Originalism and the Importance of Constitutional Aspirations

By RICHARD B. SAPHIRE*

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* Professor of Law, University of Dayton School of Law; B.A., Ohio State University, 1967; J.D., Northern Kentucky University, 1971; LL.M., Harvard Law School, 1975. Thanks go to Dan Conkle, Kent Greenawalt, and Michael Solimine for their helpful comments on an earlier draft of this Article. Work on this Article was supported by a University of Dayton School of Law Summer Research Grant.

I. Introduction

Who shall live and who shall die? How shall we live our lives, and how shall they end? When can others control the most central aspects of our being, and when does control rest with us? These are the questions that are presented for constitutional adjudication, and they are questions which interpreters of our Constitution must answer.[1]

Where are the answers to be found? The obvious and simple response is: *in the Constitution.* The answers are to be found by reading and understanding its words. But the words are not always clear, and the task of clarifying their meaning and their significance can be both challenging and controversial. Prescribing how this task should be performed is the province of the enterprise academics call "constitutional theory."[2]

For at least a generation, constitutional theorists have coalesced into two principal camps or competing schools of thought. One school of thought was once labeled "interpretivism"[3] and is now most commonly referred to as "originalism."[4] This school of thought holds that the Constitution has the same meaning today that it did to the generation that promulgated its words.[5] Although there are important varia-

1. Of course, whether the Constitution speaks to these questions is often an important issue. However, the answer to this question is itself a problem of constitutional interpretation, and even a determination that the Constitution does not speak to a particular question is a determination with practical consequences.

2. Constitutional theory is concerned primarily with the question of the appropriate method for constitutional interpretation. Because methodological issues have been closely connected with issues of institutional role and political theory, constitutional theory has also concerned itself with exploring the legitimacy of judicial review in the context of various conceptions of American democracy.

3. *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); *see also* Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261 (1981) [hereinafter Perry, *Interpretivism*].

4. The most prominent early essay to employ the term "originalism" is by Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). On the change in terminology from interpretivism to originalism, see Richard B. Saphire, *Enough About Originalism*, 15 N. KY. L. REV. 513, 515 n.7 (1988) [hereinafter Saphire, *Originalism*].

5. Perry defined interpretivism as follows:

> The Supreme Court engages in *interpretive* review when it ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists—that is, by reference to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution. . . . Interpretive review is a hermeneutical enterprise; the effort is to ascertain, as accurately as available historical materials will permit, the character of a value judgment the Framers constitutionalized at some point in the past.

tions among originalist theories, they have in common a belief that the materials relevant to determining the Constitution's meaning are limited to the text, structure, and historical context of the document. To be legitimate, a proposed interpretation of the Constitution must find affirmative and persuasive support in these materials. If a proposed interpretation can be defended only by reference to sources outside these materials, it must be rejected.

The second school of thought in constitutional theory, once called "noninterpretivism,"[6] is now known as "nonoriginalism."[7] Nonoriginalism accepts the notion that the text, structure, and historical context of the Constitution are all relevant to its meaning. However, those who subscribe to nonoriginalism share the conviction that the search for constitutional meaning need not be confined to, nor determined by, these sources. In particular, nonoriginalists believe that historical inquiry into how the constitutional text was understood by its authors and ratifiers is not necessarily determinative of its meaning. Accordingly, for nonoriginalists, consulting additional sources of meaning is sometimes required.[8]

Perry, *Interpretivism*, *supra* note 3, at 264.

For efforts to define originalism, see, for example, Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding*, 82 VA. L. REV. 493, 499-500 (1996) (defining originalism as "an approach to constitutional adjudication that accords binding authority to either the text of the Constitution, when the text 'clearly' provides the answer to the query, or, if the text is unclear, to the intentions of those who adopted it"); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1127 (1995) ("[T]he originalist always asks what the Framers *meant to say* when enacting the text, or what they *did say* while debating it, or what *they would have said* about today's constitutional questions had they been asked . . . ."); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1482 (1985) ("The group of claims promoting the use of the framers' intent in interpreting the Constitution is called originalism."). *See generally* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); Saphire, *Originalism*, *supra* note 4, at 516-17.

6. *See generally* Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981).

7. On the change in terminology from noninterpretivism to nonoriginalism, see Saphire, *Originalism*, *supra* note 4.

8. One way in which the debate between originalists and nonoriginalists has been framed is whether constitutional interpretation should be a process whose goal is to find or discover constitutional meaning, or whether the process should be characterized as one in which the interpreter gives or creates that meaning. In a very general sense, originalism has been characterized as a relatively passive method of interpretation which conceives of the Constitution as embodying meaning which the interpreter seeks to find. In a similarly general sense, nonoriginalism conceives of the Constitution in more symbolic terms: Its provisions (or at least some of them) are viewed as suggesting, but seldom providing, answers to various political and moral issues. The interpreter must become actively engaged with the text in a process whose inherent dynamism belies the notion that the interpreter can avoid playing a creative role. *See* Brennan, *infra* note 167, at 15-16 ("interpretation

Originalism and nonoriginalism have been the principal competitors for the attention and favor of the constitutional cognoscenti.[9] They are presented by some as polar opposites, involving fundamentally different and even irreconcilable conceptions of the nature of language, interpretation, and politics. Others have argued that these two ways of conceiving of and engaging in constitutional interpretation are less dichotomous than they are continuous; that, properly understood, each shares more in common with the other than the proponents of the more extreme versions of each are willing to concede. Yet even those who advance more moderate positions acknowledge that, in both theory and practice, the two camps are divided by something fundamental and important—that something significant and consequential hangs on the choice between the two competing interpretive methodologies (although specifying precisely what that something is can itself be a difficult task). Thus, no prominent constitutional theorist suggests that, as a general matter, one could be both an originalist and nonoriginalist at the same time.[10]

Nor have constitutional theorists tended to be an equivocal lot. With perhaps one important exception, there have been no prominent, contemporary theorists who have changed sides in the scholarly debate.[11] Seldom does one see a recantation of earlier work or a fundamental modification of basic premises or principles earlier articulated. Instead, with the passage of time, one is more likely to find leading originalists and nonoriginalists become even more deeply committed to their initial positions.[12]

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must account for the transformative purposes of the text"; judges must "interact with this text.").

9. *See* Robert H. Bork, *The Struggle over the Role of the Court*, NAT'L REV., Sept. 17, 1982, at 1137. For a recent effort to propose an alternative to originalism and nonoriginalism, see Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996) (proposing conventionalism as third option).

10. *But cf.* MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 134-35 (1988) [hereinafter PERRY, MORALITY] (suggesting, in the context of elaborating and defending a nonoriginalist approach to constitutional interpretation, that even a judge who is generally committed to one approach may, in certain circumstances, properly decide to forego that approach and pursue the other).

11. The fact that there seems to be so little changing of sides should not be very surprising. Taking sides in the debates that constitute constitutional theory is often the result of extensive and deep reflection about the nature and role of American politics and law. How one thinks about the Constitution and its interpretation cannot help but be influenced, if not determined, by one's deepest moral and political convictions.

12. Some of the most influential and unrepentant originalists include: Raoul Berger (*see, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) [hereinafter BERGER, GOVERNMENT BY JUDICIARY]; Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 699-701

In this Article, I shall examine the recent work of Michael J. Perry, perhaps the only (and if not the only, surely the most prominent) exception to this phenomenon. For more than fifteen years, Professor Perry has been one of the most important, influential, and consistent expositors and defenders of nonoriginalism. In his most recent work in constitutional theory, however, Perry has switched sides, concluding that nonoriginalism can no longer be defended as the superior way of conceptualizing and interpreting the Constitution.[13] In doing so, Perry has recanted much of his prior work in constitutional theory. When a person of Perry's stature concludes that much of what he has proposed and tried to justify over a span of two decades can no longer be defended, perhaps it is an appropriate time for those of us who have been influenced by his past work to take stock as well.

In what follows, I engage in such an effort. In Part II of this Article, I examine some of the most important elements of Perry's earlier efforts to elaborate and defend a nonoriginalist conception of constitutional interpretation. In Part III, I discuss his most recent, major contribution to constitutional theory and examine the conception of originalism that he now proposes and the reasons he believes it superior to all nonoriginalist competitors. In Part IV, I consider a range of potential explanations for Perry's conversion to originalism, and the extent to which his defense of originalism is persuasive. In Parts V and VI, I attempt to identify the conception of the Constitution which underlies and supports Perry's defense of originalism. I suggest that his abandonment of nonoriginalism might best be explained by a subtle but extraordinarily important change in his thinking about the very nature and function of the Constitution itself. Here, I distinguish two

(1996); Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151 (1993)), Robert Bork (*see, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH (1996); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) [hereinafter BORK, THE TEMPTING OF AMERICA]; Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971)), and Earl Maltz (*see, e.g.*, Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773 (1987); Earl Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987); Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811 (1983)).

Nonoriginalists meeting the same description include: Paul Brest (*see* Brest, *supra* note 4) and Erwin Chemerinsky (*see, e.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989)). *See also* Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 HARV. J.L. & PUB. POL'Y 487 (1996) ("Originalism has dominated too many agendas for too long. We should move on to more fruitful topics.").

13. *See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (1994) [hereinafter PERRY, THE CONSTITUTION IN THE COURTS].

quite different ways of understanding the Constitution. The Constitution as interpreted through nonoriginalism is an aspirational Constitution; and while the Constitution of originalism is not aspirationless, its aspirations are of a quite different sort. A choice between originalism and nonoriginalism, I shall suggest, is at bottom a choice between these two conceptions of constitutional aspirations. Ultimately, in Parts VII and VIII, I conclude that the originalist's conception of the Constitution—even that of an originalist as sophisticated and thoughtful as Perry—should be rejected, as should the originalist approach to constitutional interpretation upon which it is based.

II. The Initial Stance: Perry's Endorsement of Nonoriginalism

In his first book, *The Constitution, the Courts, and Human Rights*,[14] written in 1982, Michael Perry set out to "elaborate a functional justification for noninterpretive review with respect to human rights issues."[15] Perry argued that virtually all of the Supreme Court's modern individual rights jurisprudence—a jurisprudence which incorporated a generally expansive view of the rights of the individual against the state, and of which Perry generally approved—"must be understood as a species of policymaking, in which the Court decides, ultimately without reference to any value judgment constitutionalized by the framers, which values among competing values shall prevail and how those values shall be implemented."[16] In Perry's view, for example, one could not be an interpretivist (originalist) and approve of or defend most modern First Amendment or Fourteenth Amendment limitations on state or federal action because the value judgments which justified these limitations were not those of the Framers or Ratifiers of those two amendments. "Instead, [the Court] is making and enforcing value judgments of its own . . . ."[17] The principal

14. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982) [hereinafter PERRY, HUMAN RIGHTS].

15. *Id.* at 27. His book represented an impressive effort to justify and defend this sort of nonoriginalist decision-making, as well as an effort to justify a "(a fierce) judicial activism." *Id.* at 138. In the second chapter, Perry concluded that noninterpretive review was illegitimate in federalism and separation-of-power cases. *See id.* at 37-60.

16. *Id.* at 2.

17. *Id.* at 66. As a case in point, Perry argued that the principle of "equality of the races" which the Supreme Court "read into the [F]ourteenth [A]mendment," and which justified the invalidation of school segregation in *Brown v. Board of Education*, 397 U.S. 483 (1954), is a principle which "the framers did not constitutionalize." PERRY, HUMAN RIGHTS, *supra* note 14, at 67. In *Brown*, "the Court does not enforce a value judgment the framers made but, instead, makes and enforces a value judgment of its own." *Id.*

purpose of the book was to offer a "functional justification" for noninterpretive review.[18]

In a subsequent book published in 1988, entitled *Morality, Politics, and Law*,[19] Perry further developed his nonoriginalist conception of constitutional interpretation. In the process, he presented "the soundest—most attractive, least vulnerable" version of originalism he could (then) imagine.[20] According to that version:[21]

> [A] judicial decision that a law or other government action is unconstitutional is legitimate . . . only if the original belief(s) signified by the relevant constitutional provision (in conjunction with whatever beliefs are supplemental to the original belief) entails the conclusion that government has done something it may not do or failed to do something it must do.[22]

In what Robert Bork was to call an admirable defense of originalism "against some of the most common revisionist attacks,"[23] Perry sought to dispel misconceptions about originalism which had become prevalent in constitutional scholarship. For example, he pointed out that originalism did not require that a judge today must decide a constitutional issue the way the Framers would have decided it.[24] Instead, "the originalist project is to discover what belief(s) the ratifiers constitutionalized, and then to decide the case on the basis of that belief (in conjunction with whatever beliefs are supplemental to it)."[25]

After dispelling various misconceptions about originalism, and after concluding that originalism did not face "insurmountable difficulties," Perry still rejected it.[26] His grounds for rejection were not that the weaknesses of originalism were intrinsic, but rather that they were

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18. *Id.* at 27. For an assessment of Perry's argument, see Richard B. Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 MICH. L. REV. 782 (1983).

19. PERRY, MORALITY, *supra* note 10.

20. *Id.* at 122.

21. Perry distinguished three types of originalism:

> Democratic originalism is based on a theory of the proper role of courts in a democratic society. Structural originalism is based on a theory of the proper separation of powers among the legislative, executive, and judicial branches of government. Constitutional originalism is based on a theory that only the originalist judicial role is legitimate because only the judicial role authorized by the ratifiers of the Constitution is legitimate and they authorized the originalist role.

Id. at 128. Perry argued that only "democratic" originalism was viable and used it as his paradigm. *See id.*

22. *Id.* at 123 (footnote omitted).

23. BORK, THE TEMPTING OF AMERICA, *supra* note 12, at 216.

24. *See* PERRY, MORALITY, *supra* note 10, at 125.

25. *Id.* at 126.

26. *Id.* at 131.

comparative.[27] Perry stated that "originalism lack[ed] the strengths of the nonoriginalist theory of [the] judicial role."[28]

According to Perry, nonoriginalism's most important comparative strength is that it allows, as originalism does not, for the text of the Constitution to have "multiple meanings."[29] In addition to its original meaning, the text frequently bears an aspirational meaning.[30] While it may have grown out of the original meaning, the aspirational meaning, unlike the original, is not simply a communication to us from the past, but is a "progressive generalization of the original meaning."[31] The aspirational meaning of the text is, therefore, distinct from its original meaning. Nonoriginalism contemplates that a constitutional interpreter, with respect to some provisions of the Constitution, will ascertain the text's symbolic or aspirational meaning and determine its significance, if any, for the case at hand.[32]

As one might expect, the aspirations signified by such constitutional provisions as the Equal Protection Clause,[33] the Due Process Clauses,[34] the Free Speech Clause,[35] and the Cruel and Unusual Punishment Clause[36] can be quite abstract and indeterminate. A nonoriginalist theory of constitutional interpretation might be expected to provide guidelines for interpreting these aspirations and for determining what they suggest for the disposition of particular cases. According to the theory Perry espoused in the late eighties, a judge deciding what the relevant aspiration requires need not rely upon or defer to conventional or majoritarian beliefs about an aspiration's meaning. Instead, the judge was free to rely on his or her own beliefs as to its meaning.

Perry did not believe that nonoriginalist judges would or could rely upon beliefs which were highly idiosyncratic or radically disconnected from the community's beliefs. After all, nonoriginalist judges are a part of—indeed, Perry argued, they are stewards of—the community's traditions. Nonoriginalist judges should consult the Framers' and Ratifiers' beliefs in determining what a constitutional aspiration

27. *See id.*
28. *Id.*
29. *Id.* at 133.
30. *Id.* (noting that constitutional text is "a symbol of a fundamental aspiration of our political tradition").
31. *Id.* at 133-34.
32. *See id.* at 135-36.
33. U.S. CONST. amend. XIV, § 1.
34. U.S. CONST. amends. V, XIV.
35. U.S. CONST. amend. I.
36. U.S. CONST. amend. VIII.

requires: "The ways in which they shaped and responded to the aspirations of the tradition may well shed important light on how we should shape and respond to those aspirations."[37] But, to consult original beliefs for whatever wisdom and enlightenment they may contain is one thing; to defer to original beliefs out of a sense of obligation in the face of the judge's own strongly held contrary moral sense, is quite another.

Perry defended his nonoriginalist conception of constitutional interpretation and the judicial role from a variety of anticipated criticisms. Prominent among these was the claim that nonoriginalism was undemocratic and therefor illegitimate.[38] According to this criticism, when courts set aside policy decisions made by political majorities and their representatives, the courts engage in policymaking which is electorally unaccountable. Since our political system presupposes popular sovereignty and self-government, only those who are directly or indirectly accountable to the people can exercise policymaking power. Thus, when unelected and life-tenured federal judges invalidate the outcome of legislative processes they act (at least presumptively) illegitimately. According to many of nonoriginalism's critics, the exercise of judicial power can claim legitimacy only when it can be justified by reference to value judgments constitutionalized by the Founders.

Perry responded to these criticisms in several ways. First, he noted that any conception of the judicial role, whether originalist or nonoriginalist, in which unelected judges have the power to set aside policies adopted by political majorities is in tension with the principle of electorally accountable policy-making.[39] Perry further argued that while we are unquestionably committed to democratic governance, precisely what democracy requires has been and remains contested.[40] Electorally accountable policy-making is not the only commitment of democratic governance. Democracy also entails other commitments, such as equality and justice. Originalism represents one way to achieve these commitments and to reasonably resolve the tensions

37. PERRY, MORALITY, *supra* note 10, at 150.

38. *See id.* at 163.

39. For a thoughtful, recent discussion of the issue of the antimajoritarian implications of judicial review, see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

40. *See* PERRY, MORALITY, *supra* note 10, at 165 ("No particular conception of democracy—that is, no particular conception of what the judicial role in that governmental apparatus should be—is axiomatic for the tradition. The tradition has never settled, even provisionally, on what the judicial role should be.").

that sometimes arise between their achievement and electorally accountable policymaking. It does not, however, represent the only way.[41]

In Perry's view, each of us must decide for himself which conception of constitutional interpretation, as well as which conception of the Constitution itself, provides the soundest political and moral basis for our democratic polity.[42] This decision should rest on our assessment of which conception, originalist or nonoriginalist, has achieved, and is likely to achieve, the best accommodation of our sometimes conflicting commitments and aspirations.

Unlike the work of many constitutional theorists, Perry's work has been self-avowedly contingent and tentative. By conceding, and even insisting, that one's preference for originalism or nonoriginalism should depend upon one's assessment of the actual or likely doctrinal consequences of each, Perry has largely avoided the purism and abstractionism that has frequently characterized much of the theoretical debate.[43] Unlike the "true believers," for him "constitutional theory is, alas, an inconclusive enterprise."[44] Accordingly, if nonoriginalism went haywire—if it generated decisions which did not represent morally sustainable doctrine—one should feel free to abandon it.[45]

41. Perry did conclude that originalism provides a "better way of keeping faith" with the aspiration of electorally accountable policy-making. *Id.* at 168.

