It Is a Constitution We Are Expounding

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> "[W]e must never forget, that it is *a constitution* we are expounding."[1]

In the last fifteen years alone, there has been enough commentary on constitutional interpretation to fill more volumes than even the most dedicated scholar of constitutional law could ever hope to read and comprehend fully. The theories range from noninterpretivism to strict originalism.[2] Under noninterpretivism, courts are allowed to base constitutional adjudication upon extra-constitutional principles. Under strict originalism, courts are bound to a static Constitution of 1787, and its amendments as of their effective dates.

Adjudication of constitutional issues demands a significant amount of judicial resources and accounts for a substantial number of pages in the federal and state reporters. As a result, courts are criticized for a preoccupation with the part of their function that requires them to decide

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1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). The Court also noted that "[a constitution's] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *Id.*

2. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); C. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION (1978); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); M. PERRY, MORALITY, POLITICS, AND LAW (1988); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICY MAKING BY THE JUDICIARY (1982); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 n.9 (1975); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); *see* Brest, *The Fundamental Rights Controversy: The Essential Contradiction of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1064 (1981) (Noninterpretivists argue that "the rights at stake . . . are not specified by the text *or the original history of the Constitution*. They argue that the judiciary is nonetheless authorized, if not duty bound, to protect individuals against governmental interference with these rights, which can be discovered in conventional morality or derived through the methods of philosophy and adjudication." (emphasis added)). *Compare* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 380 (1981) (originalism may not "be used to reach results *contrary* to the Framers' specific and known intent . . . ." (emphasis in original)), *with* Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 412 (1981) ("[T]he judicial role . . . necessitates, rather than excludes, rationalistic resort to 'general principles of political morality not derived from the constitutional text or the structure it creates.' " (quoting Monaghan, *supra*, at 353)); Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 324 (1981) [hereinafter Perry, *Noninterpretive Review*] ("[O]nce the judge resolves to move beyond specific value judgments constitutionalized by the Framers, the ultimate source of decisional norms is the judge's own values . . . ."); and *id.* at 341 ("[T]he Constitution does not give the Court the power of noninterpretive review, yet I have not hesitated to say that the Court can legitimately exercise that power.").

There are many forms of noninterpretivism, interpretivism, originalism, and nonoriginalism. Therefore, unless the context indicates otherwise, when these and other such terms are used in this Article, they are meant to refer to a species of theories rather than a single theory.

constitutional issues.[3] The criticism is that the courts seem to have forgotten that their primary function is to "resolve ordinary disputes" and not to give "meaning to constitutional values."[4]

A significant amount of the commentators' and courts' prolific writings may be attributable to: (1) the recent bicentennial of the Declaration of Independence (1976); (2) the bicentennials of the drafting (1987) and ratification (1988) of the Constitution; (3) the bicentennial of the first year of operation under the new Constitution (1989); (4) the current bicentennial of the Supreme Court (1990); and (5) the impending bicentennial of the Bill of Rights (1991). Some commentators, however, have a different explanation. They feel that the volume of constitutional theorizing is a sign that our judicial system is not well.[5]

No generally accepted theory of constitutional interpretation has emerged despite (or due to) the abundance of writings on the subject.[6] Consequently, courts and commentators lack an effective criterion by which to judge the decisions of judges. The lack of an effective criterion leads to an expectation that the meaning and nature of the Constitution will change with the varying composition of the judiciary.[7] This brand of legal realism is an evil that exists because we have forgotten "it is *a constitution* we are expounding."[8]

In the first section of this Article, I demonstrate why noninterpretivism, generally, and nonoriginalist interpretation, more specifically, are not suited for the task of constitutional interpretation[9] in the context of

3. *See, e.g.*, G. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 33 (Center for Judicial Studies, 1985).

4. *Id.* at 33. Some of this criticism may be well-founded. However, in the context of constitutional adjudication, it is often impossible to "resolve ordinary disputes" without resorting to, determining, and giving "meaning to [relevant] constitutional values."

5. *See, e.g.*, Bork, *Forward* to G. MCDOWELL, *supra* note 3, at v.

6. This problem is not new. As Leslie Dunbar has noted, "[n]one of the Supreme Court's critics would accuse it of having disposed of its work by application of a consistent dogma. On the contrary, the Court has chiefly impressed by its groping for principles, both substantive and jurisdictional." Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627 (1956).

7. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

8. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

9. Disagreement over the meaning of the terms compounds the problem of disagreement over substance and procedural results. The terms nonoriginalism and noninterpretivism are sometimes interchanged. Likewise, originalism and interpretivism are sometimes equated. *See* Sandalow, *supra* note 2, at 1033-34. These terms, however, are not equivalent. Noninterpretivists reject the binding force of constitutional principals while nonoriginalists merely reject the binding force of the original meaning. Interpretivists accept the binding force of the Constitution, but not (as originalists would) necessarily its original meaning. *See* Clinton, *Original*

constitutional adjudication of individual rights.[10] In the second section, I posit that, in the context of constitutional adjudication of individual rights, moderate intentionalism[11] is a better alternative to nonoriginalistic interpretation and other forms of originalism.[12] Finally, I seek to

Understanding, Legal Realism, and the Interpretation of "This Constitution," 72 IOWA L. REV. 1176, 1182 n.4 (1987).

Some writers assert that "[w]hat distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text . . . ." Grey, *supra* note 2, at 706 n.9 (1975); *see also* J. ELY, *supra* note 2, at 1 (Interpretivists take the position that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution [while noninterpretivism is] the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."). What Professor Grey and Dean Ely call interpretivism is referred to in this Article as textualism (as opposed to as intentionalism). In this Article, textualists and intentionalists are further divided into originalists and nonoriginalists. These classifications are preferable because under either of these approaches, courts are charged with the task of interpreting the Constitution—even if from a nonoriginalistic standpoint. Thus, these approaches are not *non*interpretive. For this reason the terms noninterpretivism and noninterpretivists are reserved for those theorists who base constitutional adjudication upon factors wholly extrinsic to either the text or the intention of the Constitution. *See, e.g.*, Perry, *Noninterpretive Review*, *supra* note 2, at 324 (the "ultimate source of decisional norms is the judge's own values (albeit, values ideally arrived at through, and tested in the crucible of, a very deliberate search for right answers)"). To soften the impact of the claim that it is appropriate to resort to extra-constitutional values, some noninterpretivists admit that "[n]o contemporary constitutional theorists . . . seriously disputes the legitimacy of interpretative review." *Id.* at 280. However, they contend that this interpretive model is only one of the sources of legitimate values in constitutional adjudication.

10. This adjudication involves what some others have called "human rights issues." Perry, *Noninterpretive Review*, *supra* note 2, at 280.

