there was no recorded comment that suggests the Due Process Clause should be given a substantive reading.196 The lack of such comment does not, by itself, prove that those who enacted the Fourteenth Amendment intended only a procedural meaning for the Due Process Clause. The founders of a clause may agree upon a certain effect even though this effect receives little discussion in the historical record surrounding enactment. This is especially so where widespread agreement about the meaning of terms used in a clause facilitates passage with little of the sort of controversy and haggling which leave a convenient paper trial for the historian of original intent.197 However, a substantive reading of the concept of due process was not widely accepted at the time of the passage of the Fourteenth Amendment.198 A few courts

197 In such a case, in order to understand what the founders of the clause had in mind, the originalist must look beyond the legislative history to the shared experiences, concerns, and conceptions which lay behind the textual language.
had read the Fifth Amendment's Due Process Clause substantively, but these cases were aberrations. Indeed, five years after the passage of the Fourteenth Amendment, in the famous Slaughter-House Cases, the Court cursorily refused to give the Fourteenth Amendment's Due Process Clause a substantive reading. In these circumstances, the absence of comment regarding a substantive reading of the Fourteenth Amendment's Due Process Clause indicates that its founders did not reach any agreement to give the Clause what surely would have been a controversial meaning. The most that the historian can say is that some members of Congress may have had such an unconventional reading in mind, but one cannot conclude that there was any consensus on that point.

However, even if those who authored and passed the Fourteenth Amendment had intended the Due Process Clause to provide special protections to certain fundamental substantive rights, the originalist cannot read the Clause substantively because the founders did not reach any agreement about what these fundamental rights or liberties would be. Surely, those who were involved in the post-Civil War amendment process had ideas about what they thought were the most fundamental liberties. However, these ideas were certainly not identical, and what is missing from the historical record and text of the Due Process Clause is any indication that its founders reached a consensus concerning a core of fundamental rights which would be entitled to special constitutional pro-

200 ELY, supra note 3, at 16.
201 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80-81 (1873):

[U]nder no construction of that provision that we have ever seen, or that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that [the Due Process] provision.

202 This conclusion has been supported by a number of scholars, including BERGER, supra note 198, at 202-09; ELY, supra note 3, at 15-16; JAMES, supra note 198, at 198; Crosskey, supra note 195, at 6; Linde, supra note 198, at 238; Stanley Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 STAN. L. REV. 140, 166 (1949). Indeed, James notes that during the congressional debates on the Fourteenth Amendment, Representative Bingham, who was a leading sponsor of the Amendment, declared that "due process of law" had the "customary meaning recognized by the courts," and "the usual meaning at the time was unquestionably procedural." JAMES, supra note 198, at 86-87, 198.

203 Some of the radical abolitionists had given the Fifth Amendment's Due Process Clause a substantive reading even before the Civil War. See JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 25, 100 (1951). However, such a reading was not universally accepted among the abolitionists, much less among more moderate and conservative Republicans in Congress. See BERGER, supra note 196, at 207-08; ELY, supra note 3, at 16 & n. 20.
In the absence of such a consensus, substantive due process would require the Court to articulate fundamental values.

As noted above, there is nothing in the record surrounding the enactment of the Fourteenth Amendment which indicates that the Due Process Clause was meant to be read substantively, much less a discussion or agreement about what values would be entitled to special protection under the Clause. See discussion supra pp. 190-92.

Nevertheless, some of the founders of the Fourteenth Amendment may have intended to give special protections to a core of fundamental rights through the Privileges and Immunities Clause. The debates surrounding the enactment of the Fourteenth Amendment reveal that leading Congressmen such as Representative Bingham and Senator Howard expected the Privileges and Immunities Clause to secure a set of "great fundamental guarantees," CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865-66) (statement of Senator Howard), or "inborn rights," id. at 2542 (statement of Representative Bingham), from state infringement whether or not the state was discriminating against blacks or harming whites as well. See Fairman, supra note 189; BERGER, supra note 196; and Alexander M. Bickel, The Original Understanding of the Segregation Decision, 69 HARV. L. REV. 1 (1955), for good, thorough discussions of the original understanding of the Privileges and Immunities Clause.