42. Debates about constitutional interpretation sometimes assume that there is some axiomatic conception of the Constitution in our political culture, and some consensual understanding of its meaning and role. According to some originalists, the Constitution is equated with its original beliefs. But, as Perry noted, "'The Constitution' is not axiomatically equivalent to 'original beliefs.' 'The Constitution' can well mean, in part, 'the aspirations or ideals signified by the constitutional text.'" *Id.* at 161-62. For further discussion about the extent to which the concept of the Constitution is contested and the significance of this fact for assessing debates about constitutional interpretation, see Richard B. Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 Nw. U. L. REV. 1435 (1984). Professor Perry has recently engaged in an extended inquiry into many of the important issues associated with defining the Constitution. Michael J. Perry, *What Is "The Constitution"?*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS (Lawrence A. Alexander, ed., forthcoming 1997) [hereinafter Perry, *What Is "The Constitution"?*]. For further discussion of the contested status of the Constitution in constitutional theory, see *infra* notes 158-75.

43. According to Perry, "One's decision to accept or reject . . . any conception of judicial role . . . is always *contingent, speculative,* and *provisional* and therefore *revisable.*" PERRY, MORALITY, *supra* note 10, at 169.

44. *Id.*

45. In his earlier work, Perry had insisted that "[c]onstitutional theory, like political theory generally, must be rooted in present as well as in past experience, lest the theory's relevance be confined primarily to the past," and that our evaluation of nonoriginalism "must proceed principally by reference to how such review has worked, can work, and is likely to work in the modern period." PERRY, HUMAN RIGHTS, *supra* note 14, at 116-17.

This course of constitutional interpretation culminated in Perry's 1988 book.[46] Perry's assessment of the work of the modern Supreme Court led him to confidently re-endorse nonoriginalism.[47] He claimed that the largely nonoriginalist Court had produced sounder constitutional decisions and doctrines than would have been produced by an originalist Court.[48] Indeed, "[i]n the modern period . . . the Court's record in the service of individual rights has been admirable."[49]

III. Changing Sides: Perry's Abandonment of Nonoriginalism

Well, as the saying goes, "that was then, and this is now." In his most recent book in constitutional theory, *The Constitution in the Courts*,[50] Perry has abandoned nonoriginalism.[51] In the relatively short span of six years, Perry has gone from one of nonoriginalism's most prominent, eloquent, and ardent defenders to one of its most vigorous critics. Noting the "tendency of many scholars to roll their eyes, if not sneer, when someone defends the originalist approach to constitutional interpretation," he now argues that originalism is the most defensible approach to constitutional interpretation.[52]

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46. *See* PERRY, MORALITY, *supra* note 10.

47. *See id.* at 168.

48. *See id.* Perry was not endorsing "every detail of modern constitutional doctrine." *Id.* at 166. Instead, he suggested that "on balance, the doctrine we have is sounder than the doctrine we might have had." *Id.* He acknowledged that his "on balance" assessment was a legitimately "contestable element in [his] defense of nonoriginalist judicial review." *Id.* at 300 n.162.

49. *Id.* at 166-67. This opinion is consistent with the evaluation of the Court's work in Perry's first book. *See* PERRY, HUMAN RIGHTS, *supra* note 14, at 117.

50. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13.

51. Perry's abandonment of nonoriginalism is not based upon an argument that it is theoretically incoherent or rationally indefensible. Indeed, he notes that "[i]t is not impossible . . . to imagine the outlines of a coherent argument for a nonoriginalist approach to constitutional interpretation." *Id.* at 53. Instead, he argues that "in the context of the American political-legal culture" it is doubtful that any argument for nonoriginalism is likely to gain widespread popular or professional support. *Id.* at 52.

At least at first blush, this might seem like a curious claim, coming as it does from a scholar who has been a prominent defender of nonoriginalism and who has noted in previous work that the Supreme Court and a large majority of the scholarly and judicial community have, at least in the modern period, been nonoriginalists, and that nonoriginalist doctrines have been widely embraced by the body politic. *See* PERRY, HUMAN RIGHTS, *supra* note 14, at 11, 63, 117; PERRY, MORALITY, *supra* note 10, at 166-67.

52. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 50-51. Perry now challenges "critics of originalism to take the time and spend the effort to present and defend an alternative, nonoriginalist approach." *Id.* at 51. To those who disagree with his view that the original understanding is authoritative Perry issues this challenge: "The ball

A. Identifying Differing Versions of Originalism

Perry begins by distinguishing, as have other theorists,[53] between different versions of originalism. He considers and rejects (as he did when he endorsed nonoriginalism[54]) strict forms of originalism, the kind most commonly associated with the work of Raoul Berger.[55] According to strict originalism, constitutional meaning must be determined by reference to the specific value judgments of the Founders[56] as they would have understood and applied those judgements. While Perry acknowledges that the Founders' own views (whether known or constructed) of the validity of a practice are relevant to a contemporary constitutional interpreter, they are in no sense binding or determinative.[57]

Although strict versions of originalism should be rejected, more moderate versions are a different matter. Indeed, it is a moderate version of originalism that Perry endorses. The notion of moderate originalism is not a new one in the lexicon of recent constitutional theory.[58] Perry's formulation, however, is especially nuanced and sophisticated, and warrants fairly extensive elaboration.

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is in the court of those who do not like that answer to present an argument for answering that some nonoriginal understanding/meaning is authoritative." *Id.* at 49.

53. *See, e.g.*, GREGORY BASHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY (1992); CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 173-78 (1996) (distinguishing between "hard" and "soft" versions of originalism); Brest, *supra* note 4; Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

54. *See supra* note 24 and accompanying text.

55. *See* sources cited *supra* note 12 referring to Raoul Berger. As Perry notes, most prominent defenders of originalism, including Robert Bork, have rejected strict originalism. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 46. *But cf.* Christopher E. Smith, *Bent on Original Intent*, 82 A.B.A. J. 48 (1996) (discussing the evolution of Justice Thomas's quite narrowly originalist approach to constitutional interpretation).

56. In this Article, I will refer to the more inclusive "Founders" (consisting of the drafters, ratifiers and other prominent actors often associated with the adoption of constitutional provisions) as the people whose views constitute the original understanding. *But see* Richard B. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 780 (1983) [hereinafter Saphire, *Judicial Review*] (suggesting that use of the term "the Constitution's historical context" is preferable to "framers' intent").

57. The Founders' specific understandings or applications are relevant to the extent they provide "some evidence of what directive the Ratifiers understood the provision to communicate, of what directive they meant to issue in ratifying the provision." PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 43. Perry argues that it is the ratifiers of a constitutional provision whose belief is relevant in determining original understanding. *See id.* at 32-33.

58. For one of the earliest and most prominent discussions, see Brest, *supra* note 4. For a more recent discussion of "moderate intentionalism," see BASHAM, *supra* note 53, at 55-56.

B. Perry's Formulation of a Moderate Originalism

Perry begins with the notion that the Constitution is meaningful in a substantive sense. That is, whatever else it was designed to do, or whatever other functions or roles it has come to play in our society, the Constitution is a repository of particular ideas about political organization and human rights. These ideas consist of, or can be expressed in terms of, a set of principles or rules that are to be taken as authoritative in some meaningful sense—principles and rules that determine the construction of government and the ways in which it interacts with persons subject to its authority.[59] These principles, which Perry calls "directives,"[60] represent the meaning of a constitutional provision. The object of constitutional interpretation is to determine the meaning of these directives.

In Perry's view, the identification of the directives represented by a constitutional provision is the exclusive task of constitutional interpretation—one that in an important sense, exhausts the originalist enterprise. Perry's methodology rests upon a distinction between constitutional *interpretation*, or the "interpretive inquiry," and constitutional *specification*, or the "normative inquiry."[61] Chapter 4 of his book is devoted in part to an argument about how courts should proceed in identifying the Constitution's directives.[62] Later, he addresses the process of constitutional specification, a process in which a court determines the shape accorded to the relevant directives in the context of a given case and, thus, what result is required by the directives in that case.

The goal of originalism, and of the interpretive inquiry, is to determine what directive a provision represents.[63] The original meaning of the directive has authoritative status for the following three rea-

59. Perry argues that the idea of our Constitution would be incoherent if its principles were not taken as authoritative in some sense, a point that seems difficult to refute. *See* Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1486 (1985) ("Justification of the authoritativeness of the Constitution is therefore not necessary at present."). Given the purposive nature of the Constitution, Perry argues that it would also be incoherent not to privilege the original understanding of the Constitution's provisions. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 48.

60. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 36, 58.

61. *See infra* note 87.

62. Chapter 4 is entitled *Originalism Does Not Entail Minimalism, I: The Indeterminacy of History*. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 54.

63. *See id.* at 70 ("The aim of the interpretive inquiry is to translate or decode the text, it is to render the text intelligible by identifying the directive or directives represented by the text.").

sons: (1) the Constitution is a communication by our political ancestors to the nation as it then existed and as it was to become,[64] (2) the directives that constitute our political ancestors' communication are worth protecting,[65] and (3) originalism provides the best assurance that these directives will be respected until our unwillingness to continue to respect them can be manifested in a reliable way.[66]

Sometimes the original understanding may be well known and uncontroversial. Frequently, however, the interpretive inquiry will be difficult, and ascertaining the original understanding may be quite problematic.[67] Some constitutional provisions are "opaque, vague, or ambiguous."[68] A judge may be uncertain about the identity of the directive that the provision contains, or she may conclude that the provision contains more than one directive. Confronted by such textual indeterminacy, or the indeterminacy of the relevant directive(s),

64. *See id.* at 47-48.

65. *See id.* at 21-24. Perry's argument here is that the rights set out in our Constitution include all or most of the rights that much of the world has come to regard as worth protecting. In support of this conclusion, he cites The Charter of Paris for a New Europe, signed in Paris on November 21, 1990. *See id.* at 22. Of course, we in the United States and many of the signatories to the Charter have different—sometimes radically different—understandings of what some of the general rights referred to in the Charter (e.g., freedom of expression and freedom from cruel or inhuman punishment) actually require or prohibit. (Protection for hate speech, capital punishment, and abortion come to mind.) Perry, therefore, seems to rest this argument on a fairly abstract notion of the basic rights set out in the Constitution and representative contemporary human rights documents.

66. *Id.* at 23, 49.

67. Perry acknowledges that it may sometimes be difficult to determine with certainty or confidence the identity of the directive(s) represented by a constitutional provision. However, he rejects the view offered by many nonoriginalists (and some originalists, too) that, by virtue of their abstractness or generality, or by virtue of the absence or obscurity of available historical materials, it may be impossible to determine the identity of the directives represented by some constitutional provisions. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 39-40. In the usual case, he believes that a court can determine the identity of the relevant directive either through the normal process of historical investigation or by constructing the directive's identity through "a hypothetical conversation with those in the past whose understanding counts." *Id.* at 41. In this regard, Perry joins other originalist scholars who have argued that originalism's coherence or intelligibility depends only upon the ability to determine, albeit without complete confidence, the directive that "best captures the purpose or point or meaning of what [the Founders] did." *Id. But see* Martin H. Redish, *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation*, 88 NW. U. L. REV. 165, 167-68 (1993) (arguing that Perry underestimates the evidentiary problems in ascertaining the framers' intent as well as the fact that "purely conceptual difficulties plague the originalist inquiry").

68. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 36. Moreover, the original meaning of a directive may "diverge radically" from the (perhaps widely shared) contemporary understanding of its meaning. *Id.*

the judge will have to make difficult and contestable determinations which inevitably will leave "room for judicial discretion."[69]

Perry delves extensively into the problem of the "indeterminacy of history" and its implications for originalism.[70] It is here that an explanation for his transformation from nonoriginalist to originalist begins to become evident. When he was a proponent of nonoriginalism, Perry had concluded that most of the Supreme Court's modern individual rights jurisprudence (much of which he approved) could not be defended in terms of value judgments constitutionalized by the Founders.[71] Rather, these decisions could only be justified as the product of an interpretive process whose norms were derived from the "judge's own moral vision."[72] This conception of the judicial function entailed the sort of judicial discretion and creativity that did not easily square with conventional assumptions about the proper role of unelected judges in democratic governance—assumptions that were central to originalist theory.[73] Consequently, a defense of the legitimacy of modern human rights decisions could not be accomplished on originalist grounds.

Perry now argues that originalism and a defense of the modern constitutional jurisprudence of human rights can coexist. He challenges the commonly held notion that originalism necessarily entails a "minimalist," or highly constrained, conception of the judicial role.[74] Given the problem of indeterminacy, judges will be faced with choices about the most plausible way to understand and then to represent or articulate the meaning of the directive at issue in the case at hand; some plausible representations will inevitably be more determinate than others. Nothing about originalism requires that the judge be an interpretive minimalist. That is, nothing about originalism requires the

69. *Id.* at 55.

70. *Id.* at 54-82 (Chapter 4).

71. PERRY, HUMAN RIGHTS, *supra* note 14, at 74-75.

72. *Id.* at 123.

73. For a classic presentation of the extent to which defenses of originalism have been closely related to the concern for highly constrained notions of the judicial role, see BORK, THE TEMPTING OF AMERICA, *supra* note 12. As Professor Sunstein has recently observed:

> The impulse toward originalism in constitutional law is best understood as an effort to make constitutional law into, or closer to, a system of rules, in which judges are disciplined by provisions that are far from open-ended standards, that limit in advance, that do not threaten predictability, and that have a democratic pedigree by virtue of their connection to past judgments of those who have ratified constitutional provisions—"we the people."

SUNSTEIN, *supra* note 53, at 174.

74. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 56.

judge to credit the most determinate, plausible interpretation of a constitutional provision as the authoritative meaning.[75]

Thus, originalism does not require or presuppose either minimalism or nonminimalism.[76] As a general philosophy, or in particular cases, an originalist can feel free to adopt either position. But on what basis is a judge to decide between them?[77] What considerations are likely to influence the decision to adopt one or another approach to the interpretive inquiry?[78]

Perry identifies two such considerations. The first is the judge's conception of the proper judicial role. If the judge believes that proper principles of political organization contemplate a relatively circumscribed judicial role vis-à-vis the other branches of government, the judge will be predisposed or inclined toward interpretive minimal-

75. *See id.* at 58 ("[T]he originalist approach . . . leaves ample room for the play of competing views about how the Court should resolve indeterminate inquiries into original meaning.").

76. Professor Redish has argued that it is a fallacy to suppose that one can be both an originalist and a minimalist. He claims that "prior to engaging in a detailed inquiry into the framers' intent, an originalist has no business describing herself as a minimalist, because she cannot know what her historical inquiry will show about the framers' intent." Redish, *supra* note 67, at 170. Presumably, the same claim would apply to the notion that one is both an originalist and a nonminimalist.

Perhaps Redish's claim is based upon the possibility that an originalist might discover that the Founders were nonminimalists, and that a principled originalist would thus have to adopt the Founders' interpretive (and perhaps even their normative) philosophy. *See* Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 NW. U. L. REV. 175, 176 (1993) ("An examination of the historical record suggests that a *true originalist must almost certainly be a non-minimalist.*"). Perry has rejected, as have many other theorists, as question-begging the notion that the possibility that the Founders were originalists would be a sufficient argument for originalism. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 50. It would seem equally question-begging to maintain that the Founders' views, if any, about minimalism or nonminimalism should be dispositive.

77. It is quite possible, if not entirely likely, that many judges, either at the time of their appointment or election to office, or during their service on the bench, will never have made a self-conscious, deliberate, and considered choice between minimalism an nonminimalism (just as it is possible or likely that many judges will never have made such a choice between originalism and nonoriginalism). But every judge will eventually develop a judicial philosophy, even if such a philosophy consists only of a diffuse set of attitudes or inclinations that influence the way he or she approaches and ultimately decides hard cases. Thus, an inquiry into the factors that influence or shape a judge's interpretive or normative position may be relevant either to the evaluation of the formal position actually adopted by a given judge or to an evaluation of the approach a judge actually takes to the decision of constitutional cases.

78. Of course, a judge who self-consciously grapples with these issues would presumably have another decision to make: whether or not to adopt an originalist approach to constitutional interpretation in the first place. I put off until later in this Article a discussion of the considerations which might affect this decision.

ism.[79] This is so because minimalism may well result in greater deference to the decisions of the other institutions of government and thus a much more limited realm for the exercise of judicial power.[80] Conversely, if a judge believes that our political arrangements and traditions permit or even invite an activist posture he or she will be inclined toward nonminimalism, the interpretive position most conducive to meaningful engagement with other government institutions.[81]

A second consideration likely to affect whether a judge adopts a minimalist or nonminimalist interpretive perspective is the nature and content of his or her "political-moral values."[82] Of course, the extent to which the judge's own values will influence his or her decision of what the Constitution means for the case at hand will itself be influenced by his or her conception of the appropriate judicial role. Application of a judge's own moral values might entail a measure of discretion, and some conceptions of the judicial role will tolerate more discretion than others. A judge for whom the exercise of discretion does not represent a nightmare,[83] and for whom constitutional decision-making requires consideration of "the likely consequences for the well-being of the political community,"[84] will find nonminimalism attractive. Conversely, a judge who prefers an approach "which af-

79. Perry identifies James Bradley Thayer as the quintessential interpretive minimalist, and engages in an extensive critique of Thayer's famous discussion of the judicial role. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 84-95 (discussing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)); *see also One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993). Perry identifies Justice Scalia as a judge whose minimalist conception of judicial role has influenced his embrace of interpretive and normative minimalism. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 59-61, 85.

Perry is careful to make a distinction between arguments for the originalist approach to constitutional interpretation and arguments for interpretive minimalism. Arguments for originalism are arguments about how any constitutional interpreter—including, but not limited to, judges—should interpret the Constitution; they are arguments "about what 'the Constitution' is and what it should mean." *Id.* at 58. Arguments about interpretive minimalism are "focused just on the judiciary: on its proper constitutional-adjudicatory role in relation to the other branches and agencies of government." *Id.*

80. Perry's suggestion that minimalism will normally result in judicial deference has been questioned. *See* Redish, *supra* note 67, at 169.

81. Perry identifies Justice William Brennan as a nonminimalist. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 90-91.

82. *Id.* at 61.

83. *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

84. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 62.

fords the least opportunity for a judge's own political-moral values to influence the outcome of particular cases"[85] will favor minimalism.

Similar considerations will affect the judge's normative inquiry. Once a constitutional directive is identified or "translated,"[86] and the directive is found to be indeterminate, the process of specifying the directive (which Perry calls the normative inquiry) begins.[87] "The aim of the normative inquiry is to specify or shape the directive, it is to render the directive determinate in a particular context . . . by establishing the concrete meaning of the directive in that context."[88] It is here that the judge must give content to the directive by determining its significance for the case at hand. Since most, or even all of the Constitution's provisions dealing with individual rights represent one or more values with respect to what it is (or, for an originalist, what the Founders thought it was) to be human, the judge must determine what the relevant value requires the government to do (or not do) in the particular case at hand.

As with the interpretive inquiry, the normative inquiry can be approached from either a minimalist or nonminimalist perspective. Here, too, the judge's position will be influenced by his or her view of the proper judicial role and by his or her personal morality. A judge who adopts a minimalist approach is likely to specify indeterminate constitutional directives narrowly, thus according significant deference to the governmental officials whose policies or conduct are under review.[89] On the other hand, a nonminimalist judge will be more in-

85. *Id.* at 84.