11. *See infra* notes 139-66 and accompanying text for a more detailed discussion of moderate originalism and the brand of moderate intentionalism advocated here. However, it should be noted at this point that at the heart of the theory advocated here is the notion that constitutional principles are not created by constitutional rules (specific application). Instead, constitutional rules are derived from and are designed to advance underlying principles. As a result, under this model, in order to give sufficient deference to the Constitution, it is not necessary for constitutional cases to be resolved in the exact manner that they would have been at some point in the past. It is more important to reach results that advance the original underlying principles—even if those results were not originally conceived or even if they were originally rejected.

12. For a more complete discussion of the distinctions between the various forms of originalism, see Brest, *The Misconceived Quest For Original Understanding*, 60 B.U. L. REV. 204 (1980).

All forms of originalism give some degree of binding force to the Constitution as originally drafted and would therefore lead to better and more consistent results than nonoriginalistic approaches. In addition, both moderate intentionalism and moderate textualism would allow courts to "remember" both constitutional features referred to in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that only its great outlines and its important objects should be designated. However, textualism is inconsistent with original interpretive intent, *see* Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 314 (1986), and is therefore not true originalism. *See infra* discussion at note 136 and accompany-

prove that the resort to principles of natural law[13] in constitutional adjudication is not only permissible, but required under originalistic theories of constitutional interpretation.[14]

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ing text. *But see* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903-04 (1981) (concluding that textualism is consistent with original interpretive intent).

The conclusions drawn in this Article relate to the original Constitution and the Bill of Rights, which immediately followed. The interpretive intent relative to later Amendments has not been reviewed and may have been different. When the issue involves interpretation of later Amendments, the appropriate inquiry would be to focus on the original interpretive intent at the time of their drafting and adoption. Of course, later Amendments should be considered in interpreting the original Constitution and Bill of Rights. Constitutional Amendments change both the nature and structure of the Constitution and the society in which it operates. Considering these effects, and other changes in the operative factors that affect the Constitution's underlying principles, the specific application must change accordingly. *See infra* notes 141-66 and accompanying text.

13. Formerly, a clear distinction was drawn between natural law and natural rights. *See* Berns, *The Constitution as Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 50, 55 (R. Goldwin and W. Schambra eds. 1985). Natural law usually referred to rights and obligations that resulted from the natural order of things in the universe. Natural rights, however, usually connoted one's ultimate license to act except as limited by compacts and other agreements. Such agreements and limitations were thought ultimately to be in the best interests of each individual in society. This distinction, however, has been blurred and lost over time. In any event, the distinction is not significant for my thesis that original intent adjudication requires resort to conceptions not held by the original drafters, ratifiers, or populace of 1787. Therefore, unless the context indicates otherwise, no distinction is drawn between the concepts of natural law and natural rights. A detailed discussion of the political theories and other factors that give definitiveness to the resulting modern-day interpretation is left for other works. *See generally infra* note 191.

Despite popular belief, natural law was not always based on divine revelation or inspiration. Many of the natural law theorists who influenced early American political thought did not base their theories on divine law. As early as the fifteenth century, John Fortescue set out to distinguish natural law from divine law. *See* A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENTS 36 n.3 (1948) (citing J. FORTESCUE, DE NATURA LEGIS NATURAE). In addition, Grotius declared in 1625 that "he could conceive of natural law even if there were no God." R. POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 74 (1957).

But even if these theories had been based on divine revelation or inspiration, one need not adopt Judeo-Christian principles or any other values considered to have been derived from divine revelation or inspiration in order to concede the relevance of natural law theories to constitutional adjudication. The theoretical foundations of natural law, or even a rejection of its validity, should be irrelevant to originalists. One need only accept that original intent has some degree of binding force and that this intent was influenced by natural law theories. The "source" of natural law is, therefore, irrelevant except to the extent that it bears upon the meaning and impact of the influence.

14. The moderate intentionalist theory of originalism advocated in this Article requires resort to natural law theories. Accordingly, courts would still reach some of the substantive results advocated by the self-styled noninterpretivists. Because the arguments are grounded in the original Constitution, however, the results and process of adjudication would carry legitimacy not found in the noninterpretivistic and even nonoriginalistic approaches.

I. Noninterpretivism, Nonoriginalism, and Constitutional Interpretation

"An independent judiciary, like a unitary executive . . . is an integral feature of sound republican government."[15] Courts have the right to exercise the power of judicial review.[16] As Alexander Hamilton asserted in the *The Federalist No. 78*, it is proper and necessary for the judicial branch to "liquidate and fix [the] meaning and operation" of the laws, including the Constitution.[17]

Despite the courts' conceded authority to exercise the power of judicial review, they must do so within constitutional constraints. That is where noninterpretivism, in its strictest sense, goes awry. Noninterpretivism and constitutional interpretation are contradictions in terms. The underlying premise of noninterpretivism is that, even in the context of constitutional adjudication, courts may resort to principles not incorporated into the Constitution.[18] This premise is an effective denial of the Constitution as a binding source of law. As such, noninterpretivism relies upon a premise of rather recent vintage that "effectively ignores and bypasses the Constitution."[19]

Few constitutional theorists would deny that our governmental system is one based upon republican theory[20] and that the branches elected

15. G. MCDOWELL, *supra* note 3, at 17.

16. This Article will not detail the debate over the legitimacy and authority for judicial review. Vesting this authority in the judicial branch is warranted because the functions of the three branches of government are constitutionally defined, *see* U.S. CONST. arts. I-III, and the Constitution implicitly places this authority in the hands of the judiciary. Article III, § 2 states that "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, [and] the Laws of the United States . . . ." Implicit in this grant of power is the authority and the mandate to the judicial branch to apply the Constitution and these laws in the exercise of its judicial power. Part of the function of applying laws when there is a hierarchy of laws, as the one established by the Supremacy Clause, U.S. CONST. art. VI, cl. 2, is to determine when inferior laws conflict with a superior one. For more comprehensive support of the judicial review, see R. POUND, *supra* note 13, at 77-81; A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Attanasio, *Everyman's Constitutional Law: A Theory of The Power of Judicial Review*, 72 GEO. L.J. 1665 (1984); Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982); Perry, *Noninterpretive Review*, *supra* note 2.

17. THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 102 (E. Bourne ed. 1947) [hereinafter THE FEDERALIST].

18. *See* Michelman, *supra* note 2, at 412; Perry, *Noninterpretive Review,* note 2, at 324.