However, congressional debates about the Privileges and Immunities Clause did not yield any agreement concerning a core set of fundamental rights which can be used as a standard for substantive due process jurisprudence or an independent claim under the Privileges and Immunities Clause itself. Neither Bingham nor Howard defined the precise contours of the fundamental rights they would protect from state infringement. Bingham repeatedly spoke in vague natural law terms, see Fairman, supra note 189, at 31, 51-54, 76; Bickel, supra, at 25, and Howard looked to the judiciary to clarify the content of privileges and immunities over time, see CONG. GLOBE, supra, at 2765; Fairman, supra note 189, at 55-56. Charles Fairman has concluded that insofar as the Privileges and Immunities Clause was meant to establish a federal standard of rights below which state action must not fall, the Congressmen's "thinking became hazy . . . [some notion of] what is implicit in the concept of ordered liberty'— comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause." Fairman, supra note 189, at 139 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Fairman disputes, in particular, Justice Black's opinion that the founders intended the Fourteenth Amendment to incorporate the Bill of Rights against the states. See Adamson v. California, 332 U.S. 46, 71-72, 92-123 (1947) (Black, J., dissenting). See also HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908), on which Justice Black relies. According to Fairman, while some Congressmen may have had such an expectation, there was no general agreement upon the Bill of Rights, or any standard, as the measure of privileges and immunities. See Fairman, supra note 189, at 134-39.

Furthermore, most of the comments during the debates reflect a far more limited understanding of the scope of the Privileges and Immunities Clause than Howard and Bingham advocated. According to this prevailing view, the purpose of the Privileges and Immunities Clause was to constitutionalize the Civil Rights Bill of 1866 rather than to protect some national standard of fundamental liberties against all sorts of state infringement. See BERGER, supra note 196, at 23, 46, 208-09; Fairman, supra note 189, at 44; Bickel, supra, at 47, 58-59. The Civil Rights Bill prohibited discrimination on the basis of race with regard to a limited, Blackstonian conception of "civil rights." See BERGER, supra note 196, at 22-36. These civil rights were enumerated as the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property" as well as rights to "the security of person and property." Civil Rights Bill of 1866, ch. 31, 14 Stat. 27, 27. While providing for equal treatment for blacks with regard
In fact, however, some scholars argue that judicial definition of a core of unenumerated fundamental rights is exactly what the founders of the Fourteenth Amendment had in mind. These scholars point to the broad, open-ended language of the Privileges and Immunities Clause of the Fourteenth Amendment and the Ninth Amendment and, less often, the Due Process Clause as intentional invitations to the judiciary to articulate and enforce fundamental rights. According to Ely, the origi-

to these “civil rights,” the Civil Rights Bill of 1866 was not intended to establish national standards for fundamental liberties but left states free to define their own versions of civil rights so long as they applied this same version to both blacks and whites equally. See Berger, supra note 196, at 212-214. 205 See, e.g., Ely, supra note 3, at 22-30; 34-41.

Ely’s claim that the broad, open-ended language of the Ninth and Fourteenth Amendments was meant as an invitation for the judiciary to protect unenumerated rights is not without some historical support. For example, as noted above, discussion supra note 204, some Congressmen expected the Privileges and Immunities Clause of the Fourteenth Amendment to protect a national standard of fundamental liberties. While these Congressmen did not define these fundamental rights, Senator Howard, who presented the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction, expected that the precise definition of “privileges and immunities” under the Fourteenth Amendment would be left “to be discussed and adjudicated when [questions] should happen practically to arise.” Cong. Globe, supra note 204, at 2765.