86. *Id.* at 38. In some cases, it may not be necessary for the interpreter to translate the provision. Apparently, this is because the text may be so clear that there can be little question about the identity of its directive, or perhaps because past interpretation has clearly established the directive's identity. Here, Perry gives the example of Article I's requirement that the Senate be composed of two senators from each state. *See id.*

87. Perry is careful to make a distinction between textual determinacy/indeterminacy and the determinacy/indeterminacy of the directive(s) represented by the text. Even where the text is found to be determinate—where "there is only one plausible conclusion about what directive the text represents"—the directive represented by the text may be indeterminate, thus requiring normative inquiry. *Id.* at 73. Presumably, if the text is determinate and the directive represented by the text is also determinate, the case can be decided in more or less mechanical fashion, without the need to engage in normative reasoning.

88. *Id.* at 71.

89. *See id.* A minimalist judge "will want to defer to any reasonable (i.e., not unreasonable) specification implicit in a law or other governmental action claimed to violate an indeterminate constitutional directive." *Id.* Presumably, judicial deference here would be based on the notion, and would be justified to the extent, that the relevant governmental officials share the responsibility with judges to undertake the interpretive and normative inquiries.

clined to specify the directive more broadly and will be less inclined to feel bound by the judgment of governmental officials.

Perry, it turns out, is neither a pure minimalist nor a pure nonminimalist. Instead, he argues that judges should adopt a nonminimalist position with respect to some individual rights issues and a minimalist position for others. Perry develops his position in the context of an examination of the Fourteenth Amendment. As an originalist, of course, his inquiry consists of a historical effort to identify or reconstruct one or more principles (directives) which best explain the Founders' thinking about the Amendment. He examines recent historical scholarship concerning the three principal clauses of the Fourteenth Amendment[90] and concludes that the most persuasive scholarship identifies a general antidiscrimination principle underlying each of them.[91]

Perry's view of the antidiscrimination component of the Fourteenth Amendment is distinctly nonminimalist. He concludes that this principle was not intended to prohibit discrimination against only blacks. The Founders' theory of antidiscrimination was more general, and the most (although not the only) plausible interpretation of that theory reveals two principles. First, states were prohibited from discriminating against a group "on the ground that members of the group are inferior, as human beings, to persons not members of the group, *if the group is defined, explicitly or implicitly, in terms of a trait irrelevant to their status as human beings.*"[92] Second, states could not discriminate against a group

> on the basis of hostility towards the members of the group, *if the group is defined, explicitly or implicitly, in terms of an activity, way of life, or set of beliefs—whether that activity, way of life or*

90. Privileges and Immunities, Equal Protection, and Due Process Clauses. U.S. CONST. amend. XIV, § 1.

91. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 133. Perry's historical examination concludes that "[t]here is no serious doubt that the Privileges or Immunities Clause was meant to protect the privileges or immunities of citizens of the United States from legislation that discriminates on certain prohibited bases. The serious question is whether it was meant to do more than that." *Id.* Relying on recent work of such scholars as John Harrison and William Nelson, Perry notes that, textually, each of these clauses focuses on a different type of government action (e.g., legislative, administrative and judicial) but that at its core, each was primarily concerned with official discrimination. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); John Harrison, *Reconstructing the Privileges or Immunities Clauses*, 101 YALE L. J. 1385 (1992).

92. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 130.

set of beliefs be religious, political, cultural, etc.—towards which no state may, as a constitutional matter, express hostility.[93]

The first of these principles, call it the "status-of-being-human principle," justifies, according to Perry, almost all of the Court's modern equal protection doctrine in the areas of racial, gender, and illegitimacy discrimination. When government disadvantages people just because of an immutable characteristic they possess, which is not relevant to their status as human beings, the government's action is constitutionally invalid. Thus, *Brown v. Board of Education*[94] and *Loving v. Virginia*[95] were correctly decided: "There is, finally, no blinking the fact that the laws and practices at issue in *Brown* . . . and *Loving* were rooted in white-supremacist ideology; they were predicated on the view that nonwhites—in particular, persons of African ancestry—are inferior, as human beings, to whites."[96]

The "status-of-being-human" aspect of the antidiscrimination principle also explains and justifies much of the Court's modern Fourteenth Amendment jurisprudence beyond racial discrimination. For example, while the drafters and ratifiers of the Fourteenth Amendment did not believe that gender was an irrelevant criterion for making legislative distinctions,[97] an originalist judge is not bound by their belief: "The question, rather, is whether sex is in fact relevant to a person's status as a human being."[98] Though conceding that some instances of gender discrimination may be premised on nonsexist grounds, Perry argues that sexism is so pervasive in our society that the significant burden the Court places on the government to sustain gender classifications is fully justified. Moreover, while *Roe v. Wade*[99] and its progeny are deeply problematic as due process decisions, Perry argues that they are justified on antidiscrimination grounds.[100] To the

93. *Id.* at 131. Perry finds that the principal source of this directive is the Privileges and Immunities Clause, not, as commonly supposed, the Equal Protection Clause. *See id.*

94. 347 U.S. 483 (1954).

95. 388 U.S. 1 (1967). In *Loving*, the Court invalidated, on equal protection grounds, a Virginia statute prohibiting interracial marriage.

96. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 145. Perry's (nonminimalist) originalist defense of *Brown* consumes less that one paragraph. Michael McConnell's recent effort to defend *Brown* on minimalist premises consumes almost 200 pages. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). This suggests that nonminimalism may have certain practical advantages.

97. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 149-50.

98. *Id.* at 150.

99. 410 U.S. 113 (1973) (establishing a woman's constitutional right to an abortion).

100. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 184-89. Perry asserts that his analysis of abortion is consistent with the Court's approach in *Planned*

extent that laws restricting abortion can principally affect women seeking an abortion, such laws reflect prohibited sexist ideology.[101]

The second aspect of the Fourteenth Amendment's antidiscrimination principle might be called the "no-hostility" principle. This principle concerns government hostility toward one's "way of life" or "underlying beliefs."[102] Since Perry identifies no modern Fourteenth Amendment case which depends on it, this principle appears to play a subsidiary role in the development of modern constitutional jurisprudence.

Does the Fourteenth Amendment concern itself with nondiscriminatory government action? Modern Supreme Court jurisprudence recognizes both substantive and procedural constraints derived from the Due Process Clause.[103] An interpretive minimalist might conclude that much, or even all, of the Court's substantive due process jurisprudence is illegitimate. Such a conclusion might be based on the observation that the text of the Due Process Clause expresses concern about process, not substance,[104] and that even if the text were open to a substantive interpretation, concerns about judicial role would caution against such an expansive interpretation. Perry, however, rejects such a minimalist interpretation. His review of recent historical scholarship and his own examination of the historical record lead him to conclude that the Founders expected that the Fourteenth Amendment would impose at least some substantive constraints on state action. In particular, he finds in the Fourteenth Amendment a "reasonableness

Parenthood v. Casey, 505 U.S. 833 (1992). *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 189 n.105.

101. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 189 n.105.

102. *Id.* at 131. Perry gives, as an example, a law denying privileges or immunities to Southern whites who remained loyal to the Union during the Civil War. *See id.* While Perry does not pursue the matter, it would seem as if certain kinds of government conduct might violate both aspects of the antidiscrimination principle, or that the principles might overlap or converge in some cases. One thinks, for example, of a law which disadvantages a member of a particular religious group or deviant minority on the basis of its beliefs or practices thought to be barbaric or otherwise inconsistent with prevailing norms of human(e) conduct.

103. U.S. CONST. amend. XIV, § 1.

104. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980) ("[T]here is simply no avoiding the fact that the word that follows 'due' is 'process'"; "'[s]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"). No one seems to doubt that the Fourteenth Amendment requires the state to conform to at least some standard of procedural regularity. *See id.* at 18 ("By the same token, 'procedural due process' is redundant.").

directive," requiring the state "to regulate [for the public good] . . . in a reasonable fashion."[105]

Although Perry's nonminimalist interpretation of the Fourteenth Amendment leads him to conclude that it contains a directive prohibiting even nondiscriminatory government action, he nonetheless endorses a distinctly minimalist approach to that directive's specification. In a sharp repudiation of his earlier work in which he argued for an expansive interpretation of the Due Process Clause,[106] Perry now believes that courts should be extremely deferential in the specification of the reasonableness directive. Because the reasonableness directive is implicated by the regulation of "virtually *every* law,"[107] an activist judicial posture would raise serious questions regarding the role of the judiciary. While Perry believes that a robust judicial activism is justified in furtherance of the Founders' antidiscrimination values, he finds activism distinctly out of place in furtherance of the Founders' concern for government reasonableness.[108]

105. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 133. Perry believes that the reasonableness directive is properly derivable, not from the Due Process Clause, but from the Privileges or Immunities Clause. Conventional understanding of modern constitutional law takes the Privileges or Immunities Clause as a dead letter, essentially written out of the Constitution by the Supreme Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). Perry's textual and historical analysis of the Fourteenth Amendment leads him to conclude that the Privileges or Immunities Clause is the part of section one which imposes limits on the legislative (as opposed to the adjudicatory or prosecutorial) process. He argues that it is the proper textual focus for evaluating much of the Supreme Court's modern Fourteenth Amendment jurisprudence. However, he concludes that not much rides on the fact that the Court has relied on the wrong clauses (i.e., Due Process and Equal Protection) to justify its doctrine; the important thing is that the results be "supported by *some* clause—by some provision of the constitutional text." *Id.* at 137.

106. *See* PERRY, MORALITY, *supra* note 10, at 173 ("Whatever its original meaning might have been, 'liberty' has come to signify to us—it has come to mean—the freedom of the individual to shape the most fundamental aspects of his or her life according to the dictates of his or her informed and conscientious judgment."). As noted earlier, Perry now traces substantive limits on state legislation to the Privileges or Immunities Clause, not the Due Process Clause. *See supra* note 105.

107. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 166. That is, virtually every law implicates a protected privilege or immunity.

108. *See id.* at 168. Of course, the practical implications of deference under the reasonableness standard will depend on how easily reasonableness claims can be converted into discrimination claims. For Perry, such a conversion seems relatively easy. Perry argues that the functional justification for activism in the antidiscrimination context is inapplicable in the reasonableness context. *See id.* This position sharply contrasts with his earlier arguments that activist judicial review across the whole spectrum of individual rights cases was functionally justified. *See* PERRY, HUMAN RIGHTS, *supra* note 14.

His current argument for deference is premised, in part, on the view that the source of the reasonableness directive, the Privileges or Immunities Clause, is implicated every time the government legislates in a way that might affect an interest that an individual might

In sum, Perry's originalism consists of interpretive and normative components. The interpretive inquiry seeks to take the constitutional text seriously and to identify the principles or directives which the text embodies. Once these are identified, the normative inquiry seeks to determine their shape and meaning. In specifying a directive, the judge tries to determine what the directive requires with respect to the case at hand. Does the text require the vindication of the constitutional claim asserted and the invalidation of the government action under consideration or does it require rejection of the claim and conclusion that the challenged action is constitutional? With respect to both the interpretive and normative inquiries, Perry determines that the judge can adopt either a minimalist or nonminimalist perspective with the former more likely to result in judicial deference to the government than the latter. However, either perspective remains consistent with originalism as long as the judge is committed to the idea that his or her function is to enforce the Constitution as originally understood.

In what follows, I inquire into the reasons for Perry's abandonment of nonoriginalism and his embrace of originalism. I then assess the extent to which Perry's defense of originalism is persuasive.

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regard as important. Were courts to actively engage in reasonableness review, they would risk second-guessing the wisdom of just about everything the legislature does, thus blurring the legislative-judicial distinction which lies at the heart of much separation of powers and democratic theory.

To the extent that the argument is so premised, however, it has a curious ring to it. In his nonoriginalist period, Perry argued for activism under the Due Process Clause, notwithstanding his rather capacious definition of liberty. *See* PERRY, MORALITY, *supra* note 10, at 173-74 (stating that the Due Process Clause embodies the ideal that "government may not deprive us of our precious liberty to shape our lives unless the government must do so in order to secure some overriding good"). This definition of liberty arguably embraces as many interests as does his current definition of privileges and immunities. Even though judicial review under the Due Process Clause also raised the specter of judicial supervision of a wide area of legislative action, that fact was not enough to condemn it.

7 To be sure, Perry's distinction between judicial review under the reasonableness and nondiscrimination directives is not based only on the concern for the ubiquitousness of judicial engagement. He also rests the distinction on what he finds to be the stronger (or clearer) historical pedigree of the antidiscrimination principle. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 168 ("Moreover, it is open to reasonable doubt that the reasonableness directive is a part of the original meaning of section 1."). This seems to leave open the possibility that an originalist judge who is more convinced than Perry that the concern for reasonableness was important to the Founders would be justified in vigorous reasonableness review.

IV. Possible Explanations for Perry's Conversion to Originalism

From leading nonoriginalist to originalist: What might account for the apparent transformation of one of the most respected constitutional theorists of his generation? A number of explanations suggest themselves.

A. The Opportunism and Pragmatism Theses

The first explanation is a rather simple one which I suspect will occur to more than a few readers of Perry's new work. It might be called the opportunism thesis, and it goes something like this: Perry has spent much of his academic career trying to defend, on nonoriginalist grounds, the individual rights jurisprudence spawned by the Warren Court.[109] While his work has been influential in certain academic circles, its central principles have never been embraced by the Supreme Court. Perry's work has remained, as a general matter, quite controversial. Perhaps seeking greater credibility and influence (whether consciously or not), Perry may have concluded that it had become necessary to repackage his arguments in more traditionalist terms. He therefore set out to construct a theory which would justify the liberal decisions of the modern Supreme Court on grounds more likely to have resonance with two constituents: (1) a Court which now appears to be a good deal more conservative than it was in the late 1970s and 1980s, and (2) older and more influential members of the professoriat who may have either grown weary of Perry's brand of constitutional theory, or become increasingly conservative themselves, or both. Based upon this explanation, Perry's embrace of originalism represents less a genuine reconsideration and modification of previously articulated principles and ideas than a way to appeal to audiences who otherwise would be unsympathetic to the jurisprudence he seeks to explain and defend and with whom his ideas have previously been uninfluential.

A second explanation, which shares some of the assumptions of the first, might be called the pragmatism thesis. This explanation arises from the significant changes in the legal and constitutional cul-

109. Earl Warren was Chief Justice of the Supreme Court from 1953 to 1969. The "Warren Court" was known for its "liberal decisions and judicial policies." *See* Christopher E. Smith, *The Impact of New Justices: The U.S. Supreme Court and Criminal Justice Policy*, 30 AKRON L. REV. 55, 57-58 (1996) (also warning that defining an era by the tenure of the Chief Justice can be quite misleading since the other members of the Court change more frequently).

ture in the last ten or so years, including the retirements of Justices Brennan, Marshall, and Blackmun from the Court and the growing influence of post-modernist thought[110] in the community of legal scholars. It also arises from the fact that the ideas and language of nonoriginalism no longer possess the currency they once did. In the new context, some nonoriginalists might reasonably conclude that they would be ignored or marginalized if they continued to press their stale ideas and rhetoric. To avoid being left behind, these nonoriginalists might quite naturally begin to reconsider their positions and look for ways to reformulate their arguments to better resonate with the non-prevailing elements of the legal culture, especially with those who still take seriously the basic values and aspirations that once made nonoriginalism appealing. In this light, Perry's new thinking might be viewed less as an effort to repackage his old ideas than as a perfectly normal effort to reconceptualize those ideas in a way which better harmonizes them with recent jurisprudential developments and that might enhance the seriousness with which they are received.[111]

There are at least two reasons why I find both of these explanations unpersuasive. First, and less significantly, these explanations, especially the opportunism thesis, ignore a very simple and quite obvious problem. Given the brief period that has elapsed since his most recent defense of nonoriginalism,[112] many critics will doubt Perry's motives, and the claim of opportunism is certain to be raised. Those who have previously rejected his nonoriginalism for its supposed liberal bias are, for the same reason, just as likely to reject his

110. Postmodernism has been defined as "the rejection of this faith in rationalism." Michael Donaldson, *Some Reservations About Law and Postmodernism*, 40 AM. J. JURIS. 335 (1995). For discussion of postmodernism in context of constitutional interpretation, see J.M Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992).

111. A variation of this explanation might go as follows: Imagine that the Supreme Court announced, as a matter of constitutional methodology and doctrine, that it was formally adopting originalism. Nonoriginalist scholars who wished to be taken seriously by judges and lawyers would be faced with two choices. One would simply be to reject the Court's decision as misguided and to press on with their nonoriginalist theorizing in an effort to convince the Justices to see the error of their ways and to recant. A second choice would be to reflect upon and reconsider their nonoriginalist assumptions and premises—a process which might lead them to a deeper understanding of originalism, a somewhat different assessment of its drawbacks, and a different appreciation of its possibilities. For an indication of how bizarre (or, at the least, how thoroughly counterfactual) this variation is, see Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J. L. & PUB. POL'Y 495, 506 (1996) (noting that the Supreme Court, as a general matter, has been so thoroughly and consistently nonoriginalist that a lawyer who insisted on making exclusively originalist arguments on behalf of a client should be considered incompetent and subject to liability for professional malpractice).

112. *See* PERRY, MORALITY, *supra* note 10.

version of originalism. The fact that critics might now claim that Perry is "wishy-washy," unprincipled, or hypocritical will only add cynicism to their rejection of his new thinking. As such a reaction is so predictable, it is inconceivable that Perry believed his new formulations could be at all efficacious.

The second and more important reason for rejecting these explanations (again, especially the opportunism thesis) is based upon my close familiarity with the whole of Perry's professional work, and, on a more personal level, with his thinking and his character.[113] Perry's scholarship has been marked by genuine curiosity and intellectual openness. Although he has been lambasted for the boldness with which he criticizes and sometimes rejects the positions of others as well as for the confidence with which he asserts his own positions,[114] Perry's work is characterized by a degree of open-mindedness and introspection often lacking in the work of other scholars. He has never been reluctant to rethink a position once it has been advanced, and has been quite willing to accept criticism and modify a position when he believes it is warranted.[115]

In addition, Perry's work has demonstrated a commitment to the scholarly tradition. According to this tradition, the object of scholarship is to participate in and advance a conversation about things that are important, to listen to what others have to say about your thinking, to give your interlocutors respectful consideration, and to learn from what they have to teach you. I have no doubt that Perry's new book, *The Constitution in the Courts*,[116] represents the outcome of just such a process. Indeed, it reflects a genuine and fundamental change in his thinking. As I will illustrate, there are important aspects of Perry's work that are subject to criticism. But to suggest that he has tried to repackage his arguments simply to appeal to his critics, or that he has modified his positions simply to be more in tune with the times, is to completely misread Perry's record as a scholar.[117]

113. Michael Perry and I, I am pleased to confess, are good friends.

114. *See, e.g.*, Gene R. Nichol, Jr., *Giving Substance Its Due*, 93 YALE L.J. 171, 181 (1983). Nichol refers to the style and tone of Perry's writing as "contentious. Indeed, like a new gunfighter trying to build a reputation on more established names, Perry seems bent on attack." *Id.*

115. *See, e.g.*, Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts—and Second Thoughts—on* Love and Power, 30 SAN DIEGO L. REV. 703 (1993).

116. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13.

117. Based upon my personal and professional conversations with Perry, it also completely misjudges the content of his character.

B. A Mid-life Conversion?

A third explanation for Perry's conversion also comes to mind, although I think it too can ultimately be rejected. It focuses on age and the wisdom it is so often said to bring. Many are the political activists whose youthful enthusiasm and exuberance have been tempered by the process of growing older. Are law professors any different? To the extent that originalism and nonoriginalism have been equated respectively with political conservatism and liberalism, perhaps Perry's conversion to originalism can be attributed to the sobering effects of middle age.

Indeed, a glance at the style of his new work suggests some evidence for such an explanation. Nowhere in *The Constitution in the Courts*[118] is there to be found the fiery language of Perry's earlier work, language which betrayed almost radical inclinations and an interest "in justifying (a fierce) judicial activism."[119] Instead, Perry now counts himself a constitutional progressive interested in demonstrating that originalism is not necessarily hostile to the progressive's cause.[120] Where he once expressed the desire to "let the framers sleep,"[121] and rejected the notion the framers could successfully be conscripted "to do service in defense of judicial activism,"[122] Perry now believes the framers play an indispensable role in determining constitutional meaning. What once was a deep skepticism about the proposition that original understandings are amenable to some kind of faithful reconstruction[123] has become an insistence that the Court will "usually be able to reach a plausible conclusion about original meaning" and that this is "good enough."[124]

Thus, Perry's current thinking appears somewhat more moderate than it once was in terms of its hope for having a significantly transformative effect on constitutional adjudication and judicial review.

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118. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13.

119. PERRY, HUMAN RIGHTS, *supra* note 14, at 138.

120. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 8-9.

121. PERRY, HUMAN RIGHTS, *supra* note 14, at 75.

122. *Id.*

123. *See id.* at 69 (referring to historical inquiry as "inevitably subjective").

124. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 41. It should be noted that even during his nonoriginalist period, Perry did not subscribe to the extreme historical nihilism sometimes associated with the work of other nonoriginalist thinkers. *See* PERRY, MORALITY, *supra* note 10, at 131 (expressing skepticism about the claim that originalism faces insurmountable difficulties). His current view is that the "practical difficulties that attend the originalist approach to constitutional adjudication," at least in its more moderate forms, do not render that approach incoherent or impossible. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 46.

Perhaps Perry has undergone what might be called a Bickelian conversion: a realization that there may be no intellectually defensible way to transform one's political liberalism into a coherent theory of judicial activism in the service of liberal goals.[125]

On closer inspection, however, there is plenty of evidence for rejecting this explanation. Perry does not retreat a step from his earlier work's conclusion that almost all[126] of the Court's modern constitutional decisions protecting individual rights are fully justified and legitimate exercises of the Court's power.[127] Indeed, cases in which the Court refused to find constitutional protection for liberal rights receive his sharpest criticism. For example, Perry believes that *Bowers v. Hardwick*,[128] which upheld a Georgia statute criminalizing consensual sexual relations between persons of the same sex, was wrongly decided.[129] *Bowers* is widely understood as a conservative decision by a Court applying conservative constitutional principles.[130] To argue that *Bowers* should have been decided differently is to take a position which would be difficult to square with the notion that the Court does not have an active role to play in the development of social and political morality. Indeed, the originalism Perry defends is "not necessarily inconsistent with a judicial role as large or active as any apostle of 'the Warren Court' (I count myself one) could reasonably want."[131]

125. For a discussion of Alexander Bickel's intellectual journey, see ELY, *supra* note 104, at 71-72. *See also* Maurice J. Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old*, 51 IND. L. J. 1025 (1976); Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521 (1976). For an argument that Bickel in fact had a consistent political and constitutional philosophy throughout his career, see Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

126. The only modern case upholding an individual rights claim which Perry believes was probably not rightly decided was *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 174.

127. *See, e.g.*, PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 142 (discussing voting rights cases); *id.* at 149-53 (defending the Court's extension of equal protection concepts in its modern gender discrimination cases); *id.* at 155-60 (defending cases upholding affirmative action programs); *id.* at 173 (defending, although on decidedly narrow grounds, *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

128. 478 U.S. 186 (1986).

129. In *Bowers*, the Court rejected the argument that the Georgia statute violated the Due Process Clause of the Fourteenth Amendment. Perry expresses doubt that such statutes violate the Due Process Clause. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 174. He believes that the Court could and should have invalidated the Georgia law pursuant to the antidiscrimination directive embodied in the Equal Protection and Privileges or Immunities Clauses. *See id.* at 177.

130. *See, e.g.*, Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L. J. 215 (1987).

131. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 55.

Ruling out a mid-life political conversion as a plausible explanation, what else might explain Perry's abandonment of nonoriginalism? There is little evidence, or at least none to which he points, that nonoriginalism has led to the sort of horrible outcomes which might prompt one to change positions.[132] Nor is there evidence Perry has concluded nonoriginalism is a hopelessly incoherent approach to constitutional interpretation, at least not in the sense that nonoriginalism calls on the interpreter to do things that cannot be done or to ask questions that cannot be answered.[133] Indeed, although he expresses doubt that "in the context of American political-legal culture . . . any argument for a nonoriginalist approach to constitutional interpretation (at least, any argument I can imagine) is likely to gain widespread popular support, or even much professional support (from judges and lawyers),"[134] Perry concedes that "[i]t is not impossible . . . to imagine the outlines of a coherent argument for a nonoriginalist approach to constitutional interpretation."[135]

132. *See* PERRY, HUMAN RIGHTS, *supra* note 14, at 119 (noting that a "defender of noninterpretive review" has the option of embracing interpretivism when "faced with a Court that persistently generates policy choices he believes to be morally infirm").

133. When he defended nonoriginalism, Perry did not contend, as did other nonoriginalists, that originalism was incoherent in the sense described in the text. *See supra* notes 20-28 and accompanying text. Instead, he believed that nonoriginalism was preferable to originalism.

134. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 52. It is difficult to know how to evaluate this claim. On the one hand, it is true that there are signs that originalism may be gaining some ground on the current Court. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring) (insisting that "[w]hen interpreting the Free Speech and Press Clauses, we must be guided by their original meaning"); *id.* at 1531 (Scalia, J., dissenting) ("[T]he question posed by the present case is not the easiest sort to answer for those who adhere to the Court's (and the society's) traditional view that the Constitution bears its original meaning and is unchanging."); United States v. Lopez, 115 S. Ct. 1624, 1642 (1995) (Thomas, J., concurring) (claiming that the Court's case law "has drifted far from the original understanding of the Commerce Clause" and calling for future decision-making that is "more faithful to the original understanding of that Clause"); *see also*, Price, *supra* note 5, at 495-96 (discussing the originalist premises that provided the foundation for both the majority and dissenting Justices in *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995)). On the other hand, most observers of the modern Supreme Court have concluded that the Court and its jurisprudence have not been originalist. *See, e.g.*, BORK, THE TEMPTING OF AMERICA, *supra* note 12, at 129-32; Levinson, *supra* note 111; Richard Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1371 (1990); Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L. J. 93, 115-16 (1983). Indeed, Perry himself once accepted this proposition. *See* PERRY, HUMAN RIGHTS, *supra* note 14, at 66. Whether Perry's (re-)conceptualization of originalism persuades judges and scholars who had endorsed nonoriginalism to now claim the originalist mantle remains to be seen.

135. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 53.

It thus seems that Perry's conversion to originalism is based on a reassessment of the comparative strengths and weaknesses of the two positions. Where once he believed that nonoriginalism represented the "better approach,"[136] he now believes the opposite. But in what ways is originalism superior or preferable to nonoriginalism as an approach to constitutional interpretation? And why, in the relatively brief period of time that has elapsed since his last major defense of nonoriginalism, has Perry changed his mind?

The choice between originalism and nonoriginalism can be characterized as a choice between different conceptions of the judicial role. Indeed, as indicated earlier, concern about the judicial role occupies an important place in Perry's thinking.[137] Perry chooses originalism in large part because of his belief that it better captures the proper role of courts and other institutions in our system of government.

Underlying most conceptions of the judicial role is a vision of the extent to which judges legitimately may participate in governing. In constitutional cases, the very institution of judicial review unavoidably implicates judges in the law-making enterprise.[138] The fact that judges have the power to interpret and enforce the Constitution presupposes the power to determine whether and how the Constitution speaks to the legitimacy of the exercise of government power. This makes judges law-making agents; it is something they cannot escape. The judges' law-making power may be most visible when they invalidate the actions of other law-making agents. That power, however, is also implicated when they uphold the validity of such actions since a law's ability to operate is dependent upon the judicial power to uphold the law as valid. Indeed, in a system in which judges possess the power to interpret whether the Constitution permits or prohibits legislative and executive acts, even a decision not to exercise that power of judicial review is an act with political, and thus law-making, consequences.

As a result, acceptance of the practice of judicial review commits one to the acceptance of some degree of government by judiciary.[139]

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136. PERRY, MORALITY, *supra* note 10, at 131.

137. At one point, Perry states that the "real-world debate" about the legitimacy of modern constitutional doctrine is not the debate about originalism versus nonoriginalism, but about the role of the Court. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 69.

138. Early in his book, in addressing the juxtaposition between law and politics that has been central to the work of some prominent originalists like Robert Bork, Perry observes: "At its best, constitutional adjudication comprises both the 'legal' process of 'interpreting' law and the 'political' process of 'making' law." *Id.* at 7.

139. *Cf.* BERGER, GOVERNMENT BY JUDICIARY, supra note 12.

Nonoriginalists tend to accept this fact without embarrassment or apology, and even the most restrained originalists will generally concede as much. The concern of originalists is not with the fact that the courts have political power, but with the potential for the abuse of that power.

How can we know when judges are abusing their power? Theorists and judges hold different views on this question, accordingly holding different conceptions of the judge's proper role in constitutional cases. Almost everyone agrees that when a judge believes that a law violates a constitutional directive (i.e., a value that has been constitutionalized), he or she is required to recognize this and to invalidate the law. To do so cannot constitute an abuse of power.[140] The abuse of power occurs only when the judge invalidates a law without grounding his or her decision in a provision of the constitutional text and without a good faith and conscientious belief that the relevant text requires or permits the decision.[141] Thus, for many, the abuse of judicial power consists of the self-conscious substitution of the judge's own values for the values that are embodied in the directives that underlie the constitutional text.

When Perry was a champion of nonoriginalism, he acknowledged that "it is a radical thing to say, and hence a thing not often said" that the source of judgment in constitutional adjudication is the judge's own values.[142] But he concluded that most of the Court's modern human rights cases—cases whose legitimacy he wished to defend—could not be justified by reference to the Founders' value judgments. He could not "see any way to avoid concluding that, in the exercise of noninterpretive review . . . the determinative norms derive . . . from the judge's own moral vision."[143]

Originalists, of course, have condemned much of the Supreme Court's modern jurisprudence for just this reason. But in the context of Perry's previous efforts to develop a functional justification for judicial review, such a conclusion about the nature of nonoriginalist interpretation was not problematic. Given the nature of constitutional language and the Court's role as a major participant in a national dialogue about political-moral issues, Perry believed that some judicial

140. Failure to do so may itself constitute an abuse of judicial power.

141. Of course, it would also be an abuse of the judge's power to act on the *mistaken* belief that the constitutional provision in question required it. But this form of abuse is likely to be viewed as less serious than when the judge willfully disregards what she takes to be the Constitution's command in favor of her own moral or political beliefs.

142. PERRY, HUMAN RIGHTS, *supra* note 14, at 123.

143. *Id.*

creativity and discretion was both welcome and inevitable. Resort to the judge's own values did not per se constitute an abuse of judicial power. Abuse would consist of a judge whose moral values were so unconventional or idiosyncratic that their application produced bizarre results, results that created a serious impediment to moral growth. Even then, Perry believed that practical and institutional constraints would safeguard against such abuse.[144] Thus, there was no reason to fear the subjective aspects of judging.

Since Perry's past embrace of nonoriginalism acknowledged and accepted the judicial discretion it necessarily entailed, one might expect his abandonment of nonoriginalism to be premised in part on a more critical view of the role of judicial discretion in constitutional interpretation. Thus, it might seem a bit strange that Perry the originalist continues to embrace quite a broad conception of the judicial role in constitutional interpretation. For example, he notes that his defense of originalism "does not presuppose that the originalist approach always or even often constrains judicial discretion to a significant extent,"[145] and that "the originalist approach to constitutional interpretation does not entail—it does not necessarily eventuate in—a small or passive judicial role."[146]

Indeed, Perry's embrace of judicial discretion seems to be every bit as enthusiastic and unembarrassed as it ever was. It is revealed in his elaboration of interpretive and normative minimalism. According to minimalism, the process of identifying and specifying a constitutional directive must be undertaken in a way that will result in the judge exercising as little discretion as possible.[147] When the minimalist judge concludes that a provision contains more than one directive

144. *See id.* at 124-37. In his 1988 book, Perry argued that the judge qua constitutional adjudicator could properly rely upon both original and nonoriginal beliefs. *See* PERRY, MORALITY, *supra* note 10. Nonoriginal beliefs were those that were "the fundamental beliefs of the American political tradition signified by [certain constitutional] provisions—beliefs or aspirations as to how the community's life, the life in common, should be lived." *Id.* at 148. Since many of these aspirational beliefs were indeterminate, the judge often would be faced with the difficult task of determining what the relevant aspiration required. With respect to this question, Perry argued that "the judge should rely on *her own beliefs* as to what the aspiration requires." *Id.* at 149. While acknowledging that a judge might abuse this power—that the judge "will go too far" —Perry expressed the view that the potential for such abuse was not great. *Id.*

145. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 50.

146. *Id.* at 55.

147. *See id.* at 54 ("[G]rounding each of the two positions is the view that there should be relatively little opportunity for a judge's own 'subjectivity'—for her own political-moral values, her own 'tastes,' 'preferences,' etc.—to influence her resolution of the constitutional conflicts with which she must deal.").

from which he or she must choose, one of which is more determinate than the other, he or she will choose the more determinate directive.[148] When the judge then turns to the task of deciding "how best to achieve, how best to 'instantiate,' in a particular context, the political-moral value—the aspect of human good—embedded in the directive,"[149] he or she will "defer to any 'not unreasonable' specification, implicit in the governmental action under review, according to which the action is not unconstitutional."[150] For the minimalist, this deference will be required because it provides the best strategy for avoiding judicial subjectivity.

Perry rejects interpretive and normative minimalism because he believes that the minimalist's obsession with subjectivity is unwarranted. In his view, acknowledgement of the indeterminacy of the constitutional text, of constitutional history, and of many of the directives embedded in the text belies any notion that judicial discretion is not a necessary and inherent aspect of constitutional interpretation. Indeed, in defending an activist judicial role and the propriety of the judge's political morality as an ingredient of constitutional decisionmaking, Perry echoes many of the arguments he advanced in his earlier defenses of nonoriginalism. He argued in 1982, for example, that judicial interpretation of constitutional provisions protecting human rights should not be anchored in such potential value sources as popular consensus.[151] Ultimately, he could "see [no] way to avoid concluding that, in the exercise of noninterpretive review . . . the determinative norms derive . . . from the judge's own moral vision."[152] Further, in 1988, after emphasizing the indeterminacy of many constitutional provisions and the aspirations which they signify, Perry wrote that "the judge should rely on *her own beliefs*" as to what the constitution requires.[153] However, he now contends that in the face of unclear or otherwise indispositive legal materials, "the judge should decide on the basis of premises she accepts, premises authoritative for her qua the particular person she is,"[154] and that it is proper for the judge's

148. *See id.* at 55-56.

149. *Id.* at 74.

150. *Id.* at 86.

151. *See* PERRY, HUMAN RIGHTS, *supra* note 14, at 123.

152. *Id.*

153. PERRY, MORALITY, *supra* note 10, at 149.

154. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 98-99.

personal morality self-consciously to influence her resolution of constitutional cases.[155]

It would thus seem that Perry's rejection of nonoriginalism is based on something other than the notion—central to the views of other prominent originalists[156]—that originalism constrains the exercise of judicial discretion in a way that nonoriginalism does not. The nonminimalist originalism Perry proposes contemplates an activist judicial role, a role in which "a judge is necessarily called upon to exercise a large measure of discretion."[157] But why should originalism be preferred not as a means but as an end? What does originalism have

155. *See id.* at 71. In one important respect, Perry's current thinking may incorporate a somewhat narrower view about the permissible scope of judicial discretion than the view he has previously expressed. In his discussion of normative minimalism, he seems to suggest that popular consensus should act as an important limit on judicial discretion. He notes that where the judge finds the "legal" materials to be inconclusive, "it seems fitting" for the judge to decide the case on the basis of premises that are "the object of widespread consensus in American society" and that "it seems problematic for her to decide on the basis of premises widely rejected in American society." *Id.* at 98. Elsewhere, he argues that the judge should "proceed, as much as possible, on the basis of premises, including moral premises about the good of the community, *widely shared in the community*, but in any event not on the basis of premises widely rejected there." *Id.* at 104. Were the judge bound to defer to a popular consensus in specifying an indeterminate constitutional directive, such a duty might significantly diminish the capacity of judicial review to accomplish the dialogical goal of coaxing, and perhaps even leading, the reevaluation and evolution of the nation's constitutional and political-moral values. Perry's discussion of the role of popular consensus, however, leaves open the possibility that the judge might discount or reject consensual views about how a constitutional directive should be specified where those views are "either contrary to legal premises" or "mistaken." *Id.* at 98. He does not explain what he means by either of these criteria, although he implies that a mistaken popular consensus is something more than a consensus that is "not authoritative for her qua judge." *Id.*

156. Justice Scalia's defense of originalism has been, in large part, based upon the view that "it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989); *see also* David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1711 (1991) (noting that Scalia's defense of originalism "is that the principal alternative way of interpreting the Constitution is too dangerous because it allows judges to act on the basis of their predilections"); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78 (1992) ("[F]or Justice Scalia, the rule's the thing; originalism and traditionalism are means, not ends."). Similarly, Robert Bork defended originalism because of its "capacity to control judges." Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 825 (1986); *see also* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 12 (1992) (stating that the "basic premise of the originalist position . . . is to constrain the exercise of judicial discretion in adding latter-day glosses to the constitutional text"). For a general discussion of the relationship between originalism and the concern for judicial objectivity, see Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984).

157. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 99 (quoting James L. Buckley, *The Catholic Public Servant*, FIRST THINGS, Feb. 1992, at 18-19).

that a legitimate approach to constitutional interpretation cannot live without? The answer may lie in the very conception of the Constitution which originalism has presupposed.

V. Understanding What the Constitution Means Based upon What the Constitution Is

To say that an approach to constitutional interpretation is a function of the conception of the Constitution upon which it is premised may seem, at first blush, a bit odd.[158] Indeed, when I ask my students, early in the first semester of my course in constitutional law, to articulate their conception of the Constitution, many of them find the exercise a bit disorienting. A common reaction is to assume that if there is indeed a "conception of the Constitution" out there, it must have some well-settled formal content, like, say, the common law of perpetuities. Invariably, however, they are unable to recall any statement from their initial readings where the Supreme Court announces "our concept of the Constitution is . . . ," and a quick shuffle through their casebook fails to turn one up.[159] When I suggest the possibility that many of the disagreements on the Court over matters of substantive constitutional doctrine may well be influenced by, or even be reducible to, fundamental disagreements about what the Constitution is—its nature and the role it plays in our political system[160]—I can see many eyes begin to roll and the onset of a "fasten your seat belt" mentality.