19. Bork, *Forward* to G. MCDOWELL, *supra* note 3, at v.

20. A distinction is drawn between a republican form of government and a representative democracy. In the latter, the representatives seek to enforce the will of the electorate. In the former, the elected representatives make decisions based on their own beliefs as to what would be the best alternatives. In this system, the representatives do not act as mere agents of the represented. Often the desire for re-election will, to a significant degree, cause those elected to be more responsive to their constituency's desires than to their personal interests. However, this is a result of human nature rather than a feature of republican government.

through the regular political process[21] should control a significant number of the decisions made within our governmental system.[22] Under the Constitution, however, there are certain decisions that may not be made by the government acting in the regular political process "no matter how democratically it decides to do them."[23] In constitutional adjudication relating to individual rights, the question to be resolved is: What decisions may result from the regular political process, and what decisions may not? Our system entrusts the judiciary with the authority to make this determination.[24] However, when the courts impinge upon the majority's right to govern without resort to constitutional limitation, they act illegitimately.[25]

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21. The use of the term "regular political process" rather than merely the "political process" is intentional. The distinction that is drawn is between the processes of the executive and legislative branches, which are more *directly* answerable to the people, and the judiciary. Although the judicial branch is ultimately answerable to the people in the political process, it is in a much less direct manner.

22. The exercise of judicial review (even as limited in this Article) contradicts the notion of government by directly accountable elected representatives: "[W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens." A. BICKEL, *supra* note 16, at 16-17.

23. Bork, *supra* note 7, at 2-3. As Judge Bork further notes:

> A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no [reason other than because they are in the majority]. . . . The model also has a countermajoritarian premise, however, for it assumes that there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

Id.

24. *See supra* notes 15-17 and accompanying text.

25. Bork, *supra* note 7, at 3 ("[The judiciary's] power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution . . ." for limiting majority rule). Some self-styled noninterpretivists so categorize themselves partly because they take an overly narrow view of the constitutional inquiry. They believe any interpretation that strays from the original specific application of the text is noninterpretivistic. However, so long as a court protects rights on a basis purportedly sanctioned by the Constitution (whether viewed from an originalist standpoint or not), the method is not noninterpretive but interpretive. *See supra* note 9. In addition, even if courts were bound to an originalistic approach as advocated here, they are not precluded from "enforc[ing] values beyond merely those constitutionalized by the Framers." Perry, *Noninterpretive Review*, *supra* note 2, at 282. As discussed in more detail below, courts are free to find constitutional limitation even if that application goes beyond the original specific application of the document. The relevant inquiry is whether the modern application is within the original underlying principles of the Constitution.

Another factor that may contribute to the rejection of moderate originalists by those who style themselves as noninterpretivists is the restraining effect of a constitutionally-based model of interpretation. Although the reins under a modern originalist approach loosen, those reins

No theory of constitutional interpretation should allow judges to substitute *their vision* of a better society for that of elected representatives. It is well settled that "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not so be unconstitutional . . . ."[26] Those who seek to have decisions made on extra-constitutional bases must rely upon the regular political process to do so.[27] "[I]f the popular branches of government . . . are operating within the authority granted to them by the Constitution, their judgment and not that of the Court must obviously prevail."[28]

For these reasons, this section will focus upon nonoriginalism, not on noninterpretivism in the stricter sense discussed above.[29] In a most striking anomaly in their arguments, nonoriginalists must admit that the original Constitution "remains the governing document of the United States. It establishes the national government, its branches and offices, its relationship to the states and the states' relationship among themselves. And although the amending power has been used sparingly, it is a vital element in the constitutional scheme."[30] Yet nonoriginalists deny the binding force of that very document.

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still impede the type of free-handed adjudication that some theorists advocate. *See supra* notes 2 and 9.

26. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (M. Farrand ed. 1966) (quoting James Wilson).

27. Otherwise, judges would lose their status as the keepers of the constitutional covenant and assume the position of "fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country." Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976).

28. *Id.* at 696.

29. As Professor Henry Monaghan aptly points out:

> It is . . . logically possible to maintain some ground other than the written constitution as the first principle in constitutional theorizing; but I simply find this argument to be a barren one. The authoritative status of the written constitution is a legitimate matter of debate for political theorists interested in the nature of political obligation. That status is, however, an incontestable first principle for theorizing about American constitutional law. That I cannot otherwise 'prove' the constitutional text to be the first principle is a necessary outcome of my first principle itself. . . .
>
> For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration. It is our master rule of recognition. . . .

Monaghan, *supra* note 2, at 383-84 (citations omitted). Professor Monaghan's comments do not establish the basis for preferring originalist over non-originalist adjudication. They do, however, demonstrate the impropriety of noninterpretivism as defined *supra* note 9. The purpose of this and the following section is to demonstrate why originalist adjudication is preferable.

30. Brest, *supra* note 12, at 236. It is also significant that the authority for judicial review is derived from this very document.

Nonoriginalism takes many forms.[31] Among the nonoriginalists are those who believe the original meaning of the text and the authors' original intentions are totally irrelevant.[32] However, there are also nonoriginalists who give "the text and original history presumptive weight" but would "not treat them as authoritative or binding."[33]

Nonoriginalists admit that the notion characterizing judges as bound by the consent given at the time of constitutional ratification is rooted deeply in American political history and thought.[34] Despite this notion's deep-rooted nature, nonoriginalists argue that, even if consent to be bound by the Constitution ever existed, such consent cannot bind our society some two hundred years later.[35] They argue further that the continued validity of the original Constitution must rest on the basis of a present consent to be bound by the original document.[36]

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31. However, nonoriginalism, in whatever form, is unacceptable. The following are at least three ways that modern society could have rejected the original intent of the Constitution: by amendment; by adopting a new constitution; or by revolution. Modern society has taken none of these steps, nor can it be considered to have legitimated nonoriginalist interpretation. *See infra* note 36. Therefore, for the reasons discussed throughout this Article, the Constitution's original meaning should, at least to some extent, be controlling.

32. *See* C. DUCAT, *supra* note 2, at 42-115. Even theories that would tie constitutional interpretation to the text of the document might still be nonoriginalistic in nature. If the text is to be interpreted without resort to its original meaning, this brand of textualism is just as nonoriginalistic as approaches that would ignore the original intent. "The principle point of the originalist critique is to ascertain the meaning *at the time the document was drafted*, rather than approaching the text in the later twentieth century from an ahistorical interpretive perspective." Clinton, *supra* note 9, at 1193 (emphasis in original).

33. Brest, *supra* note 12, at 205. The contention that nonoriginalist adjudication respects the constitutional order by according presumptive weight to the text and original history, *id.*, is not convincing. According presumptive weight to the principles upon which the government is founded rather than being bound by those principles does not serve the ends of constitutional adjudication.

34. *See* Brest, *supra* note 12, at 225.

35. *Id.* at 225; *see also* Michelman, *supra* note 2; Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1492 (1985).

