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CONSTITUTIONAL INTERPRETATION AS POLITICAL CHOICE†

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I. INTRODUCTION

Despite nearly two centuries of experience with the Constitution of 1787, it is evident that there is no real consensus within our political community as to the "meaning" of this text. While our politics has been cast decidedly within the broad parameters of a "liberal tradition,"[1] there is nevertheless a great divergence of opinion as to what specifics the text actually dictates. As interpreted by the Supreme Court via the long progression of litigated cases "arising under this Constitution," the very same constitutional text has at various times sanctioned the concepts of slavery and human chattel, as well as racial discrimination and segregation.[2] More recently, the same text has been deemed to demand the pursuit of nondiscriminatory public policies and a good measure of equal protection in what would appear to be rather private arenas of conduct.[3]

Beyond this disagreement over specifics, there is obviously a more fundamental divergence of opinion as to what it means to be governed by a written text—that peculiarly American understanding of "constitutionalism" which has its roots in John Marshall's seminal statement in *Marbury v. Madison*.[4] The depth of this disagreement

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1. *See* L. HARTZ, THE LIBERAL TRADITION IN AMERICA 3-32 (1955); R. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 1-9 (1985).

2. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896). See M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986), for a discussion of the impact of *Dred Scott* on antebellum constitutional history.

3. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (sustaining constitutionality of Title II of the Civil Rights Act of 1964 under the Commerce Clause).

4. 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Justice Marshall relied on a notion of constitu-

can be seen in the recent clash of opinions between Attorney General Meese and Justice Brennan regarding the tenability of a "jurisprudence of original intentions."[5] It is similarly reflected in the ongoing lively debate within the academic community concerning the nature of constitutional interpretation. Much of this scholarly debate leaves the impression that the fundamental problem of constitutional theory is the discovery (and justification as "legitimate") of an authentic method of reading the text. Yet, ultimately these disagreements share an underlying misperception of the problem as one of method and interpretation, rather than as a conflict of political choices.[6]

Because of the strength of the American constitutional tradition, which conceives of the interpretive enterprise in terms of limiting governmental power (and hence "tyranny") by way of a written text, this conflict of political visions is deceptively cast in the language of a dispute over methodology. The constitutional tradition regards the text as the locus of all "legitimate" political authority and is perceived as the organizing principle of politics itself—a formalistic perspective which formerly dominated academic political science as well.[7] The persistence of this constitutional perspective on the bench and in the law schools constitutes the basis for a judicial ideology which seldom questions the theoretical justification of such an enterprise. As one

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tionalism in which a written text is conceived of as the source of principles and standards which the Supreme Court enunciates as the "fundamental and paramount law." *Id.* at 177. *See infra* text accompanying notes 26-31.

5. The reference is to comments made by Attorney General Edwin Meese III, in an address at the Meeting of the American Bar Association House of Delegates on July 9, 1985 (available from the United States Department of Justice). Attorney General Meese also developed similar themes in an address at the Meeting of the American Bar Association in London, England on July 17, 1985 (available from the United States Department of Justice). Associate Justice William J. Brennan, Jr. delivered a subsequent response in an October 12, 1985 speech delivered at Georgetown University, (*reprinted in* N.Y. Times, Oct. 13, 1985, at 36, col. 1). *See also* Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986); Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

6. *See* L. TRIBE, CONSTITUTIONAL CHOICES vii-viii (1985) [hereinafter L. TRIBE, CONSTITUTIONAL CHOICES]:

> Constitutional choices must be made . . . . Judges must make them whenever choosing among alternative interpretations of the Constitution . . . . The Constitution is in part the sum of all these choices. But it is also more than that. . . . Thus, just as the constitutional choices we make are channeled and constrained by who we are and by what we have lived through, so too they are constrained and channeled by a constitutional text and structure and history, by constitutional language and constitutional tradition, opening some paths and foreclosing others.

See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 452 (1978).

7. *See* R. SEIDELMAN, DISENCHANTED REALISTS: POLITICAL SCIENCE AND THE AMERICAN CRISIS, 1884-1984, at 19-21 (1985).

political scientist has observed with a more cynical eye: "American constitutional interpretation takes for granted the elemental preposterousness of its subject, namely the presumption that a political world can be constructed and controlled with words."[8]

While this skepticism is justified in terms of the capacity of a text to contain political power (especially given that the underlying principle of the document itself suggests a view that *power* is necessary to restrain power[9]), such a shared judicial ideology can have an impact upon politics. To the extent that the judiciary actually believes it is bound by the text of the Constitution, it will behave differently than if it no longer feels such a constraint. The judiciary's tenuous position as a political institution necessitates that it cling to the constitutional text as the source of its "legitimate" authority;[10] consequently, the text and how the Court interprets it will be crucial to understanding how the judiciary functions as a political institution.[11]

The American constitutional tradition assumes an implicit formalism based on a mechanical model that entails the text, its "meaning" as interpreted by the Court, and the adjudication of the particular cases as expressions of the terms of that meaning. This is the kind of legal formalism, presuming that law yields "objective" and neutral outcomes (i.e., justice), that has been recently subjected to the persistent debunking analysis of the so-called "critical legal studies" school.[12] The basic theoretical perspective of this "critique" is to apply a neo-Marxist structuralist analysis[13] to demonstrate how law (generally private law, but constitutional law as well) expresses an underlying economic rationality—namely, the impact of emergent cor-

8. Harris, *Bonding Word and Polity: The Logic of American Constitutionalism*, 76 AM. POL. SCI. REV. 34 (1982).

9. *See* J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 37 (1984).

10. *See* M. SILVERSTEIN, CONSTITUTIONAL FAITHS 218-19 (1984).

11. *See* Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

12. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). *See also* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985); Menand, *What is "Critical Legal Studies"?*, NEW REPUBLIC, Mar. 17, 1986, at 20; Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984) (part of a symposium on critical legal studies). The formalistic traits of American constitutionalism have been attacked from a variety of perspectives. *See, e.g.*, Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).

13. For a recent discussion of this theoretical perspective, see M. CHARNOY, THE STATE & POLITICAL THEORY ch. 4 (1984). *See also* Cohen, *Democracy From Above*, in WORLD POLITICS (forthcoming).

porate capitalism upon American legal structures.[14] When applied to constitutional law, this critique correctly recognizes that the constitutional document represents a commitment to specific economic and political values made at the time of the founding. Thus, Professor Unger states, "The nation, at the Lycurgan moment of its history, had opted for a particular type of society: a commitment to a democratic republic and to a market system as a necessary part of that republic."[15] However, critical legal studies regards the text as less determinative in constitutional decisionmaking than the economic structures supporting the legal/political system.[16]

In many ways the method of critical legal studies is only a more sophisticated revision of the older attack of the progressive historians, specifically Charles Beard's analysis of the Constitution.[17] Indeed, this new critique has a political agenda of its own, as did the progressives and legal realists of an earlier generation.[18] In the arena of constitutional law, this agenda has been pursued by taking the path of least political resistance. Rather than through direct political action, the critique has sought to apply new methods of textual interpretation to more subtly recast the meaning of the text and the kinds of issues which will be drawn into the arena of constitutional politics. This approach rests upon two essentially valid assumptions: (1) the constitutional text expresses specific political and economic values, and (2) the act of judicial decisionmaking utilizing a method of textual interpretation can work a reconstitution of the text and those values in pursuit of other political purposes. As practiced by critical legal stud-

14. *E.g.*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1850 (1977).

15. Unger, *supra* note 12, at 567. *See also* L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 6, at 10: "One difficulty that immediately confronts process theories [and also critical theory] is the stubbornly substantive character of so many of the Constitution's most crucial commitments: commitments defining the values that we as a society, acting politically, must respect."

16. *See* Carter, *supra* note 12, at 823-31. Such economic determinism applied to the study of legal institutions ignores the most significant developments in recent political analysis stressing the relative "autonomy" of political elites and decisionmaking in the democratic state. *See, e.g.*, M. CHARNOY, THE STATE AND POLITICAL THEORY (1984); E. NORLINGER, ON THE AUTONOMY OF THE DEMOCRATIC STATE (1981); S. SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982).

17. *See, e.g.*, C. BEARD, THE ECONOMIC BASIS OF POLITICS (3d ed. 1945); C. BEARD, THE ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY (1915); C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); C. BEARD, AMERICAN GOVERNMENT AND POLITICS (1910).

18. Unger admits as much. *See* Unger, *supra* note 12, at 563. For an attack on such a pursuit of a political agenda via constitutional adjudication, see Berger, *New Theories of "Interpretation": The Activist Flight From the Constitution*, 47 OHIO ST. L.J. 1 (1986); Bork, *Styles in Constitutional Theory*, 26 S. TEX. L. REV. 383 (1985).

ies, however, this debunking of the formalistic and mechanical model of legal decisionmaking is couched in the mystifying jargon of "deconstructionism" and "post-structural" analysis,[19] creating an illusion of profundity surrounding the "critique."