However, as argued above, the bulk of the evidence suggests that the Privileges and Immunities Clause was merely intended to secure equal treatment for blacks rather than protection for some national standard of fundamental rights. Nevertheless, while noting that most Congressmen at least explicitly described the Fourteenth Amendment as the constitutionalization of the Civil Rights Bill of 1866, Alexander Bickel has argued that Republican Radicals and Moderates used broad, elastic language in order to leave the full effect of the Fourteenth Amendment to “future determination” by Congress and the courts. See Bickel, supra note 204, at 60-65. These Republicans recognized that “an explicit provision going further than the Civil Rights Act could not have been carried in the 39th Congress,” id. at 61, but cleverly constructed an amendment that was susceptible to elaboration by more progressive future decision makers. See id. at 60-65. While Bickel’s account has some plausibility, unpopular and unexpressed intentions by an amendment’s authors hardly qualify as the sort of openly debated choices that count as constitutional standards under this Article’s theory of originalism.

Furthermore, many scholars have disputed Ely’s interpretation of the Ninth Amendment as well. See, e.g., Russell L. Caplan, The History and Meaning of the Ninth Amendment, 69 VA. L. Rev. 223, 238-43, 254-55 (1983); Arthur E. Wilmarth, Jr., The Original Purpose of the Bill of Rights: James Madison and the Founders’ Search for a Workable Balance between Federal and State Power, 26 AM. CRIM. L. Rev. 1261, 1297-98 & n.181 (1989). According to these scholars, the Ninth Amendment was not intended to authorize the federal judiciary to articulate and enforce enumerated rights but, rather, was merely intended to emphasize that congressional powers are limited to the specific grants listed in Article I of the Constitution. See Wilmarth, supra, at 1297-98; Caplan, supra, at 254-55. The Bill of Rights was included in the Constitution in response to the demands of Anti-Federalists, who feared the abuse of federal power. Wilmarth, supra, at 1263-64, 1281, 1288-89, 1295-96. Federalists such as James Madison, Alexander Hamilton and James Wilson initially opposed the inclusion of a bill of rights because they thought such a bill was unnecessary in light of the limited powers of the federal government; they also feared
nal intention that the Ninth and Fourteenth Amendments function as an invitation to the judicial articulation of unenumerated rights confounds the originalist because it is the very founders of the Fourteenth Amendment who are calling for noninterpretivism.²⁰⁶

However, even if the authors of the Fourteenth Amendment intended the judiciary to define and protect unenumerated constitutional rights, the originalist judge cannot take them up on their offer. Nor would such a refusal be incompatible with the principles of originalism. According to this Article’s understanding of originalism, what gives the original meanings of the textual provisions their legitimacy as the appropriate standard for constitutional interpretation is the fact that they represent decisions about political principles or values which have been reached through a process of public discussion, argument and consensus building and, thus, reflect truth. Where the authors of an amendment have not reached an agreement concerning such values but, rather, have merely agreed that substantive decisions should be left to the judiciary, there are no legitimate constitutional principles for the originalist judge to enforce. Decisions on the part of the American people to essentially delegate their constitution making responsibilities to the judiciary are incompatible with the notion of democratic constitution making which undergirds this Article’s defense of originalism as the only legitimate model of judicial review.

Nevertheless, the Court has sought to justify and legitimate its substantive due process decisions by arguing that it is not creating rights on its own but, rather, is deferring to some authoritative extrajudicial sources. For example, in *Griswold v. Connecticut*,²⁰⁷ Justice Douglas sought to locate the right to privacy in a “penumbra” of the Bill of Rights. Douglas defines penumbras as emanations from express guarantees of the Bill of Rights which are “necessary in making the express guarantees fully meaningful.”²⁰⁸ *Griswold* involved a Connecticut statute which made the use of contraceptives, even among married persons, a criminal offense. According to Douglas, a penumbra of the Fourth Amendment prohibition against unreasonable searches and seizures, the Third

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²⁰⁸ *Id.* at 483.
Amendment restrictions upon the quartering of soldiers, and the Fifth Amendment right against self-incrimination creates a zone of privacy covering the sanctity of the home and marital relations. The Connecticut law impermissibly infringed upon this penumbral zone because its enforcement required the state to enter the home and expose the privacy of marital relations.209