36. However, nonoriginalists conclude that such consent may not be possible in a modern industrial society. Brest, *supra* note 12. And if possible, the consent is not to the Framers' Constitution, but to the hybrid that has derived through modern interpretation. Simon, *supra* note 35, at 1510. Modern constitutional adjudication, however, is not as overtly hybrid as these theorists contend. " '[T]he Court has always, when plausible (and, indeed, even when not plausible), tended to talk an [originalistic] line.' " Perry, *Noninterpretive Review, supra* note 2, at 280 n.6 (quoting J. ELY, *supra* note 2, at 3). The Court does so because of "the suspect legitimacy of a [nonoriginalistic] line." Perry, *Noninterpretive Review, supra* note 2, at 280 n.6 Therefore, "[t]he claim that over time the polity has consented to and thereby legitimated [nonoriginalistic] review is both doubtful and irrelevant. The polity as a whole could not have consented to a mode of judicial review with which many of its members were not even familiar." *Id.* at 328 (footnote omitted). In these quotations, orginalistic and nonoriginalistic is substituted in brackets for interpretive and noninterpretive. Due to the interchange and differing meaning given to the terms "interpretive" and "noninterpretive," *see supra* note 9,

Because nonoriginalists no longer feel constrained by the original Constitution, they are free to recommend "a designedly vague criterion: How well, compared to possible alternatives, does the [interpretive] practice contribute to the well-being of our society—or, more narrowly, to the ends of constitutional government?"[37] Such nonoriginalist adjudication has been compared to that employed at common law to derive "legal principles from custom, social practices, conventional morality, and precedent."[38] Under such theories, however, judges are left with only their own predilections to fill in the details and substantive content of rules to better the "well-being of our society."[39]

Not all nonoriginalists would free judges from all restriction in the search for substantive content. Some theorists attempt to provide constraints upon judges' discretion in choosing among competing principles. One such attempt is known as neutral principles.[40] This theory has been described as second only to originalism in popularity among the competing theories of constitutional adjudication.[41] The theory, however, provides no guidance on how judges are to find and determine the underlying principles that should guide their decisions.[42] Nor does it

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this substitution adds clarity. One might argue that the nonoriginalistic *results* have been legitimated by the acceptance of the people (an argument of which I am not yet convinced but am willing to consider). This would eliminate the need for overruling well-established precedent. This argument, however, ignores the intentional difficulty built into the amendment process and would allow inertia and a minority of the states (one-third) to legitimate extra-constitutional results. Even if prior nonoriginalists' results have been legitimated, the argument cannot be used to legitimate the *process* of nonoriginalist adjudication because the process was not revealed to the people.

37. Brest, *supra* note 12, at 226; *see also* Simon, *supra* note 35, at 1487 ("the basic criterion for evaluating the arguments supporting the various methodologies or interpretations is the extent to which those methodologies and interpretations promote a good and just society").

38. Brest, *supra* note 12, at 228-29; *see also* Michelman, *supra* note 2, at 412.

39. Brest, *supra* note 12, at 226. As advocates of nonoriginalistic adjudication admit, "it is unlikely that a sizable segment of the American population would object to judges being guided mainly by what is good and just in interpreting the Constitution, although people certainly would disagree about which particular interpretations correspond to these values." Simon, *supra* note 35, at 1488. That is why some source of normative principles must be provided to judges. Otherwise judges would be left to their own predilections of what is good and just.

40. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Neutral principles are not necessarily nonoriginalistic. Resort to other theories of interpretation, which may be originalistic in nature, is necessary to determine the initial principle which is to be neutrally applied. *Id.* at 19.

41. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 782 (1983). For a more complete criticism and discussion of neutral principles, *see id.* at 808-21. *Compare* Bork, *supra* note 7, *with* Wechsler, *supra* note 40.

42. "[T]he requirement of generality of principle and neutrality of application does not provide a source of substantive content." J. ELY, *supra* note 2, at 55.

provide insight as to what specific judgments should be made in order to resolve disputes while still advancing these principles.

Under the neutral principles theory, courts are obliged to render principled decisions. A principled decision, however, is very narrowly defined as "one that rests on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[43] Proponents of this theory use "the term 'neutral principles' to capsulate [their] argument, though [they] recognize that the legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another."[44]

The neutral principles theory fails to provide guidance to judges in making initial determinations of which controlling principles should guide their opinions. This theory also fails to provide an adequate basis for healthy criticism or for determining the correctness of constitutional decisions. The neutral principles model allows criticism of judges for failing to apply principles if the principles had been applied previously in a case that was not relevantly distinguishable. It provides no basis for criticism, however, because the principles used are not required or even allowed by the Constitution.[45] Accordingly, the neutral principles theory allows judges to decide cases without regard to any standard but consistency. In a case of first impression, this theory gives judges almost free reign to determine what is a contribution to rather than a degradation of society's well-being.

One of the goals of the neutral principles theory is to avoid result-oriented decisions. The notion of a result-oriented decision has acquired very bad connotations. These connotations have developed because the notion is often associated with judges striving to impose results dictated

43. Wechsler, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 27 (1961).

44. Bork, *supra* note 7, at 2. The neutral principles method of interpretation takes two forms. The first requires a judge to commit to the principles used in the case under consideration for all future cases that are not relevantly distinguishable. The judge must determine the principles to invoke, imagine related future cases, and determine whether the principles would apply in those future cases. If they would not, the judge must determine if the future cases are relevantly distinguishable from the present case. If they are not, then the judge may not now legitimately apply the principles. Tushnet, *supra* note 41, at 808.

The second form of the neutral principles method of interpretation requires a judge to consistently apply principles from previous decisions to the one under consideration. When using this method of interpretation, a judge determines what principles governed previous cases and whether those principles are consistent with the result intended in the case presently under consideration. *Id.* at 814.

45. "If neutrality is to serve as a meaningful guide, it must be understood not as a standard for the content of principles, but rather as a constraint on the process by which principles are selected, justified and applied." Tushnet, *supra* note 41, at 806.

by their own personal value judgments. In constitutional adjudication, however, deciding cases to achieve a result is not an evil in and of itself. In this context, courts should strive to decide cases based on the result dictated by the Constitution.

Another goal of the neutral principles theory is consistency in adjudication. If the theory were properly applied, consistency would be achieved. Consistency in constitutional adjudication is desirable, but consistency is not the beginning and end of constitutional inquiry. In a system of law guided by a constitution, the mere requirement that judges consistently apply principles is not sufficient. The consistent application must also be constrained by that constitution and its underlying principles. Otherwise, the law and the constitution would be no more than what the judges say it is.[46]

To address the problems resulting from the lack of substantive content of neutral principles, some nonoriginalists attempt to add substantive content to their theories and to provide a substitute for the Constitution's "great outlines" and "important objects."[47] Through this attempt, judges are provided with standards to determine whether a decision "contributes to the well-being of our society . . . [and] to the ends of constitutional government."[48]

An example of one such theory employs an economic analysis. This theory calls for courts to formulate rules designed to maximize efficiency. In true economic analysis, the bottom line on efficiency must be defined in terms of dollars and cents.[49] Many of the interests involved in individual rights adjudication, however, are not readily, if at all, quantifiable in economic terms.[50] Instead these theorists engage in a cost-benefit analy-

46. Although a particular judge's "sayings" would be consistent, they would still be what his personal predilections lead him to "say."

47. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

48. Brest, *supra* note 12, at 226.

49. Shapiro, *Richard Posner's Praxis*, 48 OHIO S. L. REV. 999, 1001-02 (1989).

50. This method of interpretation has other shortcomings. It has an intellectual and social heritage which is tied to the "classical eighteenth and nineteenth century economics of unfettered contract, consumer sovereignty, social Darwinism, and perfect markets." Tribe, *Constitutional Calculus: Equal Justice Or Economic Efficiency?*, 98 HARV. L. REV. 592, 597 (1985). The bias resulting from that heritage inhibits courts from effectively enforcing the constitutional aspects aimed at advancing fundamental rights and structural concern for democratic separation of powers. *Id.* This same bias calls upon courts to apply an *ex ante* approach to litigation. Such an approach causes courts to be more concerned with creating rules to govern the future behavior of society than in doing justice for the actual litigants. Courts view litigation as an opportunity to formulate legal rules to "order . . . activities more efficiently in the future." *Id.* at 593.

sis.[51] Under this approach, courts maximize the good for the least cost. Many economic theorists claim that these costs and benefits are determined by our society's existing rules and practices.[52] Thus, the judiciary should concern itself only with maximizing the predetermined social good and the effect that its decisions will have on the decisions made by the political branches.[53]

The cost-benefit analysis is not an appropriate model for constitutional interpretation when the issues center upon individual rights.[54] The most significant drawback is that the philosophic basis of this analysis is utilitarianism.[55] If a court engages in the assessing and weighing of good with costs, the tendency would be to consider the collective interests as good and the individual rights that call for collective concessions as costs. This alone is not a necessary result of employing a cost-benefit analysis. Assuming that constitutionally protected individual rights were selected as good, the cost-benefit analysis could be used to maximize this good as well as any other. For the reasons discussed below, however, it is more likely that individual rights will be viewed as costs even when it is not appropriate to do so.

Citizens in a republican form of government have two classes of rights or interests—those which they hold individually and those which they hold collectively.[56] There is a tension between these two classes of rights.[57] As the number and scope of individual rights increase, the number and scope of collective interests decrease, and vice versa.[58] Re-

51. *See* Easterbrook, *The Supreme Court, 1983 Term—Forward: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

52. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 657 (1982) ("But economic analyses of this type would insist that they have no economic criteria for recommending [an outcome to] be considered 'good,' 'optimal,' or 'desirable.' "); *see also* Tribe, *supra* note 50, at 620. Not all economic theorists disavow normative content to their approach. Morris, at 657 ("A second way of doing economic analysis of law is to make efficiency *and* normative judgments." (emphasis in original)).

53. Tribe, *supra* note 50, at 594.

54. *Id.* at 593. For a defense of the cost-benefit analysis see Easterbrook, *supra* note 51.

55. R. POSNER, ECONOMIC ANALYSIS OF LAW, § 2.3, at 20 (1977).

56. I draw a distinction between individual rights (*e.g.*, the right against "unreasonable searches and seizures") and collective interests (*e.g.*, the right to have streets safe from criminals). Of course, each of us as individuals is affected by detriments to the collective interests. When collective interests are harmed, however, no one person is affected in any unique way. Quite to the contrary, when a detriment to an individual right exists, a particular person's interests are affected uniquely.

57. B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 57 (1955).

58. The collective good, which I distinguish here from collective interests, is achieved by a correct determination, delineation, and prioritizing of individual rights and collective interests. The adoption of the Constitution was an effort to find, define, and incorporate the principles that are the key to unlocking these answers. Therefore, in the context of constitutional adjudication, courts should turn to the principles that underlie that document. Because we, like the

straints must exist for both classes of rights if both are to exist. The more significant danger in a majoritarian government, however, is that the majority will overemphasize the majoritarian interests as a collective unit.[59]

There is a potential threat that individual rights may be overemphasized to the inappropriate detriment of collective interests. Such a threat, however, is not likely. The political power of the majority is capable of subverting individual liberties to the demands of the majority. Accordingly, the prospects of the overemphasis of collective interests is substantially greater than the overemphasis of individual rights. Frequently individual interests will not seem very weighty when balanced against the perceived best collective interests of the majority.[60] Therefore, individual rights will be sacrificed in the balancing process. This result is not consistent with the Constitution's function in the context of individual rights adjudication.[61] These rights create entitlements in favor of the individual against the collective interests. When the State denies one a right to which he or she is entitled, an injustice is done—even if denied for the benefit of collective interests.[62]

In the place of cost-benefit analysis, some noninterpretive theorists would have courts focus on the representative nature of our government

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people of 1787, have not yet discovered all of these principles (and have not learned to fully appreciate those that have been discovered), we do not have all of the right answers. *See infra* notes 190-271 and accompanying text. However, constitutional adjudication should be an endeavor to continue the process of discovery and implementation.

59. B. PATTERSON, *supra* note 57, at 57. In his 1930 book entitled *Liberty*, Everett Martin aptly concludes:

> The psychological fact is that to the mass of men, acting as a whole, liberty is primarily the removal of restraint on crowd behavior, and what crowds call liberty is not liberty for the individual: it is liberty for the crowd to act without considering the results of its behavior on other people.

E. MARTIN, LIBERTY 10 (1930).

60. Initially, encroachments into individual rights in the name of collective interests may be miniscule, but such encroachments may mark an odious beginning to further encroachments. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and *slight* deviations from legal modes of procedure." Boyd v. United States, 116 U.S. 616, 635 (1886) (emphasis added).

61. *See* comments by James Madison at the introduction of the Bill of Rights:

> If [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 ANNALS OF CONG. 439 (J. Gales ed. 1789).

62. R. DWORKIN, TAKING RIGHTS SERIOUSLY 199 (1978).

in formulating rules for individual rights adjudication.[63] These theorists assert that whenever courts determine the constitutionality of governmental action, they assign institutional authority and responsibility to the affected government area.[64] Accordingly, in making decisions that affect the other branches of government, courts should take the other branches of the government seriously. As a corollary, these theorists limit the judicial branch to intervening in other branches' decisions only when there is a malfunction in the democratic process that renders the political branches not "deserving of trust."[65]

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63. *See* J. ELY, *supra* note 2; Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1983). Dean Ely is among the most noted of this group of theorists. The central premise of his theory is a perceived dichotomy of functions between the judiciary and the representative branches of government. He claims to respect this dichotomy by a "general theory . . . that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack." J. ELY, *supra* note 2, at 181. Accordingly, when judicial intervention is appropriate, the courts fulfill this function by policing the process of decision-making and leaving the policy choices to the other two branches of government. *Id.* at 73-75, 77-88.