The critical legal studies movement is not the only academic theory of constitutional interpretation to borrow from disciplines such as philosophy and literary criticism to reshape the tradition legal understanding of the meaning of the constitutional text. Such selective borrowing has an inherent problem: in most cases the explicit goal of modern theories of textual interpretation—whether it be hermeneutics,[20] deconstructionism, or post-structuralism—is the liberation of the reader from the restraints of the text and the search for the author's intended meaning. This may work fruitfully with James Joyce's *Ulysses*, but it defies one of the long-standing goals of the American constitutional tradition. An express intention of American constitutionalism, as a variant of the broader liberal tradition, has been to restrain political elites by *imposing* a "meaning" or structure of imperatives on them by way of law. Regardless of the theoretical possibility of "controlling" the judiciary and politics by way of a written text, the impact of this intent as a vital ideological tenet has been significant in shaping American political practice. If justices do not feel impelled to adhere to the written text of the Constitution and precedential determinations of its meaning and they embrace an interpretive approach which facilitates the creation of new meanings, then the Constitution as an organizing principle would be greatly altered. Undoubtedly, this is the intention of those who search for new theo-

19. "Deconstructionism" essentially argues that a text (or social action) lacks any objective meaning, and any meaning attached to the text (or social action) is imposed by the interpreter. The application of deconstructionism from the fields of literary criticism to social analysis is often accompanied by an assertion that economic and political power determines the success of the imposition of any particular interpretation. The French philosopher and critic Jacques Derrida is the most prominent of contemporary theorists of the deconstruction movement. *See generally* H. BLOOM, J. DERRIDA, G. HARTMAN & H. MILLER, DECONSTRUCTION AND CRITICISM (1979); Carter, *Constitutional Adjudication and the Indeterminate Text*, 94 YALE L.J. 821 (1985). "Structuralists" argue that "language" possesses an inherent complex structure of symbols and meanings which it imposes upon the individual and social organization. The task of structuralist theory is to uncover and clarify the underlying structures of human social life. *See generally* C. LÉVI-STRAUSS, TRISTES TROPIQUES (1973); Taylor, *Descartes, Nietzche, and the Search for the Unsayable*, N.Y. Times Book Review, Feb. 1, 1987, at 3.

20. "Hermeneutics" is the study of the principles of interpretation. Traditionally, hermeneutics has focused upon the interpretation of texts; however, it also has been applied to epistemology, or the study of human understanding. *See generally* R. PALMER, HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER, AND GADAMER (1969). *See infra* text accompanying notes 75-77.

ries of interpretation to pursue a political agenda different from what was actually adopted at the "Lycurgan moment."

Despite the efforts of critical legal studies and other groups to incorporate the methods of literary criticism, constitutional interpretation is fundamentally different from literary interpretation. All constitutional interpretation involves a political choice which is absent in literary interpretation. The constitutional text establishes the rules and principles which govern the legitimate uses and goals for political power—the "metalaw," as Lawrence Tribe has called it.[21] Pursuit of a new method of textual interpretation will reshape this metalaw, thereby reconstituting the judiciary and the existing constitutional regime. Inevitably within the context of an ongoing constitutional regime, the words of the text will give rise to specific political practices and procedures that are shaped by the meanings attached to the text by the legal system.[22] Adopting a new method of textual interpretation transforms those established practices, and hence involves political consequences and an attendant political choice. At times, the political choice involved is explicit and obvious; at other times, it is lost in the discussion of methodology as if it were an "objective" or scientific matter.

One of the illusions of the American constitutional tradition is the belief that it is possible to pronounce as final and permanent the adoption of certain values and principles simply by codifying them in a text, which presumably de-politicizes them. This position is untenable. Constitutional decisionmaking always involves an active and present act of choosing among various meanings of the text. Indeed, different approaches to textual interpretation inevitably enhance and magnify the Court's role in the political process to different degrees. Moreover, the more extreme attacks on the Court and constitutional lawmaking (from both the political Left and the Right) often have as their aim the reconstitution of the Constitution itself. This aim is to be achieved through the sleight of hand of textual (re)interpretation, presumably avoiding the politically unfeasible task of cultivating a broad consensus for an outright change of the Constitutional text. Although the attractiveness of constitutional amendment is apparent (especially to the New Right), a subtle rereading of the existing text is easier and achieves very much the same effect. This approach, a fa-

21. L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 6, at 246.

22. "The words narrate the polity into existence and, as its working principles unfold, the polity becomes a kind of large-scale text in its own right." Harris, *supra* note 8, at 34.

vorite of mainstream liberal politics since the 1960's, is being recapitulated in the obtuse jargon of critical legal studies as a means for its partisans to pursue their own more radical objectives. Conversely, the political Right would employ textual interpretation to limit the Court's jurisdiction in some areas of constitutional law despite strong textual and historical foundation for an active judicial role—for instance, the so-called criminals' (or accused persons') rights developed under the Warren Court. Both sides recognize the relative attractiveness of using textual interpretation to work political changes which neither is capable of achieving through the aggregation of majoritarian consensus. For this reason, an essentially political battle is waged in the course of textual interpretation through the language of judicial rhetoric.

II. Judicial Review and Textual Interpretation

Textual interpretation from the bench is very different from literary interpretation, cultural interpretation,[23] or even academic constitutional interpretation. The difference lies in the ensemble of relationships within which the interpreter is located—namely, the structure of institutional political powers. To the extent that its meanings are recognized as authoritative or legitimate by other political actors, any exercise of the judicial power of interpretation to give meaning to the text enhances the Court as a political institution. Thus, whatever the original intentions of the drafters or adopters of the constitutional text, the Court's first successful exertion of a power of judicial review (founded upon the capacity to give the text a meaning)[24] worked a significant influence upon how the federal system has unfolded. Of course, this was Hamilton's argument in *The Federalist No. 78* in favor of such a power of judicial review. Hamilton justified a judicial power derived from the capacity to pronounce an authoritative textual meaning on the grounds that this would strengthen the Court vis-à-vis the House of Representatives and its presumed self-aggrandizing tendencies.[25] Thus, Hamilton's argument for a general power to interpret the text was actually an instrumental tactic intended to limit legislative power. Hamilton assumed an aristocratic judiciary and the dangerousness of an unchecked democratic legislature, but he failed to perceive the likelihood of the judiciary coming

23. *See* C. Geertz, The Interpretation of Cultures (1973).

24. *See infra* notes 27-31 and accompanying text.

25. The Federalist No. 78, at 521, 524 (A. Hamilton) (J. Cooke ed. 1961).

under the domination of those holding precisely those powers which he sought to restrain. Ironically, the Federalists established the power of judicial review and the concomitant power to interpret the constitutional text, powers which would ultimately undermine their political vision of the regime established by the Constitution.

Chief Justice John Marshall's justifications of a power of judicial review fully revealed the potential for utilizing the authority to interpret the text as such a political instrument. In the course of claiming the power of judicial review for the Court in *Marbury v. Madison*,[26] Marshall established the foundation for the American constitutional tradition in which the written Constitution is regarded as the source of a "supreme law." Marshall's claim was that the necessity for judicial interpretation is inherent within the very notion of constitutionalism as adherence to a written text. For the Court to exercise its delegated role under Article III, this power to review and interpret was presumed to be an implicit judicial function. Marshall asked, more rhetorically than not, "Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?"[27] On the slight logic of this argument, Marshall rested a broad structural theory of the judiciary and its role vis-à-vis the other branches.

In *Marbury*, Chief Justice Marshall relied on a peculiarly limited notion of textual interpretation in defining the judicial role.[28] Obviously, Marshall recognized the tenuousness of such claims for judicial power in relation to Congress and the President, and he implied that the art of interpretation is a rather literal application of clear standards evident in the Constitution. The examples he uses in *Marbury* to illustrate the act of interpretation are the kind of "easy cases" that

26. 5 U.S. (1 Cranch) 137 (1803).

27. *Id.* at 179.

28. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707 (1975): "*Marbury* defends . . . what I have here called the pure interpretive model of judicial review. The case itself involves the close interpretation of a technical and explicit constitutional provision, which is found, upon conventional linguistic analysis, to conflict with a statute." *See also* A. BICKEL, THE MORALITY OF CONSENT 29 (1975):

> In establishing the power of judicial review in 1803, in *Marbury v. Madison*, vesting the Supreme Court with value-definition exercised in the name of the Constitution, John Marshall spoke of the Constitution as law, and reasoned that when properly invoked before them in a case judges must enforce it. He spoke as if most of it were manifest, and suggested later that where it is open-textured it confers little if any power on judges. Matters have turned out quite the other way around.

give rise to the view that a text can be determinate.[29] Indeed, these examples entail such a literal application of standards that no interpretation is required. For instance, Marshall notes that conviction for treason demands the testimony of "two witnesses" in open court.[30] Presumably, it is a relatively straightforward affair to "look into" the text here and apply the prescribed constitutional standard. Marshall implies that applying the prohibition against bills of attainder and ex post facto laws similarly involves a literal invoking of the text.[31] Later cases decided by the Supreme Court, however, demonstrate the elusiveness of these terms and their intended meanings.[32]

While in *Marbury* Chief Justice Marshall portrayed textual interpretation as involving a rather literal application of an express constitutional standard, he later relied on a far more expansive reading of the text. In *McCulloch v. Maryland*,[33] Marshall demonstrated that he understood how a theory of interpretation could support a political position as he read the words "necessary and proper" from article I, section 8,[34] in a broad fashion to sustain a significant exertion of federal power over state government. Marshall's opinion was not unprincipled; rather, he was demonstrating how interpreting the text cannot be divorced from broader questions of political judgment. Marshall's political vision distinguished between exerting a judicial power within the federal government against the other branches and the use of judicial power on behalf of the federal government as a whole against the constituent political units of the republic.[35] Marshall's description of the art of textual interpretation in *McCulloch* supports an expansion of the federal government as well as judicial powers, without stating that as an explicit goal. For this reason, *Mc-*

29. *See* 5 U.S. at 179-80.

30. *Id.* at 179.

31. *Id.*

32. *See, e.g.*, United States v. Brown, 381 U.S. 437 (1965); Flemming v. Nestor, 363 U.S. 603 (1960); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

33. 17 U.S. (4 Wheat.) 415 (1819).

34. Article I, § 8 of the Constitution bestows on Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

35. *McCulloch*, 17 U.S. at 437:

> The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

Culloch is often quoted by proponents of the hermeneutic technique, which it vaguely foreshadows, because they share a similar interest in pursuing an expansion of judicial powers.[36] Obviously, when such an approach is applied to passages in the text such as the Due Process Clause of the fourteenth amendment, a similar expansion of federal scrutiny over state action is justified. In this sense, a theory of textual interpretation supports and reflects an underlying conception of politics and is simply the same view of politics expressed in the language of legal discourse.

Another Supreme Court case which illustrates how textual indeterminacy can be resolved by reference to an assumed political perspective (namely, the broad nationalist vision underlying the Marshall opinion in *McCulloch*) is Justice Holmes' opinion in *Missouri v. Holland*.[37] In this case the state of Missouri challenged the enforcement of the Migratory Bird Treaty Act of 1918, a statute implementing a treaty negotiated by the President and Great Britain. The treaty and statute were challenged as unconstitutional infringements upon the powers reserved to the states under the tenth amendment.[38] The Court was forced to consider how two specific clauses of the Constitution interact—or, in this case, decide which clause would dominate in providing a coherent meaning for the document as a whole. Article VI provides that treaties made under the "Authority of the United States" are to be regarded as the "supreme Law of the Land," along with the Constitution itself and laws made pursuant to it.[39] However, Missouri argued quite reasonably that the traditional state power to regulate wildlife within its domain had been guaranteed by the tenth amendment.[40] The question thus arose as to whether a treaty—the supreme law of the land—and a statute enacting it can cut back the powers seemingly reserved to the states by the tenth amendment? Those powers are not specifically enumerated by the tenth amendment.[41] Could expressly enumerated rights such as those in the first amendment also be curtailed by a treaty?

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36. *See* Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L. REV. 204, 207 (1980). *See also* Leyh, An Essay on Constitutional Hermeneutics, an unpublished paper delivered to the Northeastern Political Science Association, 1985, at 8 (copy on file with author).

37. 252 U.S. 416 (1920).

38. *Id.* at 431-32.

39. U.S. CONST. art. VI.

40. *Holland*, 252 U.S. at 417-24.

41. The tenth amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Justice Holmes' opinion in *Holland* presents an instructive illustration in how "interpretation" requires much more than merely defining terms and often slides into broader constitutional "construction."[42] The Constitution itself provides no method of determining how the two clauses at issue should be integrated, and no historical investigation into the framers' intentions or legislative history could reveal the unforeseen contradiction and indeterminacy of the text.[43] Holmes could have read the conflict out of the text by simply locating the power to regulate migratory birds under an established federal power (such as the Commerce Clause), thus preempting state regulation and rendering moot the tenth amendment claim. Instead, Holmes constructed a broader meaning of the Constitution which would resolve this textual contradiction or ambiguity. Holmes invoked the now familiar metaphor of the Constitution as a flexible, living document (which inevitably precedes an expansion of the traditional meanings attached to the text). He described the text as a "constituent act" which "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[44] Indeed, the text is incomplete and indeterminate on this question and the issue could only be resolved (if it can be resolved at all) by reference to some external political principles. These Holmes willingly supplied.

Echoing the nationalist sentiments of Marshall, Holmes saw the

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42. "Construction" is the "drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit though not the letter of the text." F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 44 (1880), *quoted in* Harris, *supra* note 8, at 40. *See also* Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984).

43. This situation invites the so-called "structuralist" interpretation. The absence of any textual guidance as to specific procedures and patterns of inter-branch relations invites a structuralist argument based on the Court's perception of the nature of the constitutional government as a whole. As Philip Bobbit has put it:

> Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures. They are to be distinguished from textual and historical arguments, which construe a particular constitutional passage and then use that construction in the reasoning of an opinion. And they are also quite different from prudential arguments . . . .
>
> Structural arguments are largely factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts.

P. BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 74 (1982). *See also* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). For a prominent recent Supreme Court case decided in some measure on an underlying structuralist interpretation, see National League of Cities v. Usery, 426 U.S. 833 (1976).

44. *Holland*, 252 U.S. at 433.

Constitution as a document which "created a nation" and thus must be understood in "the light of our whole experience and not merely in that of what was said a hundred years ago."[45] Of course, the national experience as well as Holmes' personal experience included a major military conflict over the balance of power between nation and state which had cost succeeding generations "much sweat and blood."[46] Thus, Holmes refused to read the tenth amendment as preserving forever whatever powers the states exercised in 1787. Since the treaty did not "contravene any prohibitory words to be found in the Constitution,"[47] Holmes was able to answer the easier question of ambiguity by resolving it in favor of the federal government. "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power . . . . It is not sufficient to rely upon the States."[48]

Holland neatly illustrates how the Court confronts a multiplicity of choices in resolving constitutional conflicts. The text often does not provide a clear standard and logically derivative result. In light of ambiguity, contradiction, a conceptual gap, or simply "open-ended" language, the interpreter is free to actively construct any number of solutions by appeal to sources external to the text. Sources such as the framers' "intent," historical practice, or the "structural" implications of the Constitution offer the interpreter the opportunity to fashion a result almost without restraint (other than the negative check of other justices who may pursue an alternative vision). This is not to say that the individual justice is unprincipled or free to impose his own "subjective" political preferences on the text. Rather, there is more than enough room and occasion for a justice (or majority of the justices) to make choices regarding how to construe the constitutional text through the expression of a logically consistent judicial ideology. Within the "penumbras" and "emanations" surrounding certain sections of the text[49] sufficient space is provided for the construction of an "unwritten constitution"[50] reflecting the judicial ideology which can currently muster a majority.

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 435.

49. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (Douglas, J.).

50. *See* Grey, *supra* note 28.

III. Contrasting Conceptions of Constitutionalism

Any theory of constitutionalism entails a normative understanding of how political power should be structured and organized in accordance with certain principles deemed to be "fundamental." As has been previously argued,[51] Chief Justice Marshall laid the foundation for a peculiarly American notion of constitutionalism based on the premise that such fundamental principles of organization can be given unified expression in a written text. While constitutionalism itself progressively became a dominant strain within the broader tradition of classical liberalism,[52] the American version took on several distinct characteristics, including a focus on the written Constitution as possessing something in the nature of a revealed sacred text, and the widely-held assumption that it is a function of the judicial branch (rather than a political body such as Congress)[53] to give meaning to the text. In the same sense that constitutionalism is a manifestation of the broader tradition of liberal political philosophy, the judicial act of textual interpretation itself raises in a truncated form much of the same concerns as political thought. Judicial interpretation is the practical expression of constitutionalism as a normative political philosophy, expressed in the language of legal discourse. Thus, judicial rhetoric concerning how to interpret the text (as well as the academic theories justifying such positions) reflects an underlying notion of constitutionalism linked to a particular political vision. For this reason, contrasting theories of textual interpretation raise differences of political theory, and the choice of how to read the text has distinct political implications.

A. Originalism

The underlying political implications of the various notions of textual interpretation can be recognized by focusing on the most extreme and diametrically opposed positions. These notions of textual interpretation, along with the broader theories of political structure and the fundamental principles with which they are associated, comprise contrasting conceptions of constitutionalism that exist within

51. *See supra* text accompanying notes 26-31.

52. *See* E. Eisenach, The Two Worlds of Liberalism ch. 11 (1981). *See also* A. Bickel, *supra* note 28.