At first glance, Douglas' endeavor to ground the right to privacy in the Bill of Rights would seem consistent with originalist principles. After all, Douglas is not presenting the right to privacy as a product of judicial creation, but, rather, he seeks to define privacy in terms of decisions that have been forged through the formal, democratic constitution making process and embodied in the constitutional text. Nevertheless, there are several problems with this reasoning. In the first place, while the content of the Bill of Rights may be the product of formal, democratic constitution making, the Bill of Rights was not originally intended to be the standard for a substantive due process jurisprudence applied against the states. Rather, the Bill of Rights was a set of liberties designed to protect against the overweening power of national government.210 The decision to use the Bill of Rights as a standard for substantive due process jurisprudence under the Fourteenth Amendment is a judicial decision, not a democratic decision found in the constitutional text or the history of the Due Process Clause.211 Indeed, differences between the functions and powers of state and national governments suggest that the set of fundamental rights defined in the Bill of Rights is not so obviously appropriate to apply against state governments as against the national government. For example, states have traditionally had a broad police power to protect the health and morals of the citizenry, and, thus, states should, perhaps, be permitted more leeway in passing the sort of moral regulations at issue in Griswold than our federal government of enumerated powers.

Furthermore, even if the Bill of Rights were an appropriate standard for substantive due process jurisprudence, the notion of privacy that the Court articulated in Griswold goes far beyond a penumbra of express constitutional guarantees and essentially involves a new interpretation of the requirements of individual liberty against the state. Judicial articulation and enforcement of penumbras of the Bill of Rights is not incompatible with originalism as long as penumbras are limited to rights

209 Id. at 485-86. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Id.
211 See discussion supra note 204.
which are truly necessary to make the explicit guarantees of the Bill of Rights meaningful. For example, a right of association with others for the advancement of beliefs and ideas is necessary to protect the explicit constitutional guarantees of free speech, press and assembly.\textsuperscript{212} However, the notion of privacy articulated in \textit{Griswold} and in the Court's other privacy decisions is not similarly necessary for the meaningful protection of the Third, Fourth and Fifth Amendments. The Fourth and Fifth Amendments are part of a series of guarantees in the Bill of Rights which are designed to protect the individual from arbitrary, harsh or unfair criminal process. They do not make the home or marriage a zone of privacy which is protected against state action even when that action is the result of appropriate procedures. Likewise, by limiting the quartering of soldiers to wartime and in "a manner prescribed by law,"\textsuperscript{213} the Third Amendment does not render the home off limits to the state but merely ensures that the state will not invade the home arbitrarily or without legitimate public purpose. Thus, when Douglas speaks of marriage and privacy as sacred precincts which are protected from state interference even when that interference results from and is applied through fair procedures, he is greatly expanding the liberties envisioned by the Third, Fourth and Fifth Amendments. The core areas of individual freedom which the Bill of Rights does protect against government interference even when that interference results from fair procedures are the liberties of speech, press, assembly and religion. The categories of marriage and family were not accorded similar protections.

Nonetheless, Justice Douglas' endeavor in \textit{Griswold} to locate the right to privacy in penumbras of the Bill of Rights has not been followed either by the Court or Douglas himself in other privacy decisions. After \textit{Griswold}, the Court's privacy decisions clearly moved beyond even a liberal interpretation of the Bill of Rights when the Court extended the right of privacy to cover the procreative choices of unmarried individuals. In most of its privacy decisions, the Court has sought to legitimate its definition and enforcement of the right to privacy by deriving that right from "fundamental political traditions" of the American people and/or "the concept of ordered liberty." In so doing, the Court has spoken in terms of "liberties . . . 'so rooted in the traditions and conscience of our

\textsuperscript{212} See Roberts v. United States Jayces, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward these ends were not also guaranteed."); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedom of speech and assembly.").

