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ARTICLE: Common Law Constitutional Interpretation

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-----Footnotes-----*

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SUMMARY:

... There are settled principles of constitutional law that are difficult to square with the language of the document, and many other settled principles that are plainly inconsistent with the original understandings. ... But textualism and originalism remain inadequate models for understanding American constitutional law. ... In Part II, I will discuss the rational traditionalism that is the most important part of common law constitutional interpretation. ... The more sophisticated variants of originalism also belong to the Austinian tradition. ... Traditionalism in Common Law Constitutional Interpretation ... The least satisfactory aspect of traditionalism, as an explanation for the basis of American constitutional law, is the way it accounts for the use of the text. ... As I said, conventionalism of this form is prominent in the common law tradition. ... B. Conventionalism and the Puzzles of Constitutional Interpretation ... Conventionalism also explains what would otherwise be a very puzzling feature of constitutional interpretation--our willingness to depart from the intentions of the Framers much more dramatically than we would depart from the text. ... Within the limits set by precedent, paying more attention to text might indeed limit judges' discretion. The appeal of textualism as a limit on judges--as the argument was made, most famously for example, by Justice Black--stems entirely from the assumption that the text will be used to resolve disputes within the gaps left by precedent. ...

TEXT:
[*877]

The Constitution of the United States is a document drafted in 1787, together with the amendments that have been adopted from time to time since then. But in practice the Constitution of the United States is much more than

that, and often much different from that. There are settled principles of constitutional law that are difficult to square with the language of the document, and many other settled principles that are plainly inconsistent with the original understandings. More important, when people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years. In fact, in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires. [*878]

Despite this, the terms of debate in American constitutional law continue to be set by the view that principles of constitutional law must ultimately be traced to the text of the Constitution, and by the allied view that when the text is unclear the original understandings must control. An air of illegitimacy surrounds any alleged departure from the text or the original understandings. In the great constitutional controversies of this century, for example, the contestants have repeatedly charged their opponents with usurpation on the ground that they were insufficiently attentive to the text or the original understandings. That was the claim made by the Justices of the so-called *Lochner* era; it was the claim made by Justice Black, first against the *Lochner* judges and then against other opponents; it was the claim made, during the last twenty years, by opponents of the Warren Court innovations.ⁿ¹ And today, textualism and originalism continue to be extraordinarily prominent on both sides of the principal debates in constitutional law.ⁿ²

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ⁿ¹ For uses of textualism and originalism in the *Lochner* era (so called after *Lochner v New York*, 198 US 45 (1905)), see, for example, *United States v Butler*, 297 US 1, 62 (1936) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,--to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."); *Home Building & Loan Association v Blaisdell*, 290 US 398, 453 (1934) (Sutherland dissenting) ("The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it."). For Justice Black's textualism and originalism, see, for example, *Adamson v California*, 332 US 46, 70-81 (1947) (Black dissenting); *Ferguson v Skrupa*, 372 US 726, 730-31 (1963); *Harper v Virginia Board of Elections*, 383 US 663, 677-80 (1966) (Black dissenting); *Griswold v Connecticut* 381 US 479, 519 (1965) (Black dissenting). For sustained attacks on the Warren Court, on originalist and textualist grounds, see, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 69-95, 130-32 (Free Press 1990); Edwin Meese, III, *Interpreting the Constitution*, in Jack N. Rakove, ed, *Interpreting the Constitution* 13, 18 (Northeastern 1990); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw U L Rev* 226 (1988); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 283-99, 363-72 (Harvard 1977).

ⁿ² See, for example, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L J* 1131 (1991); Akhil Reed Amar and Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 *Harv L Rev* 701,

702-25 (1995).

Bruce Ackerman, 1 We the People: Foundations (Belknap 1991), should also be considered a form of originalism, for reasons discussed at text accompanying notes 29-30. See also Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv L Rev 799, 808-13 (1995). Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv L Rev 1221, 1225 & n 9 (1995), is critical of both of these originalist approaches, but on the ground that they are insufficiently respectful of "text, structure, and history."

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But textualism and originalism remain inadequate models for understanding American constitutional law. They owe their preeminence not to their plausibility but to the lack of a coherently formulated competitor. The fear is that the alternative to some form of textualism or originalism is "anything goes"--that constitutional law, if cut loose from text and original understandings, will become nothing more than a reflection of judges' political views.

In fact, however, the alternative view is at hand, and has been for many centuries, in the common law. The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices. The emphasis on text, or on the original understanding, reflects an implicit adherence to the postulate that law must ultimately be connected to some authoritative source: either the Framers, or "we the people" of some crucial era. Historically the common law has been the great opponent of this authoritative approach. The common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time. And it is the common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by "we the people," that best explains, and best justifies, American constitutional law today.

In Part I, I will outline the common law approach to constitutional interpretation. I begin by identifying some puzzling aspects of our practices of constitutional interpretation--things that seem well settled but that so far lack a convincing theoretical justification. Then I will suggest how the common law approach can explain and justify those well settled practices. In Part II, I will discuss the rational traditionalism that is the most important part of common law constitutional interpretation. This form of traditionalism, characteristic of the common law method, calls for recognizing the value of conclusions that have been arrived at, over time, by an evolutionary process; but it also describes the circumstances in which such conclusions should be rejected. In Part III, I will discuss another component of the common law approach to constitutional interpretation, what might be called conventionalism. Conventionalism, which is the primary justification for the continued role of the text in constitutional law, is a generalization of the familiar idea that sometimes it is more important for a matter to be settled than for it to be settled right. In Part IV, I will consider whether common law constitutional interpretation gives judges too much power or is otherwise inappropriate for a democracy.

I. The Puzzles of Constitutional Interpretation

A. Noah Webster's Problem, and Some Others

The practice of following a written constitution, increasingly common throughout the world, is puzzling on at least two levels. First is what might be called the central problem of written constitutionalism. Following a written constitution means accepting the judgments of people who lived centuries ago in a society that was very different from ours. To adapt an argument that Noah Webster made in 1787, it would be bizarre if the current Canadian parliament asserted the power to govern the United States on such matters as, for example, race discrimination, criminal procedure, and religious freedom. n3 But we have far more in common--demographically, culturally, morally, and in our historical experiences--with Canadians of the 1990s than we do with Americans of the 1780s or 1860s. Even if we pay no attention to specific intentions as revealed in the ratification debates and similar sources, the words of the Constitution reflect decisions made by those Americans. Why should we allow those decisions to govern our politics today?

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n3 "The very attempt to make perpetual constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia." Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 379 (North Carolina 1983) (quoting Webster). On the context and significance of Webster's argument, see Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 137-42 (Chicago 1995).

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Our practice is also puzzling on a less abstract level. There are a number of specific aspects of our practice of constitutional interpretation that are well settled, and that lie at the core of how constitutional law operates in our society, but that are difficult to justify under any theoretical approach now in circulation. These puzzles concern not just how the courts interpret the Constitution but how the Constitution is received in the society as a whole.

1. Text.

Everyone agrees that the text of the Constitution matters. n4 [*881] Virtually everyone would agree that sometimes the text is decisive. n5 But some constitutional provisions are interpreted in ways that are very difficult to reconcile with the text. n6 And principles with no clear textual source are enforced. n7 If we are cavalier with the text sometimes, why do we treat it somewhat seriously almost all the time, and extremely seriously sometimes?

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n4 See, for example, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *BU L Rev* 204, 205 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan L Rev* 703, 706 (1975).

n5 See, for example, Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv L Rev* 1189, 1244 (1987); Thomas C.

Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan L Rev 843, 844 & n 6 (1978). But see Anthony D'Amato, Aspects of Deconstruction: The "Easy Case" of the Under-Aged President, 84 Nw U L Rev 250 (1989); Gary Peller, The Metaphysics of American Law, 73 Cal L Rev 1151 (1985).

n6 See text accompanying notes 54-69.

n7 See text accompanying notes 69-70.

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2. The Framers' specific intentions.

Virtually everyone agrees that the specific intentions of the Framers count for something. n8 In litigation over constitutional issues, evidence that the Framers' specific intentions favored one position is at least a strong argument. It is unusual for clear evidence of a specific intention to be disregarded, and occasionally specific intentions are decisive. n9

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n8 See, for example, Brest, 60 BU L Rev at 236 (cited in note 4) ("Nonoriginalist adjudication . . . accords presumptive weight to the text and original history."); Tribe, 108 Harv L Rev at 1242 n 66 (cited in note 2); Fallon, 100 Harv L Rev at 1198 & n 36 (cited in note 5).

n9 See, for example, Marsh v Chambers, 463 US 783, 790 (1983).

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But sometimes, and on important issues, the Framers' specific intentions are overridden with only a little concern. n10 Originalists urge that specific intentions must be taken more seriously; some critics reject the originalist position and suggest that specific intentions should count for little or nothing. n11 In the meantime a practice somewhere in between--counting specific intentions for something but not everything--seems well settled. n12 But that settled practice is not easy to rationalize.

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n10 See Cass R. Sunstein, The Partial Constitution 97-98 (Harvard 1993) (citing examples). See also Michael J. Perry, The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary 61-69 (Yale 1982); Morton J. Horowitz, The Supreme Court, 1992 Term--Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv L Rev 30, 66-67 (1993); Grey, 27 Stan L Rev at 710-14 (cited in note 4).

n11 For a defense of originalism on this point, see, for example, Bork, Tempting of America at 155-60 (cited in note 1); Berger, Government by Judiciary at 193-220 (cited in note 1); Kay, 82 Nw U L Rev at 258-59 (cited in note 1). For the critique, see Brest, 60 BU L Rev at 213-17, 229-34 (cited in note 4); Grey, 27 Stan L Rev at 715-17 (cited in note 4).

n12 See, for example, Philip Bobbitt, Constitutional Interpretation 12-15 (Blackwell 1991); Fallon, 100 Harv L Rev at 1998 (cited in note 5).

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3. The role of moral judgments.

A similar hard-to-rationalize equilibrium seems to hold on the question whether judges and other actors interpreting the Constitution may rely on their own judgments of right and wrong (generally phrased as judgments of fairness or good policy). It's hard to see how anyone could interpret the Constitution without relying on such judgments at least sometimes. n13 But at the same time, the practice has an air of illegitimacy about it. It is often condemned as usurpation. n14 And no one suggests that the interpreter's judgments of right and wrong are the only things that matter.

-Footnotes-----

n13 See, for example, Sunstein, Partial Constitution at 101 (cited in note 10); Fallon, 100 Harv L Rev at 1204 & n 67 (cited in note 5); Bobbitt, Constitutional Interpretation at 20-22 (cited in note 12).

n14 This charge was frequently made by Justice Black. See, for example, Harper v Virginia Board of Elections, 383 US 663, 677 (1966) (Black dissenting) (accusing the majority of "consulting its own notions rather than following the original meaning of the Constitution"). See also Bork, Tempting of America at 258-59 (cited in note 1); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 63-69 (Harvard 1980); Henry P. Monaghan, Our Perfect Constitution, 56 NYU L Rev 353, 353-61 (1981).

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4. The "preferred position" of some provisions.

Not all constitutional provisions are equal; some are interpreted more expansively than others. n15 For about the last half century, courts have narrowly interpreted the provisions of the Constitution that protect economic liberties, while interpreting other provisions, such as the guarantee of free speech, broadly. n16 The legitimacy of this practice, by now well settled, has been one of the great issues of modern constitutional law. This is the issue [*883] to which the "preferred position" debate and the Carolene Products footnote were directed. n17 Here again there is a disjunction between settled practice and the theoretical debate, because a fully convincing theoretical justification for the practice still seems elusive.

-Footnotes-----

n15 Or at least so it is conventionally said. It is difficult to define in the abstract what counts as a more or less expansive interpretation, or as a "narrow" or "broad" interpretation. The terms may more properly refer to a level of judicial activity, rather than to the interpretation of the clause. Current interpretations of the Free Speech Clause entail more judicial invalidation of statutes and other government actions than do current in-

terpretations of the Takings or Contract Clauses; in that sense the Free Speech Clause might be said to be interpreted more broadly. On the other hand, one might say that there is more judicial intervention only because a wide range of confiscations of property or abrogations of contracts are unthinkable politically, and that the features of the political culture that make them unthinkable are themselves part of the way the Takings Clause and the Contract Clause are understood. In that sense there is no basis for saying that those clauses are interpreted more narrowly.

n16 See, for example, *Chicago Board of Realtors, Inc. v City of Chicago*, 819 F2d 732, 743-44 (7th Cir 1987) (Posner concurring) ("Imagine what freedom of speech would have come to mean if the Court had interpreted the First Amendment--which is no more absolute in its language or clearcut in its history than the contract clause--as loosely as it now interprets the contract clause.").

n17 *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938). On the "pre-ferred position" debate, see, for example, *Murdock v Pennsylvania*, 319 US 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."), and Justice Frankfurter's criticism of this approach in *Kovacs v Cooper*, 336 US 77, 90-97 (1949) (Frankfurter concurring).

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5. The priority of doctrine over text.

Although everyone agrees that the text is in some sense controlling, in practice constitutional law generally has little to do with the text. Most of the time, in deciding a constitutional issue, the text plays only a nominal role. The issue is decided by reference to "doctrine"--an elaborate structure of precedents built up over time by the courts--and to considerations of morality and public policy.

This point is, I think, obvious for judicial decisions. It is the rare constitutional case in which the text plays any significant role. Mostly the courts decide cases by looking to what the precedents say. n18 But the same is true for other political actors and for society as a whole. In public and political debates over the First Amendment, while the text is ritually incanted ("no law"), in fact the text matters very little (no one suggests that the First Amendment applies only to Congress), and instead the public debate invokes notions derived from precedents--clear and present danger, prior restraint, obscenity, fighting words, view-point discrimination, subsidy versus prohibition, reckless disregard, incidental regulation, the centrality of political speech. Debates over the Equal Protection Clause invoke not the words of the Constitution but the supposed principles of *Brown v Board of Education* n19 and subsequent cases. The "requirement" of a search warrant is notoriously hard to square with the words of the Fourth Amendment. n20 Most informed nonlawyers would [*884] probably say that the Constitution requires "the separation of church and state"--a principle that is by no means a necessary implication of the words of the Establishment Clause. n21 Debates over criminal justice invoke such ideas as reasonable doubt and the presumption of innocence that are not found in the text.

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n18 See, for example, Charles Fried, *Constitutional Doctrine*, 107 Harv L Rev 1140 (1994); Brest, 60 BU L Rev at 234 (cited in note 4); Harry W. Jones, *The Brooding Omni- presence of Constitutional Law*, 4 Vt L Rev 1, 28 (1979); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum L Rev 723, 770-72 (1988).

n19 347 US 483 (1954).

n20 See Telford Taylor, *Two Studies in Constitutional Interpretation* 23-24 (Ohio State 1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 761 (1994).

n21 See, for example, Michael W. McConnell, *Religious Freedom at a Crossroads*, in Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein, eds, *The Bill of Rights in the Modern State* 115, 117-18, 168-94 (Chicago 1992).

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6. The prevalence and importance of nontextual amendments.

The Constitution has changed a great deal over time, but--to overstate the point only slightly--the written amendments have been a sidelight. Most of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment. This is true, for example, of the Marshall Court's consolidation of the role of the federal government; the decline of property qualifications for voting and the Jacksonian ascendance of popular democracy and political parties; the Taney Court's partial restoration of state sovereignty; the unparalleled changes wrought by the Civil War (the war and its aftermath, not the resulting constitutional amendments, were the most important agents of change); the rise and fall of a constitutional freedom of contract; the great twentieth-century growth in the power of the executive (especially in foreign affairs) and the federal government generally; the civil rights era that began in the mid-twentieth century; the reformation of the criminal justice system during the same decades; and the movement toward gender equality in the last few decades. In some of these instances--notably the expansion of the congressional commerce power and the enforcement of gender equality--amendments bringing about the changes were actually rejected, n22 but the changes occurred anyway.

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n22 See, for example, Gerald Gunther, *Constitutional Law* 115 (Foundation 12th ed 1991) (child labor amendment); Jane J. Mansbridge, *Why We Lost the ERA* (Chicago 1986).

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B. Common Law Constitutionalism

1. The two traditions.

There is, prominent in our legal tradition, a method--the method of the common law--that both resolves the central puzzle [*885] of written constitutionalism and makes sense of these apparently problematic aspects of our settled interpretive practices. The common law method has not gained currency

as a theoretical approach to constitutional interpretation because it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind. But our written constitution has, by now, become part of an evolutionary common law system, and the common law--rather than any model based on the interpretation of codified law--provides the best way to understand the practices of American constitutional law. n23

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n23 The notion that American constitutional law is a common law system has no doubt occurred to many, see, for example, Frederick Schauer, *Is the Common Law Law?*, 77 Cal L Rev 455, 470 & n 41 (1989), but it does not seem to have received a theoretical defense, see, for example, Brest, 60 BU L Rev at 228-29 & n 90 (cited in note 4) (identifying "adjudication" and the "'common law' method" with "nonoriginalist strategies of constitutional decisionmaking"). Harry H. Wellington has endorsed what he describes as a "common-law method of constitutional interpretation." Harry H. Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* 127 (Yale 1990). See also Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L J 221, 265-311 (1973). But Wellington appears to understand the common law method quite differently, emphasizing the role of "public" or "conventional" morality and the text more heavily than the doctrinal structure established by precedent. Wellington, *Interpreting the Constitution* at 82-88, 96-123; Wellington, 83 Yale L J at 284. See also Ely, *Democracy and Distrust* at 63-69, 218 n 112 (cited in note 14) (criticizing Wellington); Ackerman, *We the People* at 17-18 (cited in note 2) (describing a "Burkean sensibility" that is "pronounced amongst practicing lawyers and judges," but that lacks a full theoretical justification). The "Burkean tendency" Ackerman describes--which he says is to some degree reflected in Charles Fried, *The Artificical Reason of the Law or: What Lawyers Know*, 60 Tex L Rev 35 (1981), and Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L J 1567 (1985)--seems substantially more conservative than the common law approach I defend here, which, as I will discuss below, allows for innovation and even sudden change. Compare Ackerman, *We the People* at 17-18 (cited in note 2), with text accompanying notes 40-42.

-End Footnotes-

The currently prevailing theories of constitutional interpretation are rooted in a different tradition: implicitly or explicitly, they rest on the view that the Constitution is binding because someone with authority adopted it. This view derives from a tradition--that of Austin and Bentham, and ultimately Hobbes--that historically has been the great opponent of the common law tradition. This authoritative tradition sees the law as the command of a sovereign. n24 Most current theories of constitutional interpretation are of course vastly more refined than [*886] the reference to a "command" would suggest. But they all in some way reflect the hold of the authoritative tradition rather than the tradition of the common law.

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n24 John Austin, *The Province of Jurisprudence Determined*, in John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* 1 (Noonday 1954) (H.L.A. Hart, ed); Jeremy Bentham, *Of Laws in General* (Athlone 1970) (H.L.A. Hart, ed); H.L.A. Hart, *Essays on Bentham*:

Studies in Jurisprudence and Political Theory (Clarendon 1982); Thomas Hobbes, Leviathan: with selected variants from the Latin edition of 1668 172, 173 (Hackett 1994) (Edwin Curley, ed).

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This point is perhaps most obvious in the case of straightforward forms of originalism. In its simplest form, originalism treats the Framers of the Constitution (or its ratifiers) as the authoritative entity, comparable to Austin's sovereign. Originalism can, of course, be defended on other grounds; n25 but much of the intuitive plausibility of originalism stems from the notion that the Framers are a super-legislature. Just as our representatives in Congress have the power to tell us how to act, so do, in a more indirect way, the Framers. n26

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n25 See, for example, Antonin Scalia, Originalism: The Lesser Evil, 57 U Cin L Rev 849, 862-64 (1989).

n26 See Bork, Tempting of America at 143-60 (cited in note 1); Monaghan, 56 NYU L Rev at 362-63, 396 (cited in note 14).

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The more sophisticated variants of originalism also belong to the Austinian tradition. Some of these variants emphasize the need to reinterpret or "translate" the Framers' commands in ways that take account of, for example, changes in factual knowledge and social understandings that have occurred since the Constitution was adopted. n27 But the Framers' command is still the starting point, and still authoritative in significant ways. n28 Perhaps the most important variant on originalism is what might be called the neo-Hamiltonian view, n29 according to which judges should enforce not necessarily the intentions or understandings of those who adopted the original constitutional provisions but rather the decisions made by "we the people" at subsequent moments, when the population at large was intensely involved in politics. n30 This approach, too, adheres to the command model; [*887] now, the authoritative entity is not the Framers but "we the people," appropriately defined. n31

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n27 See Lawrence Lessig, Fidelity in Translation, 71 Tex L Rev 1165, 1169-82, 1263-68 (1993). Among the prominent antecedents of this view, I believe, is Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 Harv L Rev 1 (1955).

n28 Lessig, for example, draws an analogy between constitutional interpretation and (sophisticated understandings of) the relationship between principal and agent, see Lessig, 71 Tex L Rev at 1254 (cited in note 27), and he emphasizes that "translation" is an act of "fidelity" to the decisions of the Framers: "Firm within our legal culture is the conviction that if judges have any duty it is a duty of fidelity to texts drafted by others, whether by Congress or the Framers." Id at 1182. The reliance on fidelity to a command makes Lessig's view Austinian. Lessig's account does, however, allow for

changes based on the evolution of social understandings. See *id* at 1233-37. In those respects it may have more in common with the common law view than either more straightforward originalism or neo-Hamiltonian approaches do. See text accompanying notes 29-30.

n29 After Alexander Hamilton's famous justification of judicial review in Federalist 78, in Clinton Rossiter, ed, *The Federalist Papers* 464, 466-72 (Mentor 1961).

n30 Ackerman, *1 We the People* (cited in note 2), is the leading statement of the neo-Hamiltonian view. Ackerman does call for "synthesis" of the judgments made at the various times when "the people" have acted, see *id* at 86-104, an idea that has some resemblance to the common law approach. But the emphasis in the neo-Hamiltonian view is still crucially on discontinuous change, and changes brought about by public opinion. The "synthesis" notion also associates Ackerman's approach (to a limited degree) with views that stress the need for narrative continuity in the law. Those views are at odds with the common law approach in important ways. See text accompanying notes 40-42. On the authoritarian nature of such views, see Frank Michelman, *Law's Republic*, 97 *Yale L J* 1493, 1515-24 (1988).

n31 There are other nonoriginalist approaches that, while they cannot be called Austinian, still seem to be under the sway of the command theory to some degree. The representation-reinforcement view of Ely, *Democracy and Distrust* at 77-88 (cited in note 14), and others, see, for example, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 *Va L Rev* 747, 747-48, 772-82 (1991), relies crucially on the text of the Constitution and its implicit structure. The argument is partly that representation reinforcement, or improving the democratic process, is the best approach because (among other things) it assigns judges the normatively best role, Ely, *Democracy and Distrust* at 101-04 (cited in note 14); but the argument is also partly that the representation-reinforcement approach is implicit in the Framers' design. See, for example, *id* at 88-101. This latter aspect of the argument seems to be originalist or textualist. The "law as integrity" theory of Ronald Dworkin, *Law's Empire* (Belknap 1986), might also seem implicitly (and unconsciously) beholden to the command theory, because it construes the law as if there were a single intelligence behind it: the law is to be seen as the work of "the community personified," *id* at 167-75, or as a chain novel that could have been written by one person, *id* at 228-38, or as an excogitation of "Hercules," *id* at 238-44, 379-81. The constructed single intelligence might be said to be the counterpart of the Austinian sovereign. A common law approach, by contrast, does not require that the law cohere in this way.

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My argument is that no version of a command theory, however refined, can account for our constitutional practices. Constitutional law in the United States today represents a flowering of the common law tradition and an implicit rejection of any command theory.

In a sense this should not be surprising. The common law is the most distinctive feature of our legal system and of the English system from which it is descended. We should expect that the common law would be the most natural model for understanding something as central to our legal and political culture as the Constitution. Other theories of constitutional interpretation

struggle with the question why judges--and not historians, philosophers, political scientists, or literary critics--are the central actors in interpreting the American Constitution; the common law, more than any other institution, has been the province of judges. American constitutional law is preoccupied, perhaps to excess, with the question of how to restrain judges, while still allowing a degree of innovation; the common law has literally [*888] centuries of experience in the use of precedent to accomplish precisely these ends.

Historically, the common law tradition has been burdened with a degree of mysticism and also, at times, with excessive conservatism. n32 But neither of those features is an essential attribute of the common law tradition. As I will suggest below, the method of the common law can be understood in an entirely rational way, free of medieval holdovers and notions of "time immemorial." As for the resistance of the common law to change: at various periods in its history the common law has shown a great capacity for innovation, and some of the greatest common law judges--Coke, Hale, and Mansfield in Britain, and Shaw in this country--are famous for the changes they brought about in the common law. The same is true of, for example, Cardozo, perhaps the greatest common law judge of this century; and Cardozo's *The Nature of the Judicial Process*, n33 the leading statement of the common law approach in this century, emphasizes the importance of innovation.

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n32 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* 36-55 (Cambridge 1957).

n33 Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale 1960).

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Properly understood, then, the common law provides the best model for both understanding and justifying how we interpret the Constitution. The common law approach captures the central features of our practices as a descriptive matter. At the same time, it justifies our current practices, in reflective equilibrium, to anyone who considers our current practices to be generally acceptable--either as an original matter or because they are the best practices that can be achieved for now in our society. n34 The common law approach makes sense of our current practices in their broad outlines; but at the same time, it suggests some ways in which our practices might be modified. It also suggests other ways in which our practices should not be modified, for example in the direction of a greater emphasis on original intent.

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n34 On reflective equilibrium, see John Rawls, *A Theory of Justice* 20-21, 48-51 (Belknap 1971); John Rawls, *Political Liberalism* 8-9, 96-97 (Columbia 1993).

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Perhaps common law constitutionalism is not the best we could do if we were writing on a blank slate. But unless our current practices are to be rejected wholesale, the common law model is (I suggest) the best way to understand

what we are doing; the best way to justify what we are doing; and the best guide to resolving issues that remain open. n35

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n35 This type of approach--a combination of description and justification--has been called "interpretive." See, for example, Dworkin, Law's Empire at 46-68 (cited in note 31); Fallon, 100 Harv L Rev at 1198-99 (cited in note 5). This may be a misleading term. The idea is not to interpret our own practices--"interpretation" seems to be an idea better applied to someone else's practices--but to see if we can justify practices to which we are (to some degree) committed, while leaving open the possibility of changing these practices to some degree and providing guidance on how to decide controversial issues that arise with these practices. The idea of justifying a practice in reflective equilibrium therefore seems more suitable.

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2. The common law, written constitutions, and statutes.

At least two somewhat counterintuitive consequences follow from the common law approach to constitutional interpretation. The first is that the interpretation of the Constitution has less in common with the interpretation of statutes than we ordinarily suppose. Conventionally we think of legal reasoning as divided into common law reasoning by precedent on the one hand, and the interpretation of authoritative texts on the other. Constitutional and statutory interpretation, while of course different in many respects, are viewed as forms of the latter and fundamentally different from the former. n36

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n36 See Monaghan, 56 NYU L Rev at 392-93 (cited in note 14); Grey, 27 Stan L Rev at 703-04 (cited in note 4); Richard A. Posner, Problems of Jurisprudence 247-61 (Harvard 1990). See generally Lessig, 71 Tex L Rev at 1218-50 (cited in note 27) (applying same analysis to statutes and the Constitution).

-End Footnotes-

In fact, constitutional interpretation, as practiced today in this country, belongs on the other side of the line. The command view, although too simple, may make sense for many statutes: a recent statute enacted by the people's representatives is plausibly an authoritative command of the sovereign that should be followed for that reason. Of course this point must not be overstated. For many statutes, a common law approach to interpretation may again be both the best description of our practices and the best account of how we should proceed. n37 But the usual reflex is to associate the interpretation of statutes with the interpretation of the Constitution, and to contrast both with the common law. To whatever extent the contrast with the common law is true of statutes, it is not true of an eighteenth- and nineteenth-century constitution. Some of the puzzling aspects of our current practices of constitutional interpretation appear problematic only because of the unreflective association of constitutional and statutory interpretation. Once we understand constitutional interpretation as an outgrowth of the common

law, those practices are much less puzzling.

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n37 See, for example, Northwest Airlines, Inc. v Transportation Workers Union, 451 US 77, 95 (1981); National Soc'y of Professional Eng'rs v United States, 435 US 679, 688 (1978). See also Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 S Ct Rev 429, 527-40 (1994); Guido Calabresi, A Common Law for the Age of Statutes 101-19, 161-66 (Harvard 1982). It may be that statutory interpretation comes in different forms, and the interpretation of certain statutes (old statutes or those with relatively open-ended phrasing) resembles the common law more than the interpretation of others.

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The second consequence of the common law approach to constitutional interpretation is of particular significance now, in a time of constitutional ferment in much of the world. It is that the conventional distinction between written and unwritten constitutions should be reconsidered. n38 The important distinction is not between nations with written constitutions and those with unwritten constitutions, but rather between societies with mature, well established constitutional traditions and those with insecure traditions. The written constitutionalism of the United States has much more in common with the unwritten constitutionalism of Great Britain than it does with the written constitutionalism of a newly formed Eastern European state--or, for that matter, than it does with the written constitutionalism of, say, the postwar German Federal Republic or the Fifth French Republic in its first decade.

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n38 For an example of the conventional argument in support of this distinction, see Frank H. Easterbrook, Abstraction and Authority, 59 U Chi L Rev 349, 363, 375 (1992).

-End Footnotes-

This conclusion should not be surprising. Anyone not antecedently committed to the distinction between written and unwritten constitutions would surely say that the constitutions of the United States and Britain have more in common than those of the United States and France, to say nothing of Poland or the Czech Republic. The common law approach to constitutional interpretation--an approach that reduces (although it does not eliminate) the distinction between written and unwritten constitutions--explains why this is so in a way that other views cannot.

3. An overview.

Common law constitutional interpretation has two components. Each of these components provides a partial explanation for why we should pay attention to the Constitution. Together they provide both the best available answer to that question and, I believe, the best account of our current practices of constitutional interpretation. [*891]

The first component is traditionalist. The central idea is that the Constitution should be followed because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances. The second component is conventionalist. It emphasizes the role of constitutional provisions in reducing unproductive controversy by specifying ready-made solutions to problems that otherwise would be too costly to resolve. The traditionalism underlying the practice of constitutional interpretation is a rational traditionalism that acknowledges the claims of the past but also specifies the circumstances in which traditions must be rejected because they are unjust or obsolete. The conventionalist component helps explain why the text of the Constitution is important and how much flexibility judges should have in interpreting it.

II. Traditionalism in Common Law Constitutional Interpretation

A. Rational Traditionalism

Traditionalism in some realms of life is a matter of adhering to the practices of the past just because of their age. The traditionalist component of common law constitutional interpretation is different because it has a more rational basis. Its central notion is not reverence for the past either for its own sake or because the past is somehow constitutive of one's own or one's nation's "identity."ⁿ³⁹ Instead, the traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience.

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ⁿ³⁹ For versions of these other forms of traditionalism in a legal context, see Fried, 107 Harv L Rev at 1140-41, 1144-57 (cited in note 18); Anthony T. Kronman, Precedent and Tradition, 99 Yale L J 1029, 1046, 1066 (1990); Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 215 (Belknap 1993). See Rebecca L. Brown, Tradition and Insight, 103 Yale L J 177, especially 212-13 (1993), and David Luban, Legal Traditionalism, 43 Stan L Rev 1035, 1040-42 (1991), for criticisms of this form of traditionalism. Each endorses an approach that, while not called traditionalist, seems compatible with the rational traditionalism I outline here. See, for example, Brown, 103 Yale L J at 213-22; Luban, 43 Stan L Rev at 1055-57.

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The central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time. Judgments of this kind embody not just serious thought by one group [*892] of people, or even one generation, but the accumulated wisdom of many generations. They also reflect a kind of rough empiricism: they do not rest just on theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough.