53. In the British constitutional system, which functions without a written constitution, the House of Lords is the final arbiter of constitutional questions. *See* A. Havighurst, Twentieth-Century Britain 94 (2d ed. 1962).

the boundaries fixed by liberal politics and a commitment to the written text as the locus of "legitimacy" for the exercise of political authority. On the one extreme is an understanding of constitutionalism which is rigidly committed to a judicial rhetoric embracing an "originalist" theory of textual interpretation. Under this view, the constitutional text is to be read only in light of its original meaning. This commitment to originalism is manifested in several forms and variations, although they are underscored by related political objectives: the search for the "original meaning" of the text, an appeal to the "original intentions" of the drafters (or "Founding Fathers") whenever the text itself betrays no discernable original meaning, and a rigid attachment to some historical understanding of the original institutional arrangements and procedures.[54] These different expressions of the concern of the originalist judicial rhetoric share a related political motive: to limit the range, scope, and impact of judicial review by imposing a restrictive method of textual interpretation upon the Court, thereby limiting the discretion afforded the judiciary within the arena of constitutional politics.

Imposing an "original" meaning upon the text (which inevitably entails a restrictive conception of politics, and not just judicial politics) will curtail the Court's political role. Specific (political) issues will be expelled from the arena of constitutional law, either to be left to the other processes of politics or excluded altogether. Indeed, it is often difficult to distinguish between originalist rhetoric aimed at a judicial resolution of certain issues, regardless of whether the complaint is against viewing such issues as political concerns, and a less principled attack aimed at the Court for actively pursuing the "wrong" (i.e., liberal) partisan position.[55] Clearly, some partisans who would employ a rhetoric of originalism as it suits them in their struggle against certain policies would also use the arena of constitutional politics for their own purposes, if they could seize control of the reigns of the Court. More thoughtful critics recognize that the underlying problem lies in the expansion of judicial power in an overly optimistic and utopian effort to read our "highest" contemporary moral sensibilities into the constitutional text and the "unwritten" realm of

54. *See* Brest, *supra* note 36. *See also* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

55. For an example expressing the rhetoric of this "less principled" position, see Eastland, *The Burger Court and the Founding Fathers: Are We All Activists Now?*, POL'Y REV., Spring 1984, at 14, 14-19.

constitutional politics—the quest for "perfectionism"[56] or "progress"[57] in constitutional law. This more principled position reflects an inherently cautious and conservative conception of the possibilities of politics along with an inherent fear of politics—be it judicial or otherwise—intruding too far into the sphere of private life. The assumption is that it may be better to suffer some injustices in the social and economic orders than to open the doors to political intervention (via judicial consideration) in all spheres of human activity. Originalism as a judicial rhetoric reflecting such a broader conservative political ideology can be a potent weapon and a viable and effective force in restraining the expansion of the arena of constitutional politics and judicial power in general. To the extent that it reigns as the dominant judicial rhetoric among the relevant political actors themselves, the impact upon the Court and federal judiciary of an originalist ideology is considerable. Attorney General Edwin Meese III has publicly expressed his adherence to an originalist position,[58] and such a position has been expressed by the most prominent of the so-called "conservatives" on the Court.[59] The impact on the judiciary as a political institution of an emergent majority supporting some version of the originalist position would be comparable to an attempted stacking of the Court with "strict constructionists"[60]—the level of Court activity, the kind of issues brought into the arena of constitutional politics, and the outcome of those issues—would all be affected by the shift in the underlying political ideology.

If it is assumed that originalism is a viable judicial rhetoric, the question remains whether it is a coherent theoretical position. Its basic theoretical premises have been significantly challenged at a number of different levels.[61] As a guiding principle of textual interpretation, originalism suggests that the Court should apply only those "plain" meanings explicitly evident in the text. This position resem-

56. *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

57. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS ch. 2 (1970).

58. *See supra* note 5 and accompanying text.

59. Chief Justice Rehnquist has made reference to such a jurisprudence of original intent, and has also been particularly critical of the rhetoric of the "living constitution." *See* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

60. The reference is to President Nixon's attempt to appoint "strict constructionists" to the Court. President Reagan's intention appears to be to appoint adherents of some modified expression of originalism.

61. *See* S. BARBER, ON WHAT THE CONSTITUTION MEANS ch. 2 (1984); Brest, *supra* note 36. *See also* R. DWORKIN, A MATTER OF PRINCIPLE 34-37 (1985); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

bles the politically instrumental portrait of textual interpretation which Chief Justice Marshall carefully laid out in *Marbury*[62] (but abandoned for other political reasons in *McCulloch*[63]). In the current academic debate, such a theory of textual interpretation is known as "clause-bound interpretation" or strict interpretation following the terminology of John Hart Ely in his influential book, *Democracy and Distrust*.[64] According to Ely, strict interpretivism is an unworkable approach to textual interpretation in all but the easiest, most literal cases, such as a court applying a clear constitutional standard like the thirty-five year age requirement for presidents.[65] Ely thus rejects the simplistic originalist premise that the text possesses an "objective" or "plain" meaning which the Court has only to uncover in interpreting the Constitution. Ely does try to salvage an originalist position, however, by turning to a revised notion of interpretivism in which the textual meaning can be derived in light of some general understanding of the document as a whole, or, in his words, in reference to "an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution."[66] This qualified version of interpretivism permits Ely a good deal more discretion in deciding the broader meaning of the document or determining which "inference" is indeed discoverable in the text. Clearly, the originalist position is much more restrictive, searching for some lost, yet recoverable historical meaning of the text—an historical meaning which may actually be more narrow than the plain meaning of the words in the text.[67]

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62. *See supra* notes 26-31 and accompanying text.

63. *See supra* notes 33-35 and accompanying text.

64. J. ELY, DEMOCRACY AND DISTRUST (1980). For a critique of interpretivist premises, see Tushnet, *supra* note 54. Ronald Dworkin has perceptively questioned the underlying assumptions of interpretivism:

> They [interpretivists] appear to pay very little attention to questions about the "point" of having a constitution or why the Constitution is the fundamental law. They seem to begin (and end) with the Constitution itself and suppose that constitutional theory need make no assumptions not drawn from within the "four corners" of that document.
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> . . . Those scholars who say they start from the premise that the Constitution is law underestimate the complexity of their own theories.

R. DWORKIN, *supra* note 61, at 36-37. Dworkin further questions the usefulness of the interpretivist/non-interpretivist dichotomy. *See also* Kristol, *The Heavenly City of Post-Constitutional Theory*, 51 U. CHI. L. REV. 315 (1984).

65. Even this "easy" and literal example can be "interpreted" to mean some other standard, such as "maturity." *See* Kaufman, *What Did the Founding Fathers Intend?*, N.Y. Times, Feb. 23, 1986, § 6 (Magazine), at 42, 59.

66. J. ELY, *supra* note 64, at 2.

67. For example, see the discussion in chapters 10 and 11 of R. BERGER, GOVERNMENT BY

Ely is searching for some middle ground between the impracticality (and excessive literalism) of originalism and the dangerous conclusions implied by a judicial realism which declares that the text means only what the Court says it means.[68] Such a middle position, if it could be sustained, might offer a viable judicial rhetoric for the Court insofar as it appeals to a wide moderate spectrum in American politics. Unfortunately, however, this revised version of interpretivism (which entails a weak originalist commitment to the text) is difficult to sustain. On the one hand, Ely concedes the theoretical impossibility of strict interpretivism; on the other, he is forced to conclude that the open-ended nature of some of the text (especially the constitutional amendments) invites and justifies the exercise of judicial discretion in applying constitutional standards. While highly critical of the Court for the kind of judicial review exercised in the so-called "privacy" cases,[69] Ely's own reading of the text's open-ended language tends to support the Court's blatant non-interpretivist approach. As Thomas C. Grey has noted:

> It should be clear that in these cases [*Griswold* and *Roe*] the Court is quite openly *not* relying on constitutional text for the content of the substantive principles it is invoking to invalidate legislation . . . . Rather the broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values.[70]

Even if these cases did not rest upon any "shared national values," and even if they tended to undermine the text as a "source of legitimacy," such review is justified given Ely's assessment that the text itself "invites" broad judicial discretion. Such judicial review is distinctly at odds with that review exercised in pursuit of interpretivism, and thus is best characterized as "non-interpretivism"—the view that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."[71]

To extricate himself from this quagmire of choices between competing views of textual interpretation (neither of which can be justified as "legitimate" by appeal to the text itself), Ely seems to recognize

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JUDICIARY 166-220 (1977), concerning the limited intentions lying behind the original meaning of the fourteenth amendment, contrary to its express language.

68. *E.g.*, Charles Evans Hughes, speech to the Elmira Chamber of Commerce, New York, May 3, 1907: "We are under a Constitution but the Constitution is what the judges say it is." C. HUGHES, ADDRESSES AND PAPERS 139 (1908).

69. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

70. Grey, *supra* note 28, at 709.

71. J. ELY, *supra* note 64, at 1.

that the problem is at bottom one of adequately defining the Court as a political institution. A theory of textual interpretation cannot compensate for the inadequate integration of the Court and constitutional lawmaking into the political system by the Constitution itself. Thus, Ely escapes from the question of methods of interpretation by focusing on a reconstitution of the Court's political role as entailing only a procedural aspect, namely, to act as a kind of supervisor of electoral politics and ombudsman of representative democracy. In so doing, however, Ely provides little justification for this wholesale substitution of egalitarian participatory democracy for the eighteenth century republicanism that is at the core of the constitutional document itself.[72]

B. Non-Interpretivism and Hermeneutics

Ultimately, Ely's constitutional jurisprudence must be judged as being at odds with the method and political motives of originalism (and interpretivism as well). Peculiarly, it also offers little comfort or support for the non-interpretivist school. Non-interpretivist judicial rhetoric, which is best represented by Michael Perry's *The Constitution, the Courts, and Human Rights*,[73] is entirely opposed to the methods and intentions of originalism and its related theory of constitutionalism. Perry's pursuit of non-interpretivist review serves a constitutionalism which seems bent on institutionalizing the Court as that infamous "bevy of Platonic Guardians"—Justice Learned Hand's clichéd euphemism for unbridled discretionary rule by judges.[74] Perry's defense of this constitutional theory, which is the logical result of non-interpretivist judicial review, might be too readily dismissed because of this criticism, especially given the lack of any theoretical support for his vision of the Court as an oracle of human rights. However, other sophisticated theories of textual interpretation point to essentially the same political outcome as recasting the judicial function.

One such theoretical position—hermeneutics[75]—contrasts with originalism and interpretivism insofar as it views the Constitution primarily as an expression of our current understanding of legal and moral concepts. As it is applied to constitutional analysis, this theory

72. *See* Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO STATE L.J. 87 (1981).

73. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

74. *See* L. HAND, THE BILL OF RIGHTS (1958).

75. *See supra* note 20.

posits that any understanding of the meaning of the constitutional text is necessarily mediated by the contemporary "subjective" human experiences of the interpreter. As such, this position is diametrically opposed to the claims of originalism. As a theory of human understanding and textual exegesis, hermeneutics, provides an inviting methodology for the aims of non-interpretivist constitutionalism. The premier hermeneutic philosopher, Hans-Georg Gadamer, has provided a theory and a method for this vision of constitutionalism and judicial politics. The theory of human understanding and textual interpretation generated by hermeneutics, along with the hermeneutic conception of historical analysis, thoroughly undermine the full range of the originalist enterprise. As Gadamer has stated, "Historical consciousness fails to understand its own nature if, in order to understand, it seeks to exclude that which alone makes understanding possible. To think historically means, in fact, to perform the transposition that the concepts of the past undergo when we try to think in them."[76] Thus, hermeneutics tells us that the best that can be attained in a quest for the "original" understanding of the Constitution is the transposition of the original conceptions into our own contemporary conceptual framework. The very act of understanding obliterates and reconstructs its subject.

Of course, those who would apply the hermeneutic method to constitutional interpretation conceive of their goal precisely in terms of expressing contemporary conceptions (usually moral in content[77]) through constitutional adjudication, rather than as an effort to preserve any original constitutional position. Indeed, as a tool of historical analysis, the hermeneutic method offers rich insights into the usage of those political concepts that are so deeply rooted in archaic language and practice so as to be unintelligible to modern thought.[78] Similarly, as a tool of constitutional historical analysis, such a method

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76. H. GADAMER, TRUTH AND METHOD 358 (1975).

77. This is the basic theme of Barber. *See* S. BARBER, *supra* note 61. *See also* Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1068 (1981): "Constitutional law thus emerges not as exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental in the operations of government. The intentions of the framers describe neither its necessary minimal content nor its permissible outer boundaries."

78. Consider the theoretical approach of historians J.G.A. Pocock and Quentin Skinner. *See, e.g.*, J. POCOCK, THE MACHIAVELLIAN MOMENT (1975); J. POCOCK, POLITICS, LANGUAGE AND TIME (1971); Q. SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978); Skinner, *Meaning and Understanding in the History of Ideas*, in HISTORY AND THEORY, VIII, at 1 (1969); Skinner, *The Limits of Historical Explanations*, in PHILOSOPHY, XLI (1966).

could aid in recovering prior understandings of legal concepts and terminology as expressed in the unfamiliar text.

> The import for constitutional jurisprudence of the argument that language is the medium of human experience is clear. Constitutional interpretation correctly conceives of itself as it attempts to transpose past meaning into terms intelligible in the present. Legal interpretation—no less than any other kind of textual interpretation—has a responsibility to translate archaic concepts (which is not to say *all* concepts) into socially meaningful terms.[79]

Such a case for a "constitutional hermeneutics," the goal of which is the recovery of prior understandings of legal concepts and language, is indeed appealing. However, this tends to understate the more radical implications that hermeneutics has for constitutional decisionmaking. Rather than merely providing a tool for clarifying the meaning of some "archaic" legal concepts, hermeneutics suggests a complete "transposition" of the text. In other words, there can be no "permanent" or fixed text any more than there can be a recovery of an "original" understanding, precisely because hermeneutics denies the possibility of trans-historical meaning. The "text" is a forum for pronouncing contemporary values as constitutional values, to be born anew with each successive progression of "human experiences." Of course, this is the ultimate expression of the "living constitution" or "unwritten constitution," bound by nothing other than the contemporary conceptual and moral framework of "living" justices.

Thus, the appeal to a "constitutional hermeneutics" is yet another judicial rhetoric: an ideological position inherently political in nature, expressed in the language of legal discourse revolving around constitutional interpretation. The nature of the judicial function implied by constitutional hermeneutics can be located at the opposite end of the political spectrum from originalism. It is no coincidence that this expression of constitutionalism, whether it be founded upon hermeneutics or some other non-interpretivist theory of judicial review, focuses on the constitutional sphere of "rights."[80] The text itself is most open-ended in this area, and under the cover of the Bill of Rights the Court is least restrained by competing political pressures

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79. Leyh, *supra* note 36, at 8.

80. For example, see Perry's work and the privacy cases. *See, e.g.*, M. PERRY, *supra* note 73; Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1971). *See also* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). *But see* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (attempt to constrain judicial decisionmaking in this realm).

from the other branches. When defining rights under the Equal Protection or Due Process Clauses, the Court's action is more often perceived as a legitimate judicial function than an intrusion into certain other substantive areas, such as matters essentially confined to the legislative branch.[81] In "rights" adjudication, often no original meaning of the text can be discovered, and thus the Court is relatively free to engage in non-interpretivist review. Where a portion of the text has been dormant for most of its existence—such as the Confrontation Clause of the sixth amendment—the Court has expressed a willingness to creatively construct a "meaning" for it through case law where the opportunity has arisen and it serves the Court's immediate goals.[82] In this area of constitutional decisionmaking, non-interpretivist review is indeed most inviting and prevalent.[83]

C. *The Meese/Brennan Debate*

The use of non-interpretivist review, especially in this area of constitutional rights, is not rare; however, its frank defense from a sitting justice on the Court is unusual. Justice Brennan provided such an open defense of non-interpretivist review employed in the pursuit of the "living constitution" metaphor in response to Attorney General

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81. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969).

82. *See, e.g.*, California v. Green, 399 U.S. 149 (1970) (the Confrontation Clause of the sixth amendment does not preclude the introduction of an out-of-court declaration, taken under oath and subject to cross-examination, to prove the truth of the matters asserted, when the declarant is available as a witness at trial); Ohio v. Roberts, 448 U.S. 56 (1980) (following *Green* with regard to the constitutional propriety of the introduction in evidence of preliminary hearing testimony of a declarant not available as a witness at trial); Davis v. Alaska, 415 U.S. 308 (1974) (finding a constitutional right under the sixth amendment to cross-examine an adverse witness for bias by questioning the witness' status as a juvenile offender on probation).

83. However, the Court may very well be reaching the limits of modern substantive due process doctrine, as witnessed in its recent refusal to extend the logic of the "privacy" cases. Perhaps Justice White's majority opinion in Bowers v. Hardwick, 106 S. Ct. 2841, 2844-46 (1986), foreshadows the emerging trend:

> It is true that despite the language of the Due Process Clauses of the Fifth and 14th Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language.
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> . . . We [are not] inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Meese's recent statement of originalist rhetoric.[84] The language of Justice Brennan's rhetoric is cast in the framework of textual interpretation, but it betrays a political aim just as clearly as Attorney General Meese's originalist rhetoric expresses an inherently conservative political stance. Justice Brennan's response to the originalist position reveals the underlying political agenda of the non-interpretivist camp. The debate is ostensibly concerned with textual interpretation, yet it quite obviously revolves around conflicting visions of the polity and the Supreme Court's role as a political institution.