Dean Ely concedes that the drafters of the open-ended provisions of the Constitution contemplated judicial value choices. *Id.* at 102. However, he claims that this judicial power is contrary to the concepts of our representative democracy and concludes that a method of interpretation that reconciles this conflict is needed. *Id.* at 101-02. The paradox in Dean Ely's argument has been noted. The argument "locates judicial authority in the Constitution and then proceeds on the assumption that the exercise of that authority is fundamentally extra-constitutional and undemocratic." Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role For the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547, 567 (1981).

Dean Ely's theory and others in its vein are not intended to be general theories of interpretation. They are instead limited to the "open-ended" provisions of the Constitution. J. ELY, *supra* note 2, at 181. *But see id.* at 87-88 (Because of the nature and amount of judicial controversy which centers upon these provisions (*e.g.*, the Ninth Amendment and Clauses such as Due Process and Cruel and Unusual Punishment), Dean Ely admits that "[o]n my more expansive days, therefore, I am tempted to claim that the mode of review developed here represents the ultimate interpretivism.").

64. Komesar, *supra* note 63. When interpreting the Constitution, it is appropriate to focus upon the nature of the government it creates. However, for the reasons discussed below, this focus cannot serve as both the beginning and the end of the inquiry when the issue involved centers upon individual rights.

65. J. ELY, *supra* note 2, at 103. The actions of other branches of government are considered as not deserving of trust when:

> (1) the *ins* are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

Id. at 103 (emphasis added); *see also* Komesar, *supra* note 63, at 373-81.

This constraint upon the appropriate areas of judicial intervention is designed to limit judicial discretion in choosing among competing principles and interests.[66] Even if this approach limits judicial discretion by limiting judicial intervention to areas in which there is a mistrust of the other branches to act faithfully, it would cost the judiciary a large portion of its traditional role. History and the Supreme Court decision in *Marbury v. Madison*[67] established that the role of the judicial branch is to interpret and apply the Constitution. The exercise of that function did not and should not now turn on whether the other branches' actions are trustworthy. To effectively apply the law (including the Constitution), the branch charged with this duty must have authority to interpret the law even when no distrust of the other branches exists.[68]

Another component of the process-oriented model is its focus upon the fact that the judiciary faces issues which "vary in the number and complexity of judicial determinations needed for their complete resolution."[69] From this premise, proponents argue that courts should factor the amount of judicial resources needed to enforce a decision into their determination of which branches of government are better equipped to manage the decision.[70] Courts should not, however, become preoccupied in debating the allocation of judicial resources. Their primary concern should be deciding the issues presented to them. Otherwise, courts may unnecessarily fail to perform their more important functions of constitutional interpretation and legislative review.[71]

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66. Estreicher, *supra* note 63, at 563-67. It does not, however, accomplish this goal. Komesar, *supra* note 63, at 399 ("[T]he task of policing the political process in fact *requires* the judiciary to make difficult and important value judgments and to substitute these judgments for those made by the legislative process." (emphasis in original)); *see also* Wellington, *supra* note 16, at 501. The initial determination of whether a malfunction in the political process exists, a function Dean Ely would have the judiciary perform, may involve value determinations. In considering the method of selecting Presidents and the number of Senators from each state, "it is far from clear how, in many situations, a court can know whether . . . [a political process is fair], unless . . . it develops a theory of political fairness." Wellington, *supra* note 16, at 501; *see also* Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 461-67 (1981). Furthermore, the cure that the judiciary fashions for the political malfunction may involve selection among competing values. Wellington, *supra* note 16, at 501.

67. 5 U.S. (1 Cranch) 137 (1803).

68. *See supra* notes 15-17.

69. Komesar, *supra* note 63, at 377.

70. *Id.* at 378. But Professor Komesar counsels that the answer for a court "[f]aced with serious doubts about the political process, along with strains on its resources," is not always acquiescence. *Id.* at 378 n.30. "[T]he Court might well respond with a sweeping declaration that all laws of a particular type are invalid," thus diminishing the strain on judicial resources. *Id.*

71. I do not contend that the judiciary should not be concerned with the practicalities of enforcing its decisions. As the retreat from Lochner v. New York, 198 U.S. 45 (1905), and Roe v. Wade, 410 U.S. 113 (1973), might indicate, even the Supreme Court has no mechanism

A theory that would have courts focus upon the protection of process-based rights has shortcomings that extend beyond the scope of judicial intervention. In the context of individual rights adjudication, such a theory overemphasizes the representative nature of government. As a result, courts are required to consider whether its decision would be contrary to the will of the majority.[72] Even when the judiciary is presumed to have a "great degree of special competence" to act (*e.g.*, procedural due process and criminal procedure), the "resolution of the issue cannot ignore the basic desires and perceptions of the populace."[73]

When the issues center upon individual rights under the Constitution, this overemphasis on the representative nature of government is particularly misplaced.[74] One underpinning of the notion that the judici-

to enforce a ruling (even a constitutional one) that is contrary to long-term national sentiment. The judiciary has neither "the sword [n]or the purse." THE FEDERALIST, *supra* note 17, at 99. *Lochner* has never been formally overruled. *But cf.* West Coast Hotel v. Parish, 300 U.S. 379 (1937), and Williamson v. Lee Optical Co., 348 U.S. 483 (1955). In addition, some implications of *Roe* have been substantially limited. *See* Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989). However, resistance to a judicial position does not necessarily spell doom for a judicial opinion. Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny demonstrate what courts willing to perform their constitutional duties can accomplish even in the face of substantial resistance. The "Southern Manifesto" is an example of resistance to the *Brown* decision. This document was signed by 101 southern Congressmen to assert that they would work to reverse the decision and to claim that the *Brown* court abused its judicial authority. The progeny of *Brown* may not have accomplished all that the deciding courts envisioned or all of the needed changes in the area of race relations. In fact, the Court's more recent approach to desegregation problems may even be viewed as a retreat from *Brown*. *See* Milliken v. Bradley, 418 U.S. 717 (1974). But despite significant resistance, and possible retrenchment, the *Brown* progeny have dramatically changed race relations in this country.

72. *See, e.g.*, J. ELY, *supra* note 2, at 103 ("[V]alue determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office."); *see also* Komesar, *supra* note 63, at 374.

73. Komesar, *supra* note 63, at 379-80; *see also* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). Dean Wellington argues that courts must impose society's moral principles in adjudication and, in determining these principles, courts must resort to conventional morality, "for it is there that society's set of moral principles and ideals are located." *Id.* at 244. He also argues that the "Court's task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law." *Id.* at 284.