The existence of different theories of constitutional interpretation and different constitutional philosophies reveals more than the difficulty and contentiousness of interpreting often ambiguous constitutional text. When the application of conventional techniques of interpretation to constitutional language results in disagreement con-

158. As Samuel Freeman has noted, the notion that one actually must decide what role to assign to the Constitution "might seem a peculiar question, especially to lawyers. For what else could our constitution be but a text, and what could constitutional interpretation be other than deciphering the meaning of this text in the way lawyers normally do?" Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 6 (1992).

159. Occasionally, a student will latch onto Chief Justice John Marshall's statement in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), that "we must never forget it is a *constitution* we are expounding" as a potential official statement of what the Constitution is. *Id.* at 407 (emphasis added). It is usually not difficult to disabuse them of that notion. *Cf.* Scalia, *supra* note 156, at 852-53 (describing as a "canard" the notion that Chief Justice Marshall's description of constitutional interpretation necessarily entailed a continually changing Constitution).

160. For an elaboration of this point, see Saphire, *supra* note 42; *see also* Freeman, *supra* note 158, at 6 ("Identifying the constitution is the first task of constitutional interpretation.").

cerning the correct or best interpretation, the debate cannot be resolved on the basis of the language alone. One must look beyond the language and identify the context in which the language is contained or embedded; the context becomes a constituent part of the language's meaning.[161]

Although it may seem too obvious to need explicit acknowledgement (and without further elaboration somewhat banal to repeat), the most immediate and most important context against which constitutional interpretation takes place is the Constitution itself. After all, it *is* a Constitution we are interpreting.[162] What we understand the Constitution to mean is inescapably and in large part a function of what we understand the Constitution to be.[163]

There are, I believe, at least two basic conceptions of what the Constitution is. Below, I identify these conceptions and suggest how the conception that one chooses[164] influences one's determination of constitutional meaning. I then attempt to determine which conception best fits originalism and nonoriginalism, respectively, and, more particularly, which best fits Perry's vision of constitutional theory.

A. Two Conceptions of Constitutional Meaning: The Constitution as a Book of Answers and as a Book of Aspirations

According to the "book of answers" conception,[165] the Constitution is a compendium of rules and principles that provides answers for most disputes that arise involving the allocation and limitations of government power. Like a rule book governing a modern day game

161. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1174-75 (1993); *see also* Freeman, *supra* note 158, at 6.

162. *See supra* note 159 and accompanying text. In this respect, the students searching for an official definition of constitutional interpretation who refer to Chief Justice Marshall's admonition in *McCulloch* are really on to something; they just haven't realized it yet.

163. In a provocative recent article, Robin West, defending a reader-response theory of constitutional interpretation, noted that "the interests, expectations, and purposes of an interpreting community can profoundly affect the identity of the interpreted text, and the identity of a text, in turn, will effect the text's meaning." Robin West, *The Aspirational Constitution*, 88 Nw. U. L. REV. 241, 261 (1993).

164. It is important to note that the interpreter must *choose*, self-consciously or not, the conception of the Constitution that will form the context for how he or she engages in constitutional interpretation. There is no single conception of the Constitution which is axiomatic for our political culture. As Perry suggests in the context of choosing between originalism and nonoriginalism, the conception of the Constitution which one embraces is necessarily the result of a political decision.

165. Perry once referred to the notion of a book of answers as not fully capturing the American self-understanding of the Constitution. *See* PERRY, MORALITY, *supra* note 10, at 139.

of sports, the rules of the Constitution are understood as having been created at a specific point in time with a meaning that is fixed at the time of their creation and transcription. In order to determine whether the Constitution provides an answer to a given case, the book is consulted and the most relevant rule is identified and applied. The book of answers conception does not necessarily yield rules so clear and determinate that they are susceptible to mechanical application.[166] Those who understand the Constitution in this way usually presume that the rules establish relatively clear and discernible lines demarcating which government action is permissible and which is not. This conception of the Constitution entails the fundamental proposition that the Constitution is self-contained; the rules are clear enough that they can be understood without the need for interpretive improvisation. If the party invoking a rule cannot establish, by appeal to arguments made legitimate by reference to conventional linguistic devices, the existence of the rule and the plausibility of its application to achieve the desired result, the court must find against him or her.

According to the "book of aspirations" conception, the Constitution does not function as a rule book containing precise or clear instructions for resolving disputes concerning the allocation or limitation of government power. Instead, any rules or principles embodied in the constitutional text are taken to be largely aspirational[167] and symbolic. Instead of viewing the Constitution primarily as resolving, in some concrete and permanent sense, a set of political and moral issues, this conception views the Constitution as establishing a set of incompletely expressed ideals or principles against which ongoing government conduct must be assessed.[168] Whereas a book of rules

166. *See* William Van Alstyne, *Interpreting* This *Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 227 (1983).

167. As Perry once noted: "For the American political community, the constitutional text is not (simply) a book of answers to particular questions .... It is, rather, a principal symbol, perhaps *the* principal symbol, of fundamental aspirations of the tradition." PERRY, MORALITY, *supra* note 10, at 139. Perhaps the most prominent recent expression of the notion that the Constitution serves an important aspirational function is Justice William J. Brennan's reminder that "[o]ur amended Constitution is the lodestar for our aspirations." William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, *reprinted in* INTERPRETING LAW AND LITERATURE: A HERMENEUTICS READER 13 (S. Levinson & S. Mailloux eds., 1988). For a general discussion of aspirationalism in constitutional thought, see GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION (1986).

168. As one commentator has described it, according to this conception, the Constitution "may not stand for the particular set of rules created and written down at a particular moment, but rather for a practice and tradition in which the courts have reviewed the acceptability of government actions in light of independent principles which are developed

interpreter sets out to find a rule in the constitutional text that is expected to provide "the answer" to the problem at hand, the book of aspirations interpreter accepts the possibility that the constitutional materials may yield abstract principles that can answer the problem only in a more provisional and tentative sense. The judge's job is to construct these principles out of those materials that the interpretive community regards as appropriate and relevant, and to determine, as best as he or she can, what those principles mean for the case at hand.[169]

Some features of, and contrasts between, these two conceptions of the Constitution are worth noting. The book of answers conception is characterized by an interpretive confidence that is lacking from its aspirational counterpart. While most of its adherents acknowledge that interpretation may require both judgment and choice, they also tend to believe, as a matter of faith, that the Constitution contains rules and that these rules contain answers. For them, the result of the rule's application follows from the rule and is an expression of its meaning.[170] From their perspective, each application may bring fur-

by the judges over time." Richard S. Kay, *The Bork Nomination and the Definition of "The Constitution,"* 84 NW. U. L. REV. 1190, 1194 (1990).

Professor West has recently suggested a distinction between an adjudicated and a legislated Constitution. *See* West, *supra* note 163. The legislative Constitution, the one interpreted not by courts but by Congress, is primarily aspirational, in a sense congenial to the book of aspirations conception I discuss in the text. It is a "recordation not of our traditions, but of our aspirations—not a history of where we have been, but a speculative and avowedly utopian assessment of where we might go." *Id.* at 262.

169. A recent example of the contrast between the rule and aspirational approaches can be found in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in which the Court considered constitutional challenges to several Pennsylvania statutes regulating abortion. The joint opinion of Justices O'Connor, Kennedy, and Souter was clearly aspirationalist in its conclusion that the meaning of the Fourteenth Amendment's Due Process Clause reference to "liberty" is "not susceptible of expression as a simple rule" but must be given content through a process of "reasoned judgment." *Id.* at 849. The joint opinion interpreted the Due Process Clause as representing "a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 847. The anti-aspirationalist conception of the Due Process Clause in Justice Scalia's dissent could not have been more clear. *Id.* at 983 (Scalia, J., dissenting). He referred to the joint opinion's invocation of "reasoned judgment" as "empty," *id.* at 983, and noted with approval the idea of the Court "doing essentially lawyers' work up here—reading text and discerning our society's [traditional] understanding of that text," *id.* at 1000. For further discussion of the opinions in *Casey* (as well as several other recent decisions) contrasting their rule versus standard conceptions of constitutional interpretation, see Sullivan, *supra* note 156, at 76-83.

170. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Sullivan, *supra* note 156, at 58. The book of answers adherent has been described as one for whom "interpretation is much like painting by the numbers." WALTER F. MUR-

ther insight into the true or full meaning of the rule; but the rule and its application are separable and distinct.

The interpretive world of the book of aspirations adherent is more uncertain. Aspirations, by their nature, tend not to be fully realized or even fully realizable. Whereas rules represent a problem resolved, aspirations embody or reflect "an ideal state of affairs,"[171] one which, by definition, is better or more perfect than the state of affairs we have thus far experienced. According to this view, each application of a constitutional principle is a constitutive act; each case not only adds to but also transforms our understanding of the principle, even if only in a small way.

Despite these differences, the two conceptions of the Constitution under discussion share important assumptions. Each takes the Constitution's principles as enforceable and binding. Where the book of answers proponent may contend that the abstractness and "mushiness" of aspirations belie virtues essential to the "rule of law,"[172] the aspirationalist counters by noting that "[c]onstruing the document in terms of constitutional aspirations need not necessitate reading one's preferences" into the Constitution.[173] Where the book of answers proponent emphasizes limits on judgment that are claimed to be internal to constitutional rules, the aspirationalist points to forces external to the rules themselves as the source of any limits thought morally or politically necessary to their enforceability.[174]

While it is possible to view these conceptions of the Constitution as mutually exclusive,[175] it is not necessary to do so.[176] Some provisions or clauses of the Constitution might be viewed as particularly, if

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PHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 291 (1986) [hereinafter MURPHY, CONSTITUTIONAL INTERPRETATION.]

171. SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 34 (1984). Barber, who conceives of the Constitution in aspirational terms, argues that "the only way to make complete sense of the Constitution is to understand it in light of what our best thinking shows Americans do and ought to stand for as a people—past, present, and future." *Id.* at 9.

172. BORK, THE TEMPTING OF AMERICA, *supra* note 12, at 216-17.

173. BARBER, *supra* note 171, at 35; JACOBSOHN, *supra* note 167, at 140-41 (referring to "the general guidance that the aspirational commitments of the framers provides to those responsible for interpretive constitutional judgments"—commitments which "provide an intellectual context that both sets limits and suggests possibilities for judicial consideration of difficult constitutional cases").

174. *See* PERRY, HUMAN RIGHTS, *supra* note 14, at 124-25 (noting limits on the answers an aspirational approach can provide).

175. *See* MURPHY, CONSTITUTIONAL INTERPRETATION, *supra* note 170, at 289 (contrasting a "vision of the Constitution as laying down only rules to be more or less rigidly followed" with a Constitution "reflecting an authoritative vision of a good society toward which the nation should aspire").

not uniquely, aspirational, while others might be viewed as embodying the sort of clear and definite rule-like standard thought more consistent with a book of answers conception.[177] But those who subscribe generally to the book of answers conception are unlikely to be predisposed to viewing any particular provision as aspirational.[178] Even if they encounter a provision whose aspirational aspects cannot easily be ignored, they are likely to understand the aspiration differently than would the aspirationist. In the book of answers conception, not only would the aspiration be understood as that of the authors of the provision in question, but its content is likely to be perceived as fixed by their understanding of that provision.[179]

B. Perry's Changing Conception of What the Constitution Is: From Aspirationalist to a Proponent of the Book of Rules

Prior to *The Constitution in the Courts*,[180] the work of most originalists proceeded on the basis of a book of answers conception of the Constitution. In contrast, the work of most nonoriginalists was clearly aspirationalist in its constitutional assumptions. In his earlier writing, Perry defended nonoriginalist (then referred to as noninterpretive) review, in large part, on the grounds that it allowed the American people to keep faith with "our religious understanding of

176. The historic Constitution, embodying the record of our collective experience, inevitably will influence the shape of our current aspirations. *See* Saphire, *Originalism*, *supra* note 4, at 530-33 (discussing ways in which constitutional interpretation is influenced by both abstract and concrete conceptions of the Constitution); West, *supra* note 163, at 262 ("An understanding of the original, historic, or traditional Constitution of our pasts would of course be relevant to the task of identifying as well as interpreting the content of that aspirational Constitution.").

177. *See, e.g.*, Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 361-67 (1981) (discussing the two clause theory of the Constitution).

178. *See* Sullivan, *supra* note 156, at 76 ("In many places, the text of the Constitution is vague, general, open-ended, and abstract. Such provisions might seem to lend themselves to treatment as standards, but some interpretive approaches claim that they may be construed in rule-like fashion.").

The book of aspirations adherent may also be predisposed to perceiving all of the Constitution in aspirational terms. However, few theorists seem to suggest that every constitutional provision—for example, those prescribing ages or terms of office for the President or members of Congress—can easily be understood in aspirational terms. *Cf.* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (discussing the effect of constitutional language on how we view, and approach the interpretation of, various provisions).

179. Most originalists would not deny that the Constitution embodies certain aspirations. However, its aspirations would be understood as those of the Founders, expressing their ideals and hopes and establishing their values as the standards for the American future.

180. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13.

ourselves as a people committed to struggle incessantly to see beyond, and then to live beyond, the imperfections of whatever happens at the moment to be the established moral conventions."[181] More recently, Perry noted that whatever other meaning the Constitution had for the American polity, "the Constitution is *also* a symbol of fundamental aspirations of the political tradition."[182] The Constitution, he wrote, signifies "certain basic, constitutive aspirations or principles or ideals of the American political community and tradition."[183] Indeed, Perry noted that what separated originalists and nonoriginalists was something more fundamental than a disagreement about the doctrinal meaning or implications of one or another constitutional provision in particular cases. They disagreed "about what it means to say that the text is authoritative."[184]

The aspirationalism of Perry's nonoriginalism was also reflected in his emphasis on the dialogic nature of constitutional adjudication. In the past, his defense of nonoriginalism relied to a great extent on its dialectical nature. In his earlier writing, Perry portrayed constitutional interpretation as a kind of grand conversation in which the Court subjected policy choices to a moral critique. Where a challenged policy failed the critique—where it did not measure up to the moral standards the Court believed were reflected in the relevant constitutional materials—the political processes could respond "by embracing the Court's decision, by tolerating it, or, if the decision is not accepted, or accepted fully, by moderating or even undoing it."[185] In his subsequent work, Perry analogized constitutional interpretation to the interpretation of sacred texts.[186] He portrayed the Constitution as serving a prophetic function, and judicial review as a process in which the Court engaged in a dialogue with the American people about the fundamental aspirations of our political and moral traditions.[187]

181. PERRY, HUMAN RIGHTS, *supra* note 14, at 101. Perry claimed that noninterpretive review "is an enterprise designed to enable the American polity to live out its commitment to an ever-deepening moral understanding and to political practices that harmonize with that understanding." *Id.*

182. PERRY, MORALITY, *supra* note 10, at 133.

183. *Id.* Perry's claim was not that the Constitution must be understood exclusively in aspirational terms, but that "what the Constitution means is not merely what it originally meant." *Id.*

184. *Id.* at 135.

185. PERRY, HUMAN RIGHTS, *supra* note 14, at 112.

186. *See* PERRY, MORALITY, *supra* note 10, at 139.

187. *See id.* In the course of this dialogue, the Court implored the political community to "respond to the incessant call of the text," and to "recall and heed the aspirations" of the political tradition. *Id.*

Thus, when Perry wrote that "the originalist's Constitution is *not the same text*—it is *not meaningful in the same way*—as the nonoriginalist's Constitution,"[188] he was noting the enormous divide that separated the two positions. The differences were measured not only in terms of interpretive strategies or methodologies, but also in terms of fundamental assumptions about the nature of the Constitution as a political and moral construct. As Perry notes, "originalism . . . is fundamentally an argument about what 'the Constitution' *is*."[189] Originalism is not just an approach to constitutional interpretation designed to cabin judicial discretion; it is also an expression of a way of thinking about the role the Constitution plays in our national development. Originalism takes the Constitution as a completed act, a settlement of arrangements and a completed blueprint for future political, social, and moral organization. In contrast, nonoriginalism views the Constitution as a work-in-progress,[190] a work which sometimes expresses itself only provisionally,[191] with what might best be called anxious yet hopeful anticipation about the nation to come.

The differences between these two conceptions of the Constitution are so profound that one might expect conversion among their respective adherents to be quite rare. Thus, it would be of interest to see whether Perry's transformation to originalism has been accompanied by a fundamental alteration in the way he conceives of the Constitution itself. While there are some grounds for uncertainty, I think Perry's conception of the Constitution, in some important respects, has in fact changed.

In his recent work, Perry never elaborates explicitly his present conception of the Constitution. The closest he comes is the following:

> To (attempt to) justify the practice of judicial review, after all, is not to justify an abstraction; it is to justify the practice of protecting the Constitution not just in any sense of "the Constitution" but in a particular sense—and understood as well,

188. *Id.* at 135.

189. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 58 (emphasis added).

190. *Cf.* Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trade Law Association in Maui, Hawaii 2 (May 6, 1987) (transcript on file with author) ("When contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.").

191. Of course, originalism's conception of the Constitution can also be viewed as provisional in the sense of its inclusion of a mechanism—the amendment process prescribed in Article V—for fundamental change. The provisional nature of nonoriginalism's Constitution is more pervasive, expressed not only by Article V, but in the aspirational nature of the commitments embodied throughout.

> therefore, as consisting not just of any conception of, or approach to, constitutional interpretation but of a particular conception, namely, the conception entailed by the particular sense of "the Constitution" in play.
>
> "The Constitution," in each and all of its various parts, is an intentional political act of a certain sort: an act intended to establish, not merely particular configurations of words, but particular directives, namely, the directives the particular configuration of words were understood to communicate.[192]

Perry's description of the Constitution as an intentional political act and his equating it with the Founders' directives may seem to suggest a book of rules perspective.[193] However, this description does not preclude the idea that the Constitution has aspirational dimensions.[194] Indeed, there are some indications Perry continues to view the Constitution in aspirationalist terms.

Perry's extensive effort to explicate the distinction between minimalism and nonminimalism—perhaps the most important and sophisticated feature of his originalist theory—leaves room for him to account for the aspirational aspects of the Constitution that characterized his previous writing, aspects that other originalists would find difficult to accept. Indeed, Perry defends nonminimalism, not just because of the indeterminacy of constitutional texts and directives they embody (as he notes, indeterminacy and minimalism are not necessarily incompatible or logically inconsistent ideas),[195] but rather because constitutional directives or principles frequently "necessitate significant moral choices"[196] and the Constitution itself does not provide clear standards for how those choices should be made. The idea

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192. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 47-48.

193. Recall that a principal justification of originalism has been that adherence to the Founders' directives is more susceptible to a rule-oriented regime of decision-making that cabins judicial discretion. *See supra* note 156; *cf.* Board of Educ. v. Grumet, 114 S. Ct. 2481, 2506 (1994) (Scalia, J., dissenting) ("Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.").