Because, in this view of traditionalism, the age of a practice alone does not warrant its value, relatively new practices that have slowly evolved over time from earlier practices deserve acceptance more than practices that are older but that have not been subject to testing over time. That is why this

form of traditionalism is associated with the common law and a system of precedent. New precedents, at least to the extent that they reflect a reaffirmation and evolution of the old, count for more than old precedents that have not been reconsidered. n40

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n40 See, for example, Planned Parenthood v Casey, 505 US 833, 864-70 (1992) (plurality opinion). See generally Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo Wash L Rev 68, 109-10 (1991); Rupert Cross and J.W. Harris, Precedent in English Law 125-64 (Clarendon 4th ed 1991); Melvin Aron Eisenberg, The Nature of the Common Law 50-76 (Harvard 1988).

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The traditionalist argument for obeying the Constitution is that the Constitution reflects judgments that should be taken seriously for these reasons. As I will discuss later, traditionalism does not provide a completely solid justification for adhering to the text of the Constitution, but it is a start. The Framers do not have any right to rule us today, but their judgments were the judgments of people (the Framers and ratifiers) acting on the basis of serious deliberation. Moreover, the parts of the Constitution that have not been amended (the traditionalist argument says) have obtained at least the acquiescence, and sometimes the enthusiastic reaffirmation, of many subsequent generations. Consequently, these judgments should not be swept aside lightly. They should be changed only if there is very good reason to think them mistaken, or if they fail persistently.

Understood in this way, traditionalism is counsel of humility: no single individual or group of individuals should think that they are so much more able than previous generations. This form of traditionalism also subsumes the common-sense notion that one reason for following precedent is that it is simply too time consuming and difficult to reexamine everything from the ground up. The premise of that common-sense notion is that any radical reexamination of existing ways of doing things is likely to discard [*893] good practices, perhaps because it misunderstands them, and is unlikely to find very many better ones.

These are familiar ideas, perhaps most commonly associated with Burke. But they are also the underpinnings of the common law approach to precedent. Before Burke wrote, this form of traditionalism was developed by Hale, Blackstone, and Coke, the great ideologists of the common law. n41 Indeed, Burke wrote at a time when the common law approach was a mainstay of English [*894] political culture, and he may have drawn more or less consciously on the common law approach as his model for how society should change. n42 The common law ideology often had, in addition, a mystical component, with its appeal to "time out of mind" and the ineffable spirit of the English people. n43 But traditionalism need not have--and as I have defined it does not have--any such mystical aspect. It can be placed on an entirely rational footing.

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n41 See, for example, Calvin's Case:

We are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto.

77 Eng Rep 377, 381 (KB 1608). See also Matthew Hale, Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe, reprinted in William Holdsworth, A History of English Common Law 504 (Little, Brown 1937) (spelling and capitalization updated):

It is a reason for me to prefer a law by which a kingdom has been happily governed four or five hundred years than to adventure the happiness and peace of a kingdom upon some new theory of my own though I am better acquainted with the reason- ableness of my own theory than with that law. Again I have reason to assure myself that long experience makes more discoveries touching conveniences or inconveniences of laws than is possible for the wisest council of men at first to foresee. And that those amendments and supplements that through the various experiences of wise and knowing men have been applied to any law must needs be better suited to the convenience of laws, than the best invention of the most pregnant wits not aided by such a series and tract of experience.

Compare Edmund Burke, Reflections on the Revolution in France 58-59 (Dent 1940):

The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught a priori. . . . The science of govern- ment being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice, which has an- swered in any tolerable degree for ages the common purposes of society.

Compare also *id* at 84:

We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the

individuals would do better to avail themselves of the general bank and capital of nations and of ages.

n42 See J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in J.G.A. Pocock, ed, *Politics, Language, and Time: Essays on Political Thought and History* 206-32 (Chicago 1989).

n43 See, for example, Pocock, *The Ancient Constitution and the Feudal Law* at 33-34 (cited in note 32), quoting John Davies's unpaginated preface to *Les Reports des Cases & Matters en Ley, Resolves & Adjudges en les Courts del Roy en Ireland* (Atkyns 1674).

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In modern terms one might say that traditionalism is a recognition of bounded rationality. n44 Humans are not perfect computing machines. People do not have the resources, intellectual and otherwise, to consider every question anew with any hope of consistently reaching the right result. Given the limits of human capacities, it is often rational to use heuristic devices or rules of thumb that have been worked out by others over time--to draw on the common stock of wisdom, in Burke's terms. n45 The precise extent to which this is true, and exactly where we should look for heuristic aids, are matters of dispute; the common law reliance on precedent is only one possible approach. But the core ideas of common law traditionalism--humility, the limits of human reason, and distrust of abstract argument--are plausible and not at all parochial or mystical.

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n44 The origin of this notion is in Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q J Econ 99, 99-101 (1955). See generally Herbert A. Simon, *Models of Man: Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting* (Wiley 1957).

n45 Burke, *Reflections on the Revolution in France* at 84 (cited in note 41). See also Hale, *Reflections* at 505 (cited in note 41).

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B. Innovation and Morally Unacceptable Traditions

Any traditionalist view must address the question of when a tradition should be rejected on the ground that it is morally wrong. Some of the most celebrated accomplishments of American constitutional law in this century have overturned established doctrine--notably the New Deal abandonment of freedom of contract and expansion of federal legislative power; the Warren Court's many innovations, especially *Brown*, the most famous case involving a morally unacceptable tradition; and more recent innovations in the law of gender equality. It might be thought [*895] that common law constitutionalism, with its emphasis on tradition and precedent, would be too receptive to pernicious traditions and would have a difficult time justifying dramatic innovations like these.

But when common law traditionalism is placed on a rational basis, it is not the iron rule that traditionalism is sometimes thought to be. Traditionalism need not mean that all traditions are sacrosanct or that abstract argument is never to be accepted. If one has a great deal of confidence in an abstraction, it can override the presumption normally given to things that have worked well enough for a long time. But that is the structure of the controversy: are we sufficiently confident in the abstract or theoretical argument to justify casting aside the work of generations? Even if we are, we should prefer evolutionary to revolutionary change. But revolutionary change remains possible, and tradition is not to be venerated beyond the point where the reasons for venerating it apply.

Traditionalism, once it is understood in this rational way, answers the concern about morally unacceptable traditions. That concern has greater force when traditionalism is justified in less rationalistic terms, for example as establishing a quasi-religious bond with the past or as maintaining a national identity. The question then becomes what to do when the past, or the nation's identity, is bound up with a practice that one considers morally wrong. But a rationalistic account of traditionalism just establishes a requirement that one give the benefit of the doubt to past practices. If one is quite confident that a practice is wrong--or if one believes, even with less certainty, that it is terribly wrong--this conception of traditionalism permits the practice to be eroded or even discarded.

In fact it is a great strength of the common law approach, compared to other views, that it gives relatively clear guidance about how we are to weigh the claims of tradition against our current assessment of the justice or appropriateness of a legal rule. Everyone recognizes that law, including constitutional law, is in substantial part about following precedent and otherwise maintaining continuity with the past. Nearly everyone also recognizes that sometimes we must depart from the teachings of the past because we think they are not just or do not serve human needs. Everyone also knows that it is not possible to specify an algorithm for deciding when such a departure is warranted. The challenge is to give as illuminating an account as we can of how that decision is to be made: to specify what we should take into account and how we should think about the problem of reconciling the claims of the past with those of morality or fairness.

Other approaches are either less plausible or much less helpful in this respect than a common law theory based on rational traditionalism. Consider in this connection approaches that emphasize the need for the law to maintain some form of narrative continuity, or the theory of "law as integrity"--that maintaining continuity with the past is a requirement of "integrity" even when we would now regard the past decisions as wrong. n46 "Integrity" in this sense is to be balanced against the requirements of "justice and fairness." As others have argued, this view seems not fully to come to grips with how extraordinary, and problematic, it is to perpetuate judgments that we now believe, all things considered, to be morally wrong. n47 It is odd to say that "integrity" or "fairness" or any other recognized virtue requires us (even *ceteris paribus*) to continue to do things that are wrong, just because we have done them before. n48 Without a clear understanding of why we should not simply repudiate what are, by hypothesis, wrong judgments, it is difficult to know when we should discard them, or even how to think about that question.

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n46 "Law as integrity" is the theory developed in Dworkin, Law's Empire (cited in note 31). See also the discussion in Michelman, 97 Yale L J at 1513-14 (cited in note 30). The account offered in Fried, 107 Harv L Rev at 1156-57 & n 55 (cited in note 18) (citing Dworkin with approval, but arguing that his "chain novel" analogy "suggests too little by way of constraint"), is similar, although it appears to have a more strongly traditionalist component. Neil MacCormick, Legal Reasoning and Legal Theory 229-74 (Oxford 1978), although critical of several elements of Dworkin's approach, offers a similar argument.

n47 See in particular the discussion in Joseph Raz, The Relevance of Coherence, 72 BU L Rev 273, 297-309, 321 (1992).

n48 See the ironic comment of Jonathan Swift, Gulliver's Travels 309 (Oxford 1960):

It is a maxim among our lawyers that whatever has been done before may legally be done again, and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly.

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The common law approach, as I have characterized it, escapes this predicament. It does not suppose that there is some independent value in adhering to past judgments that are by hypothesis wrong, which is to be compared to the value of making the right judgment. The idea of rational traditionalism is simply that we should think twice about our judgments of right and wrong when they are inconsistent with what has gone before. We adhere to past practices not despite their wrongness, but [*897] because we might be mistaken to think them wrong. It follows that if, on reflection, we are sufficiently confident that we are right, and if the stakes are high enough, then we can reject even a longstanding tradition.

In short, the danger is not that an action that we are convinced is otherwise morally right will affront "integrity" because it is inconsistent with some previous action. Rather, the dangers are recognizable human frailties--arrogance, vision limited to one's own circumstances, excessive trust in one's own rational powers, ignorance of the complexity of the situation. If we think we are justified in running those risks, we may move away from, and even break with, any tradition.

C. The Problems of Traditionalism and the Text

Although traditionalist ideas descend from the common law, to some degree they apply to the textual provisions of the Constitution as well. Except for the most recent amendments, the text of the Constitution has, by now, been validated by tradition. Subsequent generations have acquiesced in the

judgments reflected in the provisions of the Constitution: they have not amended them, rebelled against them, insisted on judges who would refuse to enforce them, or repeatedly taken political actions that ignored them. n49

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n49 The persistence of a provision does not necessarily show that people generally approve of it or even acquiesce in it, of course; it might just show that powerful groups or actors are in a position to prevent it from being changed. But the longer a provision has survived, the more likely it is that people generally at least find it minimally acceptable.

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At the same time, however, as the association with the common law suggests, traditionalism is not unequivocal in its support for the text. The judgments to which deference is due are not just those embodied in the text. Nor is deference due to all the judgments in the text equally. If practices have grown up alongside the text, or as a matter of interpreting the text, or even in contradiction of the text, those practices too are entitled to deference if they have worked well for an extended time. An old precedent that has been accepted by subsequent generations is, under the traditionalist component of the common law approach, on a par with the text.

Marbury v Madison n50 and McCulloch v Maryland n51 are examples. Neither decision has a particularly clear textual basis. [*898] They are simply extremely well established precedents. But there is no sense in denying that both are every bit as much a part of the Constitution as the most explicit textual provision. The same is true of a well established practice that is neither explicit in the text nor embodied in a judicial precedent, such as the rule that a majority vote of the members of each house of Congress is necessary and sufficient to constitute "passage" of a bill under Article I, Section 7. n52 So far as traditionalism is concerned, provisions of the text are no more entitled to obedience than any other long-standing practice.

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n50 5 US (1 Cranch) 137 (1803).

n51 17 US (4 Wheat) 316 (1819).

n52 See, on this subject, Bruce Ackerman, et al, An Open Letter to Congressman Gingrich, 104 Yale L J 1539, 1541-43 (1995). Whatever the scope of congressional power to impose supermajority rules, the tradition that a majority vote is sufficient (at least in the absence of such rules) has grown up without any specific textual support, or for that matter any awareness of the kind of support identified in id.

-End Footnotes-

By the same token, not every textual judgment is entitled to equal deference. All are perhaps entitled to a degree of respect, since they represent serious, good-faith efforts to address problems. But if some textual judgments have worked better than others, they are entitled to greater support. And, perhaps more strikingly, under the traditionalist view there is nothing wrong

with sometimes deciding (in exceptional cases, to be sure) that a textual provision should be discarded--just as precedents can be overruled. In that respect traditionalism is quite clearly not consistent with our practices and must be modified in ways I will discuss below.

Traditionalism in this form provides at least a colorable answer to Noah Webster's question. We follow judgments made long ago by people living in a different society for two reasons--serious judgments made in good faith merit some deference; and, more important, those judgments have worked, at least well enough to enjoy continued acceptance in many subsequent, different circumstances. There is no need to apotheosize the Framers of the Constitution--only to recognize their seriousness and their good faith, and the fact that many of their arrangements have been at least reasonably successful for generations.

D. Traditionalism and the Puzzles

Traditionalism also provides a partial explanation of some of the puzzling aspects of our current practices. [*899]

1. Text.

The least satisfactory aspect of traditionalism, as an explanation for the basis of American constitutional law, is the way it accounts for the use of the text. But even here traditionalism at least points in the right direction. Unlike some competing views, traditionalism is able to explain why the text matters; but unlike others, it does not sanctify the text. On a traditionalist approach, as I have said, the text should count for something but not everything. In rough terms, that is our practice.

The problem with traditionalism is that, taken alone, it would justify much sharper departures from the text than our current practices allow. It would treat a textual provision as no more binding than a common law precedent. But it is no part of our practice ever to "overrule" a textual provision. Even if a provision is read very narrowly, even to the point of being in fact a dead letter, it is not acceptable explicitly to say (as one can say about a precedent) that a textual provision is no longer good law because it has outlived its usefulness. This is one reason that traditionalism must be supplemented by a conventionalist account.

2. The Framers' specific intentions.

Traditionalism also explains why the specific intentions of the Framers matter, but matter less than the text and can be disregarded more freely. Those intentions reflect judgments made with care at times when the Framers, and in some cases the entire society, were seriously addressing an issue. Consequently, on Burkean grounds, those intentions are entitled to some respect. This is especially true when subsequent generations have accepted those judgments.

At the same time, however, judgments not embodied in the text are likely to be less well considered than judgments that are. Moreover, while the fact that a provision has not been amended does suggest that subsequent generations have acquiesced in the judgments expressed in the text (however limited those might be), it does not necessarily suggest that they have acquiesced in the specific views of those who drafted or adopted the text.

In fact, in determining the significance of the Framers' intentions, the method of the common law seems to apply quite directly to constitutional interpretation. The text of the Constitution is analogous to the holding of an earlier case; the Framers' specific intentions (assuming they can be ascertained) are analogous to [*900] the earlier court's reasoning. The reasoning counts for something. It cannot be brushed aside. But it definitely does not count for as much as the holding. Moreover, a later judge can be faithful to the precedent so long as she follows the holding, even if she disregards the specific reasoning. Likewise, in constitutional interpretation, the Framers' intentions should not be ignored, but sometimes one can be faithful to the obligation to follow the text even while acting in direct contradiction of the Framers' intentions. There is a good Burkean reason for this (rough) parallel: the language adopted by the Framers, like the holding of a case, represents the most fully considered judgment of the earlier decision maker. The Framers' explanations of why they adopted that language, like judges' elaborations of their reasons for a holding, are likely to be the product of less careful consideration, and may even be post hoc rationalization, self-justification, or political posturing. n53

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n53 See, for example, Cardozo, Nature of the Judicial Process at 29-30 (cited in note 33) ("I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition.").

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3. The role of moral judgments.

The traditionalist component of the common law model also explains the role of moral judgments in constitutional interpretation. Moral judgments--judgments about fairness, good policy, or social utility--have always played a role in the common law, and have generally been recognized as a legitimate part of common law judging. n54 At the same time, it has always been a part of the common law that judges are not free to do whatever they think is right. Precedent limits them in significant ways.

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n54 The leading modern statement of the common law approach, Cardozo's Nature of the Judicial Process (cited in note 33), repeatedly asserts the importance of moral judgments. (Cardozo does not use that term, referring instead to "sociology" or "the welfare of society," but it is clear that he means moral judgments.) See, for example, id at 94-97. For the role of morality in the views of the classic common law theorists, see Gerald J. Postema, Bentham and the Common Law Tradition 60-77 (Oxford 1986). For the role of morality in the common law generally, see Eisenberg, Nature of the Common Law at 14-26 (cited in note 40); A.W.B. Simpson, The Common Law and Legal Theory, in A.W.B. Simpson, ed, Oxford Essays on Jurisprudence 79, 80-88 (Clarendon 2d series 1973).

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This is essentially what the practice is in constitutional interpretation. Some matters are settled by the text; no policy arguments, however sound, could justify the conclusion that Congress may by majority vote elect the President. n55 Other matters [*901] are settled by precedent. But within the boundaries set by the text and precedent, judgments of fairness and policy are appropriate. For substantive reasons, judges interpreting the Constitution should be less willing to make such judgments, or more willing to defer to the other branches, because a constitutional decision, unlike a common law decision, cannot be overturned by the legislature. n56 But this is a substantive principle about the proper scope of judicial review. The legitimacy of moral judgments should not be any more questionable in constitutional interpretation than it is in the common law.

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n55 The original understanding is actually less clear. The Framers may have envisioned that the House (voting by states) would routinely elect the President, because before the development of the party system the leading candidate would seldom have a majority. James Ceaser, *Presidential Selection: Theory and Development* 45-46 (Princeton 1979).

n56 See text accompanying notes 109-15.

-End Footnotes-

Even though moral judgments are an inescapable part of constitutional interpretation, there are repeated suggestions that it is somehow illegitimate for such judgments to play a role, n57 and those who deny their illegitimacy are often defensive about using them. Part of the reason for this, I believe, is the continuing hold of some version of the command theory: those who deny the legitimacy of moral judgments are, on some level, agreeing with Hobbes's dictum that "it is not Wisdom, but Authority that makes a Law." n58 If constitutional interpretation is a matter of faithfully carrying out authoritative decisions made by others, then it is indeed problematic--potentially a usurpation--for the interpreter to rely on her own moral judgments. n59 Sometimes, of course, the proper interpretation of a command is that the interpreter should do what is best by the interpreter's own lights. But in a command theory, moral judgments will properly have at most only that kind of limited and derivative role. That is the role we instinctively believe that moral or policy judgments should play in statutory interpretation.

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n57 See, for example, Bork, *Tempting of America* at 16-18, 241-50 (cited in note 1).

n58 Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* 55 (Chicago 1971) (Joseph Cropsey, ed).

n59 See Monaghan, 56 *NYU L Rev* at 353 (cited in note 14); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 *Yale L J* 1501, 1527 (1989), reviewing Michael J. Perry, *Morality, Politics, and Law* (Oxford 1988). See McConnell, 98 *Yale L J* at 1535-38, for additional arguments to the effect that judges in particular should not be trusted to make moral judgments.

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But in constitutional interpretation as we practice it, the role of such judgments is more central. There is some moral (or poli- cy, or fairness) component to many unsettled constitutional is- [*902] sues. Traditionalism, and the analogy to the common law, ex- plain why this is so. The reason for adhering to judgments made in the past is the counsel of humility and the value of experience. Moral or policy arguments can be sufficiently strong to outweigh those traditionalist concerns to some degree, and to the extent they do, traditionalism must give way.

Similarly, if the tradition is weak, equivocal, or unsettled, moral judgments play a correspondingly greater role. Many of the Supreme Court decisions that seem most clearly to break with tradition--the New Deal decisions overthrowing freedom of con- tract; Brown and other decisions striking down state-enforced racial segregation; and more recent decisions enforcing gender equality--have this character. Perhaps the moral imperative was sufficiently great that those decisions would have been justified even if the traditions had been stronger. n60 But those lines of pre- cedent were beginning to fray before the Supreme Court discard- ed them, and that made it easier to overrule them. n61 This is the method of the common law, and--with the qualification, men- [*903] tioned but not yet explained, for the binding force of the text--this is our constitutional practice, too.

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n60 In the case of freedom of contract, in particular, the moral question is somewhat cloudy. See the discussion in Robert G. McCloskey, Economic Due Process and the Su- preme Court: An Exhumation and Reburial, 1962 S Ct Rev 34, 40-54 (1962) (discussing other possible explanations). See also Jerry L. Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tulane L Rev 849, 849-60 (1980). The rejection of a constitutional freedom of contract might be understood as the result of a process that dis- closed that a doctrine with some virtue was unworkable in practice--a process typical of common law development. See, for example, Edward H. Levi, An Introduction to Legal Reasoning 9-25 (Chicago 1963).

n61 The constitutionality of race discrimination had not been reaffirmed by the Su- preme Court for decades before Brown. See, for example, Cumming v Board of Education, 175 US 528 (1899). Also, some pre-Brown decisions were hard to square with the contin- ued existence of any form of "separate but equal." See, for example, Gaines v Canada, 305 US 337 (1938); Sipuel v Board of Regents, 332 US 631 (1948); McLaurin v Oklahoma State Regents, 339 US 637 (1950); Sweatt v Painter, 339 US 629 (1950). See also Louis Michael Seidman, Brown and Miranda, 80 Cal L Rev 673, 708 (1992) ("Given what came before, the real question is why Brown needed to be decided at all."). See generally Seidman's discussion, id at 699-708, tracing the disintegration of state-enforced racial segregation to McCabe v Atchison, Topeka & Santa Fe Railway, 235 US 151 (1914). See also Geoffrey R. Stone, et al, Constitutional Law 497 (Little, Brown 2d ed 1991) ("After Sweatt and McLaurin, was there anything left for the Court to decide in Brown?"). The Court had reaffirmed the constitutional freedom of contract not long before the New Deal shift, see New State Ice Co. v Liebmann, 285 US 262 (1932); Louis K. Liggett Co. v Baldridge, 278 US 105 (1928); Adkins v Children's Hospital, 261 US 525 (1923). The shift is generally taken to have begun with

Nebbia v New York, 291 US 502 (1934), but the line of precedent was studded with inconsistencies. See David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* 210 (Chicago 1990). At the time of the change in the law of gender discrimination, which dates to *Reed v Reed*, 404 US 71 (1971), no gender-based classification had been upheld for ten years, see, for example, *Hoyt v Florida*, 368 US 57 (1961), but perhaps more important were the developments in the law of race discrimination, which drew gender classifications into question.

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4. Preferred position.

Prima facie it seems questionable to interpret some provisions of the Constitution broadly and some narrowly. Even among those who think this practice is justified, many view it as one of the central puzzles of modern constitutional law. n62 In the background is the sense that the real reason for interpreting (for example) the First Amendment more broadly than the Contract Clause is that we think the First Amendment is better, or more important, as a matter of policy or justice--and that this is not a legitimate reason for treating provisions differently.

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n62 See, for example, Ely, *Democracy and Distrust* especially chs 2, 3 (cited in note 14); Archibald Cox, *The Court and the Constitution 196-97* (Houghton Mifflin 1987); Laurence H. Tribe, *American Constitutional Law* 769-72 (Foundation 2d ed 1988) (describing this and kindred issues as the basic problem of post-1937 constitutional law).

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As a result, some theories try to devise other explanations for treating different provisions differently. Justice Black tried to address this issue by urging that all rights explicitly stated in the text--both the First Amendment and the Contract Clause--should be treated the same way, and that rights that do not have an explicit textual source should not be recognized at all. n63 Others have suggested that rights that are integral to the protection of the democratic process should be interpreted more expansively than those that are not. n64 But the problems with both of these theoretical approaches have been well catalogued, n65 and neither describes our practices very well.

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n63 Compare, for example, *City of El Paso v Simmons*, 379 US 497, 517 n 1 (Black dissenting), with *Griswold v Connecticut*, 381 US 479, 508-18, 520-25 (1965) (Black dissenting).

n64 See, for example, Ely, *Democracy and Distrust* at 86-88 (cited in note 14). See also Klarman, 77 *Va L Rev* at 768-82 (cited in note 31).

n65 Ely, *Democracy and Distrust* at 11-41 (cited in note 14); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L J* 1063 (1980); Paul Brest, *The Substance of Process*, 42 *Ohio St L J* 131 (1981).

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Once constitutional interpretation is seen as a process akin to the common law, instead of as a matter of fidelity to an authoritative direction, the existing, settled practice becomes much less problematic. The interpretation of constitutional provisions parallels the interpretation of precedents. Not all precedents are treated the same, and the differences are (or legitimately can be) explicitly based on whether the precedent is a good idea as a matter of morality or social policy. n66 Some precedents and provisions are read broadly, in the sense that they are taken to stand for an important principle that must be vindicated even at significant cost to other interests. Those precedents or provisions are treated as the foundation for an elaborate and far reaching doctrinal structure. The First Amendment is an example. Other precedents or provisions are "limited to their facts"--they are not overruled or ignored, but they are confined to a very narrow range of applications. The Contract Clause has been "limited to its facts" in this way. Roughly speaking, it is interpreted to reach the narrowest range of cases that it could reach without being effectively read out of the Constitution.

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n66 See K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 74-75 (Oceana 1960); Cardozo, *Nature of the Judicial Process* at 149-52 (cited in note 33).

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5. The priority of doctrine over text.

Here the superiority of the common law theory, as an account of existing practice, is apparent. In practice constitutional law is, mostly, common law. What matters to most constitutional debates, in and out of court, is the doctrine the courts have created, not the text. n67 Of course the text matters to some degree and, as I have said, it matters in ways that traditionalism alone cannot explain. But traditionalism, and the common law method, account for the largest part of constitutional practice.

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n67 See text accompanying notes 18-21.

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In this connection, common law constitutional interpretation, with its traditionalist explanation for why we care about what the Constitution says, captures an aspect of our practice that differs from the usual rhetoric. The rhetoric habitually extols the exceptional wisdom and foresight of the Founding generation. There is reason for crediting the Framers with exceptional foresight, as I will explain below, if explanation is needed. But the notion that the Founding generation was uniquely wise (as the rhetoric sometimes suggests) is not borne out by our practice. n68 The great achievements of American constitutional law today are the product not just of the Framers and their generation but of Marshall and Story, of the generation that fought the Civil War and initiated Reconstruction, of Brandeis and Holmes, of the New Deal

generation, of the Warren Court, and of many other people (not just judges) along the way.

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n68 See Holmes's remark in Missouri v Holland: "The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago." 252 US 416, 433 (1920).

-End Footnotes-
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It is by no means clear--in fact it seems quite mistaken to say--that the Founding generation is the dominant or even the most important influence in American constitutional law today. The common law approach explains this. The vision of the common law is precisely that the law is the product not of a few exceptional lawgivers (or one lawgiving generation), but of many generations of lawyers and judges. n69 That is our practice.

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n69 See Coke's observation from Calvin's Case in note 41. See also Michelman, 97 Yale L J at 1498 (cited in note 30).

-End Footnotes-

6. Extratextual amendments.

The common law approach also explains this apparently settled aspect of our practice. The most important changes to the Constitution--many of them, at least--have not come about through changes to the text. They have come about either through changes in judicial decisions, or through deeper changes in politics or in society.

Moreover, contrary to the neo-Hamiltonian approach, many of these changes evolved over time instead of occurring all at once. To consider just this century, the following changes in the Constitution--they must be regarded as that--are neither traceable to a textual amendment nor the product of a sudden shift, but rather are the products of evolutionary growth: the accretion of federal power, roughly in the first half of this century; the accretion of executive power, principally in the middle third of this century; the growth of a federal regulatory state in ways difficult to square with previous understandings of the separation of powers; the development of extensive protections for freedom of expression; the development of constitutional protections for women; and the federalization of criminal procedure. Other important changes in this century are somewhat--only somewhat--less evolutionary, but again cannot be traced to any textual amendment. The demise of a constitutional freedom of contract and the growth of constitutional protection for racial minorities are examples.

In all of these instances, the development of constitutional law followed, more or less closely, a common law model. Changes occurred only after the groundwork was laid: either the old doctrine proved unstable on its own terms, or changes in society made it seem wrong. The changes were based on

considerations of policy and social justice, and, to some extent, on earlier decisions. The changes were evolutionary: there was no single, authoritative act that marked any of these changes. (The most prominent arguable exception--Brown--was the culmination of both an elaborate legal campaign and an evolution in social attitudes. n70) In at least two instances--the Child Labor Amendment and the Equal Rights Amendment--the change in the law came about even though it was rejected, or at least not accepted, by "we the people" in the textual amendment process. These are very important parts of American constitutional law, and the common law approach seems to explain them best. Traditionalism--the cornerstone of the historic common law method--therefore provides both a plausible answer to the fundamental problems of written constitutionalism and a justification of some of the otherwise puzzling settled practices.

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n70 See generally Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (North Carolina 1987). See also Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va L Rev 7, 13-75 (1994) ("The reason the Supreme Court could unanimously invalidate public school desegregation in 1954 . . . was that deep-seated social, political, and economic forces had already begun to undermine traditional American racial attitudes.").

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III. Conventionalism and the Common Law Method

A. Conventionalism and the Text

1. The conventionalist justification for adhering to the text.

Traditionalism does fall short in at least one important respect: it cannot account for the deference that is given to the text. A strictly traditionalist approach would occasionally "overrule" textual provisions. But it is not acceptable, in our practice, to declare that a provision of the Constitution (for example, the provision requiring that the President be a natural-born citizen) has outlived its usefulness and therefore is no longer the law. Explicitly declaring that a provision was no longer part of the Constitution would be an act of civil disobedience or, if the provision were very important, revolution. In some way or another, however creative the interpretation, the text must be respected.

Moreover, where the text is relatively clear, it is often followed exactly. Simply as a descriptive matter, no one seriously suggests that the age limits specified in the Constitution for Presidents and members of Congress should be interpreted to refer to other than chronological (earth) years because life expectancies now are longer, that a President's term should be more than four years because a more complicated world requires greater continuity in office, or that states should have different numbers of Senators because they are no longer the distinctive sovereign entities they once were. n71 The text is not always treated in this way: "Congress" in the First Amendment is taken, without controversy, to mean the entire federal government, even though elsewhere "Congress" certainly does not include the courts or the President. But sometimes the text is treated this way, and the traditionalist,

Burkean account cannot explain why specific provisions are taken as seriously as they are, as often as they are.

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n71 See, for example, Sanford Levinson, Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (a) <26; (b) 26; (c) >26; (d) all of the above), in Sanford Levinson, ed, Responding to Imperfection: The Theory and Practice of Constitutional Amendment 13, 18 (Princeton 1995).

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Conventionalism, the second component of common law constitutional interpretation, takes care of this deficiency. Conventionalism is a generalization of the notion that it is more important that some things be settled than that they be settled right. The text of the Constitution is accepted (to adapt a term used in a related way by its originator) by an "overlapping consensus": whatever their disagreements, people can agree that the text of the Constitution is to be respected. n72

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n72 On the notion of an overlapping consensus, see Rawls, Political Liberalism at 133- 72 (cited in note 34). Rawls uses the term to refer to agreement on a "political conception"--a set of principles to govern the basic structure of society--which agreement is reached among people who have differing "comprehensive" views. See id at 134-40. Comprehensive views govern moral questions generally and therefore go far beyond the political. See id at 174-76.

It is crucial to Rawls's idea that the political conception is willingly affirmed by the holders of different comprehensive views, as fully consistent with their comprehensive views. See id at 171. An overlapping consensus is therefore different from a modus vivendi, which is the product of a compromise and a coincidence of self-interest among competing parties. A modus vivendi exists when people settle on a certain set of principles as a necessary evil, even though those principles do not follow from their comprehensive views. See id at 147. It is unclear to what extent conventionalism, as I have defined it, should be seen as describing an overlapping consensus as opposed to a modus vivendi, but in any case the metaphor of an overlapping consensus seems useful in describing it.

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Left to their own devices, people disagree sharply about various questions, large and small, related to how the government should be organized and operated. In some cases, the text of the Constitution provides answers; in many other cases, the text limits the set of acceptable answers. People who disagree will often find that although few or none of them think the answer provided by the text of the Constitution--either the specific answer or the limit on the set of acceptable answers--is optimal, all of them can live with that answer. Moreover, not accepting [*908] that answer has costs--in time and energy spent on further disputation, in social division, and in the risk of a decision that (from the point of view of any given actor) will be even worse than the constitutional decision. In these circumstances, everyone might agree

that the best course overall is to follow the admittedly less-than-perfect constitutional judgment.