74. As Laurence Tribe notes:

> [A]ttempts to ground constitutional rights . . . in conventional morality . . . have inherently limited power. For we are talking, necessarily, about rights of individuals or groups *against* the larger community, and against the majority. . . . [C]ourts—and all who take seriously their constitutional oaths—must ultimately define and defend rights against government in terms independent of consensus or majority will.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 896 (1978) (emphasis in original) ("Indeed, if there really were consensual values of a determinable, helpful sort, there would probably be little need for the Court to enforce them frequently against electorally accountable officials."); *see also* Perry, *Noninterpretive Review*, *supra* note 2, at 284.

ary should have limited review is that courts should not act contrary to the will of elected representatives. However, the Constitution sanctions many practices which are countermajoritarian.[75] More important, the emphasis upon populist desires ignores the fact that the Constitution and its underlying principles function to protect individuals and political minorities from the "basic desires and perceptions of the populace."[76]

It makes "[n]o sense to use value judgments of the majority to protect minorities from the value judgments of the majority."[77] The Constitution protects individuals and minorities from the choices of the majority against infringement of protected interests.[78] It is no answer to say the political minority is protected from oppression because the electorate may "vote [the rule makers] out of office."[79] Unless the oppression forbidden by the Constitution is unpopular, the rule-makers most often would not be voted out of office.

Other nonoriginalist theorists decry attempts to tie constitutional interpretation to any national consensus, past or present. They contend that, with the possible exception of the values included in the Constitution, there is not and has not been a defensible and definable national consensus.[80] Instead, these theorists would have judges play a prophetic role in determining and shaping evolving moral growth.[81] They argue that there is a functional support for their thesis—moral growth is better than moral stagnation or decay.[82] This is hardly a controversial proposition. A legitimate complaint, however, is that these theorists allow the

75. Wellington, *supra* note 16, at 488. For example, the Constitution does not provide for the direct popular election of Presidents. Also, Senators, chosen by electorates of varying sizes, each have one vote in the United States Senate. In addition, much legislative practice fosters dilution of the concept of majority rule (*e.g.*, seniority systems, lobbying, and staff members with significant influence). *Id.* at 487-92.

76. Komesar, *supra* note 63, at 380.

77. J. ELY, *supra* note 2, at 69. Dean Ely would limit application of the above-stated maxim of interpretation to the protection of minorities "systematically disadvantag[ed] . . . out of simple hostility or a prejudice[]." *Id.* at 103. However, when the issue involves the individual rights guaranteed by the Constitution, it should make no difference whether it is one of these types of minorities or merely a political minority. At the heart of our Constitution is the notion that certain rights are immune from infringement even when the government is acting on behalf of what is perceived to be the general welfare and the will of the majority. A. KELLY & W. HARBISON, *supra* note 13, at 38. There must be a buffer between the value judgment of the majority and the protected interests or there is no true constitutional "right." "The nerve of a claim of right . . . is that an individual is entitled to protection against the majority even at the cost of the general interest." R. DWORKIN, *supra* note 62, at 146.

78. *See* R. DWORKIN, *supra* note 62, at 132-33; *see also* Wellington, *supra* note 16, at 500.

79. J. ELY, *supra* note 2, at 103.

80. *See, e.g.*, Perry, *Noninterpretive Review*, *supra* note 2, at 283-88.

81. This prophecy cannot be based on any view of a future consensus because these theorists reject this possibility. *Id.*

82. *Id.* at 288-96.

judiciary to set the tone for and define this moral growth without the constraint of constitutional principles.[83]

According to these theorists, the constraint on the judiciary's power derives from the power of Congress to limit federal jurisdiction, including that of the Supreme Court.[84] This limitation, however, ignores the very nature of the impropriety of inappropriate judicial review and provides no readily available solutions to the problems created. A court, in the context of constitutional adjudication, may not rely upon norms that are not contained in or authorized by the Constitution. Such norms should not be the basis of even *one* judicial opinion in the context of constitutional adjudication.

Even if the possibility of one inappropriately decided case is insufficient cause to reject this approach, what happens after the case has been decided? Some may argue the decision is only "law" as between the parties and not binding on other potential actors.[85] The overemphasis of this fact, however, is inconsistent with government under the rule of law in at least two respects. First, the "justice" that is meted out to litigants would depend upon the fortuity of whether they pressed their claim before or after Congress limited jurisdiction. As a result, identically situated litigants would receive different results—not because the substantive rules under which they operate change, but because the courts' jurisdiction would now be limited.[86] Second, the approach fosters the idea that future actors should feel free to ignore judicial pronouncements simply

83. This approach fosters a society in which the "determinative norms derive . . . from the judge's own moral vision." *Id.* at 324.

84. *Id.* at 331-43. A substantial amount of debate surrounds the authority of Congress to limit the jurisdiction of the Supreme Court and lower federal courts because of a substantive disagreement over the judiciary's constitutional decisions. *See* J. ELY, *supra* note 2, at 46; Eisenberg, *Congressional Authority to Restrict Lower Court Jurisdiction*, 83 YALE L.J. 498, 518-30 (1974); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 171-73 (1960).

85. *See, e.g.*, Perry, *Noninterpretive Review*, *supra* note 2, at 335-36.

86. There is a difference between this situation and one in which the substantive law changes. Under the approach advocated by these theorists, the different results would not be justified by the change in the substantive rules, but by the fact that the elected representatives should be able to prevent the courts from acting in contravention of the representatives' will, unless these representatives have exceeded their constitutional authority. These theorists and I agree on this point. However, these theorists would require the elected representatives to await judicial action and then respond by limiting jurisdiction in future cases. In many instances this judicial action contravenes the decisions of the elected representatives (*e.g.*, when legislation is declared unconstitutional). The better approach would be that courts may not, in contravention of executive action or legislative enactment (including delegation), enforce rules that do not advance underlying principles of the Constitution. This would lead to the same result that these theorists admit is correct, but would not create the anomaly of the inappropriately decided opinion.

because the courts no longer have the jurisdictional authority to pronounce the action wrongful.[87] Neither of these results are appropriate in a system that purports to adhere to the rule of law.[88]

II. Originalism and Constitutional Interpretation

In Section I, I attempted to explain why some of the major alternatives to originalism are inappropriate for constitutional adjudication of individual rights. In this Section, I will review the various forms of originalism and attempt to show why one form, moderate intentionalism, best serves individual rights adjudication.

It is tempting to argue that originalism would eliminate judicial activism. Such an argument might win many converts, but would be false. Originalism, like noninterpretivism, is consistent with judicial activism.[89] Under originalistic theories of interpretation, courts must determine and apply the fundamental principles and values of our society as incorporated in the Constitution. "[T]his task will inevitably eventuate in activism . . . [but] it will be a constitutional activism that does not lead to a 'depreciation of the Constitution.' "[90]

87. "Of course, there is good reason for treating a single decision as generally binding [on potential future litigants], . . . but only when the Court retains jurisdiction to decide future, similar cases in the same way." Perry, *Noninterpretive Review*, *supra* note 2, at 336.