194. The notion that the Constitution was not, in some sense, an intentional political act would seem to border on incoherence. But originalists have sometimes relied upon the fact of the intentionality of the Constitution's creation as necessarily requiring originalist interpretation. *See* BERGER, GOVERNMENT BY JUDICIARY, *supra* note 12, at 363-72. Precisely what implications that fact ought to have for interpretive theory are, of course, highly debatable. It alone cannot establish the supremacy of originalism; only a broader political or moral theory can do that. *See* CASS SUNSTEIN, THE PARTIAL CONSTITUTION 98-104 (1993).

195. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 55. Although Perry does suggest that originalism would entail minimalism in the case of constitutional directives that are (relatively) determinate. *See id.*

196. *Id.* at 89.

of a Constitution consisting of broad moral concepts demanding considerable room for interpretive choice is one that fits comfortably with a Constitution concerned with aspirations and not rules.

Nevertheless, discussion of constitutional aspirations of the sort that characterized his nonoriginalist writings is conspicuously absent from his new conception of originalism. Instead, for example, he now believes that the Fourteenth Amendment contains directives which have a well-defined and limited meaning—a meaning which can be ascertained and confirmed by historical analysis.[197] As noted earlier, this core meaning is contained in two directives: one concerning discriminatory regulations, the other concerning unreasonable regulations. These directives express the actual vision of the drafters and ratifiers of the Fourteenth Amendment regarding the proper relationship between the government and the people. It is that vision which the judge is bound to enforce, not some vision which is somehow abstracted and constructed from the nation's evolving sense of morality or justice.[198]

Moreover, emphasis on the dialogic nature of judicial review, so integral to the aspirationalism of the nonoriginalism Perry once embraced, is also absent from his current conception of originalism. He once defended nonoriginalism for its capacity to effectuate dialogue between the Court and the nation concerning the nature and practical

197. In rereading his 1982 book prior to beginning this Article, I was struck by the contrast between how little Perry had to say about the actual content of the Constitution's human rights provisions then and how much he has to say about it now. For example, his earlier discussion of the content of the Fourteenth Amendment consisted primarily of an expression of agreement with the general historical conclusions reached by Raoul Berger. *See* PERRY, HUMAN RIGHTS, *supra* note 14, at 62-63. His new book devotes three full chapters to the subject. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 116-91.

198. Perry once described the originalist conception of constitutional test and interpretation as one in which the text "control[s] the future by establishing as supremely authoritative for the legal system a certain belief (or beliefs)." PERRY, MORALITY, *supra* note 10, at 141. In contrast, he argued, "[u]nder the nonoriginalist conception . . . original beliefs are not necessarily authoritative." *Id.* His new conceptualization of originalism appears to maintain this distinction. While specification of constitutional directives may sometimes be difficult and subject to legitimate disagreement and debate, he leaves little doubt that it is the Founders' directives (as we now understand them) that are authoritative and that control interpretation, not directives that are (at least in part) being created by subsequent generations as the nation evolves and matures in its political and moral thinking. This is not to say that the (non-minimalist) originalism Perry defends involves some sort of mechanical application of the Founders' value judgments; clearly it does not. How the judge interprets and applies the Founders' directives can and will be influenced by the judge's personal morality, as well as the judge's conception of the judicial role. But it is still the Founders' directives—their value judgements—that the judge is bound to implement.

implications of our deepest aspirations—aspirations reflected in our traditions, values, and commitments. The primary reference he now makes to dialogue is in a discussion of how a judge ought to approach the specification of indeterminate constitutional directives.[199] He argues that when confronted with indeterminacy, and when existing legal materials are not dispositive, the judge may sometimes have to decide an issue on the basis of "premises she accepts."[200] This decision-making process is dialogic in the following sense: it should be "a process in which [the judge] publicizes rather than conceals her real premises" and in which "she cultivates a genuinely deliberative rather than dismissive stance."[201] What ensures against arbitrariness is the notion that "[s]pecifying constitutional indeterminacy is an instance of collective, not individual political-moral judgment."[202] Thus, where the dialogue of nonoriginalism represented a collective enterprise in which the judge, deciding on the basis of her own values, engaged the body politic in a conversation about the nature and content of our constitutional values, the dialogue contemplated by Perry's originalism serves a much more limited function. Instead of representing a method for giving meaning to our aspirations, dialogue serves to ensure that nonminimalist originalism comports with the rule of law.[203]

199. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 98.

200. *Id.* at 99.

201. *Id.* at 104.

202. *Id.* at 100.

203. *See id.* at 105 ("The ideal of the rule of law is properly conceived to require, not that judges never engage in the nondeductive process of specifying indeterminate constitutional directives, but that when they engage in that process, they do so dialogically."). The point here is not that the dialogue contemplated by Perry's originalism might not lead, as was the case with dialogic nonoriginalism, to wiser or more enlightened constitutional decision-making. Indeed, Perry believes that nonminimalist originalism should be aimed "at the common good," and that the Court should concern itself with moral premises widely shared in the community itself. *Id.* at 104. Instead, the point is to note that, whereas dialogue was something that the nonoriginalist Perry once saw as primarily extrinsic to the decision-making process—something which was triggered by the judicial decision and which had a liberating influence on judicial review—dialogue is now internal to the decision-making process itself. Its role is not somehow to precipitate a conversation with the body politic about our constitutional aspirations, but rather to facilitate good judgment, and to safeguard against the potential abuse of judicial power. *See id.* at 111.

That Perry now views dialogue as a constraining, as opposed to a liberating, feature of judicial review is made clear in the book's final chapter. *See id.* at 192. There, he notes his past defense of judicial activism as an "energizing" and "enervating" force in the development of "popular deliberation about fundamental constitutional matters." *Id.* at 199. He refers critically to Justice Brennan's Hart Lecture at Oxford, where Brennan (quoting Perry with approval) had embraced the notion that the Court, in dialogue with the political processes, helps facilitate a more reflective and correct political morality. *See id.* (discussing William Brennan, Jr., *Why Have a Bill of Rights*, 9 OXFORD J. LEGAL STUD. 425, 433-44 (1989)). Perry now writes critically of that conception of constitutional interpretation—

I strongly suspect that Perry would insist that the originalism he now defends is not inconsistent with—indeed that it furthers—an aspirational conception of the Constitution. In his discussion of the importance of dialogue in the specification of indeterminate constitutional directives, he writes:

> If one doubts that more than a (relatively) few judges, or more than an occasional justice of the Supreme Court, have, or will have, the requisite qualities of mind and character—and, in particular, the requisite dialogic capacity—then one will be skeptical that constitutional adjudication can generally be a matrix of mature deliberation about the concrete meaning, in various particular contexts, of indeterminate constitutional directives.[204]

The notion that constitutional adjudication functions as a "matrix of mature deliberation"[205] about constitutional meaning suggests the idea that constitutional meaning is neither static nor settled. It also suggests the idea that the moral values embodied in the Constitution, or at least the Founders' perceptions of the meaning and implications of those values, are imperfect. To speak of a more mature deliberation is a way of describing what one hopes are increasingly sensitive and sophisticated thought processes of the deliberator; but it might also be taken to suggest that the relevant values themselves are crude (i.e., immature) or not fully formed and developed.[206] By charging the judge with the task of specifying indeterminate constitutional directives guided, at least in some cases, by her own political morality, nonminimalist originalism might serve to give new content to constitutional values.[207] Thus, to the extent that it holds out the possibility

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at least in the context of our Constitution—and suggests that it is more suited to, for example, the Canadian Constitution. *See id.* at 201. He even suggests reasons why the United States might consider adopting features of the Canadian Constitution, including that it "would certainly encourage greater citizen participation 'in the conversation about constitutional meaning.'" *Id.* (quoting Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 124 (1991)).

204. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 111.

205. *Id.*

206. The notion that constitutional interpretation served the function of helping us to achieve "a more mature political morality" was integral to Perry's earlier nonoriginalist theorizing. PERRY, HUMAN RIGHTS, *supra* note 14, at 113. This dimension of his earlier writing is discussed in Saphire, *supra* note 18.

207. By suggesting that nonminimalist interpretation might give new content to constitutional values, I do not mean to suggest that Perry would accept that originalist interpretation should or would actually change or fundamentally transform the core meaning of those values. If there is to be a distinction between nonoriginalism and originalism—a proposition I take up later—it probably must be based on whether, and the extent to which interpretation properly can be seen as fundamentally rejecting, modifying, or transforming values actually constitutionalized by the Founders. Thus, to say that Perry's originalism

that, through specification, constitutional directives can come to be seen as evolutionary—as not fixed in or by time, and, from the perspective of any given specification or time, provisional—nonminimalist originalism retains aspirationalism as a constitutional characteristic.

Although perhaps subtle, there is an important difference between the aspirationalism of the nonoriginalism Perry once defended and—assuming my interpretation of his position is plausible—the aspirational implications of the originalism he now espouses. In *Morality, Politics, and Law*,[208] Perry attempted to illuminate nonoriginalism by drawing an analogy to the interpretation of sacred texts. He made a distinction between two sorts of referents of such texts. One referent is "behind" the text and is best understood "as evidence of past beliefs."[209] The other referent is "in front of" the text[210] and both signifies the aspirations of the tradition and represents the "prophetic call of the text."[211] This referent is a source of "a meaning in addition to the original meaning," a "meaning broader, more general, than the original meaning."[212] This representation of nonoriginalism suggested the notion that the original meaning—the referent behind the text—and the aspirational meaning—the referent in front of the text—were, or at least could be, different and perhaps even autonomous meanings.[213] Indeed, Perry argued that a nonoriginalist judge was not obliged to give effect to the aspirational meaning; if the judge found an aspiration to be "not worthwhile," he or she could decide the case on the basis of original meaning.[214] Thus, nonoriginalism contemplated that aspirational meaning and original meaning could diverge.[215]

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might function to give new content to constitutional values is to recognize the possibility that our understanding of (the Founders') constitutional values might be different—i.e., fuller, deeper, and more mature—as the result of their application, through specification, over time.

208. PERRY, MORALITY, *supra* note 10.

209. *Id.* at 137-38.

210. *Id.* at 138.

211. *Id.* at 138-39.

212. *Id.* at 140.

213. Perry did not refer to the two referents, or the meanings they embodied, as autonomous. Instead, he claimed that the "semantic autonomy of the constitutional text helps to explain" how the text can yield more than one meaning. *Id.*

214. *Id.* at 146.

215. I do not mean to suggest that the potential divergence between original and aspirational meaning contemplated in *Morality, Politics, and Law* would necessarily, or even ordinarily, be clear or striking. After all, the aspirations of which Perry wrote were aspirations of the political tradition, and thus would necessarily have their foundation in, and a connection to, our past. Indeed, Perry noted that the aspirational meaning of a constitutional provision "seems invariably (though not necessarily)" to have "grown out of

In the originalist vision elaborated in *The Constitution in the Courts*,[216] the idea of a separation—that there might be a distinction and even a divergence—between original and aspirational meanings seems to have been abandoned. Constitutional provisions may contain more than one directive, but each of these represents the Founders' value judgment with respect to the meaning of equal protection, the free exercise of religion, due process, and so on. In turn, one or more of a provision's directives may be indeterminate, thus yielding a number of specifications, each of which might represent a plausible view of what the directive means or requires in the context of a particular case. But when the (nonminimalist) originalist judge specifies a directive—in a process potentially influenced by the judge's conception of the judicial role and political morality—the specification ultimately chosen represents the judge's best understanding of what the Founders' value judgment requires. Perhaps Perry would describe some or even many of the Founders' directives as aspirational. However, it would be odd to say, as he once did about the aspirations of the nonoriginalism he has now abandoned, that these aspirations, or the particular specifications they yield, represent "meaning *in addition to* original meaning."[217]

VI. The Significance of Diminished Aspirationalism in Perry's Conception of Originalism

What significance should one attach to the diminished aspirationalism of Perry's conception of originalism? On a practical level, perhaps very little. After all, in an important sense the aspirationalism of nonoriginalism is instrumental. The case for a Constitution of aspirations seems based on the fear that a Constitution consisting only of original meanings will come up short when put to the test of evaluating government policies once thought to have been acceptable but now generally condemned. The very idea of aspirations connotes a certain dissatisfaction with current arrangements as well as the notion that things can and should be better than they are. It also connotes a suspicion that those responsible for these arrangements were incapa-

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the original meaning." *Id.* at 133. Inevitably, constitutional aspirations must be understood in light of—indeed their implications may only be intelligible by reference to—the original beliefs that helped shape our traditions. In Perry's words, aspirational meanings may (but need not) represent a progressive generalization of the original meaning. *See id.* at 133-34.

216. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13.

217. PERRY, MORALITY, *supra* note 10, at 133.

ble of creating the sort of world we now wish to occupy.[218] While aspirations represent the possibility of perfection as we now understand it, they also represent a concession of our past shortcomings. In a constitutional world where original meanings are viewed as narrow, morally problematic, and dispositive, aspirational meanings are likely to assume greater significance.

On the other hand, in a constitutional world where original meanings seem more open and morally enlightened, aspirational meanings are likely to seem less important. This is especially true where judicial review is not shackled by minimalist constraints. When, for example, one combines Perry's broad view of the original understanding of the Fourteenth Amendment[219] with his robust conception of the judicial role in specifying constitutional values, the perfectionist's need to see the Constitution in aspirational terms is clearly diminished.[220] Thus, Perry can move easily from his earlier nonoriginalist defense of much contemporary Fourteenth Amendment jurisprudence affirming a broad vision of human rights (and a corresponding criticism of rights-restrictive decisions) to an originalist defense of most of the same jurisprudence. Whereas his prior rejection of originalism and the narrow account of original meanings upon which it was premised required an aspirational conception of the Constitution for its legitimacy, the expansive view of original meanings to which he now subscribes needs no original-aspirational meaning distinction to support it. The legal doctrine ultimately produced from either approach to constitutional interpretation is remarkably similar.

Even on a theoretical level, the significance of Perry's apparent abandonment of an aspirationalist conception of the Constitution is subject to question. In an insightful essay critiquing *Morality, Politics, and Law*,[221] Larry Solum claimed that Perry's distinction between original and aspirational meaning could not withstand careful analy-

218. In Robin West's account, the notion of an aspirational Constitution is deeply connected to progressive, even utopian, social thought. *See* West, *supra* note 163, at 262.

219. In terms of doctrine, *The Constitution in the Courts* deals primarily with the Fourteenth Amendment. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13. Perry does not apply his nonminimalist originalism to such areas as the First Amendment's guarantee of freedom of speech. U.S. CONST. amend I. It is not difficult, however, to imagine the arguments which would establish a nonminimalist-originalist justification for much of the Court's modern free speech doctrine. *Cf.* Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137 (1983) (arguing for an expansive interpretation of the First Amendment on the basis of nonoriginalist premises).

220. Of course, those who view the Constitution as first and foremost embodying an aspiration of representative government and electorally accountable policymaking are likely to be less enamored with nonminimalist originalism.

221. PERRY, MORALITY, *supra* note 10.

sis.[222] Applying important insights from the literature of hermeneutics,[223] Solum argued that both aspirational meaning and original meaning have backward-looking and forward-looking dimensions, and that any rigid distinction between the two cannot be maintained.[224] Whether original or aspirational, the meaning of the Constitution "is only given to us in the process of application."[225] To know the meaning of a text requires an understanding of its context,[226] and the context of any text includes its original meanings, its original applications, its post-original meanings, and its subsequent applications. We can only comprehend the content and significance of a text as we come to see and understand how it has been applied in past circumstances, and how it is applied in new circumstances.

Solum views efforts to draw any clear past/future and behind-the-text/in-front-of-the-text distinctions between original and aspirational meaning as problematic.[227] To the extent that the idea of aspirations suggests a forward-looking search for meaning, we expect that meaning to change. But original meaning, which draws its content from its applications, cannot lie dormant in the past; it, too, must change. If, as Perry suggested, original meaning "'is a mediation between past and present,'"[228] it must be constituted by elements of both. From this

222. *See* Lawrence Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989). I am grateful to Larry Solum, Professor of Law and Rains Fellow at Loyola Law School, Los Angeles, California, for discussions with me illuminating the matters addressed in his article.

223. Hermeneutics is defined as follows: "The science and methodology of interpretation, especially of scriptual text." THE AMERICAN HERITAGE DICTIONARY 846 (3d ed. 1996).

224. *See* Solum, *supra* note 222. Solum characterized the distinction as involving both "important difference[s]," *id.* at 1613, and qualities which are "mutually exclusive," *id.* at 1614. While I agree with the former characterization, I think the latter one may be overstated.

225. *Id.* at 1615; *see also* HANS-GEORG GADAMER, TRUTH AND METHOD 290 (1975) ("It is only in all its applications that the law becomes concrete.").

226. One way to express this is to note that a text can be intelligible only by reference to a context, and prior applications of a text—whether perceived as a bearer of original or aspirational meanings—form an indispensable part of its context. *See* David Couzens Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479, 493 (1988) ("A text only makes sense insofar as it inheres in a context, and for us even to be able to understand the text at all, we must presuppose an understanding of that context.").

227. *See supra* note 222 and accompanying text.

228. PERRY, MORALITY, *supra* note 10, at 138 (quoting DAVID TRACY, THE ANALOGICAL IMAGINATION 99 (1981)).

perspective, Perry's abandonment of the original-aspirational meaning distinction brings him in line with hermeneutic reality.[229]

Notwithstanding the force of Solum's analysis, a conception of the Constitution and its interpretation that fails to account for the independence of aspirational meaning is problematic. To explain why, I must first say something more about the notion of constitutional aspirations. In one sense, the idea that the Constitution embodies or signifies aspirations is probably unexceptionable, even for many proponents of more narrow forms of originalism. As noted by Professor Michael McConnell, a prominent originalist and advocate of judicial restraint, "[t]he Constitution is chock-full of aspirations. We usually call them, more mundanely, constitutional principles."[230] It is difficult to deny that at least some constitutional provisions have a forward-looking dimension—a dimension which presents "a general idea of the perfection we ought to aim at" rather than "any certain and infallible directions of acquiring it."[231] According to McConnell, the "distinctive connotation" of an aspiration "is that it is a perfection to be striven for, but never entirely achieved;" "[a]spirations are always slightly out of our reach."[232]

But to agree that the Constitution signifies aspirations is not necessarily to accept, at least for the purpose of constructing a defensible theory of constitutional interpretation, a distinction between those aspirations and original beliefs.[233] The same questions always arise: If

229. Indeed, the principal point of Solum's analysis was to suggest that Perry's nonoriginalist theory was, "in an important sense, an originalist one." Solum, *supra* note 222, at 1629.

230. Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 100 (1988) [hereinafter McConnell, *Moral Realist Defense*]. Elsewhere, Professor McConnell notes that "[t]o some extent, the term 'aspiration' is not a bad expression for the principles of the United States Constitution." Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1530 (1989) (reviewing MICHAEL J. PERRY, MORALITY, POLITICS AND LAW (1988)) [hereinafter McConnell, *Democratic Politics*]; *see also* Barber, *supra* note 171, at 34 ("If we approach the Constitution in a manner mindful of the distinction between aspirations and immediate wants and aversions, much of what we see in constitutional language and history is aspirational.").