\textsuperscript{213} U.S. CONST. amend. III.
people as to be ranked as fundamental"214, "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"215, "the fundamental theory of liberty upon which all governments in this Union repose"216, "sacred private interests, basic in a democracy"217; basic values "implicit in the concept of ordered liberty"218, "rights which are fundamental . . . to the citizens of all free governments"219; freedoms "essential to the orderly pursuit of happiness by free men"220; and so on.

However, despite the eloquence of the Court's language, the Court's attempt to justify its definitions of privacy in terms of fundamental political traditions or some self-evident concept of ordered liberty runs into problems. Surely most Americans would agree that family, marriage, sexuality and procreation should be, in some sense, private and, hence, beyond state interference. However, Americans disagree about the precise contours of such a privacy right. Indeed, a glance at the Court's own privacy decisions reveals that the Court has not followed one single understanding of the right to privacy either.

One of the Court's various Understandings of the right to privacy underlies the Court's pre-Roe v. Wade case law. In its early decisions in Meyer v. Nebraska, Pierce v. Society of Sisters, and Prince v. Massachusetts, the Court was interested in protecting parents' control over the education and upbringing of their children from state interference.221 In the later cases of Skinner v. Oklahoma ex rel. Williamson and Loving v. Virginia, the Court protected a related right to marry and have children.222 In Griswold, as well, the Court cast privacy in terms of mar-

214 Griswold, 381 U.S. at 487 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
215 Id. at 493 (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).
218 Griswold, 381 U.S. at 500 (Harlan, J., concurring in the judgment) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
221 Id. (state law prohibiting teaching of foreign language to children below the eighth grade impermissibly infringes upon the right of individuals to "marry, establish a home and bring up children"); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (state law compelling public education of children between eight and sixteen years of age impermissibly "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Prince v. Massachusetts, 321 U.S. at 166 (though there is a "private realm of family life which the state cannot enter," interference is permitted insofar as state child labor laws are necessary in order to protect the health and welfare of children).
222 Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (declaring that marriage and procreation are "basic civil rights of man" and striking down sterilization law for
riage and family when it spoke of "marital privacy." The *Griswold* decision did depart from earlier precedents in an important respect when it protected the right of married couples to decide not to have children rather than the right to have a family and educate children as they wish. Even so, the Court's decisions from *Meyer* to *Griswold* draw upon a similar conception of the requirements of freedom and the relationship between the individual, community and the state. Limiting the right of privacy to traditional categories of marriage and family, these cases do not establish a "negative liberty" to do whatever one pleases in the area of sexuality and procreation. Rather, the Court is protecting a "positive liberty" of individuals to make their own choices in the context of well-established social institutions and moral structures. Justice Harlan expresses this aspect of the Court's pre-*Roe* understanding of privacy well when he writes that

> [adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.]

By contrast, in its privacy decisions following *Griswold*, the Court began moving towards an understanding of the right to privacy which is cast far more in terms of negative liberty. In *Eisenstadt v. Baird* and *Roe v. Wade*, the Court broke away from the traditional categories of marriage and family and protected the right even of the unmarried individual to make decisions regarding procreation and child-bearing. Thus, procreation becomes an area of individual liberty which is protected from state interference regardless of whether procreative choices occur in the context of traditional social structures of marriage. Nevertheless, in *Bowers v. Hardwick*, the Court refused to extend the concept of privacy to protect "any kind of private sexual conduct between consenting

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"habitual" criminals); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down antimiscegregation law as infringing upon "the freedom to marry [which] has long been recognized as one of the vital personal rights essential to an orderly pursuit of happiness by free men").

223 *Griswold*, 381 U.S. at 486.