Justice Brennan's notion of textual interpretation betrays the non-interpretivists' association with a vision of the Court as the enunciator of rights and moral values. Similarly, the justices are seen in hermeneutic terms as the mediators between the constitutional text, its attendant historical meaning and contemporary human experience. While the words of the document remain constant, its meaning must be continually recreated for successive generations, which is the justices' role in constitutional intepretation. The Court must interpret the text for and by reference to the current needs and values of the citizenry. Justice Brennan clearly recognizes the power attached to the capacity to pronounce the authoritative interpretation of the text, but he shifts the debate into the language of methodology and textual interpretation, thereby obscuring the political nature of such power: "Because judicial power resides in the authority to give meaning to the Constitution, the debate is really a debate about how to read the text, about what is legitimate interpretation."[85]

Justice Brennan's statement misses the point that the authority to interpret the text, the source of the judicial power, is inherently a political power within the context of a political system, and thus the debate is "really a debate" about conceptions of politics, and precisely not about interpretation, except on the surface.

If Attorney General Meese's jurisprudence of original intentions expresses an obvious political intention of restricting the range and scope of judicial review and the discretion to create standards exercised by the Court, so Justice Brennan's pronouncements on textual interpretation betray an underlying political content. Particularly striking is the conception of the role of the justices which is implicit within Brennan's theory of textual interpretation. As he frames it, the

84. Speech by Associate Justice William Brennan, delivered at Georgetown University (Oct. 12, 1985), *reprinted in* N.Y. Times, Oct. 13, 1985, at 36, col. 1.

85. N.Y. Times, Oct. 13, 1985, at 36, col. 1.

justices must divine the political values of the "community" and mediate between the text and these societal values: "The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought."[86] But it is apparent that the justices are more than just representatives of the community's values; the judicial task is to consciously translate the "law" into a structure which is meaningful and appropriately suited to contemporary "needs" and "values." As such the justices apply a method of reading the text much like that suggested by hermeneutics. The justices do not passively and neutrally read and discover the law as some abstract entity; they actively participate in creating a meaning for the text appropriate to contemporary society. In his statement that the justices should seek "the community's interpretation," Justice Brennan evokes the obvious—the community has changed significantly since 1789 when the intentions of the framers were constitutionalized. This observation suggests to Brennan that the Court must not "turn a blind eye to social progress and eschew adoption of overarching principles to changes of social circumstances."[87] The modern justice must not read the text in terms of its eighteenth century meaning, but rather as a "20th century American." Indeed, for Justice Brennan, an understanding of the "original" meaning of the text is not the goal of constitutional interpretation: "The ultimate question must be, what do the words of the text mean in our time."[88] The virtue of this particular view of the Constitution lies precisely in the fact that it allows for an "adaptability of its great principles to cope with current problems and current needs."[89]

Undue weight ought not be afforded a single speech of a single Justice (although Justice Brennan's opinions do fully reflect this position); the same may be said of an admittedly partisan representative of the Department of Justice. Neither position is a fully-developed intellectual stance. However, both views mirror the underlying political motivations of their better-articulated academic counterparts, although these positions are ultimately more influential by virtue of the strategic position of their proponents. Justice Brennan's position regards the Constitution as a broad delegation of authority to the Court to read its understanding of contemporary morality and "social

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

progress" into the text and thus the polity. The political role of the judiciary is thereby expanded dramatically. Conversely, the jurisprudence of originalism espoused by Attorney General Meese is a less sophisticated version of the originalist and interpretivist positions. Its blatant political intention is to curtail the range of discretion exercised by the Court, presumably intending to exclude certain issues from arising in the political arena, not merely excluding them from the judicial arena. Peculiarly, Justice Brennan partially acknowledges that the dispute is ultimately between competing visions of politics, even as it is expressed in the language of textual interpretation: "A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. This is a choice no less political than any other . . . ."[90] However, even while recognizing that this is a political debate at heart, Justice Brennan reverts to wrapping himself in the Constitution as he attacks the "arrogance" of a jurisprudence of originalism which claims to seek the intentions of the framers but really wishes to restrict the power of the Supreme Court.[91] Of course, it is no less inviting to put the same charge to Justice Brennan that he pursues a political agenda under the auspices of a theory of textual interpretation and a "living" constitution.

IV. The Nature of the Constitutional Text

The judicial rhetorics of "originalism" and the "living Constitution" represent the polar extremes located within the narrow confines of the moderate Lockean liberalism (and constitutionalism) which maintains hegemony over American political thought. Within this political spectrum, there is no inherent theoretical linkage between interpretivism and conservative politics, nor between a non-interpretivist perspective and a more egalitarian ideology.[92] However, accepting as given the nature of our *particular* constitutional text (and its obvious commitment to a late eighteenth century liberalism of limited government), a correlation can be found between a theory of textual interpretation and a vision of the polity. Insofar as the

90. *Id.*

91. *Id.*

92. I am grateful to Professor Mark Tushnet for his comments to me on this point made at a presentation of an earlier draft of this paper to the American Political Science Association in August 1986.

Constitution expresses coherent substantive political values, then a commitment to an originalist or interpretivist position will embrace a concomitant attachment to a more conservative politics of limited government. This is true whatever the theoretical or epistemological flaws in originalism (or interpretivism) as a theory of interpretation. As a viable judicial rhetoric, it is limited to a particular vision of politics. To argue otherwise is to imply that the text is thoroughly "indeterminate" and our ability to comprehend the intellectual history of the constitutional period is epistemologically impossible, thereby rendering the text bereft of any "meaning." This is to deny the possibility of both expressing moral values through language and achieving any trans-historical understanding of those values.

To the extent that the text has meaning (even if particular phrases are ambiguous), then interpretation constitutes an expression of political values. In this way, a judicial rhetoric is generated from a theory of interpretation. In the same way that broader Lockean liberalism has often found expression as a struggle between competing impulses within the political mainstream, American constitutionalism has been informed by dual impulses. There is a danger of sinking into an overly-simplistic historiography of "dualities"—for instance, Herbert Croly's portrayal of American history as a struggle between Jeffersonian and Hamiltonian "spirits."[93] However, mainstream liberalism has been characterized by dual impulses which provide a useful analytic perspective for understanding historical development.[94] Likewise, American constitutional history appears at times to be driven by a dialectic of opposing political impulses expressed within the narrower confines of a moderate liberalism. The judicial rhetorics previously discussed simply represent the current manifestations of these impulses.

Historically, these impulses within American constitutionalism can be characterized in the following terms: one emphasizing an "institutionalist"[95] concern, the principles of the rule of law and limited

93. H. CROLY, THE PROMISE OF AMERICAN LIFE (1909). *See also* V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT (1930).

94. A wide variety of American political theorists and historians have pursued this notion of a "duality" within the American tradition. *See* A. BICKEL, *supra* note 28, ch. 1; J. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM (1984); R. SEIDELMAN, *supra* note 7; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1972).

95. R. SEIDELMAN, *supra* note 7, at 4-7.

government, and a generally conservative ("whig"[96]) vision of the limits of politics; the other essentially antinomian, equalitarian, democratic or populist, and utilizing the more radical language of natural rights theory.[97] In so far as the natural rights theory is most suited to providing an external vantage point for challenging the legitimacy of an extant regime, it is an historical anomaly that it should find expression in the inherently conservative vehicle of constitutionalism. Ironically, the triumph of natural rights theory and its entrenched position in American political thought create an uneasy tension between rhetoric and reality.[98] The institutionalization of natural rights theory within the constitutional text itself and the forum of the Court creates a tension between democratic values and government by the judiciary. This accounts for the apparently insatiable need for intellectual defenders of judicial review to "reconcile" democracy with the pursuit of a politics based upon "rights" attained through the admittedly undemocratic institution of the federal judiciary.[99] The natural rights tradition in American constitutionalism thus tends to suffer from enough self-doubts to limit even the most active proponents of Court-created "rights."[100]

These two opposing strains of American constitutionalism lurked behind the movement for a new federal Constitution throughout the 1780's as dissatisfaction with the Articles of Confederation mounted, and they continued to inform the subsequent processes of amendment and adjudication by the Court. The dominant strain looks to institutional solutions to the problem of the undue concentration of political power by establishing a limited federal government within fixed boundaries. This position curiously views the federal government as both a prerequisite to the preservation of liberty and as a danger, requiring the whole system of checks and constraints. On the other hand, the second strain of American constitutionalism, natural rights theory, is equally ambiguous regarding political power. Here, the ambiguity lies in expressing a theory which is inherently antinomian and

96. A. BICKEL, *supra* note 28, at 3.

97. *See, e.g.*, T. JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774); T. PAINE, COMMON SENSE (1776). *See also* C. HILL, PURITANISM AND REVOLUTION ch. 3 (1958).