In addition, conventionalism can be justified on the ground that it is a way for people to express respect for their fellow citizens. Even among people who disagree about an issue, it is a sign of respect to seek to justify one's position by referring to premises that are shared by the others. Moral argument in general has this structure (at least according to most modern conceptions). But appealing simply to shared abstract moral conceptions (such as a common abstract belief in human dignity) does less to establish bonds of mutual respect than appealing to more concrete notions that do more to narrow the range of disagreement--such as the appropriateness of adhering to the text of the Constitution.

These conventionalist ideas are, of course, not novel. They date to Aristotle and were expounded by Hume. More recently a number of people have offered various forms of conventionalist justifications for legal rules.ⁿ⁷³ Conventionalist arguments of this form are an important part of the common law tradition. The common lawyers did not justify adherence to precedent simply on traditionalist grounds. They also insisted, plausibly in at least some cases, that it was important to have certain matters settled because the costs of further controversy were too great.ⁿ⁷⁴ This [*909] aspect of the common law approach is sometimes overlooked when the common law is identified with an encompassing case-by-case method that emphasizes analogy, context, and "situation sense."ⁿ⁷⁵ In fact, rules, as well as case-by-case decision making, are an important part of the common law.ⁿ⁷⁶ It may be that conventionalism is a less celebrated aspect of the common law method than traditionalism because it is--in conception at least--a more uncontroversial, commonsensical idea. Some people will viscerally reject traditionalist arguments, but no one denies that, for some set of issues, it is better to have well settled answers even if they are less than perfect.

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ⁿ⁷³ Aristotle, *The Nichomachean Ethics* 1134b18-35 (Harvard 1926) (H. Rackham, trans); David Hume, *A Treatise of Human Nature* 489-90 (Oxford 2d ed 1978) (L.A. Selby-Bigge, ed); David Hume, *An Inquiry Concerning the Principles of Morals* 125 (Bobbs-Merrill 1957) (Charles W. Hendel, ed). See also David Gauthier, *David Hume, Contractarian*, 88 *Phil Rev* 3, 22-24 (1979); Postema, *Bentham and the Common Law Tradition* at 110-43 (cited in note 54). See also the discussions in David K. Lewis, *Convention: A Philosophical Study* 3-4, 36-42 (Harvard 1977); Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 *J Legal Stud* 165, 182-97 (1982). Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 *S Ct Rev* 231, 253-56, draws the specific connection between conventionalism and reliance on the language of an authoritative text.

ⁿ⁷⁴ For instance, Hale wrote:

[There is] instability, uncertainty and variety in the judgments and opinions of men touching right and wrong when they come to particulars . . . to avoid that great uncertainty in the application of reason by particular persons to particular instances; and the end that men might understand by what

rule and measure to live and possess; and might not be under the unknown arbitrary, uncertain judgment of the uncertain reason of particular persons, has been the prime reason, that the wiser sort of the world have in all ages agreed upon some certain laws and rules . . . and these to be as particular and certain as could be well thought of.

Hale, Reflections at 503 (cited in note 41). On Hale's relationship to the common law tradition, see the discussion in Postema, Bentham and the Common Law Tradition at 77-80 (cited in note 54). For a summary of Hume's similar views, see F.A. Hayek, The Legal and Political Philosophy of David Hume (1711-1776), reprinted in W.W. Bartley, III and Stephen Kresge, eds, 3 The Collected Works of F.A. Hayek: The Trend of Economic Thinking: Essays on Political Economists and Economic History 101, 107-17 (Chicago 1991).

n75 This aspect of the common law features prominently, for example, in the criticism of common law constitutionalism in Bruce Ackerman, The Common Law Constitution of John Marshall Harlan, 36 NY L Sch L Rev 5, 26-29 (1991).

n76 For example, the Statute of Frauds, the Rule in Shelley's Case, the Rule Against Perpetuities, and other similar rules are rule-like parts of the common law. Many of the rules governing estates in land also have the structure of a law. See Richard A. Posner, A Theory of Negligence, 1 J Legal Stud 29, 52-73 (1972) (surveying courts' behavior in railroad collision cases and concluding that, at least in the area in question, "the tendency of the common law is to become more certain and to precipitate specific rules of conduct from general principles"). See also Stephen G. Gilles, Rule-Based Negligence and the Regulation of Activity Levels, 21 J Legal Stud 319 (1992).

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But although conventionalism is important to the common law and conventionalism itself is a familiar idea, the conventionalist approach to constitutional interpretation is at odds with many current understandings. Under the conventionalist account the text should be followed just because it is there, so to speak. There is nothing special about the fact that it was adopted, or the process by which it was adopted, or the people who adopted it. Adhering to the text of the Constitution, on this account, "has nothing to do with ancestor worship." n77

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n77 See Holmes, Passions and Constraint at 10 (cited in note 3) ("Democratic commitment to rules of the game that are difficult to change has nothing to do with ancestor worship. The present generation accepts some of the decisions of the past because, on balance, they are good decisions, . . . making present problems easier, not harder, to solve.").

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Two analogies may be useful. First, on the conventionalist account, our practice of adhering to our eighteenth- and nineteenth-century Constitution is comparable to the reception of Roman law in Continental Europe. Roman law became the standard in the late Middle Ages because it was an

accessible, widely known, comprehensive, and basically acceptable set of rules. The reason Roman law was widely accepted was not that its promulgators had a claim to obedience. Nor was the reason that the provisions of Roman law were the best that could be devised as an original matter. It was simply that Roman law was a coherent body of law that was at hand, and its adoption avoided the costly process of reinvention. n78 Conventionalism such as this is not the whole explanation for why we should obey the Constitution; there is the traditionalist component too. But it is part of the explanation of why the Constitution should be followed.

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n78 On the reception of Roman law in Europe, see Paul Vinogradoff, Roman Law in Medieval Europe (Barnes & Noble 1968); Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition especially ch 3 (Harvard 1983).

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The second analogy is to "focal points" in game theory. n79 In a cooperative game with multiple equilibria, the solution will often depend on social conventions or other psychological facts. A simple example would be deciding whether traffic should keep to the left or the right, or who should call back if a telephone call is disconnected. These are games of pure cooperation, but even when there is some conflict of interest a "focal point"--a solution that, for cultural or psychological reasons, is more "salient" and therefore seems more natural--might be decisive. n80 For example, some disputes in society have roughly the structure of the so-called "battle of the sexes" game: each side would prefer its own first choice, but both are willing to give up their own first choices if necessary to avoid conflict. n81 Similarly, in many disputes in society, although each faction has a different preferred outcome, [*911] all might prefer an expeditious resolution to prolonged conflict. n82 The outcome of such a game can be determined by social conventions that may make one solution stand out as more natural or appropriate. n83 On the conventionalist account, the Constitution is a focal point of this kind: our culture has given it a salience that makes it the natural choice when cooperation is valuable. But its salience and general acceptability, rather than its authority or optimality, are the most important reasons for accepting it.

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n79 The classic discussion of focal points is Thomas C. Schelling, The Strategy of Conflict 58-80 (Oxford 1969). See also Eric Rasmusen, Games and Information: An Introduction to Game Theory 34-37 (Basil Blackwell 1989); David M. Kreps, Game Theory and Economic Modelling 170-74 (Clarendon 1990); Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, Game Theory and the Law 39-46 (Harvard 1994).

n80 See, for example, Schelling, Strategy of Conflict at 57-58 (cited in note 79); Lewis, Convention at 35-38 (cited in note 73); Kreps, Game Theory and Economic Modelling at 34-35, 101-02, 172-74 (cited in note 79); Rasmusen, Games and Information at 35 (cited in note 79). Gauthier says that Hume invoked this notion of salience in his account of legal rules. See Gauthier, 88 Phil Rev at 23-24 (cited in note 73).

n81 In the traditional statement of the "battle of the sexes" game, A wants to go to the ballet; B wants to go to a boxing match; but each would prefer to sacrifice his or her preference in order to be with the other. The game apparently originated in R. Duncan Luce and Howard Raiffa, Games and Decisions: introduction and critical survey 90-94 (Wiley 1967).

n82 Of course the game only roughly models the social controversy; among other things, in the game there is no communication. Still, the rough parallel seems illuminating.

n83 See, for example, the argument in Kreps, Game Theory and Economic Modelling at 102, 143-44 (cited in note 79).

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Conventionalism, understood in this way--as an allegiance to the text of the Constitution, justified as a way of avoiding costly and risky disputes and of expressing respect for fellow citizens--helps explain the deference given to the text more fully than traditionalism standing alone. We do not "overrule" the text because any such overruling would jeopardize the ability of the text to serve as a generally accepted focal point. Once one textual provision was explicitly disregarded, others could be disregarded too, and the benefits of having a focus of agreement--imperfect but "there" and "good enough"--would be diminished. Conventionalism thus accounts for a prominent feature of our practices and provides the rest of the answer to the question of why we adhere to the text of the Constitution.

2. Conventionalism and interpretation.

It may seem that this account of conventionalism assumes that the "text alone" provides answers to a significant range of constitutional issues. In fact the opposite is more nearly true. A conventionalist account not only accepts the need to interpret the text but gives relatively specific guidance about how to interpret the text. In any event, of course, the claim is not about the "text alone" at all, if that means the text read in isolation from any background understandings or presuppositions. Whatever guidance the text of the Constitution (or any other text) gives, it gives because of a complicated set of background understandings shared in the culture (both the legal culture and the popular culture). n84 The premise of conventionalism is only that the text, [*912] combined with a set of generally accepted background assumptions (that are difficult to specify but need not be specified for current purposes), occasionally provides answers and more often limits the set of acceptable answers.

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n84 In the literature on interpretation generally this point is common ground among widely divergent views. Compare, for example, Hans-Georg Gadamer, Truth and Method 284 (Seabury 1975), with E.D. Hirsch, Jr., Validity in Interpretation 4-5, 87-88 (Yale 1967). For a discussion of this point in the legal context, see, for example, Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 113-17 (Harvard 1990); Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life 38-76 (Oxford 1991).

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That is, conventionalism does not presuppose that the Constitution provides specific answers to a wide range of questions. It only presupposes that the Constitution (interpreted according to various background understandings) says something significant. In some instances, such as age limits, what it says is relatively precise. But even when the text is not precise, it still serves to limit the range of disagreement.ⁿ⁸⁵ For example, people disagree greatly over how to treat criminal defendants, and the text of the Constitution leaves many questions unanswered. But the text still narrows the range of disagreement. There are significant benefits in using the provisions of the Constitution as a starting point--however imperfect they are from everyone's point of view--and great potential costs in starting from scratch. Even when the constitutional provisions are quite open-ended, as in the case of the Religion Clauses for example, having the text of the clauses as the shared starting point at least narrows the range of disagreement, and is valuable for that reason. So even when the text does not come close to providing an answer, conventionalism still explains why the text is a shared starting point.

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ⁿ⁸⁵ See, for example, Fallon, 100 Harv L Rev at 1196 (cited in note 5); Frederick Schauer, An Essay on Constitutional Language, 29 UCLA L Rev 797, 802-12, 824-31 (1982).

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This is how conventionalism can guide the interpretation of the text. Conventionalism suggests that, other things equal, the text should be interpreted in the way best calculated to provide a focal point of agreement and to avoid the costs of reopening every question. In a sense there is nothing "inherent" in the text, whatever that might mean, that tells us that the President's "Term of four Years" means four years on the Gregorian calendar. But interpreting it that way is most likely to settle the issue once and for all without further controversy. The same is true when the text only narrows the range of disagreement instead of specifying an answer. The reason we do not engage in fancy forms of interpretation that would permit us to question the length of the President's term, or the citizenship qualification, or other "textual" resolutions of issues, is not because we have an obligation to be faithful to the Framers' decisions as revealed by the text. We break faith with the Framers (if that is the right term) on issues that are far more important. Rather, it is because the leading function of the text is to provide a ready-made solution that is acceptable to everyone. That function would be subverted by interpretations of the text that struck most people as contrived.

3. Why the text?

The conventionalist justification need not be limited to adherence to the text. There are familiar conventionalist arguments for adhering to precedent: the precedent may be wrong, but it is established, and it is not worth the cost and risk of reopening the issue.ⁿ⁸⁶ As I said, conventionalism of this form is prominent in the common law tradition. The adherence to precedent in constitutional law rests on conventionalist grounds as well as traditionalist grounds: the demands of stare decisis exceed the Burkean justification. That

is, often it will be an exaggeration to say that a prior decision represents the kind of time-tested judgment that should be honored out of humility and a sense of one's own limitations. Rather, the practice of following precedent is a focal point. Everyone can agree, relatively easily, that precedent should generally be followed, and potentially disruptive disagreements on the underlying substantive issues can then be bracketed.

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n86 Hume gives this conventionalist justification for precedent. See Hume, An Inquiry Concerning the Principles of Morals at 125 (cited in note 73) ("When natural reason [] points out no fixed view of public utility by which a controversy of property can be decided, positive laws are often framed to supply its place and direct the procedure of all courts of judicature. Where these two fail, as often happens, precedents are called for; and a former decision, though given itself without any sufficient reason, justly becomes a sufficient reason for a new decision.")

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Undoubtedly the adherence to the Framers' original intentions is, in part, conventionalist, for the same reasons that conventionalism explains adherence to the text. Some practices that have grown up without clear textual warrant--such as judicial review itself--can claim a conventionalist, as well as a traditionalist, justification. Judicial review might be the best system for our society, but our acceptance of it outruns our belief that it is theoretically best: we are much more certain that we are going to retain judicial review than we are that it is the best system. One [*914] reason is that it works well enough, and it would be too costly and risky to reopen the question whether, abstractly considered, it is the best possible arrangement.

It might be objected, however, that conventionalism does not fully explain the status of the text, which was the deficiency in the traditionalist account that conventionalism was supposed to remedy. In a particular instance, we might think that the range of solutions consistent with the text is not good enough--that is, that the gains from deviating from the text would outweigh the losses. On a conventionalist account, it might be said, we should unapologetically reject the text in such a case. But it is not part of our practice to reject the text in such an explicit way. Why does our overlapping consensus seem to have settled so heavily on the text? The answer to this important question is multifaceted, but two things seem especially important. One is the specific way in which the Constitution was drafted; the other is the special status that the Constitution has in the American political culture.

One reason we do not explicitly disavow the text may be that the text seldom forces truly unacceptable actions on us. This is where the "genius" of the Constitution--that it consists of provisions that are sufficiently broad and flexible, yet not vacuous--becomes manifest. Many of the provisions are worded in terms broad enough to permit a course that we think is morally acceptable. We therefore seldom have strong reasons to reject the text overtly; instead we can reinterpret it, within the boundaries of ordinary linguistic understandings, to reach a morally acceptable conclusion. At the same time, the costs of disavowing the text, in terms of the ability of the text to serve as a focal point, are likely to be great. It is valuable to society that people who disagree sharply on important issues can have, as common ground, an acceptance

of the text. Again there is perhaps an analogy to Roman law. Roman law provided a framework for resolving concrete legal disputes; but it was sufficiently open-ended that different societies could adapt it in different ways, without losing the advantages of having a ready-made, good-enough body of law that reduced the need to reopen issues and revisit first principles.

The text of the Constitution--interpreted, as always, in the way I described before, according to certain background assumptions--is far from wholly manipulable. As a result, the common ground it establishes is more than nominal. On all but very important issues, if you can make a good textual argument to me, I [*915] will accede, even if the result seems morally wrong to me. That maintains stability and bonds of mutual respect as well as a culture in which disputes are resolved by appeals to common premises.

At the same time, the acceptance of the Constitution is not the product strictly of calculation, or of an entirely rational process. At first glance conventionalism might seem to be an overly rationalistic explanation that drains notions of national identity and heritage from constitutional interpretation and denies that the Constitution should be revered or accorded a scriptural status. In fact, on a conventionalist account, it is not that the Constitution is important just because of a rational calculation; rather, the calculations come out as they do because of the cultural importance of the Constitution. For a variety of complex reasons--rooted in patriotic impulses and narratives, in American exceptionalism, in Protestantism, n87 and in other sources of national culture--the Constitution has been a central unifying symbol for Americans. n88 That is why the Constitution, and not some other document or source of law, can serve so well as the focal point of agreement. This is one way to understand Madison's famous answer, in Federalist 49, to Jefferson's suggestions that constitutions should be easy to change:

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n87 See, for example, Sanford Levinson, *Constitutional Faith* 11-12 (Princeton 1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv L Rev 885, 889- 94 (1985).

n88 See, for example, Michael Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* (Knopf 1986); Levinson, *Constitutional Faith* at 11-17 (cited in note 87); Max Lerner, *Constitution and Court as Symbols*, 46 Yale L J 1290 (1937). See also Monaghan, 56 NYU L Rev at 356 (cited in note 14) ("The practice of 'constitution worship' has been quite solidly ingrained in our political culture from the beginning of our constitutional history.").

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As every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. . . . When the examples which fortify opinion are ancient as

well as numerous, they are known to have a double effect. . . . The most rational gov- [*916] ernment will not find it a superfluous advantage to have the prejudices of the community on its side. n89

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n89 Federalist 49 (Madison), in Rossiter, ed, Federalist Papers at 314-15 (cited in note 29).

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Societies hold together not just by virtue of rational calcula- tion but also because of shared symbols, and there is little doubt that the Constitution is such a symbol for the United States. It is because of this special status of the Constitution that its text has become the focal point of agreement. n90

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n90 Incidentally this may also justify classifying the agreement on the Constitution as something akin to an overlapping consensus, as distinguished from a modus vivendi. People are loyal, not just to liberal principles (as Rawls describes), but to specific national institutions (such as a particular form of democratic government, and perhaps even a par- ticular governing text). They follow these particular institutional forms not because it is the best that can be done under the circumstances (that would be a modus vivendi) but because of a belief in the institutions that derives from their own moral views. That is, the explanation of why these institutions are a focal point is perhaps richer and more in- teresting than the rationalistic game theoretic account suggests.

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B. Conventionalism and the Puzzles of Constitutional Interpretation

The principal argument for conventionalism is that it an- swers the last bit of Noah Webster's question left unanswered by traditionalist arguments: why we treat the text as sacrosanct. In addition, however, conventionalism sheds light on some other puzzling aspects of our practices--practices that, under compet- ing theories of constitutional interpretation, seem hard to justify.

1. The text matters most for the least important questions.

That the text matters most for the least important questions is a relatively little noticed but persistent, and puzzling, aspect of our practices. The common law approach I have outlined explains it; other approaches seem very difficult to reconcile with it. For the most part we interpret the Constitution formalistically in just the circumstances that conventionalism would predict--when the stakes are relatively low but it is important that a matter be settled one way or another. Under the usual textualist or originalist understandings, this seems backward. If the text is important because of the authority of those who adopted it, then it should be more important when the issues are more important. But that is not our practice. Our practice is more consistent with conventionalism. [*917]

The most striking example is the separation of powers. In the last decade or so there has been much litigation about the allocation of power between the executive and Congress. Much of the resulting law is notoriously formalistic, in the sense that the courts (as well as the broader legal and even popular cultures) emphasize the text and the original understanding far more in these cases than they do in addressing issues like equality and reproductive freedom.

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n91 See, for example, Freytag v Commissioner of Internal Revenue, 501 US 868 (1991); Bowsher v Synar, 478 US 714 (1986); INS v Chadha, 462 US 919 (1983); Buckley v Valeo, 424 US 1 (1976). This point has been made by Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U Pa L Rev 1513 (1991), and Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions--A Foolish Inconsistency?, 72 Cornell L Rev 488 (1987).

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Sometimes it is suggested that the reason for this is that separation of powers is in the end more important than the guarantees of rights. n92 But that argument seems forced and overstated. Certain aspects of the separation of powers, such as an independent judiciary and the requirement that the executive follow the law, are of the first importance. But many controversial separation of powers issues concern matters about which well governed democratic societies might differ, such as the legislative veto and the question of who shall appoint which officials. n93 Those are the issues that we resolve formalistically. And the reason for formalism in dealing with separation of powers is precisely that specific separation of powers issues are, relatively speaking, often not particularly charged, as a matter of morality or public policy. Few people have passionate convictions about whether the legislative veto is good or bad for society, or about which classes of officials the President must appoint. In fact few people (if they thought about the issue as an original matter) would be certain that our society would be, on balance, much worse off even if we made much more dramatic changes in the allocation of power between Congress and the President--perhaps even if we had a parliamentary system.

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n92 Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U L Rev 881, 894-97 (1983).

n93 Sometimes, of course, questions arising under the Appointments Clause might be of considerable significance, especially when they concern the power to discharge officials. But so far, in its formalistic decisions, the Supreme Court has confined itself to relatively insignificant applications. See, for example, Freytag, 501 US at 880-92; Bowsher, 478 US at 722-27; Buckley, 424 US at 109-43. In fact one might question whether the Court will continue on the course set by its formalistic decisions if the stakes in future cases are higher. The conventionalist approach suggests that the Court would not. (I am grateful to Peter Strauss for clarification on this point.)

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Issues of equality and reproductive freedom, by contrast, elicit strong reactions. In these contexts, people are less likely to accept a solution just for the sake of having the matter resolved with minimal friction. They are willing to live with controversy as the price of trying to resolve the issue in the way they think is right. They are therefore much more likely to force the issue by directly addressing the moral rights and wrongs. But in dealing with separation of powers issues it is more important that the issue be settled than that it be settled just right--so that we know which acts are valid, which political actor must make which decision, and so on. Consequently our practices are more formalistic. That is what conventionalism predicts, and that is our practice. The more important the provision, the less formal- istic its interpretation. n94

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n94 See, in this connection, the discussion in Monaghan, 56 NYU L Rev at 361-63 (cited in note 14) (summarizing the "two-clause theory" and acknowledging that "it provides at least a general account of what the supreme court has been doing"). Justice Frankfurter made a similar point in his opinions in United States v Lovett, 328 US 303, 321 (1946) (concurring), and National Mutual Insurance Co. v Tidewater Transfer Co., 337 US 582, 646-47 (1949) (dissenting).

In dissent in National Mutual, Justice Frankfurter stated:

No provisions of the Constitution, barring only those that draw on arithmetic, as in prescribing the qualifying age for a President and members of a Congress or the length of their tenure of office, are more explicit and specific than those pertaining to courts established under Article III. . . . The precision which characterizes these portions of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government. This was not due to chance or ineptitude on the part of the Framers. The differences in subject-matter account for the drastic differences in treatment. Great concepts like "Commerce . . . among the several States," "due process of law," "liberty," "property" were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged. But when the Constitution in turn gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the limitation. Precisely because "it is a constitution we are expounding," [citing McCulloch] we ought not to take liberties with it.

337 US at 646-47.

This discussion is notable because the interpretation of Article III has not proven to be governed by the text to the extent that Justice Frankfurter urged (his opinion was, after all, a dissent). See, for example, Commodity Futures Trading Commission v Schor, 478 US 833 (1986); Thomas v Union Carbide Agricultural Products Co., 473 US 568 (1985); Crowell v Benson, 285 US 22

(1932). That is because questions about the scope and limits on federal judicial power also "relate to the whole domain of social and economic fact" and must "gather meaning from experience." But the general point--that the specific provisions of the Constitution are interpreted in a more formalistic way than the more general provisions, the meaning of which should evolve over time--has to a significant degree been borne out in the way separation of powers law has developed.

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There are, of course, important provisions that are interpreted formalistically. The provision that each state have two Senators is an example, although in times of the greatest stress, such as Reconstruction, this provision was disregarded. Although this is an important provision, the reason for adhering to it remains conventionalist. It is a clear provision, and any violation of it would be highly salient. Consequently, violating it would greatly increase the risk that the valuable consensus on the text will dissolve generally, increasing the potential for disruption and for outcomes that are, even to those who dislike the textual solution, worse still.

2. The relative importance of text and intentions.

Conventionalism also explains what would otherwise be a very puzzling feature of constitutional interpretation--our willingness to depart from the intentions of the Framers much more dramatically than we would depart from the text. Originalism (defined as strict adherence to the specific intentions of the drafters of the Constitution) is subject to a variety of well known objections. n95 Even its purported adherents accept many departures from what originalism would dictate. n96

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n95 See, for example, the discussions in Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St L J 1085 (1989); Brest, 60 BU L Rev 204 (cited in note 4).

n96 See, for example, the qualifications in Bork, *Tempting of America* at 161-85 (cited in note 1), and Scalia, 57 U Cin L Rev at 856-57, 861-62 (cited in note 25).

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But adherence to the text differs only in degree from adherence to the Framers' specific intentions. If we accept the judgments unequivocally reflected in the text, why should we not accept the other judgments the drafters thought they were adopting? Yet judgments reflected in the text are accepted almost categorically, in the sense that one can never simply disregard the text, while the understandings the drafters had when they adopted the text are accepted much less frequently.

One especially dramatic illustration of this paradox is that in some areas, the law has developed in a way that can be squared fairly easily with the text but is plainly at odds with the Framers' intentions. The interpretation of the

right to counsel in the Sixth Amendment is an example. The Sixth Amendment gives a criminal defendant the right "to have the assistance of counsel for his defence." n97 There is little doubt that the original [*920] understanding of this provision was that the government may not forbid a defendant from having the assistance of retained counsel. n98 Today, of course, Gideon v Wainwright n99 and subsequent decisions have established that in serious criminal prosecutions the government must provide counsel even for defendants who cannot afford it. That rule fits comfortably with the language, and the language has been used to support it.

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n97 US Const, Amend VI.

n98 See William M. Beaney, The Right to Counsel in American Courts 8-33 (Greenwood 1955); Bute v Illinois, 333 US 640, 660-66 (1948).

n99 372 US 335 (1963).

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But in fact it is just a coincidence--almost a matter of homonymy--that the modern right to counsel is supported by the language of the Sixth Amendment. The drafters of the Sixth Amendment might have used some other language to express their intentions, language that would have made it more difficult to find support for the modern right (for example, that the accused shall have the right "to retain counsel for his defense"). n100 At first glance it seems odd to use the language of the Sixth Amendment to support Gideon when it is only a coincidence that it does so.

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n100 See, for example, Md Declaration of Rights, Art 21 ("to be allowed counsel"); NH Const, Part First, Art 15 ("to be fully heard in his defense, by himself, and counsel"); SC Const, Art 1, section 14 ("to be fully heard in his defense by himself or by his counsel or by both").

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Originalist views of the Constitution seem quite unable to account for this aspect of our practice. But conventionalism can. It is important to show that Gideon is consistent with the text because that helps preserve the overlapping consensus. So long as a judge can show that her interpretation of the Constitution can be reconciled with some plausible ordinary meaning of the text--so long as she can plausibly say that she, too, honors the text--she has maintained some common ground with her fellow citizens who might disagree vehemently about the morality or prudence of her decision. But once a judge or other actor asserts the power to act in ways inconsistent with the text, the overlapping consensus is weakened. If there is one unequivocal departure from the text, there can be others. Society's ability to use the text as common ground--to provide a basis of agreement or a limit on disagreement--will be eroded. That is why the text must be preserved, even though the Framers' intentions need not be.

There are other examples, less clear-cut than Gideon, of this aspect of our practice. The Establishment Clause is interpreted to forbid state establishments, although both the text and the original understanding say something more like the opposite (that Congress was forbidden from prohibiting state establishments). The Warrant Clause is taken to require warrants, although it says nothing of the kind. The Equal Protection Clause is treated as a general constitutional injunction of "equality," despite the narrower wording and fairly clear evidence that the original understanding of the clause was different. Of course, some of these interpretations may be incorrect (although they all seem well established). The point is that these interpretations gain strength from the presence, in the text, of some words that support them--even though the original understanding of the words is at odds with that interpretation. The question is why this significant aspect of our practices is not a weird form of verbal fetishism. The answer is that the words themselves provide a focal point, something on which people can agree, whatever their moral or policy disagreements.

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n101 Wallace v Jaffree, 472 US 38, 91-99 (1985) (Rehnquist dissenting); Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction 14-15 (Lambeth 1982).

n102 See David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888 342-51 (Chicago 1985); John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L J 1385, 1433-51 (1992). Harrison concludes that "during Reconstruction the interpretation of the Equal Protection Clause that is today accepted had a competitor which limited the clause to the protective functions of government," and that this view was "widespread among Republicans." Id at 1438, 1440.

-End Footnotes-

Perhaps the most impressive example of this aspect of our practices is the application of the Bill of Rights to the states through the Fourteenth Amendment, the so-called incorporation doctrine. The Bill of Rights originally applied only to the federal government. In a series of decisions, mostly in the 1960s, the Supreme Court applied to the states essentially all of the provisions of the Bill of Rights that protect criminal defendants. The effect was to bring about a large-scale reform of the criminal justice systems of the states. These decisions were the culmination of a protracted argument, mostly between Justices Black and Frankfurter (and their respective followers outside the Court), over the appropriateness of incorporation. n103

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n103 See, for example, Adamson v California, 332 US 46, 59 (1946) (Frankfurter concurring); id at 68 (Black dissenting).

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Three things seem clear about the incorporation issue. First, it went from being a subject of intense controversy--probably the most controversial issue in constitutional law between the mid-1940s and mid-1950s, and one of the most controversial for a decade or more thereafter--to being a completely settled

issue. [*922] The incorporation controversy involved the most divisive matters--criminal justice, federalism, and, implicitly, race. But by the mid-1980s, even the most severe critics of the Warren Court accepted incorporation, and some of them aggressively embraced it. n104

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n104 See, for example, Bork, *Tempting of America* at 94 (cited in note 1) ("As a matter of judicial practice the issue is settled."); *Albright v Oliver*, 114 US 807, 814 (1994) (Scalia concurring) ("[Incorporation is] an extension I accept because it is both long established and narrowly limited.").

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Second, incorporation came to be a settled issue even though it was not widely accepted that incorporation was consistent with the intentions of the Framers of the Fourteenth Amendment. During the time that incorporation took hold in the legal culture, the received wisdom was that the Framers of the Fourteenth Amendment did not intend incorporation. n105 We now recognize that that received wisdom was at least too simple. But what the incorporation controversy and its denouement reveal about our practices is that--so far as the acceptance of incorporation in the legal culture is concerned--the Framers' intentions were essentially beside the point.

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n105 See, for example, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 101-02 (Yale 1986) (observing that the "weight of opinion among disinterested observers" is against a historical basis for incorporation). See also the discussion of this consensus in Amar, 100 *Yale L J* 1131 (cited in note 2) (attacking the consensus).

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Third, and most striking, despite the fact that there are certain notorious textual difficulties with incorporation, n106 the widespread acceptance of incorporation has something to do with its use of the text. It helped enormously that the Court was reforming state criminal justice systems on the basis of conceptions that had some link to the text of the Bill of Rights. It seems very unlikely that incorporation would have succeeded in the way it did if the Court--instead of invoking the text of the Bill of Rights to aid its campaign to reform state criminal justice systems--had simply devised a new set of rules for the states to follow, however sensible those rules might have been.

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n106 For example, incorporation makes the Due Process Clause of the Fourteenth Amendment redundant, since the incorporated Fifth Amendment already contains a Due Process Clause.

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Since there is no general belief that the Framers (of either the Bill of Rights or the Fourteenth Amendment) contemplated that the text would be viewed in this way, and since the text itself doesn't immediately lend itself to that

interpretation, why should the textual basis of incorporation matter so much? If we [*923] don't care about what the Framers thought they were doing, why do we care so much about the words they wrote? Conventionalism provides an answer to this question. By tying reforms of state criminal justice systems to the text of the Bill of Rights, the incorporation doctrine invoked the overlapping consensus. That is, in the face of widespread disagreement about criminal justice, the Court could take advantage of the fact that everyone thinks the words of the Constitution should count for something. The link to the text legitimated incorporation by connecting it to something everyone believed in. People who might have disagreed vigorously about the merits of various reforms of the criminal justice system could all treat the specific rights acknowledged in the Bill of Rights as common ground that would limit the scope of their disagreement. A reform program that had a plausible connection to the text of the Bill of Rights was therefore more likely to be accepted than one that did not.

It is in this sense that incorporation is "consistent with the Constitution" in a way that a nontextual program of criminal law reform would not be. The point is not that the Framers, or "we the people," commanded the reforms that the Court undertook. The Court undertook those reforms, and the reforms lasted, because they made moral and practical sense, and because, by virtue of their connection to the text, society could reach agreement (or at least narrow the range of disagreement) on a legal outcome even in the face of deep moral disagreement. That is why the text matters even if the Framers' intentions were to the contrary.