231. McConnell, *Democratic Politics*, *supra* note 230, at 1530 (quoting LON FULLER, THE MORALITY OF LAW 5 (1964)). While Professor McConnell believes that some of the Constitution's provisions protecting individual rights are aspirational—he cites as a principal example the Equal Protection Clause—he denies that they all are, *see id.* at 1531 (arguing that the First and Fifth Amendments and the Due Process Clause of the Fourteenth Amendment are "better understood as bulwarks against change rather than aspirations to further change").

232. *Id.*

233. Indeed, Perry's past efforts to build a theory of constitutional interpretation around such a distinction has been a lightning rod for his critics. *See, e.g.*, BORK, THE

not the Founders' aspirations, then whose? While reliance upon the Founders' beliefs—even their aspirational beliefs—may itself be somewhat problematic in terms of the ideal of government by popular consent, in what sense has anybody consented to be ruled by the instantiation of aspirations derived from the vision of anyone but the Founders?[234]

These questions have loomed forebodingly over modern efforts to defend activist theories of judicial review. Perry's earlier work aside, rarely has a theorist argued for an approach to constitutional interpretation in which the Court is justified in considering aspirations unconnected to original beliefs.[235] Instead, aspirational theorists typically have sought to establish some sort of originalist pedigree for constitutional aspirations. For example, in his book, *The Supreme Court and the Decline of Constitutional Aspiration*,[236] Professor Jacobsohn lamented the demise of aspirationalism in constitutional law and argued for its resuscitation.[237] Jacobsohn argued that "a judicial function involving the application of fundamental aspirations is compatible with the jurisprudential perspectives of a wide range of constitutional theory."[238] However, Jacobsohn was careful to draw a distinction between "aspirations of the Constitution"[239] and "additional aspirations, concerning which the document is basically agnostic."[240] The aspirations that provide a legitimate touchstone for constitutional interpretation—at least in the courts—are not those which might be derived from any "present consensus"[241] or from free-standing theories of natural law. Instead, judges should try "to retrieve, where relevant, the constitutional aspirations of the

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TEMPTING OF AMERICA, *supra* note 12, at 216-17; McConnell, *Democratic Politics*, *supra* note 230.

234. For general discussions of the relevant issues, see BORK, THE TEMPTING OF AMERICA, *supra* note 12, at 170-76; ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 18-21 (1987); Brest, *supra* note 4; Simon, *supra* note 5, at 1495-1505.

235. *But see* BASHAM, *supra* note 53, at 110 (arguing that "in the relatively few cases in which a judge may be warranted in making new law for a new day, his task is 'to objectify in law, not [his] own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of [his] time'") (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 173 (1921)).

236. JACOBSOHN, *supra* note 167.

237. *See id.*

238. *Id.* at 138.

239. *Id.* at 139 ("Constitutional aspirations refer to aspirations of the Constitution."). Elsewhere, Jacobsohn referred to constitutional aspirations as "the animating, vital principles imminent within the document." *Id.* at 144.

240. *Id.*

241. *Id.* Jacobsohn attempted to draw a distinction between constitutional aspirations on the one hand, and political or social aspirations on the other. *See id.*

framers."[242] Thus, for Jacobsohn, it is the connection of aspirations to the historical Constitution that provides aspirationalist review with the necessary legitimacy.

Sotirios Barber has also been a strong proponent of aspirationalist interpretation. However, like Jacobsohn, the aspirations he contends ought to guide the courts are originalist in nature. For Barber, "[t]he aspirational tone of the Constitution is unmistakable in the Preamble. As in the Constitution's history and text, an aspirational dimension is present in the Constitution's logic."[243] He argues that "we are entitled to take our understanding of its words and phrases as the best evidence of the framers' intentions," and that our understanding ought to focus on the "the general purposes that we believe make up what they believed would be a good and just society."[244] Thus, it is the Founders' aspirations, not their immediate interests, which ought to guide modern constitutional interpretation.[245]

These efforts to connect constitutional aspirations to the Founders represent a completely understandable response to the "by what right" questions[246] raised by the critics of judicial activism. Aspirations unconnected to history—or for which some sort of plausible historical justification cannot be presented—can look a lot like, and may often represent, nothing more than the subjective longings of the person who professes them. Constructing a plausible originalist pedigree for whatever aspiration a Supreme Court Justice or law professor might wish to inject or find in the Constitution simply is not that difficult.[247]

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242. *Id.* at 140. Relying in part upon the writings and speeches of Abraham Lincoln, Jacobsohn locates the source of the Constitution's aspirations in the Declaration of Independence and the natural rights theory that influenced the founding generation. *See id.* at 95-112.

243. BARBER, *supra* note 171, at 34.

244. *Id.* at 37.

245. *See id.* Elsewhere, Barber has argued that the Founders' aspiration to justice, derived from the Preamble and other originalist sources, ought to guide judicial interpretation of the Ninth Amendment. *See* Sotirios Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67 (1988).

246. *See* LOUIS LUSKY, BY WHAT RIGHT? 27-43 (1975).

247. The confirmation process for Supreme Court Justices, while certainly not foolproof, is likely to screen out those people whose personal ideals or aspirations are too wild or bizarre. *See* PERRY, HUMAN RIGHTS, *supra* note 14, at 116, 123-25. Indeed, some have suggested that the confirmation process, if anything, is too sensitive to the personal morality of judicial nominees. *See, e.g.*, STEPHEN CARTER, THE CONFIRMATION MESS (1994). For law professors, the same may not be as true. One is reminded here of Mark Tushnet's claim that, were he a judge, he would decide cases on the basis of the result which is "likely to advance the cause of socialism." Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981). But even this position might not be impossible to

By the same token, however, neither is it difficult to raise legitimate questions about originalist support for the aspirations most commonly attributed to the Founders. For example, the Founders' aspirations to which Jacobsohn refers are primarily those contained in the Declaration of Independence. Among the most famous provisions of the Declaration is the reference to the self-evident truths, the first of which is that "all Men are created equal."[248] If this language is interpreted as aspirational, how does one articulate the relevant aspiration? Is it simply equality? Perhaps it is the aspiration that all people be treated with "equal concern and respect."[249] The Declaration's appeal to equality can be interpreted as so abstract[250] that any equality-oriented aspiration can lay claim to at least some historical support.[251]

To be credibly originalist, of course, an aspiration is expected to have demonstrable roots in the Founders' vision of the ideal world. But this should seldom prove an insurmountable requirement.[252] For

square with an aspiration—call it (economic) justice—which plausibly might be connected to the Founders. *See* Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 (1992).

248. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

249. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-81 (1977) (discussing equal concern and respect as an abstract right in a theory of justice); ELY, *supra* note 104, at 82 (referring to equal concern and respect as an ideal dramatically embodied in the Fourteenth Amendment).

250. The same is true, of course, concerning the Declaration's references to the "inalienable Rights" of "liberty" and "the pursuit of happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For those, like Professor Barber, who take the Constitution's Preamble as an important source of aspirations, see BARBER, *supra* note 171, an analogous point can be made concerning the Preamble's reference to the ideas of "establishing justice" and forming "a more perfect Union." U.S. CONST. preamble. If the founding generation's commitment to liberty, as embodied in the Due Process Clause of the Fifth (and Fourteenth) Amendment, is taken as aspirational, almost any vision of human freedom can be said to have some sort of originalist justification. *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (stating that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"). *But see* McConnell, *Democratic Politics*, *supra* note 230, at 1532 (arguing that the Due Process Clauses cannot plausibly be construed as "transformatively" aspirational).

251. *Cf.* Bruce Ledewitz, *Judicial Conscience and Natural Rights: A Reply to Professor Jaffa*, *in* HARRY JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 1, 114 (1994) ("The authority of the Declaration's assertions cannot be based on age, but on their truth. . . . [R]eal questions of moral right and political policy cannot be handled by quotes from the ancients about abstractions like equality."). A similar point could be made about reliance upon the Constitution's Preamble for guidance in originalist interpretation. *See* Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117 (1990).

252. Recall, here, Solum's argument that aspirations cannot be separated from the context of their past applications. *See supra* text accompanying notes 224-32.

example, Perry argues that a principal directive embodied in the Fourteenth Amendment, the "status of being human" principle,[253] prohibits the state from discriminating against an individual on the basis of "the view that the members of a group are inferior, as human beings, to persons not members of the group, *if the group is defined, explicitly or implicitly, in terms of a trait irrelevant to their status as human beings.*"[254] While Perry does not refer to this directive as aspirational per se, it could easily be conceptualized in those terms.[255] It holds open the possibility that the drafters and ratifiers of the Amendment believed that the kind of state action with which the Amendment would be inconsistent would not be determinative of its meaning. The Amendment's directive also invites (if it does not demand) the interpreter to take into account evolving, and more enlightened, moral conceptions of the state of affairs with which it is concerned (i.e., what are the traits "relevant" to human identity?).

If an originalist theory can do all this—if it has forward-looking and aspirational dimensions and can justify constitutional decisionmaking by the courts untethered by narrow historical conceptions of morality while claiming plausibly to work in the service of, and therefore in some meaningful sense to be authorized by, the Founders' political and moral vision—why not embrace it?[256] Asked differently,

253. *See supra* notes 93-100 and accompanying text.

254. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 150.

255. If perceived as necessary, it would not be difficult to articulate the values underlying such a directive in language that was even more aspirational—for example as embodying the aspiration that the government treat people with dignity or, as suggested earlier, with equal concern and respect. *See supra* note 249 and accompanying text; *cf.* Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 121 (1978) (arguing that the Due Process Clause protects the value of "inherent dignity," drawn in part from philosophical concepts influential with the Founders).

256. There is, in a sense, something for everybody in Perry's theory. For the traditional originalist, the theory's connection to the past supplies elements of interpretive constraint and political legitimacy deemed so essential to the viability of judicial review. For the conventional nonoriginalist, Perry's embrace of a judge's resort to personal morality in the active specification of indeterminate constitutional directives provides the flexibility and adaptability so essential to the organic requirements of constitutional doctrine.

On the other hand, there is much in Perry's theory which is destined to cause controversy. For example, like John Ely before him, Perry surely will be criticized by nonoriginalists for his abandonment of the idea that the Constitution provides meaningful judicial protection for interests which might fall within the umbrella of a general right to privacy. *See* ELY, *supra* note 104; *cf.* Thomas Gerety, *Doing Without Privacy*, 42 OHIO STATE L.J. 143 (1981). In Chapter 9, Perry argues that the Fourteenth Amendment embodies a reasonableness requirement, but argues that a judge should adopt a quite restrained (minimalist) posture in its specification—a posture that would seem to leave little room for meaningful judicial protection of privacy interests. *See* PERRY, THE CONSTITU-

are there good reasons why those who (like me) have rejected originalism[257]—those for whom the concept of the Constitution has an irreducibly aspirationalist dimension that until now only nonoriginalist theory has been able to capture—might be skeptical of Perry's originalist theory, notwithstanding what I have suggested are its aspirationalist pretensions? The answer, I think, is yes.

VII. The Scope of Originalism

Some years ago, in an Article entitled *Enough About Originalism*,[258] I accepted the view, expressed at that time by Perry and other nonoriginalists, that originalism, although fraught (as is nonoriginalism) with "theoretical and methodological difficulties," was neither incoherent nor impossible to pursue.[259] Nonetheless, I argued that originalism ought to be rejected as an exclusive or paradigmatic approach to constitutional interpretation because, standing alone, it could not adequately capture, either descriptively or normatively, "the full role the Constitution has played, and will surely continue to play, in our national experience."[260] Perry's book has only re-enforced this conclusion.

It is perhaps ironic that what is certainly the most sophisticated, powerful, and in many ways most attractive conception of originalism yet to be advanced reveals more clearly than ever the major defect of originalism.[261] Notwithstanding its capacity to convert the Founders' beliefs into forms and applications that can resonate with modern moral sensibilities, Perry's originalism remains chained to those beliefs. The judicial task is to probe the historical context of a constitu-

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TION IN THE COURTS, *supra* note 13, at 161. From a traditionally originalist standpoint, whatever credibility Perry might gain from his abandonment of a right to privacy will be lost with the apparent ease with which he reconceptualizes (and defends) much privacy doctrine in the form of legitimate antidiscrimination analysis. *See id.* at 174-89 (arguing that antidiscrimination principles embodied in Fourteenth Amendment justify invalidating laws regulating abortion and homosexuality).

257. *See* Saphire, *Judicial Review*, *supra* note 56; Saphire, *Originalism*, *supra* note 4; Richard B. Saphire, *Professor Richards' Unwritten Constitution of Human Rights: Some Preliminary Observations*, 4 U. DAYTON L. REV. 305 (1979).

258. Saphire, *Originalism*, *supra* note 4.

259. *Id.* at 536-37. Much of what follows in the next several paragraphs parallels arguments advanced in my earlier Article.

260. *Id.* at 538.

261. Perry himself has made the point that "[b]ecause critics of originalism often misconceive it, they end up attacking a straw man." PERRY, MORALITY, *supra* note 10, at 125. By advancing the most careful and, from a traditional nonoriginalist standpoint, most attractive form of originalism yet developed, Perry has gone a long way toward eliminating the straw man phenomenon.

tional provision, to translate the provision by determining the directive the Founders intended or understood it to embody, and to shape the directive so that its meaning can be made concrete in the context of the facts of a given case. And, while the judge need not reconcile her decision with her best approximation of how the Founders would have applied their directive to the case at hand, the ultimate responsibility for the decisional norm, and thus the decision itself, must rest with the Founders.

It may be true that the chains that bind Perry's originalism to the past are less taut than those that bind a more conventional (minimalist) originalism. But they are not chains of sand. To be genuinely originalist—at least if that term is to retain any independent meaning—each decision establishing the rights of individuals and the powers of government must be justified by reference to an historically fixed conception of political-moral value. Some interpretations of constitutional language can be wrong just because they cannot fairly be reconciled with the Founders' vision of that aspect of the human condition to which the provision relates. Even an interpretation of a constitutional provision that can be explained and justified by reference to arguably plausible linguistic meanings of the text, judicial precedents, post-adoption customs and practice, conventional morality,[262] and emerging conceptions of morality,[263] simply will not do. It still must square with the directive the Founders intended meant the provision to embody.

There is a sense in which this observation may seem uninteresting or inconsequential. As suggested earlier, in the face of historical indeterminacy, many of the Constitution's most important rights-protecting provisions may well yield directives elastic enough to provide plausible support for almost any decision reached on nonoriginalist grounds.[264] Thus, there may in fact be only a few cases where the

262. *See* Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 720 (1976) (discussing "the conventions of the social and political culture" as a source of meaning in constitutional interpretation).

263. *See id.* at 715 (arguing that the Court should bring to bear "the evolving ethical sensibility of the culture" in constitutional interpretation); *see also* Daniel O. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 629 (1985) (proposing that "the long-term pattern of American moral development" should serve as a source for constitutional decision-making).

264. For example, having read a great deal about the historical context of the Fourteenth Amendment as it relates to the problem of segregated public schools (including McConnell's recent, interesting article, McConnell, *supra* note 96), I confess to being more than a tad uncertain whether any principle of equality embraced by the enacting Congress

originalist's requirement of a historical pedigree cannot be met. Yet, the originalist's insistence on such a pedigree exacts a significant cost, a cost that some will be unwilling to pay.

The allure of originalism derives mainly from the conception of political responsibility upon which it is based. As noted earlier, for many modern originalists, the need to take original understanding seriously has nothing (or at least very little) to do with hero worship.[265] One is not obliged to follow the Founders' directives just because they were great men, or just because their principles and values were great and worthy.[266] Instead, originalism represents a strategy designed "to

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and ratifying states can really produce the result reached by the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). However, I do not find Perry's argument in defense of *Brown* implausible; I am open to Perry's argument that the enactors and ratifiers really did view the Fourteenth Amendment as involved with a directive which can be construed to prohibit the sort of human degradation that contemporary America has come by now (if not by 1954) to associate with officially sanctioned racial segregation.

A further confession: I have no way of knowing the extent to which my personal views about the immorality of officially sanctioned racial segregation affect my amenability to Perry's defense of *Brown*. Perhaps, however, I should not feel troubled; after all, Perry acknowledges and accepts the (perhaps inevitable) role that personal moral values may play in resolving the problem of historical indeterminacy. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 62. Perhaps I should also acknowledge that my past support of *Brown* as a constitutional decision has not been deterred by my serious doubt about its originalist pedigree. *See* Saphire, *Judicial Review*, *supra* note 56.

265. *See supra* notes 3-4 and accompanying text.

266. In his earlier work, Perry argued that a nonoriginalist judge was not obliged to "bring to bear" every aspiration signified by the constitutional text. *See* PERRY, MORALITY, *supra* note 10, at 135. Indeed, if a judge believed that a particular aspiration was not a "worthy" one, Perry insisted that a nonoriginalist judge ought not bring it to bear; instead, he or she should "pursue the originalist approach to adjudication under the provision in question." *Id.* at 135. Of course, when Perry was defending nonoriginalism, he had no reason to suggest what any judge ought to do when faced with an original belief that she found to be unworthy. There was nothing in the logic of Perry's nonoriginalist theory which suggested that a judge was any more bound to follow unworthy nonoriginal principles or beliefs than unworthy original ones.

According to the new Perry, the originalist, it would appear that things are different. When faced with historical indeterminacy, a judge must specify a constitutional directive so as to make it determinate. This task has both historical (i.e., objective) and normative dimensions. The initial inquiry is historical: the judge must "embrace one plausible conclusion about the original meaning of a constitutional provision rather than another plausible conclusion." PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 56. Perry believes (and is not troubled by the idea) that a judge's conception of the judicial role and personal morality may well (perhaps not consciously) influence his or her choice of the most plausible meaning of a provision. But if the judge concludes that the weight of the historical evidence in support of one meaning is stronger than the evidence supporting a second meaning, it would seem that he or she is bound to accept and enforce the former. This would be true even if the judge believed that enforcement of the historically supported meaning would lead to less worthy decisions than would enforcement of alternative meanings. If the judge self-consciously chose a meaning based solely upon her moral pref-

narrow the occasions for the ultimate judicial sin: the abuse of power."[267] To act responsibly, judges must respect some boundary that demarcates, even if imprecisely, the sphere of electorally accountable policymaking from the sphere of judicial enforcement of constitutional norms.[268] Originalism, it is said, facilitates government by consent.[269]

Perhaps this is true. To be sure, nonoriginalists insist that their theories are restrained—that nonoriginalism does not necessarily entail the unbridled exercise of judicial discretion and the dreaded abuse of judicial power.[270] Yet for those who are especially preoccupied with the specter of "government by judiciary," it is reassuring to know that at least sometimes there exists a historically fixed star to guide judicial navigation of the constitutional sea.[271] As Perry notes, "there

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erences, notwithstanding her belief that alternative meanings had better historical support, it would be difficult to see how the decision could be defended as originalist.

Perry has recently noted that the fact that an originalist judge may feel compelled to reach some decisions that are, for that judge, morally problematic may lead one to conclude that "the attractiveness of an uncompromising 'originalist' constitutional theory . . . is far from obvious." Perry, *What Is "The Constitution"?*, *supra* note 42.