98. This is similar to the central argument of S. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY (1981).

99. This recognition is the source of "distrust" in Ely's DEMOCRACY AND DISTRUST. *See* J. ELY, *supra* note 64. *See also* the collected essays in JUDICIAL REVIEW AND THE SUPREME COURT (L. Levy ed. 1967).

100. The best example is M. PERRY, *supra* note 73.

anti-institutionalistic through the constitutional decisionmaking of an entrenched legal system. Grafted onto the institutionalist (Madisonian) text of the Constitution, the (Jeffersonian) natural rights theory of the Bill of Rights creates a source of uneasy tension in American constitutional law.[101]

Because neither the institutionalist nor natural rights position triumphed, neither intellectually nor by the force of political power, elements of both have remained within the American tradition of constitutionalism. Indeed, both positions found some expression within the constitutional text as the Bill of Rights and subsequent amendments were added to the document. The resulting text is sufficiently mixed in character as to facilitate either constitutionalist strain in reading its position into the document. This mixed character of the text explains the "ironic" argument of John Hart Ely when he observes that by a strict interpretivist reading of the text, non-interpretivism is suggested by virtue of the open-ended language in sections of the Bill of Rights.[102] The inability to settle on an interpretivist or non-interpretivist approach to the text is a result of its mixed character, which itself reflects the historical absence of consensus regarding the nature of constitutionalism. While it is by no means asserted here that interpretivists are modern Federalists and non-interpretivists are Jeffersonians, in a strong sense, institutionalist objectives are served by an interpretivist reading of the text and a natural rights position is most readily pursued through non-interpretivism.

The constitutional text which emerged historically upon ratification and subsequent amendment possesses a character sufficiently "mixed" to make impossible the quest for a single authoritative method of textual interpretation. Theoretically, this need not be the case. It is possible to imagine a constitutional text which would fully express a single theory of constitutionalism and an attendant method of textual interpretation. This particular constitution, however, simply does not resolve the matter in favor of an institutionalist or natural rights constitutionalism, mandating neither interpretivism nor non-interpretivism. Several significant features of the constitutional document are responsible for this uncertainty. If the text did possess a clear character and mandated a specific method of interpretation which would generate consistent outcomes in adjudication, much of the current debate over interpretation would disappear and be re-

101. *See* Carter, *supra* note 12, at 847 (describing the structural elements of the Constitution).
102. J. ELY, *supra* note 64, at 13.

placed with more visibly and overtly political arguments for a change of texts. Instead, the "indeterminate" text has remained constant (and ambiguous), while approaches to interpreting it have worked more subtle transformations in the character of the American political and constitutional regime.[103]

Perhaps the most significant feature of the Constitution which denies an absolute victory for either vision of constitutionalism is the absence within the text of any procedure (or even authorization) for interpretation per se. Even if the exercise of the power of judicial review by the Court is now taken as a political given, its exercise too strongly in favor of either view of interpretation raises immediate protests challenging its "legitimacy." Both an unrestrained non-interpretivism and a clause-bound interpretivism would be politically unfeasible from the bench. Neither could justifiably be pursued in its purest form;[104] neither can be simply abandoned. Because the text authorizes neither option, the resulting jurisprudence exercised from the bench is inevitably a blend of both. No court could survive politically if it pursued in unrestrained fashion either a pure non-interpretivist articulation of natural rights rhetoric or the straightjacket jurisprudence of originalism. The limits of non-interpretivist review were most likely revealed by the *Roe v. Wade*[105] decision. Similarly, Attorney General Meese's challenge to the doctrine of incorporation[106] may be historically correct, but it fell on deaf ears in the legal and political community as the question was essentially rendered

103. *See* T. LOWI, THE END OF LIBERALISM 271 (2d ed. 1979) ("Many Americans believe that there have been no basic regime changes. . . . Yet there have been regime changes worthy of recognition as a change of republic.").

104. Consider the following example given by Judge Irving R. Kaufman: the drafters specified the age requirement for the President as "35 years" rather than merely requiring "maturity." *See* Kaufman, *supra* note 65, at 59. A strict non-interpretivism would permit the Court to substitute the latter for the former, something that Judge Kaufman fails to recognize.

105. 410 U.S. 113 (1973).

106. The question of the applicability of the Bill of Rights to the states was first raised in Barron v. Mayor and City Council of Baltimore, 31 U.S. 464 (1833), in which the Marshall Court held that the Bill of Rights restricted only the national government and not the states. The historical evidence and Supreme Court precedent fully support Attorney General Meese's adherence to the original understanding that the fourteenth amendment did not "incorporate" the provisions of the Bill of Rights and make them applicable to the states. However, by the 1930's and 1940's, the majority of the court followed Justices Cardozo and Frankfurter in arguing for a "selective" incorporation of the Bill of Rights. *See* Palko v. Connecticut, 302 U.S. 319 (1937) (Cardozo, J.); Adamson v. California, 332 U.S. 46 (1947) (Frankfurter, J., concurring). In his dissent in *Adamson*, Justice Black, joined by Justice Douglas, argued for the "total incorporation" of the Bill of Rights, claiming that such was the "original purpose" of the fourteenth amendment. *Id.* at 89 (Black, J., dissenting).

moot decades ago.[107] The constitutional text dictates neither originalism nor non-interpretivism, and undoubtedly political considerations suggest that only a diluted version of either will succeed from the bench.

The second source of ambiguity in the text stems from of the lack of any statement of organizing principles in the document. In order to resolve inconsistencies, ambiguities, and unanticipated situations, it is necessary that a written document such as the Constitution offer some guiding principles. Where the text itself provides no specific, determinate answer—such as in the aforementioned cases decided by Chief Justice Marshall and Justice Holmes[108]—some broader principle such as federal supremacy or the preservation of state autonomy could offer substantial guidance. However, the Constitution clearly explicates neither general principle. Indeed, it actually provides some vague textual support for either position.[109] This lack of general guiding principles should be distinguished from the use of general terms or concepts[110] in the Constitution without specifying their particular applications. For example, there is clearly some general theory of federalism inherent within the Constitution and the institutions which it establishes. The problem lies in not knowing what *kind* of theory of federalism is implied. Without such a statement of principle, a states' rights proponent on the bench could have justifiably taken a position entirely contrary to those held by Marshall and Holmes.

This absence of internal principles has given the Court the discretion to generate its own guiding principles. Undoubtedly, the clearest such example is the judicial creation through case law of a theory of "separation of powers" which governs in the absence of any specific statement in the text of the underlying organizational principle of the Constitution.[111] Given the wide range of "separation" theories in

107. By the 1960's, the more flexible "selective incorporation" approach, which had always been the majority position on the Court, had applied virtually the entire scheme of criminal procedure guarantees to the states. Indeed, the *Palko-Adamson* doctrine of "fundamental fairness" succeeded in applying an even heightened judicial scrutiny to state government, which is precisely the kind of exercise of judicial review to which Attorney General Meese currently objects and which Justice Black foresaw as a potential danger.

108. *See supra* notes 33-48 and accompanying text.

109. *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976). *See* L. TRIBE, CONSTITUTIONAL CHOICES, *supra* note 6.

110. R. DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977).

111. In recent decades, the Supreme Court has articulated a theory of separation of powers in a number of significant cases. *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Buckley v. Valeo, 421 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

contemporary eighteenth century political thought[112] (including mixed government theory and corporatist theories of functional representation), the organizational principle of the Constitution is not easily discovered. The *Federalist* offers some extra-textual statement of principle, but to a large extent the Court has fashioned its own simplistic theory of "checks and balances" which it has applied in significant constitutional decisions.[113] Even if the Court's theory was built upon an accurate reading of the *Federalist* (which it is not), it would still be a rather arbitrary guiding principle—one easily avoided by a subsequent Court bent on enunciating an alternative political vision.

Due to the lack of any statement of principle—be it for the separation of powers or the notions of "due process" and "equal protection"—there is little in the text itself which will bind the Court to any particular position. Whatever the political inclinations of a particular Court, it is a relatively simple matter to discover some contrary source of principle external to the text. An individual justice is free to be an interpretivist or non-interpretivist as he or she sees fit, because the text itself is silent as to the choice.

There is a third source of this mixed character of the Constitution. The historical irony of grafting a limited natural rights document onto an institutionalist blueprint for limited government has given us a Constitution which is potentially all things to all judicial ideologies. The open-ended language of much of the Bill of Rights (and the fourteenth amendment) invites a significantly greater range of judicial review than anything imagined by the originalist position. Even if the invitation does not extend to creating "new" rights, such as privacy, there is certainly a wide range of possibilities for the extension of "old" rights under the labels of "equal protection" and "due process." Whatever the merits of the originalist or interpretivist positions as to the political reasons for wishing to restrain the capacity of the Court to engulf the entire arena of politics by way of an expansion of the scope of the constitutional arena, the actual language used by the drafters of these sections of the text justifies a much broader review than the originalist or interpretivist would concede. Given that no "rules of construction" are provided in the text which suggest that a phrase such as "cruel and unusual" must be restricted to its "origi-

112. *See* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS chs. 1, 2, 3 (1967).