3. Formalism and new written constitutions.

It is customary, especially in this country, to distinguish between written and unwritten constitutions. Perhaps that is because it was important to the Framers of our Constitution that it was written, unlike Britain's. n107 But there is something unrealistic about supposing that today there is a great difference between written American constitutionalism and unwritten British constitutionalism. There are differences, of course, but they seem minimal when compared to the differences among nations with written constitutions--not just between, say, the United States and the nations of Eastern Europe, but also between the [*924] United States and even postwar Western European nations with new written constitutions, especially in the earlier years of those constitutions. Intuitively (and to most nonlawyers obviously) the important distinction is between nations that have well established liberal traditions and those that do not. That distinction does not track the one between written and unwritten constitutions.

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n107 See, for example, Wood, Creation of the American Republic, 1776-1787 at 259-305 (cited in note 3).

-End Footnotes-

Conventionalism helps account for this intuition, undermining the distinction between written and unwritten constitutions. When a nation does not have well established traditions, the words of its constitution are correspondingly more important in providing something on which people can agree. When a nation is just starting, it is important for political actors to be

able to point to the text of the constitution to justify their actions. Creative interpretations of that text will breed distrust and make it more likely that whatever consensus exists will dissipate. Once people think that their political opponents are playing fast and loose with the text, all consensus is more likely to break down because there is so little to fall back on. Only by staying very close to the text--being as formalistic as possible--can political actors in an immature regime convince others that they are acting in good faith. By contrast, once a society develops political traditions, political actors can be more confident that their opponents, even if arguably departing from the text, will operate within the traditions, or will be reined in by other forces in society if they do not do so. In both Britain and the United States, the traditions and precedents are the dominant features of constitutional law, even though the United States has a text; in less mature societies, any written text will be more important.

We should, therefore, expect to find more formalism, and more emphasis on the "writteness" of constitutions, in new constitutional regimes. This may explain why the written character of the American Constitution was so important to the Framers: with its traditions discarded, or in an uncertain state, the society was held together, to a greater degree than today, by its Constitution. But the longer a constitutional regime endures, the more it develops constitutional traditions, and the more stable the patterns of cooperation become in society. The text becomes less important, and the distinction between written and unwritten constitutions blurs. Therefore the fact that the Framers attached so much importance to the written character of our Constitution, as distinguished from the British constitution, does not mean that we should do so today. [*925]

IV. Judicial Restraint and Democracy

Judges are not the only ones who interpret a constitution, of course. One virtue of common law constitutionalism is that despite initial appearances, it is not tied to judicial interpretation. To the contrary, the common law can serve as a model for incremental change in society as a whole, as it did for Burke. As I suggested earlier, legislators and even ordinary citizens, in their encounters with the Constitution, act in ways consistent with the common law approach. In particular, glosses on the Constitution (by judicial decision and otherwise), when validated by tradition, operate in public discourse on a par with the specific provisions of the Constitution. In this respect, common law constitutional interpretation is actually less vulnerable than some of its competitors to the criticism that it is court centered. Certain justifications for originalism and textualism emphasize the need to limit judges' discretion and prevent abuses. But the common law approach does not necessarily link constitutional interpretation to particular capacities of judges and courts.

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n108 In addition, a common law approach is more consistent with the fact that the lower courts, federal and state--not just the Supreme Court--are centrally involved in constitutional interpretation. Those courts are, as a practical matter, the courts of last resort for most citizens. But for those courts, constitutional law consists almost exclusively of Supreme Court precedent. The intent of the Framers, and even the text, are of very limited importance to their work. See, for this important point, Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*

tion, 25 Conn L Rev 843 (1993).

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Nonetheless, any approach to constitutional interpretation must explain how it restrains the officials responsible for implementing the Constitution and prevents them from imposing their own will. A theory of constitutional interpretation for our society also ought to be able to explain how the institution of judicial review--judicial enforcement of the Constitution against the acts of popularly elected bodies--can be reconciled with democracy. It might be argued, in particular, that a theory of common law constitutional interpretation overlooks the crucial difference that common law judges can be overruled by the legislature but judges interpreting a constitution ordinarily cannot. n109

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n109 See, for example, Ackerman, 36 NY L Sch L Rev at 29-32 (cited in note 75); Richard H. Fallon, Jr., Common Law Court or Council of Revision?, 101 Yale L J 949, 961 (1992) ("How much like a common law court could a Court with such nearly ultimate powers be?"); Monaghan, 56 NYU L Rev at 355-58 (cited in note 14).

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Neither the concern with judicial restraint nor the concern with democracy, however, undermines the justification of common law constitutionalism. If anything, with respect to both [*926] concerns, common law constitutionalism is superior to its competitors.

A. Judicial Restraint

Textualism and originalism are sometimes defended as the best way of restraining judges and preventing them from abusing their authority. n110 On the surface this may seem to be at least a plausible claim. But on closer examination I believe that it owes all of its plausibility to the unspoken assumption that some version of the common law approach to constitutional interpretation is operating in the background.

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n110 See, for example, Scalia, 57 U Cin L Rev at 862-64 (cited in note 25); Bork, Tempting of America at 146-47 (cited in note 1).

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A judge who conscientiously tries to follow precedent is significantly limited in what she can do. But a judge who acknowledges only the text of the Constitution as a limit can, so to speak, go to town. The text of the Equal Protection Clause, taken alone, would allow a judge to rule that the Constitution requires massive redistributions of wealth (reasoning that "equal protection of the laws" includes "equal protection" against the vicissitudes of the market); the text of the Contract and Just Compensation Clauses, taken alone, would allow a judge to invalidate a wide range of welfare and regulatory legislation. n111 The text of the Due Process and Cruel and Unusual Punishment

Clauses, taken alone without reference to the precedents interpreting them, could justify a thorough overhaul of the criminal justice system. And so on.

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n111 As is argued in Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 327-29 (Harvard 1985).

-End Footnotes-

The notion that the text of the Constitution is an effective limit on judges is plausible only if one assumes a background of highly developed precedent. Within the limits set by precedent, paying more attention to text might indeed limit judges' discretion. The appeal of textualism as a limit on judges--as the argument was made, most famously for example, by Justice Black n112 --stems entirely from the assumption that the text will be used to resolve disputes within the gaps left by precedent. If we assume that the various clauses of the Constitution are to be interpreted in something like the current fashion, then judges may indeed be more "restrained" if they insist on some relatively explicit textual source for any constitutional right. But that is [*927] primarily a demonstration of the restraining effect of precedent, not of text; the bulk of the restraint by far is provided by precedent.

-Footnotes-

n112 See note 1.

-End Footnotes-

For similar reasons, it is implausible to say that adherence to the Framers' intentions, by itself (or together with adherence to text), limits judges more than precedent. The familiar problems--uncertainty about who counts as "the Framers," unclarity in the historical record (or no relevant record at all), difficulty in defining the level of generality on which to identify the intention, changing circumstances n113 --all make the historical record a poor restraint on judges. In fact the strongest advocates of adherence to the Framers' intentions are often, at the same time, embroiled in controversies over what the Framers of particular provisions actually did intend. The existence of controversy in applying a method does not invalidate the method, of course, but it does mean that that method is a less sure way of preventing a judge from "finding" her own moral or political views in the Constitution.

-Footnotes-

n113 See, for example, Brest, 60 BU L Rev at 229-37 (cited in note 4).

-End Footnotes-

By contrast, the common law method has a centuries-long record of restraining judges. Needless to say, precedents can be treated disingenuously, and judges can abuse the freedom that the common law approach gives them to make moral judgments about the way the law should develop. But no system is immune from abuse. A conscientious judge will find substantial guidance in a well developed body of precedent, like that interpreting the Constitution. Judges who might be tempted to overreach, but who are susceptible to criticism (by others

or by themselves), can be evaluated by fairly well developed standards under the common law method. None of the competing views seems superior on this score, and most--including the various forms of originalism--seem decidedly worse.

Finally, common law constitutionalism has the advantage of confronting the question of judicial restraint--that is, the question of how concerned we should be about the danger that judges will implement their own moral and political views under the guise of following the law--more directly and candidly than other theories do. n114 Under common law constitutionalism, the tension is between, on the one hand, the demands of tradition and [*928] the need to maintain the text as common ground, and, on the other hand, the perceived requirements of fairness, justice, and good policy. By facing that tension, the judge is forced to decide how restrained she should be. Approaches that emphasize the text or the Framers' intentions, by contrast, ordinarily insist on the supposed absolute priority of the text or the Framers' intentions over the judge's moral views. Those approaches have a tendency to suggest that it is a usurpation for a judge ever to consider the fairness or justice of the action she is being asked to take. n115 In this way those approaches do not confront the issue of just how restrained a judge should be. Disputes that in fact concern matters of morality or policy masquerade as hermeneutic disputes about the "meaning" of the text, or historians' disputes about what the Framers did. By contrast, in common law constitutional interpretation, the difficult questions are on the surface and must be confronted forthrightly.

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n114 For a suggestion that the extent to which judges should be so restrained is perhaps a more difficult question than has generally been acknowledged, see Frederick Schauer, *The Calculus of Distrust*, 77 Va L Rev 653 (1991).

n115 See text accompanying notes 13-14. See also *Harper v Virginia Board of Elections*, 383 US 663, 676 (1966) (Black dissenting); Bork, *Tempting of America* at 251-59 (cited in note 1).

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B. Democracy

A crucial part of the argument for textualist or originalist approaches is not just that they restrain judges but that they are more consistent with democracy. The objective of constitutional interpretation, on these accounts, is to uncover and enforce the will of "we the people" as expressed in the Constitution. By contrast, the argument goes, common law approaches that rely on precedent exalt the views of "Judge & Co.," an elite segment of the population.

So far as the argument from democracy is concerned, the more simplistic forms of textualism and originalism are, of course, subject to Noah Webster's objection. It is difficult to understand why democracy requires us to enforce decisions made by people with whom the current population has so little in common. It is true that the Framers were Americans, and we are Americans. But it does not follow that adherence to their decisions is democratic self-rule in any remotely recognizable sense. The originalist notion that the decisions of the eighteenth-century Framers somehow reflect the views of a continuous "we the people" extending since that time is as mystical and implausible as the

most remote reaches of the common law ideology. n116

-Footnotes-

n116 This problem is not cured by allowing "we the people" to amend the Constitution by some suitable vote. See Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum L Rev 457, 499-503 (1994); Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U Chi L Rev 1043 (1988). The question remains why, in the absence of such an extraordinary action by "the people," decisions made generations ago should govern.

-End Footnotes-

[*929]

Neo-Hamiltonian views are less vulnerable to this objection. According to those views, judges are to enforce the decisions made by "we the people" at subsequent moments rather than those reflected in the original constitutional provisions. These approaches mitigate the objection that the dead hand of the past is governing the present. And at first glance it might seem that such views, whatever else one might say about them, are more suitable for a democratic, self-governing society than a common law approach. In particular, the common law approach seems elitist by comparison--a reflection of the guild interest of law- yers. n117

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n117 This charge is powerfully presented in Ackerman, 36 NY L Sch L Rev at 5 (cited in note 75).

-End Footnotes-

This argument can be answered on several levels. To begin with, it is not obvious what should count as an appropriately "democratic" approach to constitutional interpretation. The most straightforward definition of democracy--rule by a current major- ity--is obviously not a good basis for constitutional interpreta- tion. Constitutions are supposed to provide some protection against the current majority.

In addition, common law constitutionalism is democratic in an important sense: the principles developed through the com- mon law method are not likely to stay out of line for long with views that are widely and durably held in the society. Indeed, by this standard the common law approach can plausibly claim to be as democratic as any of its competitors. Consider the most impor- tant principles that have emerged from constitutional common law in this century: expansive federal power; expansive presiden- tial power, particularly in foreign affairs; the current contours of freedom of expression; the federalization of criminal procedure; a conception of racial equality that disapproves de jure distinctions and intentional discrimination; the rule of one person, one vote; a (somewhat formal) principle of gender equality; and reproductive freedom protected against criminalization. None of these impor- tant principles can be said to be rooted in original intent, and none has particularly strong textual roots. For most of them, it is hard to identify any "moment" at which a strong popular consen- sus crystallized behind them. [*930]

Instead, all of these principles were developed essentially by common law methods--the evolution of doctrine in response to the perceived demands of justice and the needs of society. All of these principles were once highly controversial. But it is plausible to say that all of them now rest on a broad democratic consensus. They are evidence that the common law approach is at least broadly consistent with the demands of democracy.

In two ways, the common law approach does seem distinctly less democratic than neo-Hamiltonian views; but these are not obviously ways in which the common law approach is deficient. First, according to the common law approach, judges do not need to accept changes in popular sentiment, however profound, as ipso facto authoritative. Longstanding traditions have claims to acceptance, for Burkean reasons. But a sudden change in popular opinion, however strongly felt, does not by itself control the interpretation of the Constitution. If the judges are convinced that the popular sentiments are wrong, they may reject them. The abandonment of Reconstruction, and certain of the "national security" excesses of the Cold War era, may be examples of profound and long-lasting changes in popular sentiment that judges should have rejected. n118 Neo-Hamiltonian views, by contrast, would apparently obligate judges to follow genuinely democratic decisions, even if those decisions were deeply morally wrong. n119 Judges could of course engage in the equivalent of civil disobedience, but that raises other issues.

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n118 On the former, see Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const Comm 115 (1994).

n119 See Bruce Ackerman, Rooted Cosmopolitanism, 104 Ethics 516 (1994).

-End Footnotes-

The common law approach is in a sense less democratic in this respect. The idea behind common law constitutionalism is that sometimes Burkean incrementalism, implemented by judges, is a good counterweight to the potential excesses of democracy. This is, for example, the way the doctrinal protections of freedom of expression are supposed to function. n120 There are two sides to this question: there is certainly a danger that judges will resist justified democratic imperatives for too long. The Lochner era can be seen in such terms. Ultimately the matter depends in large measure on an empirical assessment of the propensities of judges and popular majorities, and the answer will probably differ from one area of law to another. But simply to insist on the more [*931] "democratic" approach across the board--a greater response to changes in popular opinion--is not necessarily warranted.

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n120 See Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am Bar Found Res J 521, 538-44; Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum L Rev 449, 449-52 (1985).

-End Footnotes-

The second way in which the common law approach can be said to be less democratic than the neo-Hamiltonian view is that judges, on the common law

approach, are not limited to purported shifts in general popular sentiment when they decide whether the law should change. They may look to the work of previous judges and lawyers as well, as they did, in this century, in developing the law of freedom of expression and in taking at least the first steps toward racial and gender equality. But here again it is not clear that this is a problem. One of the premises of the neo-Hamiltonian view is that between constitutional "moments," the people are not engaged in constitutional politics. It follows that no decision made during that time--including a decision to adhere to the status quo ante--can be fully democratic. Seen in that light, a common law approach--judicial decisions that depart from the status quo by continuing evolutionary trends that have been generally accepted, even if they have not been ratified by a "constitutional moment"--may be as democratic a decision as we can hope for.

Finally, it is fair to say that the common law approach to constitutional interpretation does give a very prominent role to characteristic lawyers' methods of reasoning and to the professional training of lawyers. The elite and guild tenor of the common law ideologists was unmistakable. The ancient truths of the common law, they held, were accessible only to those with the proper (legal) training, not to kings, much less to hoi polloi.ⁿ¹²¹ But in this sense all interpretive methods--originalism, textualism, neo-Hamiltonianism, and legal process approaches--are elitist. They all require specialized capacities that only certain groups in society will have. Neo-Hamiltonian views (and some forms of textualism and originalism) claim to be democratic on the ground that they are trying to determine what "the people" decided. But it takes highly specialized training, and a great deal of sophisticated argumentation, to do that. Originalism requires highly refined historian's (and lawyer's) skills.ⁿ¹²² Textual interpretation is not plausibly a matter of just reading the text in the way that an ordinary citizen would. Particularly if a textual approach draws "structural" inferences (as it probably must to be plausible), textual interpretation is a high legal art form. As for neo-Hamiltonian views, one can accept that "we the people" determined many important things at the time of, for example, the Civil War or the New Deal, but showing how those determinations bear on today's contested constitutional issues requires enormous interpretive skill and originality.

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ⁿ¹²¹ See Hale, Reflections at 505 (cited in note 41); Prohibitions Del Roy, 77 Eng Rep 1342, 1342-43 (KB 1608); Simpson, Common Law and Legal Theory at 94 (cited in note 54).

ⁿ¹²² See, for example, Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va L Rev 947 (1995); Michael J. Klarman, Brown, Originalism and Constitutional Theory: A Response to Professor McConnell, 81 Va L Rev 1881 (1995); Michael W. McConnell, The Originalist Justification for Brown: A Reply to Professor Klarman, 81 Va L Rev 1937 (1995). Although the Court in Brown conducted an extremely detailed examination of the original intent of the Fourteenth Amendment--the Court ordered rebriefing specifically on that question, 345 US 972 (1952), and reargument was devoted principally to that issue, see 347 US 483, 489 (1957)--the Court essentially conceded that the original understanding did not support its decision. See 347 US at 489-90. Even if Professor McConnell is right, and there is an originalist defense of Brown, it is surely a major difficulty with originalism as an approach to constitutional interpretation that no one was able to discover that defense

for forty years--even though the advocates (and the Justices and law clerks) at the time of Brown had the strongest incentives to do so.

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In fact, one great advantage of the common law approach is that it explains why trained lawyers--not historians, literary critics, philosophers, or political scientists--should play such a large role in constitutional interpretation. n123 It is not clear what, exactly, the distinctive lawyers' skills are, but the abilities required by the common law method--proficiency in a form of moral casuistry (distinguishing cases, recognizing significant particular facts, and so on), a rough understanding of social science, and skill at certain kinds of textual interpretation--are good candidates. It is less clear why lawyers should be thought to have the abilities required by the other approaches, such as the historian's skills required by originalism, the sophisticated skills of historical interpretation required for neo-Hamiltonian views, or the philosopher's skills required by other approaches.

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n123 See McConnell, 98 Yale L J at 1502 (cited in note 59); Fried, 60 Tex L Rev at 38 (cited in note 23).

-----End Footnotes-----

C. Democratic Substance versus Democratic Method

This last point suggests the final answer to the charge that the common law approach is undemocratic: it may be a mistake to suppose that a method of constitutional interpretation should be democratic, at least when the courts have important responsibility for implementing it. Judicial review necessarily has a guild character in a sense, because by definition judges do it, and inevitably lawyers' norms will heavily influence it. This means that [*933] we have to address the tensions between democracy and judicial review on the level of substance, not on the level of method. That is, we should not try to find--because we cannot find--a wholly democratic method of constitutional interpretation. Instead, we should determine, as a matter of substantive constitutional law, when judges in a constitutional democracy must accept the decisions of the political branches and when the judges should oppose the political branches.

The conceit shared by originalist and neo-Hamiltonian views is that when judges oppose the political branches they do so in the name of some other version of "the people." This conceit seems, falsely, to make it unnecessary to face the difficult substantive question of when, exactly, judges should be willing to overturn the decisions of the political branches. Common law constitutionalism can also claim a democratic basis, as I said above. But it may be more illuminating to recognize that judicial review, however practiced, has strongly undemocratic elements. The solution is to decide as a substantive matter when the democratic process should prevail and when it should be questioned. Common law constitutionalism focuses this question and forces us to answer it in the design of substantive doctrines. The other approaches (and the more mystical versions of the common law) obscure it by pretending that the method is sufficiently democratic to make it unnecessary to ask this question.

The objection that traditional common law decisions can be overruled by the legislature--and that the common law is therefore an inappropriate model for constitutional interpretation--can be met in the same fashion. This is, of course, an important difference between constitutional adjudication and common law adjudication, but it does not invalidate the common law model for constitutional interpretation. Instead it is a reason to adopt substantive principles of constitutional law that assign judges their proper role in constitutional adjudication. So, for example, we have adopted a principle that requires judges interpreting the Constitution to be deferential to legislative decisions in most circumstances. Similarly, the authority of constitutional judges to adopt innovative policies is much more sharply limited than that of traditional common law judges.

These principles themselves are excellent examples of principles that have developed by the common law method, rather than by any command. There is no specific textual warrant for them. Nothing in the text of the Constitution says that judges shall presume the validity of statutes, for example. No textualist [*934] should feel comfortable referring to the "countermajoritarian difficulty" or kindred notions: the text does not say that the decisions of our government should presumptively be made by majorities. (Also, of course, the evidence that the Framers were majoritarians is problematic, to say the least.) The need to be appropriately deferential to popular majorities--like, for that matter, all the rest of the institution of judicial review--has evolved over time, by the common law method.

The principles that require unelected judges to be appropriately deferential to majorities are principles that any plausible theory of constitutional interpretation should adopt, in any democracy, whether it has our Constitution or any constitution. They are valid principles not because the text or the Framers or the people commanded them, but because they are sensible ways of reconciling judicial review with democracy. The common law method acknowledges that judicial review accommodates itself to democracy by adopting such principles--not by attempting to explain judicial constitutional interpretation in a way that makes it appear to be more democratic than it is.

Conclusion

Our legal system is distinctive, perhaps unique, for the prominence it gives to judges. The distinctiveness is manifested in two practices in particular: judicial interpretation of the Constitution, and the common law. I have suggested that these two practices have much in common, and that American constitutionalism, over the years, has increasingly, and justifiably, taken on the character of a common law system. We sometimes say that the written Constitution is another distinctive aspect of our legal order. The written text does play a crucial role as a focal point for the conventionalism that is important to any political order. There are powerful reasons not to interpret the text in a way that would seem too contrived. But the Constitution is much more, and much richer, than the written document. When we apotheosize the Framers we understate the importance of the many subsequent generations of lawyers and judges, and nonlawyers and nonjudges, who have helped develop the principles of American constitutional law.

Today it is those principles, not just the document, that make up our Constitution. Originalist and textualist approaches often find themselves in the position of making exceptions for, or apologizing for, or simply being unable

to account for, some of the most prominent features of our constitutional order. The common [*935] law approach greatly reduces the need to do any of that. It forth- rightly accepts, without apology, that we depart from past understandings, and that we are often creative in interpreting the text. These practices, which are common and well settled, need not be carried on covertly or with a sense that they are somehow inap- propriate. They are important parts of our system, and they can be justified on the basis of one of the oldest legal institutions, the common law.

Perhaps the most serious charge against the common law approach is that it is resistant to change. To some degree that is true. But properly understood the common law method does not immunize the past from sharp, critical challenges. Gradual inno- vation, in the hope of improvement, has always been a part of the common law tradition, as it has been a part of American constitutionalism. Even sudden changes are possible. They re- quire a stronger justification, but the common law approach, un- like some other methods, allows judges to make them. Perhaps most important, the common law method identifies what is truly at stake: whether the arguments for change, in order to make the law fairer or more just, overcome the presumption that should operate in favor of the work of generations. Since we cannot avoid that question, we are perhaps better off with an approach that forces us to answer it.

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REVIEW: Confirmation Messes, Old and New

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SUMMARY:

... Stephen Carter's new book decries the state of the confirmation process, especially for Supreme Court nominees. ... This history offers scant support for Carter's lamentation that the confirmation process has become focused on a nominee's substantive testimony and obsessed with the nominee's likely voting record. ... The kind of inquiry that would contribute most to understanding and evaluating a nomination is the kind Carter would forbid: discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues. ... Indeed, a confirmation process devoted to substantive inquiry might favor nominees with a paper trail, all else being equal. ... More available writing thus might lead to less required testimony in a confirmation process committed to substantive inquiry. ... Suppose, for example, that a senator asked a nominee to commit herself to voting a certain way on a case that the Court had accepted for argument. ... But that said, the real "confirmation mess" is the gap that has opened between the Bork hearings and all others (not only for Justices Ginsburg and Breyer, but also, and perhaps especially, for Justices Kennedy, Souter, and Thomas). ...

TEXT:
[*919]

The Confirmation Mess. Stephen L. Carter.

Basic Books, 1994. Pp xiii, 252.

What confirmation mess?

Stephen Carter's new book decries the state of the confirmation process, especially for Supreme Court nominees. "The confirmation mess," in Carter's (noninterrogatory) phrase, consists of both the brutalization and the politicization of the process by which the nation selects its highest judges. That process, Carter insists, is replete with meanness, dishonesty, and distortion. More, and worse, it demands of nominees that they reveal their views on important legal issues, thus threatening to limit the Court "to people who have adequately demonstrated their closedmindedness" (p xi). A misguided focus on the results of controversial cases and on the probable voting patterns of would-be Justices, Carter argues, produces a noxious and destructive process. Carter's paradigm case, almost needless to say, is the failed nomination of Robert Bork.

But to observers of more recent nominations to the Supreme Court, Carter's description must seem antiquated. President [920] Clinton's nominees, then-Judges Ruth Bader Ginsburg and Stephen Breyer, confronted no unfair or nasty opposition; to the contrary, their confirmation hearings became official lovefests. More important, both nominees felt free to decline to disclose their views on controversial issues and cases. They stonewalled the Judiciary Committee to great effect, as senators greeted their "nonanswer" answers with equanimity and resigned good humor. And even before the confirmation process became quite so cozy (which is to say, even before the turn toward nominating wellknown and well-respected moderates), the practice to which Carter most objects--the discussion of a nominee's views on legal issues--had almost completely lapsed. Justices Kennedy, Souter, and Thomas, no less than Justices Ginsburg and Breyer, rebuffed all attempts to explore their opinions of important principles and cases. Professor Carter, it seems, wrote his book too late. Where, today, is the confirmation mess he laments?

The recent hearings on Supreme Court nominees, though, suggest another question: might we now have a distinct and more troubling confirmation mess? If recent hearings lacked acrimony, they also lacked seriousness and substance. The problem was the opposite of what Carter describes: not that the Senate focused too much on a nominee's legal views, but that it did so far too little. Otherwise put, the current "confirmation mess" derives not from the role the Senate assumed in evaluating Judge Bork, but from the Senate's subsequent abandonment of that role and function. When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public. Whatever imperfections may have attended the Bork hearings pale in comparison with these recent failures. Out, then, with the new mess and in with the old! n1

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n1 And no, I haven't changed my mind since, several months after I drafted this Review, the Senate turned Republican and Orrin Hatch assumed the chairmanship of the Judiciary Committee. The conclusion of this Review still holds--even if I am no longer quite so sanguine about it.

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I. Carter's Critique

Carter depicts a confirmation process out of control--a process in which we attend to the wrong things in the wrong manner, in which we abjure reasoned dialogue about qualifications in favor of hysterical rantings about personalities and politics. Carter is no partisan in this description; he blames Republicans and Democrats, right and left alike (pp 10, 142). Similarly, Carter takes no sides as between the President and the Senate; he assumes that both ought to evaluate judicial candidates by the same criteria and argues that both have performed poorly this evaluative function (pp 29-30). Carter views the current mess as having deep roots. He refers often to the attempt of segregationist senators to defeat the nomination of Thurgood Marshall (pp 62-63) and describes as well some yet more distant confirmation battles (pp 65-73). Although he focuses on the nomination and confirmation of Supreme Court Justices, he buttresses his case with discussion of the recent travails of Lani Guinier (pp 37-44) and Zoe Baird (pp 25-28). Always, though, the face in the foreground is Robert Bork's. Carter's understanding of the Bork hearings informs--sometimes explicitly, sometimes not--the whole of his argument and analysis.

Carter identifies two cardinal flaws in the confirmation process. The first concerns the absence of "honesty" and "decency" (p ix). Here Carter laments the deterioration of public debate over nominations into "the intellectual equivalent of a barroom brawl" (p x). He catalogues the ways in which opponents demonize nominees and distort their records, referring to the many apparently purposeful misreadings of the writings of Robert Bork (pp 45-52) and Lani Guinier (pp 39-44). He describes the avid search for disqualifying factors, whether of a personal kind (for example, illegal nannies) or of a professional nature (for example, ill-conceived footnotes in scholarly articles) (pp 25, 42-43). He deplores "smears" and "soundbites" (p 206)--the way in which media coverage turns nominations into extravaganzas, the extent to which public relations strategy becomes all-important. And in a semimystical manner, he castigates our refusal to forgive sin, accept redemption, and acknowledge the complexity of human beings, including those nominated to high office (pp 183-84).

The second vice of the confirmation process, according to Carter, lies in its focus on a nominee's probable future voting record. In Carter's portrayal, the President, Senate, press, interest groups, and public all evaluate nominees primarily by plumbing their views on controversial legal issues, such as the death penalty or abortion (pp 54-56). Carter's paradigmatic case, again, is Robert Bork, a judge of superior objective qualifications whose views on constitutional method and issues led to the defeat of his nomination. Carter is "struck" by the failure of participants in the Bork hearings to consider "that trying to get him to tell the

[*922] nation how he would vote on controversial cases if confirmed might pose a greater long-run danger to the Republic than confirming him" (p x). This danger, Carter avers, arises from the damage such inquiry does to judicial independence. Examination of a nominee's views on contested constitutional matters, Carter claims, gives the public too great a chance to influence how the judiciary will decide these issues, precisely by enabling the public to reject a nominee on grounds of substance (p 115). At the same time, such inquiry undermines the eventual Justice's ability (and the public's belief in the Justice's ability) to decide cases impartially, based on the facts at issue and the arguments presented, rather than on the Justice's prior views or commitments (p 56).

The failures of the confirmation process, Carter urges, ultimately have less to do with rules and procedures than with public "attitudes"--specifically, "our attitudes toward the Court as an institution and the work it does for the society" (p 188). We view the Court as a dispenser of decisions--as to individual cases of course, but also as to hotly disputed public issues. Our evaluation of the Court coincides with our evaluation of the results it reaches (p 57). Because we see the Court in terms of results, we yearn to pack it with Justices who will always arrive at the "right" decisions. And because the decisions of the Court indeed have consequence, we feel justified, as we pursue this project, in resorting to "shameless exaggeration" and misleading rhetoric (p 51). The key to change, according to Carter, lies in viewing the Court in a different--a more "mundane and lawyerly"--manner (p 206). And although Carter is unclear on the point, this seems to mean judging the Court less in terms of the results it reaches than in terms of its level of skill and craftsmanship.

In keeping with this analysis, Carter advocates a return to confirmation proceedings that focus on a nominee's technical qualifications--in other words, his legal aptitude, skills, and experience (pp 161-62). At times, Carter suggests that this set of qualifications constitutes the only proper criterion of judgment (pp 187-88). But Carter in the end draws back from this position, which he admits would provide no lever to oppose a nominee, otherwise qualified, who wished to overturn a case like *Brown v Board n2* (pp 119-21). Carter urges, as a safeguard against extremism of this kind, an inquiry into whether a nominee subscribes to the "firm moral consensus" of society (p 121). The Senate, Carter writes, should resolve this question by "undertaking moral inquiry, both into the world view of the nominee and, if necessary, into the nominee's conduct" (p 124). This inquiry, in other words, would involve a determination of whether a nominee has the "right moral instincts" and whether his "personal moral decisions seem generally sound" (p 152). Carter views this inquiry as wholly distinct from an approach that asks about a nominee's legal views or philosophy (id). He suggests, for example, that the Senate ask a nominee not whether discriminatory private clubs violate the Constitution, but whether "the nominee has belonged to a club with such policies" (id). An assessment of moral judgment alone, independent of legal judgment, would combine with an evaluation of legal aptitude to form Carter's ideal confirmation process.

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n2 *Brown v Board of Education*, 347 US 483 (1954).

- - - - -End Footnotes- - - - -

II. Current Events

Does Carter's critique of the confirmation process ring true? It might have done so eight years ago. It ought not to do so now.

Carter tries to update his book, to make it more than a comment on the Bork proceedings. He invokes the nomination, eventually withdrawn, of Lani Guinier to serve as Assistant Attorney General for Civil Rights (pp 37-44). Consider, Carter implores us, the distortion of Guinier's academic work, initially by her many enemies, finally and fatally by some she thought friends. Do not the exaggeration, name-calling, and hyperbole that surrounded the discussion of

Guinier's views prove the existence of a confirmation mess? And Carter then invokes the battle over the nomination of Clarence Thomas to serve as a Supreme Court Justice (pp 138-42). Recall, Carter tells us (and it is not hard to do), the intensity and wrath surrounding that battle--the fury with which the partisans of Thomas and Anita Hill, respectively, exchanged charge and countercharge and bloodied previously unsullied reputations. Does not this episode, this display of raw emotion and this unrelenting focus on personal traits and behavior, demonstrate again the existence of a confirmation mess?