225 *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down state law prohibiting the distribution of contraceptives to unmarried individuals); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (deciding that right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").
adults" when it upheld a Georgia law criminalizing sodomy. According to the Bowers Court, states retain the right to pass moral regulations regarding extra-marital sexual relations such as adultery and incest.227

Nevertheless, the dissent in Bowers presented yet a different understanding of the right to privacy which would have gone much further in protecting the individual against moral regulations of the state. The Bowers dissent argued that all moral regulations which interfere with private, consensual sexual activity should be struck down whether or not the community disapproves of certain forms of sexual activity. According to the dissent, the individual must be free to make the sorts of decisions which relate to the process of "self-definition," and consensual sexual relations are an important aspect of privacy because "individuals define themselves in a significant way through their intimate sexual relationships."228 While the majority in Bowers did not accept this argument, five members of the Court joined in invoking the dissent's broad concept of privacy when the Court upheld the central holding of Roe in the more recent Planned Parenthood v. Casey case:

[The right to privacy] involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy[,] . . . At the heart of [the] liberty [protected by the Fourteenth Amendment] is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.229

The Court's struggle to define the precise nature and contours of the right to privacy reveals that there is no single understanding of privacy inherent to America's political traditions. The Court's decisions reflect a variety of conceptions of privacy, which in turn reflect different notions of the requirements of human freedom and the proper relationship between the individual, his or her community and the state. Furthermore, these different strains within the Court's privacy jurisprudence correspond with different positions among the American people as well. On the one hand, political "conservatives" who believe that the state has an important role in reinforcing traditional "family values" may prefer to limit any constitutional right to privacy to the family or marital unit as the Court's earlier privacy decisions did. However, some may reject the notion of a constitutional right to privacy altogether if they believe that the state has a role in the preservation of morals and other important goals even within the family unit. For instance, as more knowledge about the

227 Id. at 195-96.
228 Id. at 205 (Blackmun, J., dissenting).
abuse and neglect within family units has come to the national attention in recent years, many Americans may favor state interference within families in order to protect the health and welfare of victimized women and children. On the other hand, political “liberals” who believe that the state should not be in the business of legislating morals may embrace the broad notion of privacy articulated by the dissent in *Bowers*. With respect to abortion laws, there is further disagreement about whether the unborn child is a human life meriting state protection even in spite of whatever privacy values one may hold.

Where there are so many different understandings of the right to privacy among the American people, legitimate constitutional principles can only result from a process of democratic constitution making which incorporates all of these points of view in a process of public discussion, debate and consensus building. The error of the Court in its privacy decisions was to overlook the amount of disagreement among the American people and within American political traditions and to enforce its own vision of privacy rather than look to the American people to hammer out a compromise through the formal amendment process. Those who lack faith in the process of democratic constitution making may argue that the American people cannot be relied upon to provide adequate protection for important liberties like the right to privacy. In fact, however, the Court’s privacy decisions have occurred against the backdrop of rapid social and moral change in American society, and during that time, there has been a vibrant ongoing debate in American politics about the proper role of government in enforcing morality and the proper scope of freedom for individuals to construct their family relationships, intimate associations, sexual activities and procreative choices without state interference. Much of this political debate presently focuses upon state and federal legislatures, at least where decisions have not been preempted by the Court’s privacy case law. However, if the Court were to retreat from the protection of privacy rights, there would almost certainly be a rush on the amendment process as well as the legislatures from all sides. The constitutional principles that would be forged through the resulting formal amendment process would have to take account of the various viewpoints in American society and, hence, would come closer to the truth than the Court’s own privacy jurisprudence.

**Conclusion**

This Article has endeavored to develop a theory of constitutional interpretation which gains its legitimacy from truth. While noting that the Constitution may quite plausibly be read at several levels, I have argued that originalist interpretation best promotes the true pattern of government in a world where political truths are neither wholly inaccessible
nor wholly accessible to human reason. By tying originalism to truth, it has been possible to respond to the CLS Critique, which demonstrates the ultimate failure of endeavors to ground the legitimacy of constitutional interpretation in notions of neutrality apart from truth. It has also been possible to respond to the concerns of those who worry that originalism means an outdated Constitution which is unable to resonate with contemporary political values and needs. The argument that originalist interpretation best promotes the ideal state rests upon certain elements of faith. However, while faith will lead to results that are self-confirming, doubt leaves the constitutional scholar unable to justify any set of constitutional principles.