113. *See, e.g.*, Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Meyers v. United States, 272 U.S. 52 (1926).

nal" late eighteenth century meaning, there is no compelling reason why it must be so restricted (although there is equally no reason why a Court could not narrowly construe its meaning). Prudence might dictate a limited interpretation of these sections of the text, but the text does not seem to demand it. While the absence of textual specificity does not sanction the "legitimacy" of *any* interpretation of such a phrase, it does justify and account for a good deal of leeway in giving specific content and meaning to the particular constitutional principle.

V. RECONSTITUTING THE CONSTITUTION

If the very character of the text makes it impossible to definitively conclude in favor of a particular approach to textual interpretation or to supply the appropriate guiding principles for resolving a textual ambiguity or open-ended phrase, does that imply that *any* interpretation is legitimate? Political and practical arguments for a particular approach to textual interpretation would remain, as would the Court's role in exercising judicial review, but the claims could not be made in terms of what is demanded by the text.

It may not be possible or desirable to create a constitutional text which could provide internal guiding principles and rules of construction which would bind a judge to a particular reading of its language. If such a determinative text is impossible or undesirable, appeals to a particular mode of judicial interpretation and scope of judicial review of an indeterminate text such as the federal Constitution ought to be made strictly in terms of political justifications. On the other hand, to the extent that a text can be constructed which will determine at least some such decisions, a political choice has already been made at the time of ratification of the text—unless, of course, we adopt the Jeffersonian principle that these choices must never be recognized as binding on any but that generation which actually gave overt consent to the principles constitutionalized.[114]

Perhaps the easiest way to construct a constitutional text which would satisfy the political interests of the originalist position (to limit the discretion and political role exercised by the Court) and the method of textual exegesis propounded by interpretivism would be to "constitutionalize" structure and procedure only—leaving substantive

114. *See* Letters from Thomas Jefferson to James Madison (Jan. 30, 1787), (Sept. 6, 1789), *reprinted in* THE PORTABLE JEFFERSON 417, 449 (1976).

values completely out of the constitutional arena.[115] Such a text would outline the structural arrangements and procedures for arriving at decisions, but would not attempt to define or restrict the kinds of decisions which could be enacted.[116] The text would be fairly detailed and specific, but authorization could be provided for a particular body (be it judicial, legislative, executive or "independent") to adjudicate any disputes over rules of procedure or organization. An authoritative statement of principles could also be provided by the drafters specifying the original intentions concerning the procedures and arrangements. This model of a limited constitution would restrict the overall arena of constitutional politics, limit the discretion and role of the Court (assuming the Court was specifically authorized to review such constitutional cases), establish as permanent (at least, until amended) the original institutions and procedures, satisfy as much as possible the interpretivist claims (by providing internal authorization for an interpretivist method of reading the text), and totally exclude any judicial role in expounding rights (although another legislative body could still create statutory entitlements and privileges).

To some extent, Professor Ely moves toward such a procedure-oriented model of constitutional review for the Court—primarily because of his inability to find boundaries for the Court in articulating substantive rights under the open-ended language of the Bill of Rights. Under such a text, politics could still address the same concerns and issues; however, the constitutional arena would be greatly restricted. Those whose criteria of a moral constitutional politics demands the kind of decisions represented by *Brown v. Board of Education*[117] or *Lochner v. New York*[118] will not be satisfied. But it must be remembered that the legislature could still pursue policies such as the racial integration of state school systems or laissez-faire economics. Of course, they could also reject any statutory pursuit of a notion such as "equal protection," as the Court did for nearly a century even with such language formally provided in the constitutional text.

At the opposite extreme, it is possible to conceive of a constitutional text which would pursue very different interests by enhancing

115. J. ELY, *supra* note 64, at 87.

116. This was the approach of Joseph Schumpeter in defining "democracy" in terms of procedure, rather than substantive content. *See* J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY ch. 22 (1942).

117. 347 U.S. 483 (1954). *See* M. PERRY, *supra* note 73, at 66-69.

118. 198 U.S. 45 (1905).

the political role and scope of review of the judiciary, utilizing textual language which would invite some form of non-interpretivist review, and favoring a "rights" oriented notion of constitutionalism. Under this type of text, the arena of constitutional politics would threaten to subsume the entire range of political issues, as the locus of political power would be shifted toward the Court and judiciary. The simplistic language of such a text would entail broad normative commands or "concepts"—perhaps only a single constitutional standard that government must treat the citizenry with "fairness" in its various contacts through public policies. Such a concept as "fairness" probably would invite a non-interpretivist (perhaps hermeneutic) method of textual interpretation, although an attempt to limit its meanings to those which the founders originally "intended" would not be logically inconsistent with the text. Of course, the text itself might prescribe a hermeneutic interpretation of the "fairness" standard, with judges instructed to look to contemporary moral values. Nevertheless, a text and non-interpretivist review *could* be the foundation for a constitutional politics centered around the Court, and other levels of the judiciary, exercising an unbounded discretionary power.

While the nature of the constitutional text and the inclusion of internal rules of construction and guiding principles can determine a particular method of interpretation and the scope of judicial review, they do so only at the extremes. Short of either delegating all discretion to the Court or trivializing its role by limiting it to specific instances of judicial review, the text will inevitably remain "indeterminate" at some levels regarding its substantive content. The federal Constitution clearly does not authorize either non-interpretivist or interpretivist review. It expresses moral values and it delineates procedures. This may be the result of a peculiar historical development, or it may be that the inadequacies of both the institutionalist approach (in providing for a specification of rights and protections for citizenship[119]) and the natural rights rhetoric (in *limiting* governmental powers) led to a text which includes both elements. A text embodying either constitutional vision exclusively would move outside the boundaries of an acceptable liberal politics—being either insufficiently attentive of the rights of citizenship or lacking in the fundamental insights of liberal political thought regarding the need to limit governmental powers. Of course, the absence of a definitive and

119. P. BOBBITT, *supra* note 43, ch. 6. *See also* P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT (1985).

exclusive text leaves uncertainty in the realm of constitutional politics, and this uncertainty permits a wide range of judicial opinions which must be seen as expressions of liberal political thought, rather than constitutional principles.

VI. Conclusion

The contours of the Meese/Brennan debate reflect many of the contrasting positions expressed in the more abstract (and thus mystifying) academic discussions of textual interpretation. Whether the language is cast in the language of hermeneutics or deconstruction or in the more traditional terms of legal discourse expressed from the bench and in the opinions of the Supreme Court, political commitments can readily be detected lurking beneath the surface. This is not unexpected. Within the boundaries imposed by the hegemony of mainstream Lockean liberalism and the entrenched judicial ideology of the American constitutional tradition, which emphasizes the concept of a written, binding text, such debate, when carried on in the judicial sphere, reflects the same conflict over political visions as expressed elsewhere in political discourse.

That the peculiarities of American constitutionalism dictate that "political" debate be cast in a distinct judicial language or rhetoric when conducted within the arena of constitutional politics does not mean that genuine issues of interpretation or construction do not exist in constitutional law. Nor is it to impute hidden, underlying "political" motives to all judicial opinions or scholarly positions. Rather, any broad notion of how to interpret the constitutional text will inevitably reflect an underlying commitment to a particular theory or vision of politics. It is an illusion of the liberal tradition that law, be it constitutional or otherwise, is some neutral ground outside the realm of ideology. Quite the contrary, the very commitment to a written text—to *this* written text—and to any notion of how it should be "read," reflects an a priori commitment of the highest order to a particular vision of politics. Even within the close confines of a moderate liberalism, there is more than enough room for differences in political ideology to generate related theories of constitutional interpretation. Thus, viewing these different approaches to textual interpretation as the primary concern is to misperceive the nature of the disagreement and suppress its inherently political terms. But this, of course, is a common feature of so much of legal and judicial discourse within the American tradition.

political discourse. Echoing a more general distain for the "political" within the liberal tradition, the legal tradition finds the apparently neutral, non-political language of a "scientific" or methodological debate particularly inviting because it preserves the illusion of constitutional law as an objective realm outside of politics.

Constitutional law is "outside of politics," at least as a process, only when there is a sufficiently strong consensus concerning the meaning of the Constitution. Surely, a total consensus has never been achieved; however, previous cleavages arose around the interpretation or meaning of particular clauses and hence particular political issues. Although this is still the case, the debate has also been elevated to the level of questioning the very possibility of being governed by a written text with "objective," trans-historical meaning. This portends ominously for American constitutionalism. A loss of faith in the possibility of adjudication based on a stable text is the underlying provocation in the current debate over textual interpretation. Calls for a return to a "principled" approach to constitutional law or denunciations of rampant "nihilism" in the law schools miss the point. Ultimately, only the re-emergence of some broader political consensus can quiet the deep divisions found in the legal community.