Well, no--not on either count, at least if the term "confirmation mess" signifies a problem both specific to and common among confirmation battles. Carter is right to note the distortions in the debate over Guinier's prior writings; but he is wrong to think they derived from a special attribute of the confirmation process. It is unfortunate but true that distortions of this kind mar public debate on all important issues. Professor Carter, meet Harry and Louise; they may convince you that the Guinier episode is less a part of a confirmation mess than of a government [*924] mess, the sources and effects of which lie well beyond your book's purview. And the Thomas incident, proposed as exemplar or parable, suffers from the converse flaw. That incident is unique among confirmation hearings and, with any reasonable amount of luck, will remain so. The way the Senate handled confidential charges of a devastating nature on a subject at a fault line of contemporary culture reveals very little about the broader confirmation process.

Indeed, Carter's essential critique of the confirmation process--that it focuses too much on the nominee's views on disputed legal issues--applies neither to the Guinier episode nor to the Thomas hearings. Carter concedes that the Senate ought to inquire into the views and policies of nominees to the executive branch, for whom "independence" is no virtue (p 32). The public debate over Guinier's articles (problems of distortion to one side) thus fails to implicate Carter's concern with the focus of the process on legal issues. And so too of the Thomas hearings. Carter's own description of the "mess" surrounding that nomination highlights the Senate's inquiry into the charges of sexual harassment and not its investigation of the nominee's legal opinions (pp 13345). The emphasis is not surprising. No one can remember the portion of the hearings devoted to Justice Thomas's legal views, and for good reason: Justice Thomas, or so he assured us, already had "stripped down like a runner" and so had none to speak of. n3 The apparent "mess" of the Thomas hearings thus arose not from the exploration of legal philosophy that Carter abjures, but instead from the inquiry into moral practice and principle that he recommends to the Senate as an alternative. n4

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n3 Clarence Thomas, as quoted in Linda Greenhouse, The Thomas Hearings: In Trying to Clarify What He Is Not, Thomas Opens Questions of What He Is, NY Times A19 (Sept 13, 1991).

n4 The same is true of the controversy surrounding the nomination of Zoe Baird as Attorney General. As Carter discusses, Baird's nomination ran into trouble because she had hired illegal immigrants and then failed to pay social security taxes on their salaries (pp 25-28). Here, too, the dispute arose from an inquiry into the nominee's personal conduct, rather than her views and policies.

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What, then, of the "confirmation mess" as Carter defines it--the threat to judicial independence resulting from a misplaced focus on the nominee's legal views and philosophy? Lacking support for his argument in the recent controversies surrounding Guinier and Thomas, Carter must recede to the Bork hearings for a paradigm. But time has overtaken this illustration: no subsequent nomination fits Carter's Bork-based model

[*925] any better than do the nominations of Guinier or Thomas. Not since Bork (as Carter himself admits) has any nominee candidly discussed, or felt a need to discuss, his or her views and philosophy (pp 57-59). It is true that in recent hearings senators of all stripes have proclaimed their prerogative to explore a nominee's approach to constitutional problems. The idea of substantive inquiry is accepted today to a far greater extent than it was a decade ago.ⁿ⁵ But the practice of substantive inquiry has suffered a precipitous fall since the Bork hearings, so much so that today it hardly deserves the title "practice" at all. To demonstrate this point, it is only necessary to review the recent hearings of Ruth Bader Ginsburg and Stephen Breyer--one occurring before, the other after, publication of Carter's book. Consider the way these then-judges addressed issues of substance and then ask of what Carter's "confirmation mess" in truth consists.

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ⁿ⁵ Senator Joseph Biden made this point near the beginning of the Ginsburg hearings. After listening, in turn, to Senators Hatch, Kennedy, Metzenbaum, and Simpson expound on the need to question the nominee about her judicial philosophy, Senator Biden said: "I might note it is remarkable that seven years ago the hearing we had here was somewhat more controversial, and I made a speech that mentioned the 'p' word, philosophy, that we should examine the philosophy, and most . . . said that was not appropriate. At least we have crossed that hurdle. No one is arguing that anymore." Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on the Judiciary, 103d Cong, 1st Sess 21 (July 20-23, 1993) ("Confirmation Hearings for Ginsburg").

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Justice Ginsburg's favored technique took the form of a pincer movement. When asked a specific question on a constitutional issue, Ginsburg replied (along Carter's favored lines) that an answer might forecast a vote and thus contravene the norm of judicial impartiality. Said Ginsburg: "I think when you ask me about specific cases, I have to say that I am not going to give an advisory opinion on any specific scenario, because . . . that scenario might come before me."ⁿ⁶ But when asked a more general question, Ginsburg replied that a judge could deal in specifics only; abstractions, even hypotheticals, took the good judge beyond her calling. Again said Ginsburg: "I prefer not to . . . talk in grand terms about principles that have to be applied in concrete cases. I like to reason from the specific case."ⁿ⁷ Some room may have remained in theory between these two responses; perhaps a senator could learn something about Justice Ginsburg's legal

[*926] views if he pitched his question at precisely the right level of generality. But in practice, the potential gap closed to a sliver given Ginsburg's understanding of what counted as "too specific" (roughly, anything

that might have some bearing on a case that might some day come before the Court) and what counted as "too general" (roughly, anything else worthy of mention).

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n6 Id at 184.

n7 Id at 180. See also id at 333 ("I can't answer an abstract issue. I work from a specific case based on the record of that case, the briefs that are presented, the parties' presentations, and decide the case in light of that record, those briefs. I simply cannot, even in areas that I know very well, answer an issue abstracted from a concrete case.").

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So, for example, in a colloquy with Senator Feinstein on the Second Amendment, Ginsburg first confronted the question whether she agreed with a fifty-four-year-old Supreme Court precedent n8 on the subject and with the interpretation that lower courts unanimately had given it. Replied Ginsburg: "The last time the Supreme Court spoke to this question was 1939. You summarized what that was, and you also summarized the state of law in the lower courts. But this is a question that may well be before the Court again . . . and because of where I sit it would be inappropriate for me to say anything more than that." n9 The Senator continued: if the Judge could not discuss a particular case, even one decided fifty years ago, could the Judge say something about "the methodology she might apply" and "the factors she might look at" in determining the validity of that case or the meaning of the Second Amendment? n10 "I wish I could Senator," Ginsburg replied, "but . . . apart from the specific context I really can't expound on it." n11 "Why not?" the Senator might have asked. Because the question functioned at too high a level of abstraction: "I would have to consider, as I have said many times today, the specific case, the briefs and the arguments that would be made." n12 Many times indeed. So concluded a typical exchange in the confirmation hearing of Justice Ginsburg.

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n8 United States v Miller, 307 US 174 (1939).

n9 Confirmation Hearings for Ginsburg at 241-42 (cited in note 5).

n10 Id at 242.

n11 Id.

n12 Id.

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Justice Breyer was smoother than Justice Ginsburg, but ultimately no more forthcoming. His favored approach was the "grey area" test: if a question fell within this area--if it asked him to comment on issues not yet definitively closed (and therefore still a matter of interest)--he must, he said, decline to comment. n13 Like Justice Ginsburg, he could provide personal anecdotes--the relevance of which were open to question. He could state settled

law--but not whether he agreed with the settlement. He could explain the importance and difficulty of a legal issue--without suggesting which important and difficult resolution he favored. What he could not do was to respond directly to questions regarding his legal positions. Throughout his testimony, Breyer refused to answer not merely questions concerning pending cases, but questions relating in any way to any issue that the Supreme Court might one day face.

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n13 Confirmation Hearings for Stephen G. Breyer to be an Associate Justice of the United States Supreme Court, Senate Committee on the Judiciary, 103d Cong, 2d Sess 85 (July 12, 1994) (Miller Reporting transcript). Sometimes Justice Breyer referred to this test as the "up in the air" test. So, for example, when Chairman Biden asked him to comment on the burden imposed on the government to sustain economic regulation, Breyer noted that "this is a matter . . . still up in the air." When the Chairman replied "that is why I am trying to get you to talk about it, because you may bring it down to the ground," Justice Breyer repeated that "I have a problem talking about things that are up in the air." Id at 55 (July 12, 1994).

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I do not mean to overstate the case; Justice Ginsburg and Justice Breyer did provide snippets of information. Both Justices discussed with candor and enthusiasm issues on which they previously had written. So the Judiciary Committee and public alike learned much about Justice Ginsburg's current views on gender discrimination and abortion and about Justice Breyer's thoughts on regulatory policy. Both Justices, too, allowed an occasional glimpse of what might be termed, with some slight exaggeration, a judicial philosophy. A close observer of the hearings thus might have made a quick sketch of Justice Ginsburg as a cautious, incrementalist common lawyer and of Justice Breyer as an antiformalist problem solver. (But how much of this sketch in fact would have derived from preconceptions of the Justices, based on their judicial opinions and scholarly articles?) If most of the testimony disclosed only the insignificant and the obvious--did anyone need to hear on no less than three separate occasions that Justice Ginsburg disagreed with Dred Scott? n14 --a small portion revealed something of the nominee's conception of judging.

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n14 Dred Scott v Sanford, 60 US 393 (1856). See, for example, Confirmation Hearings for Ginsburg at 126, 188, 270 (cited in note 5).

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Neither do I mean to deride Justices Ginsburg and Breyer for the approach each took to testifying. I am sure each believed (along with Carter) that disclosing his or her views on legal issues threatened the independence of the judiciary. (It is a view, I suspect, which for obvious reasons is highly correlated with membership in the third branch of government. n15) More, I am sure [*928] both judges knew that they were playing the game in full accordance with a set of rules that others had established before them. If most prior nominees have avoided disclosing their views on legal issues, it is hard to

fault Justice Ginsburg or Justice Breyer for declining to proffer this information. And finally, I suspect that both appreciated that, for them (as for most), the safest and surest route to the prize lay in alternating platitudinous statement and judicious silence. Who would have done anything different, in the absence of pressure from members of Congress?

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n15 In 1959, lawyer William Rehnquist wrote an article criticizing the Senate's consideration of the nomination of Charles Evans Whittaker to the Supreme Court. The Senate, he stated, had "succeeded in adducing only the following facts: . . . proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; . . . he was the first Missourian ever appointed to the Supreme Court; and since he had been born in Kansas but now resided in Missouri, his nomination honored two states." William Rehnquist, *The Making of a Supreme Court Justice*, Harv L Rec 7, 8 (Oct 8, 1959). Rehnquist specifically complained about the Senate's failure to ask Justice Whittaker about his views on equal protection and due process. *Id.* at 10. By 1986, when he appeared before the Senate Judiciary Committee as a sitting Associate Justice and a nominee for Chief Justice, Rehnquist had changed his mind about the propriety of such inquiries.

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And of such pressure, there was little evidence. To be sure, an occasional senator complained of the dearth of substantive comment, most vocally during the preternaturally controlled testimony of Justice Ginsburg. Chairman Biden and Senator Specter in particular expressed impatience with the game as played. Specter warned that the Judiciary Committee one day would "rear up on its hind legs" and reject a nominee who refused to answer questions, for that reason only (p 54). And Biden lamented that no "nominee would ever satisfy me in terms of being as expansive about their views as I would like." n16 But for the most part, the senators acceded to the reticence of the nominees before them with good grace and humor. Senator Simon sympathetically commented to Justice Breyer: "You are in a situation today . . . where you do not want to offend any of us, and I understand that. I hope the time will come when you may think it appropriate . . . to speak out on this issue." n17 Senator DeConcini similarly remarked to Justice Ginsburg that it was "fun" and "intellectually challenging"--a sort of chess game in real life--for a senator to "try[] to get inside the mind of a nominee . . . without violating their oath and their potential conflicts" n18 And of course no one voted against either nominee
[*929] on the ground that he or she had declined to answer questions relating to important legal issues.

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n16 Confirmation Hearings for Ginsburg at 259 (cited in note 5). In a similar vein, Senator Cohen accused Justice Ginsburg of resorting to "delphic ambiguity" in her responses. Senator Cohen recalled the story of the general who asked the oracle what would occur if he (the general) invaded Greece. When the oracle responded that a great army would fall, the general mounted the invasion--only to discover that the great army to which the oracle had referred was his own. See *id.* at 220.

n17 Confirmation Hearings for Breyer at 77-78 (July 13, 1994) (cited in note 13).

n18 Confirmation Hearings for Ginsburg at 330 (cited in note 5).

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The ease of these proceedings in part reflected the nature of both the nominations and the political context. First replace divided government with single-party control of the White House and Senate. Now posit a President with an ambitious legislative agenda, requiring him to retain support in Congress, but with no judicial agenda to speak of. n19 Assume, as a result, that this President nominates two clear moderates, known and trusted by leading senators of both the majority and the minority parties. Throw in that each nominee is a person of extraordinary ability and distinction. Finally, add that the Court's rulings on some of the hot-button issues of recent times--most notably abortion, but also school prayer and the death penalty--today seem relatively stable. This is a recipe--now proved successful--for confirmation order, exactly opposite to the state of anarchy depicted by Carter. At the least, this suggests what David Strauss has argued in another review of Carter's book: n20 that the culprit in Carter's story is nothing so grand and seemingly timeless as the American public's attitudes toward the courts; that the cause of Carter's "mess" is the simple attempt of the Reagan and Bush administrations to impose an ideologically charged vision of the judiciary in an unsympathetic political climate.

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n19 See David A. Strauss, *Whose Confirmation Mess?*, *Am Prospect* 91, 96 (Summer 1994), reviewing Carter, *The Confirmation Mess*. Herein lies one of the mysteries of modern confirmation politics: given that the Republican Party has an ambitious judicial agenda and the Democratic Party has next to none, why is the former labeled the party of judicial restraint and the latter the party of judicial activism?

n20 *Id* at 92, 95-96.

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But even this view overstates the longevity of the "confirmation mess," as Carter defines it. That so-called mess in fact ended long before President Clinton's nominations; it ended right after it began, with the defeat of the nomination of Robert Bork. The Senate overwhelmingly approved the nominations of Justices Kennedy and Souter after they gave testimony (or rather, nontestimony) similar in almost all respects to that of Justices Ginsburg and Breyer. n21 This was so even though the Senate knew little about Justice Kennedy and still less about Justice Souter prior to the hearings--an ignorance which should have increased the importance of their testimony. (Just ask Senator Hatch whether he now wishes he had insisted that Justice Souter be more forthcoming.) The Senate also confirmed the nomination of Justice Thomas after his substantive testimony had become a national laughingstock. Take away the weakness of Justice Thomas's objective qualifications and the later charges of sexual harassment (inquiry into which Carter approves), and the Justice's Pinpoint, Georgia, testimonial strategy would have produced a solid victory. n22 This history offers scant support for Carter's lamentation that the confirmation process has become

focused on a nominee's substantive testimony and obsessed with the nominee's likely voting record. So what, excepting once again Robert Bork, is Carter complaining about?

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n21 Prior to nominating Justice Kennedy, the Reagan White House nominated Judge Douglas Ginsburg, only soon to withdraw the nomination. The decision to pull the nomination followed revelations about Judge Ginsburg's prior use of marijuana. Carter barely mentions this nomination. Carter, however, generally considers the prior illegal conduct of a nominee to be a meet subject for investigation, although not necessarily a sufficient reason for disqualification (pp 169-77).

n22 The margin of victory would have increased yet further had Thomas not made controversial statements, before his nomination, on subjects such as abortion and affirmative action. Carter is unclear as to whether (or how) participants in the confirmation process ought to take account of such prenomination statements. If Carter does approve of an evaluation of the substantive views expressed by a nominee in prior speeches or writings, then virtually all of the votes cast against Justice Thomas would have derived from the consideration of factors that Carter himself deems relevant to the process.

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If Carter is right as to what makes a "confirmation mess," he had no reason to write this book--or at least to write it when he did. Senators today do not insist that any nominee reveal what kind of Justice she would make, by disclosing her views on important legal issues. Senators have not done so since the hearings on the nomination of Judge Bork. They instead engage in a peculiar ritual dance, in which they propound their own views on constitutional law, but neither hope nor expect the nominee to respond in like manner. Under Carter's criteria, this process ought to count as nothing more than a harmless charade, not as a problem of any real import. It is only if Carter's criteria are wrong--only if the hearings on Judge Bork ought to serve less as a warning than as a model--that we now may have a mess to clean up.

III. Critiquing Carter

What, then, of Carter's vision of the confirmation process? Should participants in the process accede to Carter's view of how to select a Supreme Court Justice? Or should they adopt a different, even an opposite, model?

One preliminary clarification is necessary. Carter's argument [*931] against a Bork-like confirmation process focuses entirely on the scope of the inquiry, not at all on the identity (executive or legislative) of the inquirer. This is an important point because other critics of the Bork hearings have rested their case on a distinction between the roles of the President and the Senate; they have argued that in assessing the substantive views of the nominee, the Senate ought to defer to the President. n23 Carter (I think rightly) rejects this claim, adopting instead the position that the Senate and the President have independent responsibility to evaluate, by whatever criteria are appropriate, whether a person ought to serve as a Supreme Court Justice. n24 Carter's argument concerns the criteria that the participants--that is, all the participants--in the confirmation process ought to use to make this decision.

It is thus Carter's contention not merely that the Senate ought to forgo inquiry into a nominee's legal views and philosophy, but also that the President ought to do so--in short, that such inquiry, by whomever conducted, crosses the bounds of propriety. (And although Carter does not address the issue, his arguments apply almost equally well to an investigation of the views expressed in a person's written record as to an inquiry into the person's views by means of an oral examination.)

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n23 See, for example, John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 *Tex L Rev* 633, 636, 653-54 (1993).

n24 This position has become common in the literature on the confirmation process. See David A. Strauss and Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *Yale L J* 1491 (1992). See also Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *Yale L J* 657 (1970). Because Carter and I agree on the issue, and because the relevant arguments have been stated fully elsewhere, this Review addresses the issue only indirectly.

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This analysis raises some obvious questions. If substantive inquiry is off-limits, on what basis will the President and Senate exercise their respective roles in the appointments process? Will this limited basis prove sufficient to evaluate and determine whether a nominee (or would-be nominee) should sit on the Court? Will an inquiry conducted on this basis appropriately educate and engage the public as to the Court's decisions and functions? Some closer exploration of Carter's views, as they relate to this set of issues, will illustrate at once the inadequacy of his proposals and the necessity for substantive inquiry of nominees, most notably in Senate hearings.

Carter argues that both the President and the Senate ought to pay close attention to a nominee's (or a prospective nominee's) [*932] objective qualifications. There may be, as Carter notes, some disagreement as to what these are (pp 161-62). Must, for example (as Carter previously has argued n25), a nominee have served on another appellate court--or may (as I believe) she demonstrate the requisite intelligence and legal ability through academic scholarship, the practice of law, or governmental service of some other kind? Carter writes that we must form a consensus on these issues and then rigorously apply it--so that the Senate, for example, could reject a nomination on the simple ground that the nominee lacks the qualifications to do the job (p 162). On this point, Carter surely is right. It is an embarrassment that the President and Senate do not always insist, as a threshold requirement, that a nominee's previous accomplishments evidence an ability not merely to handle but to master the "craft" aspects of being a judge. In this respect President Clinton's appointments stand as models. No one can say of his nominees, as no one ought to be able to say of any, that they lack the training, skills, and aptitude to do the work of a judge at the highest level.

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n25 See Stephen Carter, *The Confirmation Mess*, 101 Harv L Rev 1185, 1188 (1988).

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But Carter cannot think--and on occasion reveals he does not think--that legal ability alone ought to govern, or as a practical matter could govern, either the President's or the Senate's decision. If there was once a time when we all could agree on the single "best" nominee--as, some say, all agreed on Cardozo--that time is long past, given the nature of the work the Supreme Court long has accomplished. As Carter himself concedes, most of the cases the Supreme Court hears require more than the application of "mundane and lawyerly" skills; these cases raise "questions requiring judgment in the finding of answers, and in every exercise of interpretive judgment, there comes a crucial moment when the interpreter's own experience and values become the most important data" (p 151). Carter offers as examples flag burning, segregated schools, and executive power (p 151), and he could offer countless more; it should be no surprise by now that many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value. Imagine our response if President Clinton had announced that he had chosen his most recent nominee to the Supreme Court by conducting a lottery among Richard Posner, Stephen Breyer, and Laurence Tribe because they seemed to him the nation's three smartest lawyers. If we are all realists now, as the saying goes, it is in the sense that we understand a choice among [*933] these three to have large consequences and that we would view a lottery among them as demonstrating a deficient understanding of the judicial process.

Carter recommends, in light of the importance of a judge's values, that the President and Senate augment their inquiry into a person's legal ability with an investigation of the person's morality. He says that "the issue, finally, is . . . what sort of person the nominee happens to be" (p 151); and he asks the President and Senate to determine whether a person "possesses the right moral instincts" by investigating whether her "personal moral decisions seem generally sound" (p 152). Here, too, it is easy to agree with Carter that this trait ought to play some role in the appointments process. Moral character, and the individual acts composing it, matter for two reasons (although Carter does not disentangle them). First, elevating a person who commits acts of personal misconduct (for example, sexual harassment) to the highest legal position in the nation sends all the wrong messages about the conduct that we as a society value and honor. Second, moral character, as Carter recognizes, sometimes will be "brought to bear on concrete cases," so that "the morally superior individual" may also "be the morally superior jurist," in the sense that her decisions will have a "salutary rather than destructive effect on the Court and the country" (p 153).

But focusing the confirmation process on moral character (even in conjunction with legal ability) would prove a terrible error. For one thing, such a focus would aggravate, rather than ease, the meanness that Carter rightly sees as marring the confirmation process (and, one might add, much of our politics). The "second" hearing on Clarence Thomas ought to have taught at least that lesson. When the subject is personal character, rather than legal principle, the probability, on all sides, of using gutter tactics exponentially increases. There are natural limits on the extent to which debate over legal positions can become vicious, hurtful, or sordid--but few on the extent to which discussion of personal conduct can descend to this level.

More important, an investigation of moral character will reveal very little about the values that matter most in the enterprise of judging. What makes the Richard Posner different from the Stephen Breyer different from the Laurence Tribe is not moral character or behavior, in the sense meant by Carter; I am reasonably sure that each of these persons is, in his personal life and according to Carter's standard, a morally exemplary individual. What causes them to differ as constitutional interpreters is

[*934] something if not completely, then at least partly, severable from personal morality: divergent understandings of the values embodied in the Constitution and the proper role of judges in giving effect to those values. Disagreement on these matters can cause (and has caused), among the most personally upright of judges, disagreement on every concrete question of constitutional law, including (or especially) the most important. It is therefore difficult to understand why we would make personal moral standards the focal point of a decision either to nominate or to confirm a person as a Supreme Court Justice. n26

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n26 It is also true that a person may engage in immoral behavior without allowing that immorality to influence his judicial decision making. Our government is replete with womanizers who always vote in sympathy with the goal of sexual equality; our Court has seen a former Ku Klux Klan member who well understood the constitutional evil of stateimposed racism. Perhaps the (im)moral conduct in these cases is all that matters; perhaps, in any event, we ought to rely on the (im)moral conduct as a solid, even if not a foolproof, indicator of future judicial behavior. But consideration of these cases may increase further our reluctance to make moral character the critical determinant of confirmation decisions.

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What must guide any such decision, stated most broadly, is a vision of the Court and an understanding of the way a nominee would influence its behavior. This vision largely consists of a view as to the kinds of decisions the Court should issue. The critical inquiry as to any individual similarly concerns the votes she would cast, the perspective she would add (or augment), and the direction in which she would move the institution. n27 I do not mean to say that the promotion of "craft values"--the building of a Court highly skilled in legal writing and reasoning and also finely attuned to pertinent theoretical issues--is at all unimportant. Justice Scalia by now has challenged and amused a decade's worth of law professors, which is no small thing if that is your profession; more seriously, the quality and intelligence (even if ultimate wrong-headedness) of much of Justice Scalia's work has instigated a debate that in the long run can only advance legal inquiry. But the bottom-line issue in the appointments process must concern the kinds of judicial decisions that will serve the country and, correlatively, the effect the nominee will have on the Court's decisions. If that is too results oriented

[*935] in Carter's schema, so be it--though even he notes that a critical question is whether the Court's decisions will have a "salutary" or a "destructive" impact on the country (p 153). It is indeed hard to know how to evaluate a governmental institution, or the individuals who compose it, except by the effect of their actions (or their refusals to take action) on the welfare of society.

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n27 The President and Senate thus ought to evaluate the nominee (or potential nominee) in the context of the larger institution she would join if confirmed. They are not choosing a judge who will staff the Supreme Court alone; they are choosing a judge who will act and interact with eight other members. The qualities desirable in a nominee may take on a different cast when this fact is remembered. Most obviously, the benefits of diversity of viewpoint become visible only when the nominee is viewed as just one member of a larger body.

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If this is so, then the Senate's consideration of a nominee, and particularly the Senate's confirmation hearings, ought to focus on substantive issues; the Senate ought to view the hearings as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct. Like other kinds of legislative fact-finding, this inquiry serves both to educate members of the Senate and public and to enhance their ability to make reasoned choices. Open exploration of the nominee's substantive views, that is, enables senators and their constituents to engage in a focused discussion of constitutional values, to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires. These are the issues of greatest consequence surrounding any Supreme Court nomination (not the objective qualifications or personal morality of the nominee); and the process used in the Senate to serve the intertwined aims of education and evaluation ought to reflect what most greatly matters. n28 At least this is true in the absence of any compelling reasons, of prudence or propriety, to the contrary; later I will argue, as against Carter, that such reasons are nowhere evident.

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n28 To structure the process to avoid these issues would be akin to enacting a piece of legislation without trying to figure out or explain the legislation's principal consequences. I presume that no one would commend such an approach generally to Congress.

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The kind of inquiry that would contribute most to understanding and evaluating a nomination is the kind Carter would forbid: discussion first, of the nominee's broad judicial philosophy and, second, of her views on particular constitutional issues. By "judicial philosophy" (a phrase Carter berates without explanation), I mean such things as the judge's understanding of the role of courts in our society, of the nature of and values embodied in our Constitution, and of the proper tools and techniques of interpretation, both constitutional and statutory. A nominee's views on these matters could prove quite revealing: contrast, for example, how Antonin Scalia and Thurgood Marshall would have answered these queries, had either decided (which neither did) to [*936] share his thoughts with the Senate. But responses to such questions can--and have--become platitudinous, especially given the interrogators' scant familiarity with jurisprudential matters. n29 And even when a nominee avoids this vice, her statements of judicial philosophy may be so abstract as to leave uncertain, especially to the public, much about their real-world consequences.

Hence the second aspect of the inquiry: the insistence on seeing how theory works in practice by evoking a nominee's comments on particular issues--involving privacy rights, free speech, race and gender discrimination, and so forth--that the Court regularly faces. It is, after all, how the Court functions with respect to such issues that makes it, in Carter's words, either a "salutary" or a "destructive" institution.

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n29 Carter often takes senators to task for failing to question nominees on constitutional theory with the appropriate level of sophistication and nuance. Although there is some truth to this criticism, it is mixed in Carter's account with a healthy measure of professorial condescension. Given the need to explain matters of constitutional theory to the public, at least a few senators do quite well. To the extent Carter's criticism has merit, the real problem is that senators now can expect answers only to high-blown questions of constitutional theory. Senators wander in the unfamiliar ground of constitutional theory because they cannot gain access to the real, and very familiar, world of decisions and consequences. See Robert F. Nagel, *Advice, Consent, and Influence*, 84 Nw U L Rev 858, 863 (1990) ("Senators are certainly qualified to consider the impact of the law's abstractions.").

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A focus on substance in fact would cure some of the deficiencies in the confirmation process that Carter pinpoints. Carter says that the process turns "tiny ethical molehills into vast mountains of outrage" (p 8)--and he is right that we have seen these transformations. To note but one example, the amount of heat generated by a few senators (and the New York Times) concerning Justice Breyer's recusal practices far exceeded the significance of the issue. But this occurs precisely because we have left ourselves with nothing else to talk about. Rather than feeling able to confront directly the question whether Justice Breyer was too moderate, Senator Metzenbaum (and likewise the New York Times) fumed about an issue not nearly so important, either to them or to the public. Carter also says that participants in the process have attempted to paint nominees (particularly Judge Bork) as "radical monsters--far outside the mainstream of both morality and law" (p 127). But assuming, as seems true, that senators and others at times have engaged in distortion--it would be surprising if they hadn't--the marginalization of substantive inquiry that Carter favors only would encourage this practice. If evaluating (and perhaps rejecting) a nominee on the [*937] basis of her substantive positions is appropriate only in the most exceptional cases, then the natural opponents of a nomination will have every incentive to--indeed, will need to--characterize the nominee as a "radical monster." The way to promote reasoned debate thus lies not in submerging substantive issues, but in making them the centerpiece of the confirmation process.

Further, a commitment to address substantive issues need not especially disadvantage scholars and others who have left a "paper trail," as the received wisdom intones and Carter accepts (p 38). The conventional view is that substantive inquiry promotes substantive ciphers; hence the hearings on Robert Bork led to the nomination of David Souter. But this occurs only because the cipher is allowed to remain so--only because substantive questioning is reserved for nominees who somehow have "opened the door" to it by once having committed

a thought to paper. If questioning on substantive positions ever were to become the norm, the nominee lacking a publication record would have no automatic advantage over a highly prolific author. The success of a nomination in each case would depend on the nominee's views, whether or not previously expressed in a law review or federal reporter. Indeed, a confirmation process devoted to substantive inquiry might favor nominees with a paper trail, all else being equal. If there was any reason for the Senate to have permitted the testimonial demurrals of Justices Breyer and Ginsburg, it was that their views already were widely known, in large part through scholarship and reported opinions--and that those views were widely perceived as falling within the appropriate range. When this is so, extended questioning on legal issues may seem hardly worth the time and effort. n30 More available writing thus might lead to less required testimony in a confirmation process committed to substantive inquiry.

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n30 The value of questioning in such circumstances is almost purely educative; the inquiry is a means not of discovering what the nominee thinks, in order to decide whether confirmation is warranted, but instead of conveying to members of the public what the nominee thinks, in order to give them both an understanding of the Court and a sense of participating in its composition. This function is itself important, see text accompanying note 28; it may provide a reason for holding substantive hearings even when senators can make, and have made, a decision as to a nominee's views prior to asking a single question (as senators could have and, for the most part, did about the views of Justices Breyer and Ginsburg). The need for such hearings, however, is much greater when (as was true for Justices Souter and Thomas) the prior record and writings of the nominee leave real uncertainty as to the nominee's legal philosophy.

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Finally, a confirmation process focused on substantive views usually will not violate, in the way Carter claims, norms of judicial impartiality or independence. Carter's "blank slate" notion of impartiality of judgment--"appointing Justices who make up their minds about how to vote before they hear any arguments rather than after is a threat," fusses Carter (p 56)--is an especial red herring. Judges are not partial in deciding cases because they have strong opinions, or previously have expressed strong opinions, on issues involved in those cases. If they were, the Supreme Court would have to place, say, Justice Scalia in a permanent state of recusal, given that in the corpus of his judicial opinions he has stated unequivocal views on every subject of any importance. And the Senate would have had to reject, on this ground alone, the nomination of Justice Ginsburg, who not only had written about abortion rights n31 --perhaps the most contentious issue in contemporary constitutional law--but who testified in even stronger terms as to her current views on that issue. n32 That both suggestions are absurd indicates that we do not yet, thankfully enough, consider either the possession or the expression of views on legal issues--even when strongly held and stated--to be a judicial disqualification.

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n31 See, for example, Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 NC L Rev 375 (1985).

n32 See, for example, Confirmation Hearings for Ginsburg at 268-69 (cited in note 5).

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As for "judicial independence," Carter speaks as though the term were self-defining--and as though it meant that in appointing judges to a court, the President and Senate must refrain from considering what they will do once they arrive there. But this would be an odd kind of decision to leave in the hands of elected officials: far better, if such subjects were forbidden, to allow judges to name their own successors--or to cede the appointment power to some ABA committee. In fact, the placement of this decision in the political branches says something about its nature--says something, in particular, about its connection to the real-world consequences of judicial behavior. Indeed, contrary to Carter's view, the President and Senate themselves have a constitutional obligation to consider how an individual, as a judge, will read the Constitution: that is one part of what it means to preserve and protect the founding instrument. The value of judicial independence does not command otherwise, however much Carter tries to convert this concept into a thought-suppressing mantra. The judicial independence that we should focus on protecting resides primarily in the inability of political officials, once having placed a person on a court, to interfere with what she [*939] does there. That seems a fair amount of independence for any branch of government.