267. James L. Buckley, *Bound by Oath*, 80 A.B.A. J. 113 (May 1994).

268. *See* PAUL W. KAHN, LEGITIMACY AND HISTORY 63 (1992) ("The methodology of originalism is legitimate because it reveals the authentic actions of the popular sovereign, not because the past has some normative priority over the present. . . . The popular sovereign is the dramatic actor in the myth of originalism.").

269. Much of the nonoriginalist literature, of course, rejects the argument-from-consent defense of originalism, relying on a number of criticisms. These include: (1) the proposition that even when measured against the population of the states at the time of ratification, relatively few people actually voted for the Constitution, *see, e.g.*, Rubenfeld, *supra* note 5, at 1152 ("The exclusion of the majority of the persons alive in the 1780s from the constitution-making procedures of that period eats away at the foundations of the Constitution's legitimacy. From the consensualist viewpoint, it ought to undercut the legitimacy of ratification altogether."); (2) nobody living today (or in the recent past) was living at the time of the original Constitution or the adoption of the post-Reconstruction amendments, so the claim of actual consent to its provisions (whether judicially or otherwise enforced), even as originally understood, is pure fiction, *see, e.g.*, Simon, *supra* note 5, at 1513; and (3) given the nature of the constitutional text and the discretionary character of historical analysis, originalism frequently will result in decisions whose actual historical pedigree (and therefore whose consistency with the true meaning of the document) will be in doubt, *see, e.g.*, NELSON, *supra* note 92, at 1-12. This is not the place to review and evaluate these criticisms—each of which has force. Suffice it to say that whatever the weaknesses in the traditional arguments in defense of originalism, the argument that nonoriginalism is more consistent with popular consent is equally, if not more, problematic.

270. *See, e.g.*, PERRY, HUMAN RIGHTS, *supra* note 14, at 128-38; BASHAM, *supra* note 53, at 116-18; CHEMERINSKY, *supra* note 234, at 123-26; Conkle, *supra* note 263, at 636; Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

271. *See, e.g.*, Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 861 (1985) (arguing that at least with respect to the Constitution's more determinate provisions, originalism may provide a relatively value-free approach to interpretation); Cass R. Sunstein, *The Idea*

is no reason to doubt that the Court will usually be able to reach a plausible conclusion about original meaning,"[272] even if it occurs through a process of construction.[273]

However, even if we assume that originalism—including Perry's relatively flexible and adaptive nonminimalist version of it—promotes one aspect of political responsibility,[274] it can also *undermine* political responsibility in different, and no less important, ways. In the most abstract sense, to say the Court works in service of the Founders may

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of a Useable Past, 95 COLUM. L. REV. 601, 602, 604 (1995) (noting that "[h]istory imposes constraints on the lawyer as well as the historian," and arguing that constitutional lawyers should look to history as "a way of disciplining legal judgment").

272. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 41. Originalists argue persuasively that the defense of originalism cannot be made to depend on the absolute certainty or incontestability of historically based conclusions. *See, e.g.*, Kay, *supra* note 53; Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987); McConnell, *Democratic Politics*, *supra* note 230, at 1525 ("The best we can hope for in some cases is that judges will steep themselves in the history and philosophy of the Constitution and attempt to apply it faithfully."). Nor can it be made to depend on the notion that all originalist judges must agree on a single interpretation of the historical record. As Perry notes, originalism only requires that the judge be committed to "retrieve the original meaning of constitutional provisions as accurately as possible." PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13, at 42. .

In this regard, consider *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511 (1995). In *McIntyre*, Justice Thomas concurred in the judgment of the Court, *see id.* at 1525 (Thomas, J., concurring), invalidating, on First Amendment grounds, an Ohio statute prohibiting the dissemination of anonymous political campaign literature, *see id.* at 1524. Thomas professed allegiance to originalism, stating that "[w]hen interpreting the Free Speech and Press Clauses, we must be guided by their original meaning." *Id.* at 1525. Thomas concluded that "the historical evidence from the framing" compelled the statute's invalidation. *Id.* at 1530. Justice Scalia, joined by Chief Justice Rehnquist, dissented. *See id.* at 1530 (Scalia, J., dissenting). Scalia also professed originalism, identifying himself as one of "those who adhere to the Court's (and the society's) traditional view that the Constitution bears its original meaning and is unchanging." *Id.* at 1531. However, Scalia's perusal of the historical record failed to convince him "that anonymous electioneering was regarded as a constitutional right" by the Founders. *Id.*

Does the fact that Thomas and Scalia disagreed about the proper resolution of the case, by itself, suggest that originalism is incoherent or otherwise fundamentally flawed? (Put aside, for present purposes, the question whether the opinions of Thomas and Scalia—especially Scalia's—are genuinely originalist.) I think not. Few originalists claim that the historical record, by itself, resolves the issues presented in individual cases. As Scalia noted, in at least some cases, "constitutional adjudication necessarily involves not just history but judgment." *Id.* at 1532. That judges will sometimes view the historical record differently, in the sense of disagreeing on the existence or relevance of particular historical facts, or that they will come to different conclusions about the proper interpretation of an agreed-upon set of facts, seems inevitable given the complexity of historical investigation. *See* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986).

273. *See* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 47, at 41.

274. This assumption, of course, is deeply contestable. *See, e.g.*, Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992).

also be to say that it is furthering the will of "We the People."[275] Yet the nonoriginalists' rejoinder, trite as it may seem, cannot be dismissed: "The People" whose directives the originalist would have us follow are not us.[276] Nobody alive today participated in the promulgation of the language of the original Constitution, the Bill of Rights, or the post-Reconstruction amendments. The principles and directives they embody reflect the world view of people of a different, and in some ways radically different, era.[277] To define the Constitution exclusively by reference to those directives is, in the final analysis, to assign full responsibility for what we are as a nation, and what we will become, to the will and the desires of others whose life experiences and expectations may only remotely or marginally coincide with our own.[278]

The conventional originalist response to this concern is twofold. First, originalists argue that the Constitution does not foreclose generations subsequent to the relevant group of Founders from taking responsibility for its meaning. Indeed, they assert, the Constitution, by providing a mechanism for formal amendment, explicitly invites us to do so.[279] Second, the more moderate originalists claim that the desire for a living, dynamic, or relevant Constitution can be accommodated once we recognize that it is the Founders' principles, not their subjective intentions or applications, that provide the touchstone for legitimate interpretation. The important point is fidelity to the Founders' *general* vision. How they applied that vision is not a controlling consideration.[280]

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275. U.S. CONST. preamble.

276. Of course, the "We" contemplated by those who drafted and participated in the ratification of our Constitution were, in an important sense, not them either. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

277. This holds true for most conventional views of the Constitution and how it was created. For a more unconventional view, which attempts to account for methods of constitutional change in addition to the actual promulgation and formal modification of the written text, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

278. For representative expositions of this problem and discussions of its significance for constitutional theory, see Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893 (1990); Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985).

279. *See, e.g.*, BERGER, GOVERNMENT BY THE JUDICIARY, *supra* note 12, at 132 (noting that the Framers included Article V as the means to avoid constitutional "congealment").

280. On the notion of accommodating change with fidelity in constitutional interpretation, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

With respect to the first of these responses, it is, of course, quite true that the formal amendment process set out in Article V provides modern Americans a means to make the Constitution more responsive and relevant to their real aspirations. But the limitations of this process are significant and well-known.[281] To credit Article V as the only means to accommodate constitutional change is to seriously constrain the capacity of our constitutional law to represent the nation's evolving values and ideals.[282] To accept the fact that Article V need not represent, and that it has not represented, the exclusive means of facilitating constitutional change does not require the conclusion that everything is up for grabs and that the Constitution is not law.[283]

The second originalist response to the political responsibility issue is more subtle. That most originalists reject the Founders' subjective intentions as the principal lodestar for constitutional meaning reflects more than the perceived difficulty in recovering those inten-

281. For some originalists, there can be no "but"; any exception to the proposition that the formal amendment process represents the only legitimate means for constitutional change is viewed as giving away the store. *See* BERGER, GOVERNMENT BY THE JUDICIARY, *supra* note 12, at 318.

282. Of course, the extent to which this is a price worth paying for the perceived benefits of constitutional change outside of Article V is one of the central disputes in constitutional law. For a discussion, see William Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Process of Change*, 1984 U. ILL. L. REV. 933.

Perhaps the most important and controversial version of the nonexclusivist approach to Article V is that proposed by Professor Ackerman, who has argued that the coalescing of extraordinary political, legal, and social forces can be construed as tantamount to constitutional amendment outside of Article V. *See, e.g.*, ACKERMAN, *supra* note 277; *see also* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995). *But see* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1246 (1995) (arguing against the notion that the "architecture-defining" provisions of the Constitution, including Article V, should be taken as "merely suggestive"). *See also id.* at 1248 (arguing that some provisions, including Article V, "demand a fairly rigid definition").

283. This is probably a place where the critical reader would expect a footnote citing authorities for the "everything is not up for grabs if you're not an originalist" thesis. But citation to authorities, regardless of how respected, would not convince the originalist devotee. The existence and force of interpretive constraints is not something that can be proven. For a theorist, the existence of constraints is something that is accepted or not, perhaps as an article of faith. For judges generally, being constrained is something that is internalized as part of the expectations of the profession and the broader interpretive community. *See, e.g.*, FRANK M. COFFIN, ON APPEAL 257-62 (1994). Every judge operates in an interpretive context—what Richard Posner has called a "vast linguistic, cultural, and conceptual apparatus." RICHARD POSNER, OVERCOMING LAW 174 (1995). No judge can take seriously the notion that he or she has the freedom or the right to interpret the Constitution or anything else in just any way he or she pleases. Any judge who does so will be reversed or ignored.

tions.[284] It also represents an effort to soften the potentially harsh edges of a narrow, historically determined method of interpretation which, if rigidly applied, would lead to politically and morally unacceptable results.[285] Once the Founders' principles, values, or, in Perry's conceptualization, "directives" become the source and standard for constitutional meaning, the Constitution gains the interpretive resiliency so necessary for its continued moral relevance.[286]

The fact remains, however, that the principles are still theirs, not our own. The originalist's insistence that it is only the Founders' vision of the proper ordering of human relations that can count means that the ultimate responsibility for each decision must be attributed to the Founders. After all is said and done, after the judge has attempted to translate the constitutional directives concerning equality (i.e., equal protection) and fairness (i.e., due process), and human dignity (i.e., no cruel and unusual punishment), the judge must in good faith be able to say that he or she has been faithful to the Founders' values

284. On the difficulty of determining subjective intentions, see, for example, Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9, 30-34 (1995); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Pierre Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283 (1985); Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 636-45 (1985).

285. Thus, for example, Robert Bork has been accused of inconsistency, pragmatism, or worse in his effort to reconcile the outcome in *Brown v. Board of Education* with the philosophical foundations of his version of originalism. *See, e.g.*, Posner, *supra* note 134.

286. Thus, it is no accident that a judge, like Justice David Souter, who focuses on the Founders' principles, is likely to be perceived as a political and judicial moderate. *See* David G. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 36, 52 (noting that Justice Souter, widely perceived as a moderating influence on the Court, was quoted as testifying during his Senate confirmation hearings that "Justices ought to identify the 'principle that was intended to be established as opposed simply to the specific application that that particular provision was meant to have by [sic], and that was in the minds of those who proposed and framed and adopted that provision in the first place'").

A focus on the Founders' principles, and not their subjective intentions or applications, can reflect political moderation of another sort. To the extent that the Founders' specific applications of constitutional provisions—or, in Dworkinian terms, their conceptions instead of their concepts, see Dworkin, *supra* note 249, at 103—would lead to archaic and morally unacceptable results, it might generate pressure for frequent efforts to amend the Constitution through the formal processes established in Article V. Such pressure might be perceived as politically destabilizing and a threat to the viability of constitutional government itself.

This is not to suggest that a judge who focuses on the Founders' principles necessarily chooses to do so because such an approach is likely to produce politically moderate results. A judge may truly believe that the Constitution is best understood as the embodiment of the Founders' principles and not their specific intentions or applications. But there is nothing inherent in the concept of the Constitution that requires the adoption of one approach over another.

and ideals.[287] I do not doubt that there is a sense (beyond that referred to above) in which adherence to the Founders' beliefs about such things as human rights can be viewed as a responsible approach to the interpretation of "their" Constitution. It is difficult to deny the values associated with modes of interpretation that self-consciously seek to maintain continuity with the past. Nor do I doubt that even one who rejects a book of rules conception of the Constitution might find value in a Constitution whose aspirations are defined in originalist terms. In the long run, however, I believe that the viability of the Constitution depends on its capacity to reflect the values and aspirations that—even if they cannot be traced directly to the Founders' understandings—we present-day Americans "as a people hold to be fundamental."[288] When we do look to the past for guidance, it must be "the sum of our history" which leads the way.[289] It is "[t]he entirety of that history, together with *current aspirations* that are both shaped by it and shape the meaning derived from it, far more than the intentions of the framers, [that] determine what each generation finds in the Constitution."[290]

I do not mean to deny or diminish the important insights contributed by originalist theory to a full understanding of the Constitution or its interpretation. Indeed, originalism's central messages—which emphasize the values of connection and continuity, the importance of relating our past to our present and future condition and vision, and

287. The notion that the Founders themselves are the exclusive source of constitutional meaning is one which even the most ardent originalists on occasion seem to find unsettling. For example, in his dissent in *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511, 1532 (1995) (Scalia, J., dissenting), Justice Scalia found evidence of the Framers' understanding of the First Amendment inconclusive with respect to the validity of laws prohibiting anonymous electioneering. Instead of resolving the matter on the basis of that evidence alone, *see id.* ("In such a case, constitutional adjudication necessarily involves not just history but judgment."), he turned to "the widespread and longstanding traditions of our people" for interpretive guidance. *Id.* Although an originalist plausibly might claim that practices contemporaneous to, or following closely on the heels of, the promulgation of a provision might illuminate the Founders' understanding of its meaning, see Price, *supra* note 5, at 495-97 (arguing that the post-enactment behavior of the Founders is an acceptable, and in some cases an indispensable, source of data for originalist interpretation), Scalia's analysis was not so confined. *See id.* at 1532-33 (discussing state laws governing anonymous electioneering enacted after 1890). Scalia's rather flexible version of originalism can be contrasted with the much narrower (and arguably more principled) version employed in Justice Thomas's concurrence. *See id.* at 1530 (Thomas, J., concurring) ("I believe the historical evidence from the framing outweighs recent tradition.").

288. Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1042 (1981).

289. *Id.* at 1050.

290. *Id.* (emphasis added).

the value of interpretive humility—all constitute an integral and important part of our constitutional and political culture.[291] Perhaps especially for constitutional aspirationists, these are messages about which we can use continuous reminding.[292]

Originalists, however, would do well to remember something of equal importance. To the extent that one believes that the spirit of the Constitution "is inherent in the aspirations of our people,"[293] the preservation and nurturing of that spirit requires constitutional interpretation to be responsive to our people's actual and evolving aspirations. Originalism's attribution of sole responsibility for the Constitution's meaning and message to the Founders both misrepresents and diminishes one of the most valuable aspects of our constitutional tradition: that constitutional interpretation represents both the construction (as in construal) and reconstruction (as in revision) of our basic self-understanding as a people.[294]

VIII. Conclusion

As noted earlier, there is an irony in the fact that the most thoughtful and compelling conception of originalism yet presented (Perry's) reveals more clearly than ever the most important shortcoming of originalism. But there is poetic justice as well. Prior to the publication of *The Constitution in the Courts*,[295] much of Perry's already distinguished academic career was devoted to making nonoriginalism respectable.[296] By all accounts, that work achieved

291. *See* Sunstein, *supra* note 271, at 604 (noting that the "American constitutional culture gives special weight to the convictions of those who ratified constitutional provisions").

292. It would, however, be easy to overstate the extent to which even the most nonoriginalist among constitutional theorists has needed reminding on this point. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 555 (1995) (noting that "historical standards still matter for the simple reason that . . . nearly every constitutional theorist believes history adds something to her account").

293. Brennan, *supra* note 167, at 24.

294. This point has been put in many ways. Perhaps the most cogent is the notion of the Constitution as a work in progress whose basic architecture was designed and built by the authors and ratifiers of the original Constitution, and its subsequent amendments, and whose shape and appearance is fleshed out only through the process of interpretation. For useful presentations, see Marshall, *supra* note 276, at 2 ("When contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago."); Tribe, *supra* note 282, at 1247 (arguing that some constitutional provisions represent ends and aspirations, and "ought perhaps to be read through lenses refined by each succeeding generation's vision of how those ends are best understood and realized").

295. PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13.

296. *See* Saphire, *supra* note 18.

considerable success. Indeed, I think the quite likely considerable nonoriginalist resistance to his version of originalism may, at least in part, be attributable to that success.[297]

But whether or not he converts the masses, Perry's new conceptualization of originalism will certainly challenge conventional thinking about constitutional theory. Some may take Perry's conversion to originalism as evidence of the hopelessness or irrelevance of the very project of theory.[298] Others, and I include myself in this group, will see Perry's provocative work—not only *The Constitution in the Courts*, but all of his work in constitutional law and theory over the last two decades—as a reaffirmation of the importance of that project.[299] Perry provokes us to consider, in a way that few other contemporary constitutional theorists have done, why it is that we believe what we do about the Constitution and its interpretation. He challenges us to confront the fact that every act of constitutional interpretation consists of more than an occasion to determine what the Constitution means with respect to the particular political-moral issue presented for resolution. Every act of constitutional interpretation presupposes, even as it helps construct, a conception of what "the Constitution" means in and for our political culture as a whole.

297. Perry's work has had an important influence on the thinking of a whole generation of constitutional theorists, including my own. Indeed, as Richard Kay notes on the dust jacket of *The Constitution in the Courts*, "Michael Perry has not just contributed to contemporary constitutional theory. He is one of a handful of people who have, more or less, created it." Richard Kay, *Dustjacket of* PERRY, THE CONSTITUTION IN THE COURTS, *supra* note 13.

298. For an impatient, antitheoretical response to Perry's work, see Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 NW. L. REV. 175, 182 (1993) ("But if talking about interpretive strategies—originalism, minimalism, and the like—is just a cover for the speaker's substantive views of the Constitution, where does that leave us? Dare I suggest that we stop talking about judicial review and theories of interpretation?"). Professor Sherry was responding to an essay by Michael Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84 (1993), in which Perry advanced many of the core ideas later presented in his book, *The Constitution in the Courts*. For an earlier suggestion that theory can obfuscate important questions of constitutional substance, see Richard B. Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L. J. 335, 370-72 (1981) [hereinafter Saphire, *What Price Purity?*] (discussing some of the costs of constitutional theory).

299. For discussions of the value of constitutional theory, see Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767 (1987); Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 CONST. COMMENTARY 231 (1989); Richard B. Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and* Dronenburg v. Zech, 10 U. DAYTON L. REV. 767, 808-13 (1985); Saphire, *What Price Purity?*, *supra* note 298, at 373-77; Tushnet, *supra* note 247; Mark Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777 (1987).