I do not mean to argue here that the President and Senate may ask, and a nominee (or potential nominee) must answer, any question whatsoever. Some kinds of questions, as Carter contends, do pose a threat to the integrity of the judiciary. Suppose, for example, that a senator asked a nominee to commit herself to voting a certain way on a case that the Court had accepted for argument. We would object--and we would be right to object--to this question, on the ground that any commitment of this kind, even though unenforceable, would place pressure on the judge (independent of the merits of the case) to rule in a certain manner. This would impede the judge's ability to make a free and considered decision in the case, as well as undermine the credibility of the decision in the eyes of litigants and the public. And once we accept the impermissibility of such a question, it seems we have to go still further. For there are ways of requesting and making commitments that manage to circumvent the language of pledge and promise, but that convey the same meaning; and these scantly veiled expressions pose dangers almost as grave as those of explicit commitments to the fairness, actual and perceived, of the judicial process.

But we do not have to proceed nearly so far down the road of silence as Carter and recent nominees would take us--to a place where comment of any kind on any issue that might bear in any way on any case that might at any time come before the Court is thought inappropriate. n33 There is a difference between a prohibition on making a commitment (whether explicit or implicit) and a prohibition on stating a current view as to a disputed legal question. The most recent drafters of the Model Code of Judicial Conduct acknowledged just this distinction when they adopted the former prohibition in place of the latter for candidates for judicial office. n34 Of course, there will be hard cases--cases in which reasonable people may disagree as to whether a nominee's statement of opinion manifests a settled intent to decide in a particular manner a particular case likely to come before the Court. [*940] But many easy cases precede the hard ones: a nominee can say a great

deal before making a statement that, under this standard, nears the improper. A nominee, as I have indicated before, usually can comment on judicial methodology, on prior caselaw, on hypothetical cases, on general issues like affirmative action or abortion. To make this more concrete, a nominee can do . . . well, what Robert Bork did. If Carter and recent nominees are right, Judge Bork's testimony violated many times a crucial norm of judicial conduct. In fact, it did no such thing; indeed it should serve as a model.

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n33 For a similar conclusion, see Steven Lubet, Advice and Consent: Questions and Answers, 84 Nw U L Rev 879 (1990).

n34 See pp 96-97. Compare Model Code of Judicial Conduct Canon 5(A)(3)(d) (1990), with Code of Judicial Conduct Canon 7(B)(1)(c) (1972). See generally Buckley v Illinois Judicial Inquiry Board, 997 F2d 224, 230 (7th Cir 1993) (Judge Posner noting the difference between these two kinds of prohibitions and holding the broader prohibition, on "announcing . . . views on disputed legal or political issues," to violate the First Amendment).

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Return for a moment to those hearings, in which the Senate--and the American people--evaluated Robert Bork's fitness. Carter stresses the distortion, exaggeration, and vilification that occurred during the debate on the nomination. And surely these were present--most notably, as Carter notes, in the misdescription of Bork's opinion in American Cyanimid. n35 But the most striking aspect of the debate over the Bork nomination was not the depths to which it occasionally descended, but the heights that it repeatedly reached. n36 What Carter tongue-in-cheek calls "the famous national seminar on constitutional law" (p 6) was just that. The debate focused not on trivialities (Carter's "ethical molehills") but on essentials: the understanding of the Constitution that the nominee would carry with him to the Court. Senators addressed this complex subject with a degree of seriousness and care not usually present in legislative deliberation; the ratio of posturing and hyperbole to substantive discussion was much lower than that to which the American citizenry has become accustomed. And the debate captivated and involved that citizenry in a way that, given the often arcane nature of the subject matter, could not have been predicted. Constitutional law became, for that brief moment, not a project reserved for judges, but an enterprise to which the general public turned its attention and contributed.

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n35 Oil, Chemical & Atomic Workers Intl. Union v American Cyanimid Co., 741 F2d 444 (DC Cir 1984).

n36 For a similar view, see Strauss, Am Prospect at 94 (cited in note 19).

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Granted that not all subsequent confirmation hearings could, or even should, follow the pattern set by the Bork hearings, in either their supercharged intensity or their attention to substance. A necessary condition of both was the extreme conservatism of Bork's known views, which made him an object of

terror to some

[*941] senators and veneration to others. It would be difficult to imagine hearings of the same kind following the nomination of Justice Ginsburg or Justice Breyer--two well-known moderates whose nominations had been proposed by senators on both sides of the aisle. To insist that these hearings take the identical form as the hearings on Judge Bork is not only to blink at political reality, but also to ignore the very real differences in the nature of the nominations.

But that said, the real "confirmation mess" is the gap that has opened between the Bork hearings and all others (not only for Justices Ginsburg and Breyer, but also, and perhaps especially, for Justices Kennedy, Souter, and Thomas). It is the degree to which the Senate has strayed from the Bork model. The Bork hearings presented to the public a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction. Subsequent hearings have presented to the public a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis. Such hearings serve little educative function, except perhaps to reinforce lessons of cynicism that citizens often glean from government. Neither can such hearings contribute toward an evaluation of the Court and a determination whether the nominee would make it a better or worse institution. A process so empty may seem ever so tidy--muted, polite, and restrained--but all that good order comes at great cost.

And what is worse even than the hearings themselves is a necessary condition of them: the evident belief of many senators that serious substantive inquiry of nominees is usually not only inessential, but illegitimate--that their insistent questioning of Judge Bork was justified, if at all, by his overt "radicalism" and that a similar insistence with respect to other nominees, not so obviously "outside the mainstream," would be improper. This belief is not so often or so clearly stated; but it underlies all that the Judiciary Committee now does with respect to Supreme Court nominations. It is one reason that senators accede to the evasive answers they now have received from five consecutive nominees. It is one reason that senators emphasize, even in posing questions, that they are asking the nominee only about philosophy and not at all about cases--in effect, inviting the nominee to spout legal theory, but to spurn any demonstration of [*942] what that theory might mean in practice. It is one reason that senators often act as if their inquiry were a presumption--as if they, mere politicians, have no right to ask a real lawyer (let alone a real judge) about what the law should look like and how it should work. What has happened is that the Senate has absorbed criticisms like Carter's and, in so doing, has let slip the fundamental lesson of the Bork hearings: the essential rightness--the legitimacy and the desirability--of exploring a Supreme Court nominee's set of constitutional views and commitments.

The real confirmation mess, in short, is the absence of the mess that Carter describes. The problem is not that the Bork hearings have set a pattern for all others; the problem is that they have not. And the problem is not that senators engage in substantive discussion with Supreme Court nominees; the problem is that they do not. Senators effectively have accepted the limits on inquiry Carter proposes; the challenge now is to overthrow them.

In some sense, Carter is right that we will clean up the mess only when we change "our attitudes toward the Court as an institution"--when we change the way we "view the Court" (p 188). But as he misdescribes the mess, so too does Carter misapprehend the needed attitudinal adjustment. We should not persuade ourselves, as Carter urges, to view the Court as a "mundane and lawyerly" institution and to view the position of Justice as "simply a job" (pp 205-06). We must instead remind ourselves to view the Court as the profoundly important governmental institution that, for good or for ill, it has become and, correlatively, to view the position of Justice as both a seat of power and a public trust. It is from this realistic, rather than Carter's nostalgic, vision of the Court that sensible reform of the confirmation process one day will come. And such reform, far from blurring a nominee's judicial philosophy and views, will bring them into greater focus.

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ARTICLE: The Regulation of Social Meaning

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SUMMARY:

... Echoing Justice Jackson in West Virginia State Board of Education v Barnette, Easterbrook wrote: ... In Part IV, I then apply this taxonomy to two areas of recent social meaning regulation--the regulation of dangerous sex, and the regulation of smoking. ... I do not intend to provide that normative judgment here, but we can describe norms for testing whether a social norm should be changed. ... And rather than reviewing what is a large literature in sociology and anthropology discussing the effects of AIDS education on behavior, Philipson and Posner raise and dismiss--with one cite to a Wall Street Journal article discussing condom sales--the possibility that attitudes are an important part of the policy debate. ... For again, by ignoring the social meaning effect of education, one ignores the collective action problem that social meaning presents. ... The hardest type of social meaning regulation to find is ritual, perhaps because there is in fact no such example. ... What the catalog of regulations here reveals, I suggest, is the broad extent to which the social meaning costs of smoking can be changed to change smoking behavior, just as the economic costs (understood more narrowly) can be changed to change smoking behavior as well. ...

TEXT:
[*943] [*944]

Introduction

In 1985, the Seventh Circuit struck down an Indianapolis ordinance that made illegal pornography that portrayed women in a sexually subordinated way. At the core of the opinion n1 was an idea that has become irresistible in free speech lore, resonating, it is thought, with the very idea of a free society. The ordinance was flawed, Judge Easterbrook wrote, because it violated first amendment neutrality.

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n1 American Booksellers Ass'n, Inc. v Hudnut, 771 F2d 323 (1985).

-End Footnotes-

Speech treating women in the approved way--in sexual encounters premised on equality--is lawful no matter how sexually explicit. Speech treating women in the disapproved way--as submissive in matters sexual or as enjoying humiliation--is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. n2

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n2 Id at 325 (citations omitted).

-End Footnotes-

This, the court held, was "thought control":

It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not. n3

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n3 Id at 328.

-End Footnotes-

"Thought control," said Judge Easterbrook, is just what the First Amendment forbids. Echoing Justice Jackson in West Virginia State Board of Education v Barnette, n4 Easterbrook wrote:

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n4 319 US 624 (1943).

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"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." . . . Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. n5

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n5 Hudnut, 771 F2d at 327-28, quoting Barnette, 319 US at 642.

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This Article is not about the First Amendment. Nor is it about the regulation of pornography. It is instead an effort to understand just how an idea so plainly false--both as a description of our constitutional past and as a prescription about the proper role of government--can come to appear as foundational truth. For Barnette and its echoes notwithstanding, n6 it has never been the case that "officials," whether high or petty, have been forbidden from prescribing "what shall be orthodox" in politics, nationalism, and other matters of opinion: n7 Think of the government's view of unsafe sex, or abortion, or family values. n8 Nor has it been the case that the Constitution has proscribed the forcing [*946] of "citizens to confess by word . . . their faith" in such ideas: "Are you, or have you ever been, a member of the Communist Party?" n9 Government has always and everywhere advanced the orthodox by rewarding the believers and by segregating or punishing the heretics. n10 The permissible means for advancing such orthodoxy may be limited, and the instances may be few, but the end has always been the place of government.

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n6 See for example, John Stuart Mill, On Liberty, in The Utilitarians 479 (Dolphin ed 1961), cited in Steven Shiffrin, Government Speech, 27 UCLA L Rev 565, 566 n 3 (1980).

n7 An exception here may be religion.

n8 Compare Rust v Sullivan, 500 US 173, 194 (1991) ("When Congress established a National Endowment for Democracy . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy"); Cruzan v Missouri, 497 US 261, 281 (1990) (state may prefer life in spite of recognized right to refuse medical treatment).

n9 See, for example, In re Anastaplo, 366 US 82, 100 (1961) (Black dissenting) (asked by the Committee on Character and Fitness, "Are you a member of the Communist Party?")

n10 Indeed, in Barnette itself, the government clearly succeeded in establishing an orthodoxy. Barnette simply permitted dissenters to dissent by not participating in a flag salute; but the dissent was dissent only because it was dissent from an orthodox view, one supported and endorsed by government action. See Barnette, 319 US at 641-42. The Barnette principle notwithstanding, not even in Barnette itself was the government forced to take no part in the construction of the orthodoxy. Id at 640. For a thorough discussion of "neutrality" in the First Amendment context, see David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 NYU L Rev 675, 702-17 (1992).

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From where then does this oddity in Barnette arise? n11 What is its source? How is it possible, when thinking of doctrine like the First Amendment, to imagine it organized around a notion so plainly inconsistent with so much else that government does? How can we come, as a constitutional culture, to intone, mantralike, in one area of the constitution a principle that we know to be false in just about every other?

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n11 This oddity in the Barnette principle has been well noted before. See Shiffrin, 27 UCLA L Rev at 567-78 (cited in note 6).

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Such selectivity in constitutional law may not be uncommon. n12 In this case, I want to argue, it has a particular source. Its source is a kind of blindness--a learned blindness--to an idea, or an understanding, common in much of social theory, n13 yet ignored n14 in much of law. This is the idea of social construction. n15 It makes sense to speak as if government does not "pre-[*947] scribe" orthodoxy only so long as we ignore the ways in which governments, as well as others, act to construct the social structures, or social norms, or what I will call here, the social meanings that surround us. For these social meanings are what is orthodox. They constitute what is authority for a particular society, or particular culture. To the extent that they are built, or remade, or managed by government, then to that extent government is "prescribing" the orthodox, and Barnette-like ideas will seem incomplete. Likewise, to the extent that we ignore how society is constructed, or ignore the ways in which governments (and others) act to construct what is orthodox--to that extent as well, Barnette-like ideas will seem quite natural. The lore of the First Amendment is as it is today, I suggest, in part because this balance is now tilted against an account of this constructivism. My aim in this essay is to resist this tilt.

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n12 Think, for example, about realism in law. We are happy to think of much of our constitutional jurisprudence as realistic--in Balkin's terms, "as Professors Peller and Singer tell us, we are all legal realists now," J.M. Balkin, Some Realism about Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L J 375, 385 (footnotes omitted)--but within the first amendment, the dominant mode of legal jurisprudence (as distinct from academic jurisprudence) is formalistic. Id at 385 n 28.

n13 For a succinct summary of this position, see Roberto Mangabeira Unger, Social Theory: Its Situation and Its Task 1 (Cambridge, 1987) ("Modern social thought was born proclaiming that society is made and imagined, that it is a human artifact rather than an expression of an underlying natural order.").

n14 For the most part. The exception is the critical in law. See text accompanying notes 335-39.

n15 One might attempt a definition of "social construction," but in what follows, I will let the examples do the work of definition. My defense for such an evasion is that my purpose here is not to demonstrate how much of some reality is socially constructed or not. For another attempt, see Paul Watzlawick, ed, The Invented Reality: How Do We Know What We Think We Know?: Contributions to Constructivism 15 (Norton, 1984).

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The point is not that law in general, or First Amendment law in particular, denies the constructivism that social theory asserts. For the most part, it simply ignores it. Indeed, the great strength of Easterbrook's opinion is that it is among the very few openly to address this question of construction. For consider again just what it was that the Indianapolis statute aimed to regulate. While its primary drafters--Catharine MacKinnon and Andrea Dworkin--stressed the physical and psychological harms that pornography causes, they also stressed the role that pornography plays in constructing what it means to be a woman. Certainly not exclusively, and possibly not even primarily, but what pornography does, MacKinnon and Dworkin argue, is to construct an image or attitude or reality of the appropriate woman, a reflection of the "inappropriate woman." This image then constitutes and hence constrains the social world in which women live. n16

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n16 See Hudnut, 771 F2d at 328-29 (discussing MacKinnon and Dworkin's views).

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Judge Easterbrook fully acknowledged this claim: n17

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n17 Acknowledged does not mean credit, or find, for Judge Easterbrook was careful to make clear that he was accepting the claim for purposes of argument, not that he was finding the claim true as a matter of fact. Id at 329 n 2.

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Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, [*948] battery and rape on the streets. In the language of the legislature, "pornography is central in creating and maintaining sex as a basis of

discrimination." n18

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n18 Id at 329 (citations omitted) (brackets in original).

-End Footnotes-

Nonetheless, held the court, there is no social construction exception to the First Amendment. Even if these words construct the reality that they then describe, or perhaps, because they construct the reality that they then describe, government has no power to regulate them.

It is this last move, I want to argue, that moves too quickly. It covers too many intermediate steps. For however well we can maintain this Barnette ideal while ignoring issues of social construction, the ideal is a confusion if social construction is brought to the fore. If the Indianapolis ordinance is unconstitutional because it is government's attempt to establish orthodoxy, then, once we understand just how orthodoxy is constructed, much of what government does should be drawn into doubt. Alternatively, once an account of social construction suggests just how this construction is the norm, it no longer seems obvious just why this particular form of construction is flawed. The antiorthodoxy ideal of Barnette is stable so long as our understanding of the construction of orthodoxy is truncated; and it is unstable once the account of construction is extended.

If we are to understand the place of orthodoxy in law--First Amendment law in particular, as well as in law more generally--we must first understand something more about how the orthodox gets made--by whom, and with what techniques. To understand this is to understand something more about the techniques of social construction. That is the aim of this Article. My hope is to suggest a way to speak about how law helps construct social reality, by drawing upon particular examples of this construction, and generalizing from these examples to some fundamental techniques. The aim is a heuristic for understanding law's place in these constructions, so as to limit (or not limit) this unavoidable rule.

I begin quite narrowly, speaking of the construction of what I call social meanings, by entities like the government. Part I begins with a better sense of what I mean by "social meanings"--how they are used, what their components are. Part II then offers a range of examples of efforts to reconstruct particular social meanings.
[*949]

Drawing upon these examples, and upon simple tools from economics, in Part III I collect from these examples four techniques of social meaning construction. Three of these are familiar; the fourth will be something new. I offer these as four ways to understand what is really a common practice of social meaning construction. They are a taxonomy with which efforts at social meaning making can be described, and with which various constructions can be understood. In Part IV, I then apply this taxonomy to two areas of recent social meaning regulation--the regulation of dangerous sex, and the regulation of smoking.

Part V, then, returns very briefly to the questions raised at the start. With an account of social construction begun, I then sketch something of the presuppositions of existing First Amendment law that now may be drawn into doubt. Again, I do not resolve those doubts here. My aim is to identify how they may depend upon an understanding of social construction. Whether and how they get resolved I leave to others, at another time.

I. Social Meanings

Some social meanings are constructed; n19 some are construct- [*950] ed by government. This is the minimum of what I will claim here. But to understand even this minimum, we must spend some time making clear just what this "construction" means, what "social meaning" means, and what social meanings are.

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n19 It is constructivism that defines modern social theory. See Unger, Social Theory at 1 (cited in note 13). Emile Durkheim is one start: "Social reality is constructed by the operation of the society itself. . . . Social facts are the product of the group life of the total operation of a society." Joseph Bensman and Robert Lilienfeld, Craft and Consciousness: Occupational Technique and the Development of World Images 157 (John Wiley & Sons, 1973) (discussing Durkheim's position). In our own time, the notion was advanced most forcefully in sociology by Peter L. Berger and Thomas Luckman's work, The Social Construction of Reality: A Treatise in the Sociology of Knowledge 19 (Doubleday, 1966), and in law most importantly by Roberto Unger. Unlike some of the earlier theorists, moderns think less about "society itself " constructing itself and more about how the actions of individuals and collectivities work to construct it. Nevertheless, the tradition has maintained its view about social reality's source: "Human reality is not provided at birth by the physical universe, but rather must be fashioned by individuals out of the culture into which they are born." David Kertzner, Ritual, Politics and Power 3-4 (Yale, 1988). Bourdieu describes experiments designed to capture this sense of construction in Pierre Bourdieu, Systems of Education and Systems of Thought, in Earl Hopper, ed, Readings in the Theory of Educational Systems 159, 161 (Hutchinson, 1971).

In claiming that reality is socially constructed, however, we should avoid three common misconceptions. First, to say that a constructed reality is treated as natural does not mean that such reality, or meanings within this reality, is in any important sense stable. While models of society speak as if a particular society were in equilibrium, "real societies can never be in equilibrium." E.R. Leach, Political Systems of Highland Burma: A Study of Kachin Social Structure 4 (Beacon, 1967). Real meanings are always contested.

Real societies exist in time and space. The demographic, ecological, economic and external political situation does not build up into a fixed environment, but into a constantly changing environment. Every real society is a process in time.

Id at 5.

On the other hand, instability does not mean models or descriptions of meanings are useless. That economies are never in equilibrium, for example, does not mean equilibrium economics is useless. Models of social equilibrium are tools, not for insisting upon a false stability, but for understanding more clearly how stabilities transform.

A second misconception is to imagine that constructivism implies that any construction is always possible. Constructions are both "invention" and "spontaneous generation, planning and growth." Eric Hobsbawm, *Mass-Producing Traditions: Europe, 1870-1914*, in Eric Hobsbawm and Terence Ranger, eds, *The Invention of Tradition* 307 (Cambridge, 1983). But this does not imply that any construction is possible at anytime. See Carol S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, in Dennis Altman, et al, eds, *Homosexuality, Which Homosexuality?* 13, 17 (GMP, 1989) ("Nor is it to say that entire cultures can transform themselves overnight, or that individuals socialized into one cultural tradition can acculturate at whim to another.")

Constructivism may imply that more than one construction may be possible, Pierre Bourdieu, *Social Space and Symbolic Power*, 7 *Sociological Theory* 14, 19 (1989), but it does not imply that every construction is possible. "That people perceive the world through symbolic lenses does not mean that people or cultures are free to create any symbolic system imaginable, or that all such constructs are equally tenable in the material world." Kertzner, *Ritual, Politics and Power* at 4. What is "possible" hangs upon particular histories and material conditions, and the constraints of both are real.

Finally, although different social constructions may be possible, it does not follow that every possible construction is achievable through central or governmental control. Governments may have a power to influence the construction of social reality, but they have no monopoly on this power. See Bourdieu, 7 *Sociological Theory* at 23. Whatever power they do have is in the end quite limited. As Bourdieu describes:

There is no doubt that the law possess a specific efficacy
Nevertheless, this efficacy, defined by its opposition both to pure and simple impotence and to effectiveness based only on naked force, is exercised only to the extent that the law is socially recognized and meets with agreement, even if only tacit and partial

Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L J* 805, 840 (1987).

The aim of much of what follows is to provide a way to think about this "management" of social reality. A.P. Cohen and J.L. Comaroff, *The Management of Meaning: On the Phenomenology of Political Transactions*, in Bruce Kapferer, ed, *Transaction and Meaning: Directions in the Anthropology of Exchange and Symbolic Behavior* 87, 102 (Institute for the Study of Human Issues, 1976). But just as there are limits on the management of economic reality, there are limits on the regulation of social reality. Timur Kuran, *Cognitive Limitations and*

Preference Evolution, 147 J Institutional & Theoretical Econ 241, 269 (1991) (discussing cognitive limitations in evolution of collective choices and individual preferences). I would willingly concede that indeed these limits are much greater in social than in economic reality. The only positive claim I need make at this point is that regulation is not wholly ineffective--that there is no rational expectations school (on the micro rather than the macro level) of the economics of social meaning, see Christel Lane, The Rites of Rulers: Ritual in Industrial Society--The Soviet Case 253 (Cambridge, 1981) (noting limitations of ritual and similar studies), or at least not yet. And unless it is proved that regulation can have no effect, there is much to gain by understanding such limited tools as there may well be, if only to understand the dangers these tools present.

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That is the aim of this Part. I make just three claims: first, that social meanings exist; second, that they are used by individuals, or groups, to advance individual or collective ends; and third, that their force in part hangs upon their resting upon a certain uncontested, or taken-for-granted, background of thought or expectation--alternatively, that though constructed, their force depends upon them not seeming constructed. I end the Part by offering a way to talk about this background of understanding, a heuristic that will make it simpler to model the process of social meaning change.

I don't mean any of this Part to be particularly new, or especially contentious. To some the claims will seem quite obvious. To others they will simply orient what is to follow. But some orientation is necessary. This is a piece that marries two traditions in social thought, one that we might call interpretive (anthropology, sociology) and the other, traditionally, noninterpretive (economics). As at any wedding, some of what follows will seem familiar, but what will be familiar depends upon on which side of the isle you are seated. Readers from both sides have pushed me to add more examples "here" and cut others "there." But the "heres" are often the "theres." Therefore, rather than seek some ideal mix, I have tried to write this Article as (to continue the wedding metaphor) more a buffet than served. Much of the structure of the argument is sketched through examples, and if the point of the examples in one Section is clear to you, further examples in that Section can be skipped. My hope is that the sum of what follows offers something new, and that this is not inconsistent with the observation that parts taken separately may be quite old.

A. The Fact of Social Meanings

Any society or social context has what I call here social meanings--the semiotic content attached to various actions, or inactions, or statuses, within a particular context. n20 If an action creates a stigma, that stigma is a social meaning. If a gesture is an insult, that insult is a social meaning. I say "social" not to
[*952] distinguish social meaning from individual meaning (whatever that would be), or meaning more generally, but rather to emphasize its contingency on a particular society or group or community within which social meanings occur. My concern is not semantics; it is, instead, pragmatics. The aim is not to advance well known debates in the philosophy of language about the nature or function of meaning. It is instead to find a way to speak of the frameworks of

understanding within which individuals live; a way to describe what they take or understand various actions, or inactions, or statuses to be; and a way to understand how the understandings change. n21

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n20 Richard Pildes has a comparable discussion of the "expressive dimension" of action, offered as an extremely strong critique of rational choice theory. See Richard H. Pildes and Elizabeth S. Anderson, Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum L Rev 2121, 2143-69, 2197-2205 (1990); Richard H. Pildes, The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium, 89 Mich L Rev 936, 936-66 (1991); Richard H. Pildes and Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 Mich L Rev 483, 506-16 (1993).

n21 Compare Robert Nozick's conception of "symbolic utility," in The Nature of Rationality 26-35 (Princeton, 1993).

-End Footnotes-

Some examples may help indicate the sense:

Seatbelts in a Budapest cab. Because most cabs in Budapest are quite small, most passengers sit in the front seat. Until about two years ago, if you tried to put on a seatbelt in the front seat of a cab, the driver would try to dissuade you. If you nonetheless insisted and buckled your belt, your action would have an important effect: To wear a seatbelt was to insult the driver. n22 That insult is a social meaning.

-Footnotes-

n22 Or at least some drivers. Certainly some drivers understood the distinction between intended and received meaning and tracked foreigners' intended meaning.

-End Footnotes-

Tipping at the turn of the century. It is well accepted in modern America that one tips certain people when they provide a service--the taxi driver, the waiter or waitress, the bellboy. You don't tip everyone who provides a service: You don't tip police officers (even in Chicago), or doctors, or law professors. Sometimes you tip the person who delivers the mail, or the person who delivers you flowers, but you never tip the person who sells flowers, or runs FedEx, or sells you stamps at the post office.

To us, these distinctions seem completely obvious. But their complexity should suggest something of their contingency. So too their origin. When tipping first appeared at the turn of the century, the practice was vilified as a relic of European inequality. n23 As described by Viviana Zelizer:

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n23 Viviana A. Zelizer, *The Social Meaning of Money* 96 (Basic Books, 1994). See also William R. Scott, *The Itching Palm: A Study of the Habit of Tipping in America* 38 (Pennsylvania, 1916) ("The difference is between aristocracy and democracy. . . . Every tip given in the United States is a blow at our experiment in democracy. The custom announces to the world that at heart we are aristocratic.").

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Even when not morally corrupting, tips were denounced as socially demeaning. What sort of gift was it, queried some [*953] critics, if it humiliated the recipient? "We do not believe," declared the editor of *Harpers Monthly Magazine* in 1913, "that it is possible for a man earning an honest living to take money which he has not earned without the misery which even the mendicant must know from alms." n24

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n24 Zelizer, *The Social Meaning of Money* at 96, quoting Scott Howells, *Matter of Tipping*, *Harper's Monthly* 127 (July 1913).

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Insulting to its recipient and corrupting to both giver and recipient, there were, by the early 1900s, "nationwide efforts, some successful, by state legislatures to abolish tipping by turning it into a punishable misdemeanor." n25 But any one individual opposing tipping had little he or she could do to resist it--"the tipping system is so established now [1916] that the individual who opposes it must be prepared to play the role of martyr, whether employee or patron." n26

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n25 See Zelizer, *The Social Meaning of Money* at 94 (cited in note 23).

n26 Scott, *The Itching Palm* at 75 (cited in note 23).

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In the mix of the debate in the early 1900s, we can say tipping had a social meaning. Its meaning was different from its meaning today. But in either context, the action (tipping) carries a complex, if only relatively clear, message. That message is a social meaning.

Confederate flags in the South. For much of the last century, the confederate flag was all but forgotten. The symbol of a defeated South, it fell quickly into history as a nation rebuilt. But early in the 1950s, it was revived as a political symbol by those most firmly resisting civil rights legislation in the South--the Dixiecrats. In Georgia, the state flag was adapted to include the Confederate symbol. In South Carolina, the Confederate flag was raised alongside the state flag.

We need not remark the obvious about the motives or intent of state legislators in making these changes. For our purposes, it is enough to note the effect such displays had on blacks in the South. As James Forman has written:

By flying the Confederate flag above the capital dome, state governments send a message. In part, that message glorifies and memorializes slavery, Jim Crow, and subsequent resistance to change. The message also excludes. n27

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n27 James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 *Yale L J* 505, 514 (1991).

-End Footnotes-

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To black southerners, the actions of the predominately white legislatures had a meaning of exclusion, just as a decision by Germany to celebrate the birthday of Goebbels would have a meaning of exclusion for German Jews. That effect is its social meaning.

Working women. In 1950, an article that focused upon women novelists appeared in a French weekly magazine. At the beginning of the article was a picture of some seventy novelists seated together. Under the picture was a caption that identified the women in, what to us, but no doubt not to the French editors in 1950, is an extraordinary way. To each name was attached a parenthetical, matching the number of novels to the number of children each woman had produced. Roland Barthes describes the meaning:

We are introduced, for example, to Jacqueline Lenoir (two daughters, one novel); Marina Grey (one son, one novel); Nicole Dutreil (two sons, four novels), etc. What does it mean? This: to write is a glorious but bold activity. . . . But make no mistake: let no women believe that they can take advantage of this pact without having first submitted to the eternal status of womanhood. Women are on the earth to give children to men. n28

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n28 Roland Barthes, *Mythologies* 50 (Hill and Wang, 1972). This is by no means the best of Barthes's readings. See also his discussion of wrestling, id at 15, or the advertising of soap powders, id at 36, or his discussion of the French and their love for "steak and chips," id at 62.

-End Footnotes-

The picture conveys this meaning; it is a text that Barthes reads. What he reads is its social meaning.

The form of each of these examples is the same. In each there is an action--buckling up, tipping, raising a flag, presenting novelists--that conveys in its particular context an easily recognized meaning. The actions then have associations with other actions, or meanings, and these associations are constitutive of what I am calling their semiotic content. Actions do not always convey easily recognized meanings--not all meanings are easily recognized, and not all actions convey meaning (think of a man turning over in his sleep). Nor of course are these meanings fixed, or stable, or uncontested, or uniform across any collection of people. They change, they are contested, and they differ across communities and individuals. But we can speak of social meaning, and meaning management, I suggest, without believing that [*955] there is a single, agreed-upon point for any social act. Gold has value even though its value across individuals differs dramatically. Actions have meaning, even if their meaning differs across individuals. Even if there is no single meaning, there is a range or distribution of meanings, and the question we ask here is how that range gets made, and, more importantly, changed.

Thus the things that I call social meanings--in this way do they exist, for a wide range of individual and social actions, n29 and because they exist, in this way is their effect in an important sense nonoptional. They empower or constrain individuals, whether or not the individual chooses the power or constraints. They are "forces to be reckoned with," n30 by the weakest as well as the strong. A story by Orwell captures the point well: Summoned as a soldier in the British Army in India to kill a runaway elephant in a small Indian village, Orwell describes chasing the elephant through the village, and then cornering it:

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n29 Marcel Mauss's examples are best here. See Marcel Mauss, *Techniques of the Body*, 2 *Economy & Society* 70, 83 (1973) ("Care of the mouth, and spitting technique. Here is a personal observation. A little girl did not know how to spit and this made every cold she had much worse. I made inquiries. In her father's village and in her father's family in particular, in do not know how to spit. I taught her to spit . . . She is the first in her family who knows how to spit.")

n30 Margaret Gilbert, *On Social Facts* 316 (Princeton, 1992) (discussing role of social conventions).

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And suddenly I realized that I should have to shoot the elephant after all. The people expected it of me, and I had got to do it. . . . Here was I, the white man with his gun, standing in front of the unarmed native crowd--seemingly the leading actor of the piece; but in reality I was only an absurd puppet, pushed to and fro by the will of those yellow faces behind me. I perceived in this moment that when the white man turnstyrant it is his own freedom that he destroys. He becomes a sort of hollow posing dummy, the conventionalized figure of a sahib. For it is the condition of his rule that he shall spend his life trying to impress the "natives," and so in every circumstance he has to do what the "natives" expect of him. He wears a mask and his face grows to fit it. n31

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n31 George Orwell, *Inside the Whale and Other Essays* 95-96 (Penguin, 1971).

-End Footnotes-

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B. The Uses of Social Meanings

If social meanings exist, they are also used. They not only constitute, or guide, or constrain; they are also tools--means to a chosen end, whether an individually or collectively chosen end. They are a resource--a semiotic resource--that society provides to all if it provides to any. They are a way "for hitting each other and coercing one another to conform to something [one has] in mind"; n32 or for inspiring another or inducing another to do, or believe, or want, in a certain way.

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n32 Mary Douglas, *Implicit Meanings: Essays in Anthropology* 61 (Routledge & Kegan, Paul, 1975).

-End Footnotes-

The examples are many and obvious. n33 One uses an insult to oppress; one uses a "thank you" to endear. One selects certain words over other acts; in some contexts, one chooses a certain language to signal one meaning rather than another. n34

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n33 For an excellent account of their use in governmental regulation, see Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U Chi L Rev 1, 66-72 (1995). As Pildes and Sunstein point out, this is a perspective also recently adopted by Robert Nozick. Id at 66 n 228, citing Nozick, *The Nature of Rationality* (cited in note 21).

n34 Susan Gal, for example, recounts a Hungarian woman "ridiculed by fellow villagers for using standard rather than local Hungarian forms in speaking to a researcher," a choice that signaled rejection of the local community in favor of the dominant elite. Kathryn A. Woolard, *Language Variation and Cultural Hegemony: Toward an Integration of Sociolinguistic and Social Theory*, 12 Am Ethnologist 738, 744 (1985) (discussing Gal's research).

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Clothing is an obvious example: In any period, styles provide a repertoire of meanings. These meanings present risk. In eighteenth-century Europe, criminal penalties applied to anyone who dressed outside his proper class or status. n35 Today, the risk may be less dramatic, though still present. Imagine underdressing at your employee's party, or overdressing at your boss's. Clothing is a type of grammar; "to read or wear clothes is in a significant respect similar to reading or composing a literary text." n36

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n35 Paul Connerton, *How Societies Remember* 10 (Cambridge, 1989). In late sixteenth and early seventeenth-century England, legal sanctions were brought to bear against men and women who wore the clothing of the opposite sex. R. Mark Benbow and Alasdair D.K. Hawkyard, *Legal Records of Cross-Dressing*, in Michael Shapiro, *Gender in Play on the Shakespearean Stage: Boy Heroines and Female Pages* 225, 226-34 (Michigan, 1994). See also Michael Shapiro, *Gender in Play on the Shakespearean Stage: Boy Heroines and Female Pages* 20 (Michigan, 1994) (concluding that "London courts labeled all female crossdressers as whores, itself a form of punishment" as a way of curtailing the independence male clothing provided women).

Even as Europe passed out of its class-based structures, clothing still functioned as a collective structure. France, for example, passed through two important stages of dress as it experienced its revolutionary period.

During the first, which dominated the years 1791-4, clothes became uniforms. The culottes of simple cut and the absence of adornments were emblematic of the desire to eliminate social barriers in the striving for equality: by making the body neutral, citizens were to be free to deal with one another without the intrusion of differences in social status. During the second phase . . . liberty of dress came to mean free bodily movement. People now began to dress in such a way as to expose their bodies of one another on the street and to display the motions of the body.

Connerton, *How Societies Remember* at 10.

n36 Connerton, *How Societies Remember* at 11-12.

-End Footnotes-

Meanings are used by collectives as well as by individuals, and most importantly for what follows, they are used by one kind of collective in particular--government. Governments trade on standing social meanings to advance state ends. If the nation suffers under a health craze, the government can use "healthy styles of life" as arguments to fight drug usage. If the nation worships, then the government can use "family values" to exclude homosexuals from social life. If a nation is trying to build national identity, then (tragically) it can use the constructed meaning of race and blood to carve up a nation. n37 This last, most destructive use was especially common as Europe tried to build its nationalities after the fall of religion. "Blood became . . . the elixir that would convert local social relationships into national culture." n38 As the fall of Yugoslavia suggests, it is not a tool that has fallen into disuse.

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n37 "When drawn from physical nature, symbols exemplify what Douglas . . . has called 'natural symbols' . . . including race, blood, and kinship. For

better or worse, such ideas have served state ideologies well." Michael Herzfeld, *The Social Production of Indifference: Exploring the Symbolic Roots of Western Bureaucracy* 11 (Berg, 1992).

n38 Id at 23-24.

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To speak of governments, however, is not to deny that there are many other institutions that affect social meaning as well. Obviously, there is advertising as well as propaganda, and there is the Catholic Church as well as the State of Georgia. I focus here on government, not to deny the constructive effect of these other nongovernmental organizations, but to isolate important features of governmental, as distinct from other collective, meaning management. A fuller account would include these other institutions. But that account, as I suggest below, is simply an application of the account that follows here.

Finally, to speak of governments affecting meaning is not to say that governments have the ability easily, or successfully to change meaning. Governments, as other institutions, are inept; changes are very often not as intended. Here, perhaps more than in any other area of social policy, unintended consequences are central to any understanding of the process of regulation. But [*958] that consequences are often unintended does not mean there is no reason to consider consequences.

C. The Force of Social Meanings

If meanings exist, and if they are used, from where do they draw their force?

I have called meanings associations, one idea that gets tied to another. But the language of associations is a bit too passive for the purposes that I have here. So instead of speaking simply of associations, I will use the heuristic of writing to signal the dynamic I intend. This is a heuristic that tracks the relationship between texts and contexts; meaning, so understood, is the product of both.

The text could be an act (the raising of one's hand); the context is that which gives this act meaning (a salute). The text, in context, activates the association. But we need to say a bit more about this context to understand just how. For while in one sense context may simply describe all that goes with (con) the text, n39 the way in which I mean to use this notion turns upon a more focused conception.

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n39 For a discussion of the etymology of "context," see Ronald K.L. Collins and David M. Skover, *Paratexts*, 44 *Stan L Rev* 509, 513 n 18 (1992). "Con" is the variant of the Latin "Cum" which means with. See Charlton T. Lewis, *An Elementary Latin Dictionary: With Brief Helps for Latin Readers* 182 (Clarendon, 1977).

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As a first cut, we can describe context as the collection of understandings or expectations shared by some group at a particular time and place. But to function in the sense that I mean here, these understandings or expectations must be shared in a particular way. They must be taken for granted by those within the group at issue, n40 or put another way, they must be relatively uncontested n41 in that context. It is not enough that individuals [*959] understand that a particular idea along with a given action may yield a given meaning. For it to function as a "social meaning," the individuals in this context must also accept it. For an action to convey a social meaning in the sense I want to use the term here, it must do so without appearing contingent or contested; it must do so in a way that feels natural. As Bourdieu describes, it must function with a sort of "social magic." n42

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n40 An action is "taken for granted" when it is the ordinary response to accept the action or the meaning it presents. To say a response is the ordinary response is not to say it is the only response. There are dissidents from what is taken for granted. But for something to function as a social meaning in the sense I offer here, it must be so understood. See Anne Norton, Republic of Signs: Liberal Theory and American Popular Culture 1 (Chicago, 1993) ("Ideas are most powerful not when they impose practices upon us but when we take them for granted, not when their primacy is aggressively asserted but when they go unquestioned."). See also Lynne Zucker, The Role of Institutionalization in Cultural Persistence, in Walter W. Powell and Paul J. DiMaggio, eds, The New Institutionalism in Organizational Analysis 83, 86 (Chicago, 1991); Ronald Jepperson, Institutions, Institutional Effects, and Institutionalism, in Walter W. Powell and Paul J. DiMaggio, eds, The New Institutionalism in Organizational Analysis 143, 147 (Chicago, 1991); Mark Ramseyer, Learning to Love Japan, 31 San Diego L Rev 263, 266 (1994).

n41 I discuss this notion in Understanding Changed Readings: Fidelity and Theory, 47 Stan L Rev 395, 410-14 (1995). Compare John R. Searle, The Construction of Social Reality 4-7 (Free Press, 1995).

n42 Pierre Bourdieu, Language and Symbolic Power 125 (Harvard, 1991):

Acts of social magic as diverse as marriage or circumcision, the attribution of titles or degrees, the conferring of knighthoods, the appointment to offices, posts or honours, the attribution of a quality label or the corroboration by a signature or initials, are all acts which can only succeed if the institution--meaning to institute in an active way someone or something endowed with this or that status or property--is guaranteed by the whole group or by a recognized institution.

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Examples will make the point more clearly: A man announces that he is a Nazi. His announcement is a text. This text (in post-World War II Western culture) stigmatizes him. A second man confesses that he is a vegetarian. This too is a text. Someone points out that Hitler was a vegetarian and that

therefore we should vilify vegetarianism just as we vilify Nazism. Even if everyone hearing this argument believes the facts and understands the links, the argument does not create stigma for vegetarians. The argument is an argument for stigmatizing, but an argument does not make stigma. So long as the premises upon which this argument rests remain contested, the argument does not function to stigmatize.

A man is accused of sexually harassing his female secretary. The charge is a text; in some parts of America, it creates a stigma. A second man, this time in Russia, commits the same acts. Even if a westerner explains perfectly well the notion of sexual harassment, why it is wrong, etc., the report in Russia will not create the same stigma. In Russia, the report may be an argument for stigma; but again, so long as the premises upon which the argument rests remain contested, the argument does not function to stigmatize.

In both examples, actions yield social meanings because they rely for their source upon expectations or understandings not themselves (then) in question--not, as I will use the term, contested. n43 These understandings or expectations exist invisibly; n44 [*960] their effect is ordinarily unnoticed. Obviously they are in some sense learned--how, and through what techniques, is the focus of much that follows. But once learned, this learning is forgotten. n45 There is a process of coming to see something in a particular way; but that is quite different from the experience of seeing something in a particular way. Compare: At one time, white southerners saw blacks as "naturally" inferior. As something seen, the view was treated as nonpolitical, a fact of nature, true. Eventually, white southerners came to see blacks differently. This coming to see was inherently a political exercise--a change from one constructed view to another constructed view--as what was natural before is now seen to be contested, and what is now viewed as contested slowly sinks into a background of naturalness. Or think of the officer in Blade Runner, whose job it is to capture and kill runaway androids: At first he sees these creatures as machines, and treats them as machines--"raping," for example, a machine that insults him by rejecting his sexual advances. But slowly he becomes susceptible to their surprises, and eventually, after falling in "love" with the one he had raped, and after listening to the poetry of another whom he had sought to "terminate," he sees these androids as human. What was uncontested before becomes contested, and, one is lead to think, what is now contested (the equal status of androids) will eventually become uncontested.

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n43 One can of course contest the claim that understandings or expectations are ever not in question or not contested. But this is not a useful quibble. I completely agree that always there is a degree of contestation--there is, after all, the Flat Earth Society. There is also a difference, I suggest, between the contestation that the Flat Earth Society brings to discourse about geography and the contestation that the Moral Majority brings to the abortion debate. The right to abortion is contested in a way that the shape of the earth is not, even though both are certainly contested.

n44 Mary Crain, *The Social Construction of National Identity in Highland Ecuador*, 63 *Anthropology Q* 43, 43 (1990).

n45 Bourdieu, *Language and Symbolic Power* at 12-13 (cited in note 42).

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When these understandings or expectations become uncontested and invisible, social meanings derived from them appear natural, n46 or necessary. n47 The more they appear natural, or necessary, or uncontested, or invisible, the more powerful or unavoidable or natural social meanings drawn from them appear to be. The converse is also true: the more contested or contingent, the less powerful meanings appear to be. Social meanings carry with them, or transmit, the force, or contestability, of the presuppositions that constitute them. They come with the pedigree, presumed or argued for, of their foundation.

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n46 This is no doubt a dangerous word, for it conveys three quite distinct ideas. The first refers to the ontological source of that which is called natural, or of nature. To say something is natural, or of nature, sometimes means that it is something outside of human control: The laws of nature are given to us; we can do little to change them. The second refers to the ease with which an idea or practice or quality can be changed. "Men are by nature greedy" need not refer to something about their genetic makeup, but can simply mean that this quality, greediness, is not something easily changed. The third meaning refers to a behavior that comes most easily. "Telling the truth for him is second nature." This means neither that truth telling is for him a genetic quality, nor that it would be particularly difficult for him to lie, but that, all things being equal, he ordinarily tells the truth, and deviating from this ordinary behavior would feel odd, or difficult.

As I use the term, I want to mix something of the last two usages, and stand quite agnostic about the first. I don't care here about the ontological source of that which I call natural; instead, regardless of ontology, I mean to report either what, in a particular context, seems most difficult to imagine otherwise, or in a particular context, what seems to be the ordinary and expected behavior. Both aspects point to the sense in which some idea or practice can become, in a particular context, relatively uncontested--that which goes without saying, or that which need not be proven to be relied upon. It is this part that becomes the natural, even if it is plainly socially constructed, and it is this sense of natural then that I mean to refer to in the discussion that follows.

n47 Thus Roberto Mangabeira Unger, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy (Cambridge, 1986).

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D. The Elements of Construction

Construction is about change. Social meaning construction is about social meaning change. So how is change effected? What is its technique?

If meaning is the product of a text in a particular context, then we can change meaning by changing either text or context. I can say "thank you" when someone opens the door for me, or I can say "go to hell." The difference is in the text, and the difference yields a difference in meaning--indeed, all the difference in the world.

But texts are not always so easily changed. Being black is a text; being black in the antebellum South had a particular meaning. A black person could not simply change that meaning by becoming white; n48 if the meaning was to change, something other than the text had to change. That something else could only be the context, or more precisely, the associations that get made when the particular text is asserted.

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n48 Or as George Samuel Schuyler's amazing novel suggests, even if it were possible, the meaning would not be the same. See *Black No More: Being an Account of the Strange and Wonderful Workings of Science in the Land of the Free, A.D. 1933-1940* (McGrath, 1931).

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Thus, while at times texts can be changed, and changing them will be the easiest way to secure a desired social meaning, at times text cannot be changed, and in those cases, it will be easier, or simpler, or simply just, to allow the text to remain the same, while changing the context of understandings that give it its meaning.

This process of changing contexts to change social meanings--the process of changing the associations, of switching on certain links while switching off others--is what I mean by social construction. In the terms I have offered so far, social construction proceeds by breaking up the understandings or associations at a particular time or built into a relatively uncontested context, and upon which social texts have meaning. It proceeds by remaking that which is taken for granted, and which gives a particular text an unwanted meaning. It functions by switching on new associations. This breaking up, or remaking, requires effort; it follows from a practice. The question I want to ask here is how it so follows: What are the techniques that constitute this practice of meaning remaking.

II. Constructing Social Meanings

Meanings exist, and are used. Construction is about how they are changed--more particularly, how the contexts within which they exist are changed. My focus is on cases where the contexts are changed, not where they simply change. My aim is to understand intervention, not evolution.

The distinction is important. While most social meaning may simply change, in the sense that its content transforms or evolves over time, the cases I want to focus on here are those where social meanings are changed by the action of individuals or groups. It is this that I call construction. Other theories of social meaning take a less activist approach. Jack Balkin, for example, offers an extremely rich account of the evolution of social meaning, understood as a process through which the "cultural software" of individuals changes through time. n49 Michel Foucault's work is another example, though his is an account focused less on meaning, and more on the "meticulous observation of detail" n50 constructing structures of power and discipline in social life.

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n49 See J.M. Balkin, Cultural Software: A Theory of Ideology (unpublished manuscript on file with U Chi L Rev).

n50 Michel Foucault, Discipline and Punish: The Birth of the Prison 141 (Pantheon, 1977).

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My account is less general than these. While an account of how social meaning changes may include an account of how it is changed, my focus is just on the latter. It is meant to stand independent of this more general account. Compare: However it is that a boat is carried down a river, there is a question about how the captain steers the boat. It is that question--or more generally, whether and how--that I am interested in here.

Some misconceptions, however, should be removed at the start..To offer a theory about how social meaning is changed is not to say that all social meaning, or social reality, can be changed. n51 What social reality is is distinct from how it can be changed; and to say that some can be changed is distinct from saying that all can be changed. How much can be changed is itself a contingency--perhaps very little, perhaps lots. However much, what follows is an effort to account for that part that can be changed.

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n51 Construction theory raises properly three distinct questions. The first is ontological: Of what is social reality made? How much is constructed and does anything "natural" remain. But to say, as I do, that some social reality is constructed is not to take sides in this unhelpful debate. Although "how much is constructed" may be an important question in some contexts, its resolution is not essential here.

The second question is qualitative: For that part constructed, it asks, how easily can the constructed be changed--how "plastic," in Roberto Unger's terms, are the social structures that constitute us. See Unger, Social Theory (cited in note 13). This question is no doubt important, though less open, I think, to theory than descriptive accounts. We are, no doubt, differentially plastic--parts of who we are, individually and collectively, are more easily changed than others--but there is little we can say theoretically about which parts are more or less plastic.

The third question is simply pragmatic: For that part constructed, what are the mechanics of reconstruction? My focus is this third question. However much social reality is constructed, certainly some is; and however plastic the constructed part is, there is a distinct question about how that plastic part gets remade. Merely calling it constructed or deciding that it is plastic does not tell us just how it gets remade. What follows is an attempt at such an account.

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I begin again with examples. The examples divide into two sorts. With one kind (Sections A and B), there is a new social meaning sought, or an old meaning to be changed; with the other (Section C), there is an old social meaning that is being preserved. The first kind I call offensive construction; the second,

defensive construction.

A. Constructions: Offensive, Nonpolitical Changes

The first class of reconstructions I discuss is what I will call offensive and nonpolitical. I mean "offensive" as the opposite of "defensive." I mean "political" in a very narrow, if ordinary, sense: "Political" are those structures directed at establishing or maintaining or transforming a political order, such as the state; nonpolitical are those structures affecting the rest of social life.

[*964] Among political reconstructions are aspects of education, the construction of tradition, nationalism, and political ideology. n52 Among nonpolitical reconstructions are changes which, although they have political implications, are narrower than the first class. Thus, while I certainly agree with the kernel of truth in the slogan "it's all politics," n53 it is another sense of "politics" that I am referring to here.

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n52 See Section II.B.

n53 See Unger, Social Theory at 15 (cited in note 13).

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1. Helmets in Russia.

In the West (as in America versus Russia, not California versus New York), there has long been a battle to get motorcyclists to wear helmets. On one side of this battle stand health professionals, pointing to the extraordinary loss of life in accidents where bikers are not wearing helmets. On the other stand bikers, pleading liberty and an odd thrill from "cheating death." n54

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n54 For a recent example of this debate, see Kim Sue Lia Perkins, Helmet Bill Left Battered at Hearing: State Safety Official Backs Biker Stance, Ariz Republic A1 (Feb 3, 1993) (describing the controversy over Arizona's potential loss of \$ 1.5 to \$ 2 million in federal aid if it fails to pass helmet law).

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In this battle, both sides have invoked social meanings to support their side of the debate. Law itself has weighed in to help change these meanings. n55 But consider an extremely odd example coming from the former Soviet Union.

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n55 In states with helmet laws, wearing a helmet has more of an ambiguous meaning: law-abidingness, as well as a concern for safety or lack of machismo. Of course, for some bikers, law-abidingness itself may be a sign of lack of machismo.

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Before the 1960s, motorcyclists in Soviet Russia did not wear helmets. In part this was because of a lack of any perceived need to wear helmets; in part it was because the Soviet economy failed to produce any helmets. Helmets were worn in Western Europe, however, and like most Western goods, by the late 1950s, helmets were slowly finding their way into Soviet Russia. Soon, some Russians began to wear motorcycle helmets produced in Western Europe. The primary design of these was French, and they were what we would now think of as half-helmets, primarily white.

When these helmets first began to appear, the Soviet government quickly reacted against them. For despite bearing the medical costs associated with cycling accidents, the Soviets perceived a much greater cost to the Soviet state associated with individuals wearing helmets, that is, the invasion of Western style. Because helmets were produced only in the West, wearing them was a political statement antithetical to the message the Soviet government wanted broadcast.

Thus began an extraordinary and self-conscious campaign by the Soviet government to vilify the wearers of motorcycle helmets. Cartoons appeared in the popular (read: government-controlled) press, mocking the "white heads" on cycles. By the early 1960s, people began wearing helmets only at night, to avoid easy detection.

The night-riding behavior suggests the campaign attacking helmet wearing as "imperialism" had some effect. For no laws were passed banning the wearing of helmets. The campaign, to the extent it had some effect on behavior, had its effect through stigma only. And to the extent behavior changed, this indicated that to some degree the Soviet government succeeded in stigmatizing those who wore white helmets.

Soon after this campaign reached its apex, however, the interests of the Soviets changed. The government started producing Soviet helmets. Once Soviet helmets were available, the propaganda campaign began to shift. No longer was it stigmatizing to wear helmets; it was only stigmatizing to import helmets. The social meaning of helmet wearing was again transformed, and again, transformed self-consciously by government propaganda. After Soviet production of helmets began, the social cost of wearing (Soviet-produced) helmets was allowed to fall, and the incidence of wearing helmets rose.

2. Civil rights in the American South.

During the legislative hearings on the Civil Rights Act of 1964, supporters of the bill called before the committee white, southern employers and business owners whose discrimination against blacks was the prime target of the legislation. Some of these employers and businessmen supported the bill, and some of them supported the bill for reasons quite relevant to our analysis of social meaning construction. n56

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n56 For a rich and comparable analysis, see Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv L Rev 1003, 1065-85 (1995).

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For obvious reasons, it would have been better for southern employers and businesses had there been no discrimination [*966] against blacks. Employers would have benefited, since the labor pool would have increased and wages decreased. Businesses would have improved, since the demand for services would have increased--so long, that is, as whites did not shift their custom.

It was this last possibility, however, that set the stage for business support for the Civil Rights Act. For what business leaders feared was the retaliation of whites against their voluntary efforts to integrate. This retaliation had both a behavior and a meaning. The behavior was simply the shift of business to another local business. n57 The meaning was a form of stigma, this time stigma suffered by whites. In a context where voluntary integration was permitted, for a white to serve or hire blacks was for the white to mark him or herself as having either a special greed for money or a special affection for blacks. As one restaurant owner said, "If I'm the only one, how can I face my fellow citizens with pride?" n58

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n57 See the testimony of Burke Marshall in A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce, Hearings on S 1732 before the Committee on Commerce, 88th Cong, 1st Sess 216 (1963) (stating that an overwhelming number of southern businessmen favor desegregation, but face serious collective action problems). See also Leslie A. Carothers, The Public Accommodations Law of 1964: Arguments, Issues and Attitudes in a Legal Debate 20-21 (Smith College, 1968) (same).

n58 Civil Rights: Hoss Unhorsed, Time 51 (Aug 14, 1964) (emphasis added). See also The Supreme Court: Beyond a Doubt, Time 13, 14 (Dec 25, 1964).

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How would the Civil Rights Act change this? In a context where there is no legal proscription against discrimination, the act of hiring or serving a black had a relatively unambiguous meaning--either a special favor for blacks or greed for money. But if that context were changed such that discrimination against blacks was illegal, then at the least, the decision to hire a black would have an ambiguous meaning. The businessman could be hiring or serving a black because of his concern for the status of blacks, or he could be hiring or serving blacks because of his concern to obey the law. By creating this important ambiguity, the law would function to reduce the symbolic costs of hiring blacks. n59 And by reducing the symbolic costs, it would increase, on the margin, black service and employment. n60

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n59 Gerald Rosenberg makes the same point in The Hollow Hope: Can Courts Bring About Social Change? 102 (Chicago, 1991).

n60 Richard Epstein points to this example as one of the effects of the antidiscrimination laws. See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 127 (Harvard, 1992). But he goes on to say that the legislation was not needed to solve a collective action problem. *Id.* at 128. This is a point that will have much salience below. Suffice it here that while there was not a collective action problem related to violence, if hiring blacks, or serving blacks was a social meaning, then there was a collective action problem in transforming it.

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[*967]

This example is important because it demonstrates how a government can change social meaning without having control over social meaning. Had the federal government had control over social meaning in the way Orwell speaks of such control, it would simply have decreed that blacks be considered equal to whites. Such a decree would have had--as some argue *Brown v Board of Education* n61 did have--little effect. n62 But such powerlessness notwithstanding, the government does have the power to change the marginal social costs of various social actions by rendering certain meanings ambiguous.

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n61 347 US 483 (1954).

n62 Rosenberg, *The Hollow Hope* at 70.

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3. Helmets in hockey.

A third example follows directly from the first two: For obvious reasons, wearing a helmet in hockey is a cost-minimizing strategy, at least when the only costs reckoned are physical or health costs. n63 For much of the history of professional hockey, however, most hockey players did not wear helmets. There are two salient reasons for their refusal. One reason is that the helmets have a small effect on the player's ability to see; the other is that the helmets were not consistent with the macho self-image of hockey players. A player who wears a helmet then suffers two kinds of costs: First, an efficiency cost relative to other players, since his vision is slightly impaired; and second, a stigmatic cost relative to other players, since their and others' vision of his "machoness" is impaired.

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n63 For some quibbles, compare Thomas C. Schelling, *Micromotives and Macrobehavior* 213-14 (W.W. Norton, 1978), with Richard H. McAdams, *Relative Preferences*, 102 *Yale L J* 1, 21-22 n 81 (1992).

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The first of these two costs can be partially eliminated, though to do so raises a collective action problem. Since the harm caused by the impaired vision is partially simply relative, then that portion of the harm would be

eliminated if all wore helmets. n64 The second harm--the stigmatic harm--also presents something of a collective action problem, though I want to defer for the moment a discussion of the structure of this collective action problem. n65

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n64 Impaired vision will increase the incidence of accidents, which cannot be reduced by having all wear helmets, but presumably that increase is outweighed by the decrease in severity of accidents.

n65 See Section III.A.

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What is interesting for our purposes is the nature of the solution adopted by the National Hockey League. Just as in the case of the Civil Rights Act, the League made it a rule that players wear helmets. n66 The effect of this rule is much like the effect of the Civil Rights rule mentioned above. After this rule, the stigma costs of wearing a helmet are less than before the rule, since after the rule, the social meaning of wearing the helmet is--at a minimum--ambiguous between a failure in machoness and a need to conform to the rules of the game. As one sports commentator put it, referring to the debate over face guards, "Yet others note a certain unmanly stigma in the use of a face guard. 'I'm glad I have an excuse to wear one,' says Montreal center/wing Ryan Walter." n67 The rule contributes to the undermining of the past macho-focused practice. n68

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n66 The rule--Rule 23(b) of the League Rules--came into effect in 1979 for players who signed contracts after June 1979. Players signing before this were allowed to play without helmets as long as they signed waivers. See N.H.L. Rules New Players Now Must Wear Helmets, NY Times C14 (Aug 7, 1979).

n67 Craig Neff and Robert Sullivan, A Prescription for Safety, Sports Illustrated 7 (Jan 13, 1986).

n68 Unfortunately, the rule may also increase the violence of the game. Some players have complained that the rule makes players less concerned about "checking" others, since the damage caused is decreased. See Kevin Allen, Players Take Hats Off to Helmetless, USA Today 7 (Nov 13, 1991); Skip Myslenski, Hats Off to "The Hatless 5"--But Watch Those Sticks, Chi Trib C1 (Oct 15, 1991). Compare Sam Peltzman, The Effects of Automobile Safety Regulation, 83 J Pol Econ 677 (1975) (better safety devices lead people to drive more intensely and take more risks).

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4. Dueling in the American South.

For much of the history of the American South, state governments struggled against a well-entrenched practice of dueling. Odd as it may seem, this practice of dueling--the ritual of retiring to a field and firing pistols at

one another to satisfy a social insult--was the domain of southern gentlemen only. n69 Not just anyone could successfully challenge another for a duel; only someone with a sufficiently high social standing. n70 Lines, of course, were not sharp, and some on the margins of high society used dueling as a way to secure their place in high society (Aaron Burr, it is said, challenged Hamilton in part to elevate his social [*969] position n71). But social climbers notwithstanding, the class for whom dueling was a practice was relatively small.

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n69 Jack K. Williams, *Dueling in the Old South: Vignettes of Social History* 26-27 (Texas A&M, 1980) (describing the social stratification of dueling).

n70 *Id* at 27 ("No gentleman ever accepted a challenge from one not considered his social equal.").

n71 See *id* at 16 ("A number of public figures gained prominence and were pushed ahead in their careers because of prowess in dueling.").

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The details of this scheme need not concern us here. For our purposes, it is enough to note some of the more obvious oddities of this social ritual. Consider first its disproportionality. A gentleman could be challenged for the slightest insult--merely for being personally cold, for example, in a social setting--yet the challenge could lead to death. n72 More interesting still is its essential randomness: for the duel can result in the death of either the injurer or the injured, with no mechanism to assure that the punishment tracks the guilty. n73 The duel was like a lawsuit where the judge, after establishing that indeed there was a wrong, flips a coin to decide who, between the plaintiff and the defendant, should be executed for the wrong. No doubt then, the duel often misfired, either because the challenge itself was wrongful and the challenged suffered death, n74 or because the challenge itself was correct but the challenger suffered death (not to mention the harm of the death even if the "correct" person died). Charles Dickinson, for example, died at the hands of Andrew Jackson after Jackson had "made uncomplimentary remarks about" Dickinson's wife. n75

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n72 *Id* at 13.

n73 See Warren F. Schwartz, Keith Baxter, and David Ryan, *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 *J Legal Stud* 321, 335 (1984) ("Dueling seems to have represented a system employing a very high penalty, a very low probability of imposition, and an extremely high error rate.").

n74 *Id* at 325.

n75 Williams's account is too wonderful to omit:

At the single word "Fire!" Dickinson aimed and shot. His ball hit Jackson in the chest but Old Hickory did not fall. Instead, he raised his left arm and pressed it against his wound, then raised his right arm slowly, aimed, and squeezed the trigger. The hammer stopped at half-cock. Jackson, bleeding badly, drew it back and fired again. Dickinson was killed. Jackson recovered to become judge, general, and president--and to fight more duels.

Williams, *Dueling in the Old South* at 19 (cited in note 69).

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Many have attempted to explain the rationality of this practice. The question of rationality has two perspectives. From one perspective, the question is whether, given structures as they were, it was rational for any individual to participate in a duel. The other is whether it is rational for a society to have the social structure of dueling. Consider each in turn.
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We have seen enough to see how it could be rational for an individual to participate in a duel, if existing structures of social meaning are taken as fixed. n76 To refuse a challenge wrongfully opened one up to severe social sanction, and the burden of this sanction could easily outweigh the expected cost of participating in the duel. Moreover, by rightfully and properly executing a duel, though risking death, one could establish oneself as a gentleman, a person to be trusted and engaged, and thus awarded significant social advantages. Social meanings could well be such that there would be a net benefit from engaging in a duel if rightfully challenged. If so, we could say, from the individual's perspective, dueling was rational.

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n76 See Schwartz, Baxter, and Ryan, 13 J Legal Stud at 341 (cited in note 73).

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The harder question is whether the practice was rational from the social perspective. To us, certain features are clearly ridiculous: the practice is random, it strikes down some of the community's most valuable citizens, and its sanction is not proportional to its harm. On the other hand, no doubt it was a polite society, n77 whose honor (supported by the system of dueling) helped it avoid the cost of cheating. n78 How--from where--one weighs these benefits and costs is an unanswerable question. But for our purposes, this ultimate judgment is not important. It is enough to note that southern states were quick to ban dueling, and to ask whether, and how, this ban was effective.

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n77 With an extremely elaborate practice of politeness. Williams, *Dueling in the Old South* at 30 (cited in note 69).

n78 Schwartz, Baxter, and Ryan, 13 J Legal Stud at 333 (cited in note 73).

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We should note up front what is a commonplace in the history of American dueling: Regardless of their form, attempts to regulate dueling were largely ineffective. n79 But even though generally a failure, there are differences in the effectiveness of the different kinds of regulation. n80 For our purposes, we can isolate [*971] two distinct forms. One form aimed to eliminate dueling simply by banning it from social life; the other aimed to eliminate it simply by changing its social meaning. n81 Consider the very different ways these two regulations would work.

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n79 See id at 327. In part they were ineffective because not enforced. Williams, *Dueling in the Old South* at 66 (cited in note 69). In part they were not enforced because of an odd conflict in the structure of interests regulating the regulation of dueling. On the one hand were the proponents of dueling's ban, the most vocal of which were newspaper editors, who were also those most likely to be challenged to a duel. Id at 60. It was their business to insult, but they were not immune from social sanction. Thus they, along with the general population, were strongly behind antidueling law enactment. Schwartz, Baxter, and Ryan, 13 *J Legal Stud* at 328 (cited in note 73). On the other hand, enforcement was within the domain of the elite. It was less public and less under popular control. See Williams, *Dueling in the Old South* at 68 (cited in note 69) (describing judicial hesitation in enforcing antidueling laws). Thus enforcement practices could in effect preserve what was proscribed by the democracy more generally.

n80 See Schwartz, Baxter, and Ryan, 13 *J Legal Stud* at 326-27 (cited in note 73).

n81 A third form of private social regulation was the creation of antidueling societies. See Williams, *Dueling in the Old South* at 64 (cited in note 69).

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As suggested above, what held dueling together was solidarity among an elite class. Simply banning dueling would not necessarily challenge that solidarity. Indeed, if the elite viewed the ban as imposed by the nonelite, ignoring the ban would itself be a demonstration of solidarity. n82 We can see this by imagining a somewhat stylized exchange between two potential combatants:

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n82 Indeed, remaining outside the ordinary system was a form of virtue. Jackson's mother is said to have told Jackson, "Never tell a lie, nor take what is not your own, nor sue anybody for slander or assault and battery. Always settle them cases yourself !" Id at 5 (emphasis omitted).

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Challenged: "I decline your challenge on the grounds that dueling is illegal."

Challenger: "But these are laws passed by commoners; they do not represent the will of gentlemen."

Challenged: "Yes, but if we engage in dueling we are likely to be jailed or hanged, if one of us is killed."

Challenger: "So you are as I thought--a coward."

Proscription here fails in part because it directly challenges the norms of loyalty built within the social structure, and these norms can be quite strong. n83 Within the elite's rhetorical structure, a law banning dueling was not a sufficient reason to refuse to duel. n84

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n83 This is not to say it had no effect. Williams writes that "anti-dueling laws gave moral courage to some" to decline a duel. Id at 70-71.

n84 Compare id at 60 (discussing public opposition to dueling).

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But a second type of sanction, while in some sense less severe, might actually have been more effective. n85 Under this sanction, an individual participating in a duel was barred from public office after the duel. n86 Holding public office, however, or more importantly, serving the public, was itself a duty of the elite. Thus, exclusion created a conflict in the duties faced by the elite, and hence an elite-based reason for refusing the challenge of a duel. Imagine again a dialogue declining the duel:

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n85 See Schwartz, Baxter, and Ryan, 13 J Legal Stud at 328 (cited in note 73).

n86 Williams, Dueling in the Old South at 67-68 (cited in note 69).

-End Footnotes-

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Challenged: "I decline your challenge on the grounds that it will bar me from serving in public office in the future."

Challenger: "But you are obligated as a gentleman to accept my challenge."

Challenged: "I am also obligated as a gentleman to serve my state, and I consider that duty superior to my duty to give you satisfaction. I agree it would be better if I were free to satisfy both duties, and I would willingly accept your challenge if it did not disable me from serving my state. I have

no control over that, however. I must, therefore, respectfully decline."

What is different about the second proscription is that it functions within the elite's rhetorical structure, to undermine the very basis for dueling itself. A gentleman could appeal to a gentleman's duty in escaping the duel, rather than appealing to self-interest or the rules of commoners. The state's action here served to ambiguate a gentleman's duty, and thereby facilitated the transformation of the social meaning of dueling itself. Against the background that the state has reconstructed, to choose to duel would be to choose to serve private interests over collective duty.

Even this sanction was ineffective for much of the history of the old South, however, usually because legislatures passing this disability would grandfather all duels up to the time of the legislation and would re-pass the grandfather legislation every few years. Thus the disability actually affected few, as the grandfathering reaffirmed the social status of the practice. Nonetheless, my point here is not so much about whether the laws were in fact effective, but rather the different ways that they could have been effective. It is enough to note that their effectiveness turned in part upon how well they connected with an existing structure of social meaning.

B. Constructions: Offensive, Self-Consciously Political Changes

The examples I have just given are examples of reconstructions that are relatively narrow within a particular culture. They are in one sense harmless, since they are not political in the sense of being about the creation or maintenance of political structures, and since our anxieties about the idea of social construction are greatest when connecting to matters of politics. Of course this is not to say that these changes have been "nonpolitical"--none could say that the civil rights acts did not involve politics. But what I mean by political here is simply that the structures transformed have not been tied directly to what we traditionally consider political interests.

The examples that follow should provoke more of these anxieties. For each ties directly to the interests of the state, and hence each will appear more political than the last. Each is an example of the state using its power to define and limit itself. No state that deserves the name has ever refrained from this type of social construction, although I again defer a discussion of its force and limits. In each of the following examples, a common pattern of construction will be revealed--one more clumsy and less effective perhaps than the examples just given, but nonetheless, a pattern that has in each case an important effect.

1. Education.

"Education is not the teaching of the three R's. Education is the teaching of the overall citizenship to learn to live together with fellow citizens, and above all to learn to obey the law." n87 In the introduction to his argument in *Cooper v Aaron*, Thurgood Marshall echoed an important theme in the history of state education. Of course education conveys information; but more importantly, it also makes certain kinds of people. This is precisely the reason that many are so keen to control the content of what goes on in "our" public schools.

n88 It is the premise behind the (mistaken) belief that if only kids could pray in school, drugs would go away.

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n87 See Brief for Respondents at 6, Cooper v Aaron, 358 US 1 (1958).

n88 Suzanna Sherry, Responsible Republicanism: Educating for Citizenship, 62 U Chi L Rev 131 (1995). See also Amy Gutmann, Democratic Education 3 (Princeton, 1987).

-End Footnotes-

How does this construction of citizens work? It is Bourdieu who has provided "one of the few coherent accounts of the central role that schools have in both changing and in reproducing social and cultural [structures and] inequalities from one generation to the next." n89 "If it be accepted," Bourdieu writes, "that culture . . . is a common code enabling all those possessing that code to attach the same meaning to the same words, the same types of [*974] behavior and the same works," then "it is clear that the school . . . is the fundamental factor in the cultural consensus in as far as it represents the sharing of a common sense which is the prerequisite for communications." n90

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n89 Richard Harker, Bourdieu--Education and Reproduction, in Richard Harker, Cheleen Mahar, and Chris Wilkes, eds, An Introduction to the Work of Pierre Bourdieu: The Practice of Theory 86 (St. Martin's, 1990).

n90 Pierre Bourdieu, Systems of Education and Systems of Thought at 162 (cited in note 19).

-End Footnotes-

To an American ear, this may exaggerate the extent to which education constructs culture. In a world where children are dazed in front of a television set three times the time they are in school, the role of school in constructing citizens may seem quite small. But Bourdieu writes of France, where education is far more centralized and nationally regulated. And his exaggerations notwithstanding, three aspects of the process that he describes are shared by the French and American systems.

First, the process of education is in many ways a process "of inculcation which must last long enough to produce a durable training." n91 The training must make aspects of the culture part of the habitus, n92 or ordinary routine, of the individual. This long inculcation has as its aim the construction of an ordinary response for the properly educated child--one that provides a minimum within a particular culture for existence within that culture. Certain ways of behaving must become automatic--or what we revealingly call "second nature." n93

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n91 Pierre Bourdieu and Jean-Claude Passeron, Reproduction in Education, Society and Culture 31 (Sage, 1977).

n92 Bourdieu, Language and Symbolic Power at 12-13 (cited in note 42).

n93 See id at 172-73; Pierre Bourdieu, Distinction: A Social Critique of the Judgement of Taste 466 (Harvard, 1984).

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Second, this process of acculturation follows from an authority that is necessarily coercive. n94 Even if one believed that there was nothing coercive in learning that two twos are four, education is not all so transparent, and certainly not the part that Marshall called "citizenship." Pedagogic action always inculcates "meanings not deducible from a universal principle . . . : authority plays a part in all pedagogy, even when the most universal meanings . . . are to be inculcated." n95 The education proceeds from one with authority to one who can be disciplined for resisting or challenging that authority.

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n94 Bourdieu and Passeron, Reproduction in Education, Society and Culture at 11 (cited in note 91).

n95 Id at 10.

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But third and most important, this coercion is only effective to the extent that it is understood or seen as something other than coercion. If the discipline or coercion is revealed or under- [*975] stood as "mere" coercion, then its pedagogic effect ceases. In America, Bourdieu writes, it is not possible to adopt the forms of inculcation practiced in France. A wide use of corporal punishment or disgrace as a means to coerce students into learning would appear to Americans as "coercion" rather than education. Instead, he writes, American teachers "overwhelm . . . pupils with affection . . . by the use of diminutives and affectionate qualifiers, and by insistent appeal to an affective understanding." n96 Accepting Bourdieu's characterization of American education, this "affection" functions no less coercively for Americans than disgrace functions for the French. For it uses that "subtle instrument of repression, the withdrawal of affection," n97 which operates in context as effectively as disgrace. It, like disgrace, is a tool to ensure conformity, and a practice of naturalized conformity is the essence of a successful education.

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n96 Id at 17.

n97 Id.

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Education thus proceeds (1) through a practice, (2) directed by an authority, (3) that coerces--without appearing to coerce--acceptance of the substance of what is taught. These elements are the components of a machine that constructs a certain world for the children it touches and constructs citizens out of these children. In this way it is a model of social meaning construction, one that hides its arbitrariness by "misrecognizing" the arbitrary as a part

of nature. n98

-Footnotes-

n98 See id at 31.

-End Footnotes-

Plainly in part this construction is "political." n99 Children are trained in one hour that two twos are four and, in the next hour, that America or the Soviet Union has promoted democracy throughout its history. They begin their day pledging allegiance to the flag, and move without interruption into classes about natural science and then about society. The messages are mixed, and none distinguishes the ontological root of the "truth" that a student must inculcate. A child can no less plead "but this, sir, is just a social construction" than she can declare "I believe two twos are five." While we reward individuality, we sanction disagreement. While we may encourage separate thinking, we do so only after we have rewarded and encouraged an essential conformity. Before a child is permitted the freedom to criticize democracy, she must inculcate the picture that no democracy could be better than America's.

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n99 See Gutmann, Democratic Education at 96-97 (cited in note 88) (discussing what a politically correct--but not "PC"--democratic education would look like). See also Bruce Ackerman, Social Justice in the Liberal State 139-67 (Yale, 1980); Relinde de Greef, Socialization and Children's Literature: The Netherlands, 1918-1940 ch 2 (1993) (London School of Economics doctoral dissertation on file with U Chi L Rev).

-End Footnotes-

I do not mean to exaggerate the significance of this education in the overall construction of America's youth. Indeed, perhaps most of what inculcates children comes from aspects of popular culture within the control of CBS or ABC rather than local school boards. But this is just a quibble about the significance of education, not a disagreement about its nature. Education is that institution most clearly revealed to be dedicated to the construction of certain types of people, through subtle and important coercion, dependent upon the invisibility of this very same coercion.

2. Language.

A second example of a political construction is one that may seem alien in an American setting, although it was a fundamentally important construction of our political past. This is the regulation of language by a political elite.

The regulation of language has been political because it promotes nationalism. More than "a way of communicating propositions about the world," n100 language is "a constitutive social activity," n101 one that has the power "to organize action" and to be an "effective tool of nationalist unification." n102 Throughout much of modern history, it has functioned "as the cement of nationalism." n103 Nations have used national languages to construct separations between citizens, and hence identity among common speakers.

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n100 Donald Lawrence Brenneis and Fred R. Myers, *Dangerous Words: Language and Politics in the Pacific* 6 (New York, 1984).

n101 Id.

n102 Herzfeld, *The Social Production of Indifference at 100* (cited in note 37).

n103 Id at 98.

-End Footnotes-

Here again, France provides a good example. Prior to the French Revolution, linguistic unification was part of the construction of a monarchical state. n104 But such unification could not occur simply by decree. Instead, a regimented educational system that enforced the dominant language was necessary, as well as a unified labor market that could ensure that language would penetrate ordinary life. n105 In both contexts the experience is coercive, in just the sense that education in general is coercive: individuals may voluntarily conform to the social expectation, but they do so in a context where the sanction for failing to conform is a form of social death.

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n104 See Bourdieu, *Language and Symbolic Power* at 5-6 (cited in note 42).

n105 Id at 6.

-End Footnotes-

Few who have lived the struggle over French in Quebec or Spanish in south Los Angeles would argue that this coercion is minor. Nor would they describe these struggles as unself-conscious. That is, people are aware of the importance of language. France again provides an example: The Academy has long had the jurisdiction to define proper French, and it continues today self-consciously to protect French from non-French invasions. The government has used its power to punish those who violate this language code, even though its power here is quite limited. n106 Nonetheless, what France does is not different in kind from what happens in every nation. The difference is the degree of centralization and self-consciousness. America has its own academy of proper English, but that academy is relatively decentralized in comparison with the French. Again, it enforces its codes in the schools, which can, because decentralized, be different in different places.

-Footnotes-

n106 See Ministry Puts Ban on English Imports, 46 Intl Mgmt 15 (Apr 1991) (describing France's effort to ensure "linguistic purity").

-End Footnotes-

What marks language, then, as a social construction is its conformance with the three elements of education that I outlined above. Like education,

language is learned through a process of inculcation. Like education, it proceeds from an authority, whether centralized--in the way that "French" is centralized--or decentralized--in the control of local authorities. Finally, like education, it is a process that is inherently coercive. One is punished, either directly or indirectly, for incorrect speech, whether the speech is ungrammatical (in the context of third-grade English) or too grammatical (in the context of a workers' pub), and that punishment is successful as coercion only when it is, in Bourdieu's sense, "misrecognized" as such. Where the coercion to a particular language is recognized as coercion--where the political nature of such inculcation, always present, is understood to be present--then the process comes apart. Language succeeds as construction only when it is genuinely background, and this it can be only when genuinely uncontested. Once background and uncontested, language is construction.
[*978]

3. Tradition.

The construction of a language can proceed only against a background tradition or history. Tradition or history is "an act of writing and reading": n107 it presents itself through stories or histories taught by those charged with carrying the tradition forward. It is not surprising, then, that "it is the discourse of 'history' that is the most powerful and most fought over." n108 Because what we identify as tradition "is always already a selective tradition[--]a present view of a past that best serves the purpose of . . . justifying the status quo" n109 --the construction of a tradition itself is within the domain of constructed social reality.

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n107 Andrew Lass, Romantic Documents and Political Monuments: The Meaning-Fulfillment of History in 19th-Century Czech Nationalism, 15 Am Ethnologist 456, 458 (1988).

n108 Id.

n109 Id at 457 (emphasis omitted).

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Following Eric Hobsbawm, we can describe this constructed tradition as an "invented tradition." An invented tradition is "a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past." n110 Like every effective construction discussed so far, its success depends in part upon its hiding its constructed nature, and this hiding is achieved by maintaining an image of apparent continuity.

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n110 Eric Hobsbawm and Terence Ranger, eds, The Invention of Tradition 1 (Cambridge, 1983).

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The construction of tradition proceeds in two very different ways, one that we could call positive, and the other, negative. The positive is "essentially a process of formalization and ritualization, characterized by reference to the past, if only by imposing repetition." n111 It proceeds not so much by silencing other interpretations--though there are important examples of this silencing n112 --but by emphasizing selected interpretations. It emphasizes these selective interpretations by repeating them at ritualistic times or in ordinary life. This method is the method by which American tradition has been built--through a story told so often that it cannot be questioned as truth.

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n111 Id at 4.

n112 See the example of Czech history discussed in Lass, 15 Am Ethnologist at 460 (cited in note 107).

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The negative construction of tradition is an institutionalized practice of forgetting. The extreme of this practice is described by Milan Kundera: [*979]

The first step in liquidating a people, said Hubl, is to erase its memory. Destroy its books, its culture, its history. Then have someone write new books, manufacture a new culture, invent a new history. Before long the nation will begin to forget that it is and what it was. The world around it will forget even faster. n113

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n113 Philip Schlesinger, Media, State and Nation: Political Violence and Collective Identities 137 (Sage, 1991), quoting Milan Kundera, The Book of Laughter and Forgetting (Harper, 1983).

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This seems extreme only because such a practice is no longer likely at the level Kundera describes. But this does not mean the practice is no longer possible. Indeed, the negative reconstruction of tradition is all the more dangerous when silent or subtle. Kundera comes from a tradition that has twice suffered "a large power depriving a small country of its national consciousness [through the] methods of organized forgetting." n114 And even without being so extreme, the practice can be quite significant. The potential for the "airbrushed tradition" turns in part on the extent to which "alternative historical interpretations . . . are made possible, through the recovery of what had been discarded." n115 To the extent that there is any "institutionalization of collective memory" there is an "institutionalization of forgetting," n116 for the institution that decides what to remember also decides what to forget.

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n114 Connerton, How Societies Remember at 14 (cited in note 35). Czech nationalists also did some reconstruction themselves, through the construction (this time literally) of what have been called the RKZ documents, which purported (they were forgeries) to show that the Czechs had an "epic tradition" comparable "with the German, Russian and Balkan epic cycles." Lass, 15 Am Ethnologist at 460 (cited in note 107). Vergil's Aeneid is another useful example--a self-conscious attempt to write a national epic, modeled on the Iliad and Odyssey. I am grateful to Alan Meese for this example.

n115 Lass, 15 Am Ethnologist at 457 (cited in note 107).

n116 Id.

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The pattern of these constructions is familiar. Whether negative or positive, the invented tradition begins with a certain kind of learning through inculcation. The learning proceeds from an authority--a government, or a university, or a church--that purports to report the facts of the past, learned as uncontested. n117 It succeeds to the extent that this pattern of learning and inculcation succeeds at freezing certain ideas about traditions into a taken-for-granted pattern of thought or action.

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n117 Alexander Blankenagel, Tradition und Verfassung (Nomos, 1987)

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[*980]

4. Nationalism.

One particular type of tradition that it is the pathology n118 of our time to embrace is nationalism. n119 Through the use of "state institutions, such as the schools, political parties, the bureaucracy, and the communications industry," states have attempted to "forge a collective will and establish popular identification with the imagined political community of the nation." n120 The goal is "to incorporate diverse peoples and heritages into a totalizing national project." n121 And unsurprisingly, it is a process that follows a now familiar pattern.

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n118 Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism 14-15 (Verso, 1983) (discussing uses of language to promote nationalistic goals).

n119 See generally Liah Greenfeld, Nationalism: Five Roads to Modernity 1-26 (Harvard, 1992) (discussing the formation of nationalism).

n120 Crain, 63 Anthropology Q at 43 (cited in note 44).

n121 Id.

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What is most striking about this nationalism and, for our purposes, most revealing, is that this process of constructing a national political identity is a "specifically modern phenomenon of cultural integration." n122 It is an "ism" that was born at the death of dominant religious modes of thought, n123 most clearly beginning in "the popular national movements proliferating in Europe since the 1820s." n124 The Swiss for example think of themselves as a "nation" over seven hundred years old, yet it was only in 1891 that the nation "decided on" 1291 as the date of the "founding" of Switzerland. n125 Not surprisingly, this process presents "nationality" as natural. As Ernst Gellner, with unmasked frustration, puts it:

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n122 Jurgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 *Praxis Intl* 1, 3 (1992).

n123 See Anderson, *Imagined Communities* at 19 (cited in note 118) (discussing the connection between notions of state sovereignty and the "divine").

n124 *Id* at 86.

n125 *Id* at 135.

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Nations as natural, God-given ways of classifying men, as an inherent though long delayed political destiny, are a myth; nationalism, which sometimes takes pre-existing cultures and turns them into nations, sometimes invents them, and often obliterates pre-existing cultures: that is a reality, for better or worse. Those who are its historic agents know not what they do, but that is another matter. n126

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n126 Schlesinger, *Media, State and Nation* at 168 (cited in note 113), quoting Ernest Gellner, *Nations and Nationalism* 48-49 (Oxford, 1983) (emphasis omitted).

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[*981]

Because, like tradition, nationalism must select among the texts of the past in its construction of a present "nation," nationalism is "to a certain extent a construct" and is thus rendered "susceptible to manipulative misuse by political elites." n127 It is "a form of collective consciousness which both presupposes a reflective appropriation of cultural traditions that have been filtered through historiography and which spreads only via the channels of modern mass communications." n128

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n127 Habermas, 12 Praxis Intl at 3.

n128 Id.

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The tools of this construction should now be familiar. To succeed, nationalism must find some way to "identify civil institutions with a pure form of some putative national culture," n129 and some way to inculcate this conception into a preexisting culture or society. This only becomes possible once the state has "direct and increasingly intrusive and regular relations with the subjects or citizens" and as the older forms of interaction tend to weaken. n130 But beyond the ritual of "bureaucratic actions," there are other everyday rituals. n131

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n129 Herzfeld, The Social Production of Indifference at 48 (cited in note 37).

n130 Hobsbawm and Ranger, eds, The Invention of Tradition at 265 (cited in note 110).

n131 See Herzfeld, The Social Production of Indifference at 37 (cited in note 37).

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"Once in being, a nation-state has to establish a pervasive reinforcement of its culturally constructed logic in every aspect of daily life." n132 This is the practice we have seen in the construction of education, language, and tradition discussed above. Furthermore, achieving a national culture or character requires a common "appeal to the conventions of collective self-representation," n133 made easier when this appeal can be tied to "reality and nature, to visual and other material images." n134 This nationalism is its authority. The history of cleansing, xenophobia, and annihilation is its coercion.

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n132 Id at 65.

n133 Id at 72.

n134 Id at 75.

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One example is the story of the Indians of Ecuador. In the early part of the history of Ecuador, "a relatively unified national self was constructed in opposition to an inferior indigenous other." n135 The national self was constructed as either white or mestizo, and Ecuadorian history was "largely the history of great men, particular notables, gentlemen, priests and military leaders, [*982] while Indians were assigned either a secondary or invisible role."

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n135 Crain, 63 Anthropology Q at 46 (cited in note 44).

n136 Id.

-End Footnotes-

But since the 1980s, Ecuador has attempted a reconstruction of its national self. "The period since 1979 has been accompanied by a burgeoning discovery and revalorization of indigenous popular culture." n137

-Footnotes-

n137 Id at 50.

-End Footnotes-

While earlier policy with respect to the Indian was based either on exclusion or on partially successful attempts to integrate the Indian within the national community, the recent period of Ecuadorian history has been characterized by a repatriation of certain aspects of Indian experience and tradition, now redefined as "national." n138

-Footnotes-

n138 Id at 47.

-End Footnotes-

Before, "Indian" was something the national identity defined itself against; now, "Indian" is something the national identity incorporates.

The techniques of this reintegration are familiar. It is practiced through national holidays and state-sponsored festivals. These practices connect with a now authoritative picture of Indian culture and life. The approved view is financed; the old view silenced. And if successful, the result of this process will be the reconstruction of Ecuador with a conception of the state not as "the land of oligarchical privilege" but as a "pluri-ethnic" field. n139

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n139 Id at 50.

-End Footnotes-

The success of these efforts is no doubt mixed, as the "state's increased role in organizing cultural productions" n140 generates mixed responses. No

doubt, the precise construction hoped for by the state is not the construction that will ultimately succeed. But as I have emphasized throughout, success is not a measure of influence, and there can be little doubt that this attempt has had influence. n141

-Footnotes-

n140 Id at 56.

n141 By far the best examples of this constructive nationalistic effort can be found in the context of colonialism. For an exceptional account of the colonialization process in South Africa, see generally Jean Comaroff and John Comaroff, 1 Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa 2-3 (Chicago, 1991).

-End Footnotes-

5. Political.

My final example of a self-conscious effort to reconstruct social meaning is drawn from perhaps its most obvious home, the [*983] former Soviet Union and its efforts to build itself into the nation that its ideology professed. If "every society is in part spontaneously generated . . . and in part consciously shaped and directed by its political elites," n142 then the Soviet Union was at the extreme of "consciously shaped and directed" cultures. Much of this construction was a failure; but much was not, and, for comparative purposes, some of the failures are quite revealing.

-Footnotes-

n142 Lane, The Rites of Rulers at 1 (cited in note 19).

-End Footnotes-

In her work examining the Soviet cultural history, Christel Lane sketches some of the mechanisms that the Soviets used to "change the consciousness of the ruled to bring perceptions of social reality into line" with the official ideology. n143 This cultural management "utilized a large variety of means to achieve the desired changes in the consciousness of individual members of society, . . . even by changing actual social relations." n144 For Lane, however, a key mechanism of change was the Soviets' use of political ritual, where ritual is "a stylized, receptive social activity which, through the use of symbolism, expresses and defines social relations. Ritual activity occurs in a social context where there is ambiguity or conflict about social relations, and it is performed to resolve or disguise them." n145

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n143 Id at 27.

n144 Id at 1.

n145 Id at 11.

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It is this system of Soviet rituals that I want to focus on here. As Lane suggests, these rituals served as an "instrument of cultural management enabling political elites . . . to gain acceptance for a general system of norms . . . congruent with their interpretation of Marxism-Leninism." n146 These rituals "embodied the norms and values of Soviet Marxism-Leninism," n147 an ideology which was "clearly no longer a revolutionary ideology mobilizing people for fundamental social change," but instead had become "a very conservative set of rationalizations which supported and legitimated the existing order." n148

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n146 Id at 25.

n147 Id at 24.

n148 Id.

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The need for this "cultural management" was apparent to the Soviets from the beginning of the revolution. n149 "Lenin was particularly aware that the socio-political changes wrought by the October revolution had to be followed by a less violent transfor- [*984] mation of attitudes if the Revolution was to succeed." n150 But both the ends and the means of this cultural management have changed over time. Patriotism is one example. Immediately after the revolution, patriotism was a suspect ideal because the revolution was supposed to be merely one stage in an international transformation. But "when the Revolution failed to extend beyond the borders of the Soviet Union . . . Stalin saw himself compelled to build 'socialism in one country,' and patriotism began again to serve a useful political purpose." n151 Likewise with Christmas:

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n149 See id at 28.

n150 Id at 2-3.

n151 Id at 140. Also, during World War II, patriotism was brought back by Stalin. See John Keegan, *The Second World War* 190 (Penguin, 1990).

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When the Bolsheviks came to power in keeping with their atheistic policy, they immediately suppressed celebration of New Year's/Christmas. But the Soviet leaders soon recognized their error. Their suppression of ritual did nothing to solidify the new regime; it only created popular resentment. To remedy the situation, Soviet authorities changed their policy and called on the state itself to sponsor the ritual. They thought to remove as much of the specifically Christian content as they could, while leaving the pagan content largely untouched. . . . The traditional figures of Grandfather Frost and the

Snow Maiden were reintroduced, and collectives sponsored public celebrations complete with tree lighting. Indeed, Lenin himself took part in a number of these rites. n152

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n152 Kertzner, Ritual, Politics and Power at 46 (cited in note 19).

-End Footnotes-

What is most striking about this regulation was its self-consciousness. The Soviets understood that social reconstruction was needed, and they established an office of "ritual specialists" (their own version of Madison Avenue) to do it. n153 Ritual specialists were almost all "local organizers and administrators of the Party, the Komsomol, the trade unions and the local soviet . . . , who received backing from the highest Party circles." n154 As Lane describes, the process that they underwent to produce the ritual "reminds one of both the scripting and producing of a play and of the introduction of a new piece of political legislation." n155 Spe- [*985] cialists would meet to hammer out a script, specifying the details of music and poetry, and their product would be submitted to a reviewing organization for approval. n156 "As is the case with a new play, several rehearsals were made. The rite was performed in one particular collective and was judged both by those who 'produced' it and by those who performed it." n157 The ritual was then "popularized by an extensive 'advertising' campaign." n158

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n153 Lane, The Rites of Rulers at 26 (cited in note 19) (discussing Soviet need for "ritual experts").

n154 Id.

n155 Id at 50.

n156 See id (discussing the process of ritual creation).

n157 Id.

n158 Id.

-End Footnotes-

We are likely to think that ritual "will not develop unless it evolves completely spontaneously as a popular creation." n159 But we tend to forget, Lane effectively argues, "that a large and well-established part of the ritual of our Western civilization, namely Christian religious ritual, originated as the result of a similarly controlled and consciously organized effort on the part of the ecclesiastical elite." n160 What made it succeed was not its spontaneity, but the extent to which it could "convert individual emotion into collectively oriented moral sentiment." n161 Ritual specialists would select events in a citizen's life that, "because they represent important turning points . . . generate emotions which can be directed in a politically acceptable

direction." n162 As one Soviet account states it:

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n159 Id at 57.

n160 Id.

n161 Id at 32.

n162 Id at 25.

-End Footnotes-

Rituals are conducted at important turning points of a man's life. Owing to the psychic mood he is particularly receptive to external influences. These opportunities to exert effective influence we must utilize in the interests of communist education. n163

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n163 Id, quoting 7 Kommunist Estonii 32 (1968).

-End Footnotes-

For the same reason, specialists focused rituals on those who, "because of age or social position, have been unable fully to develop their critical facilities: children, youths, manual workers and collective farmers. Very notable is the absence of regularly recurring ritual specifically for members of the intelligentsia or the Communist Party." n164

-Footnotes-

n164 Lane, The Rites of Rulers at 26 (cited in note 19).

-End Footnotes-

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Of course, this social meaning management was not entirely successful. But as I have suggested in the other examples above, lack of complete success does not mean that the efforts had no effect. As Lane presents it, "the data . . . show conclusively that despite their numerous shortcomings the new socialist rituals have made a significant impact on the soviet population." n165 People within Soviet society, and Soviet society itself, were reconstructed by this mechanism of ritual.

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n165 Id at 251.

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To say that this management had an effect, and even that it had in some ways its intended effect, does not mean that it must also follow that social reality is infinitely plastic, however. It is not to say that cultural managers could construct any culture they wish n166 or that "given the right social context, any social activity can be turned into a ritual at the whim of ritual specialists." n167 Rituals, and the reality they construct, depend upon the values of the parties to that ritual. They constrain the range of possible rituals, and possible social constructions. Again, that the government can make inflation rise does not mean it can achieve full employment and no inflation.

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n166 See note 19.

n167 Lane, The Rites of Rulers at 14 (cited in note 19).

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Soviet rituals succeeded, to the extent that they did succeed, by enacting a practice that was both supported and created by a dominant ideology, in a context where that ideology could have its most coercive effect without being recognized as coercive. It succeeded when it could operate undetected on those emotionally or intellectually vulnerable, and it succeeded through its regularized and forceful practice.

C. Constructions: Defensive Construction

The examples given so far have been offensive uses of social meaning construction, where the aim was to change some social meaning, either from what was thought to be an inferior meaning to a superior meaning, or from no meaning in particular to a particular meaning.

But if absent any intervention the meaning would have evolved to what it did, then it is fair to say that the meaning was not "changed" by the intervention. Change in this context, therefore, means differences that are caused in some sense by the intervention. Meanings that one believes would have emerged [*987] absent the intervention I do not include. Although this understanding of change may be somewhat murky and counterfactual, the distinction is an important one and will often be clear enough.

This way of speaking of change suggests a second kind of social meaning change that we could call defensive construction. If "change" refers to meanings that would not have been but for an intervention, then some "changes" are cases where a meaning that otherwise would have decayed or evolved is preserved by an intervention aimed at conserving the old social meaning. This is a "change" in social meaning in the sense that the intervention affects the resulting social meaning, but it is different from the kind of change in social meaning discussed in the examples above because rather than aiming for a new meaning, the change here aims at preserving an old meaning.