88. These considerations aside, the removal of jurisdiction not only prevents the judiciary from making inappropriate decisions in the now-taboo area, it also stagnates the law after an admittedly inappropriately decided case. This loss of jurisdiction also prevents courts from making future constitutional pronouncements on legitimate, constitutionally based factors. Finally, the approach ignores the effect that the one inappropriately decided case will have on state court adjudication of federal constitutional claims. Are state courts to ignore this decision? Or should they be bound to continue to apply a decision that is based on inappropriate factors?

89. *See, e.g.*, Bork, *Forward* to G. MCDOWELL, *supra* note 3, at xi. I am reluctant to make such an admission. The term "judicial activism" has developed such negative connotations that this admission may well be viewed as a condemnation of originalism. However, the activism referred to here is tied to and limited by the demands of the Constitution and its underlying principles. In this respect it differs from noninterpretive activism tied to the personal and political agenda of the deciding judge, which has been rightfully criticized.

90. G. MCDOWELL, *supra* note 3, at 36. The acceptance of originalism as the binding theory of interpretation requires the acceptance of an objective, intelligible Constitution. It does not, however, require acceptance of the notion that the task of making sense of the Constitution will be an easy one:

> [L]ooking for guidance in the Constitution requires only a belief in the possibility of ascertaining what the Constitution means; those who believe it can mean nothing in particular cannot take it seriously as law. Those who take it seriously as law must believe it means something, however much they may debate that meaning or oppose it politically.

S. BARBER, ON WHAT THE CONSTITUTION MEANS 36 (1984).

A. Strict Originalism and the Constitution

Originalists are divided into two major camps, strict and moderate. These camps are further subdivided into textualists and intentionalists.[91] Strict originalists in the textual faction advocate deciding constitutional issues according to the original meaning of the *text* of the Constitution and amendments. The strict originalists in the intentionalist faction advance constitutional decision-making based on the original *intent* of the relevant group or groups of authors.[92]

Strict textualists are concerned only with the meaning of the text as written. This meaning is to be derived from the text without recourse to the reasons for or the underlying principles supporting the inclusion of the various provisions. This textual approach limits the application of the text to the specific instances to which it applied at the time of drafting.[93] The original meaning of the text is to be determined by the accepted meaning at the time of drafting. A paradigmatic canon of strict textualism is the "plain meaning rule."[94] This rule requires that the text be given the meaning it would have had for a "normal speaker of [the] English language under the [linguistic and social] circumstances in which it is used."[95]

Strict intentionalists employ several means of determining intent. Some means include examining: the incidents that may have prompted the inclusion of the text and the language of the text; the undesirable consequences that were to have been avoided; and the original specific applications of the text. Strict intentionalists would consider constitutional interpretation illegitimate if it were to go beyond the specific con-

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91. Brest, *supra* note 12, at 209-10.

92. *See supra* note 9.

93. Brest, *supra* note 12, at 208-09, 214-16.

94. There are those who deny that the constitutional text has a "plain meaning." *See* Tushnet, *Constitutional Interpretation and Judicial Selection: A View From the Federalist Papers*, 61 S. CAL. L. REV. 1669 (1988); Allen, *The Federalist's Plain Meaning: A Reply to Tushnet*, 61 S. CAL. L. REV. 1701 (1988).

95. Brest, *supra* note 12, at 206 (quoting Holmes, *The Theory of Interpretation*, 12 HARV. L. REV. 417, 419 (1899)). Placing language in this historical context is essential to understanding and application of the rule:

> [W]e ought to expect the past to differ from the present. Even though the language of the founders can seem deceptively modern on commonplace topics, we should expect it to convey presuppositions about life and society that we no longer share and that we can understand and appreciate only through patient effort.

Murrin, *Can Liberals Be Patriots? Natural Right, Virtue, and Moral Sense in the America of George Mason and Thomas Jefferson*, in NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON, at 51 (R. Davidow ed. 1986); *see also* Letter from James Madison to Henry Lee (June 25, 1824), *quoted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 464 (M. Farrand ed. 1966) ("What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!").

ceptions held by the group deemed relevant.[96]

There are several deficiencies in strict originalistic models. These deficiencies cause the models to fall short of proper constitutional adjudication in the context of individual rights.[97] The original specific applications of the text and the specific intentions were driven by the circumstances that faced the people of that earlier society and their effort to adhere to underlying principles incorporated into the Constitution.[98] Some of the conditions and operative factors affecting the underlying principles have changed.[99] In light of these changes, it may be necessary to vary the text's specific application in order to advance the underlying principles that originally warranted that particular application.[100] As the Supreme Court stated in *Brown v. Board of Education*,[101] "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[102] Because we cannot turn back the clock, a strict adherence to originalism "require[s] that we find legislation valid unless it violates val-

96. *See* Monaghan, *supra* note 2, at 379-80.

97. Further, these methods of interpretation do not coincide with the original interpretive intent and accordingly are not appropriate for originalist adjudication. *See infra* note 136; *see also* Brest, *supra* note 12, at 216 ("The adopters may have understood that, even as to instances to which they believe the clause ought or ought not to apply, further thought by themselves or others committed to its underlying principle might lead them to change their minds.").

98. *Cf.* United States v. Chadwick, 433 U.S. 1, 9 (1977) ("[T]he Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."); Williams v. Florida, 399 U.S. 78, 88-90 (1970) ("In short, while sometime in the 14th century the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place." (footnotes omitted)); *see also* Tennessee v. Garner, 471 U.S. 1 (1985). In *Garner*, the Court rejected the notion that it should rely exclusively on the practice at common law at the time of the adoption of the Fourth Amendment in defining its application today. The Court stated that, "[b]ecause of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry." *Id.* at 13.

99. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989).

100. Because the amendment process cannot sustain the entire burden of adaptation if the Constitution is to remain a viable document, strict originalism might eventually raise serious questions about the need to introduce a new constitutional system. Sandalow, *supra* note 2, at 1046. But de-emphasis upon the Constitution may also raise substantial question as to the validity and viability of our system. "The refusal of some to acknowledge that [the original understanding of the Constitution can answer interpretive questions] ultimately threatens the stability of the Constitution either as a symbol or as an important societal institution." Clinton, *supra* note 9, at 1264. Moderate originalism strikes the appropriate balance between these two extremes.

101. 341 U.S. 483 (1954).

102. *Id.* at 492 (footnote omitted).

ues that are both old-fashioned and seriously outmoded."[103]

Those who would bind judges by a static interpretation of the original specific application of intent or text fail to consider that the Constitution was drafted with certain underlying principles that justified that original application. If constitutional interpretation is limited to the original application of the Constitution, without resort to the underlying principles, the very principles of the Constitution would be sacrificed in the name of the original application.

As a general rule, strict originalists deny that the original specific application of the Constitution may legitimately change in modern-day adjudication.[104] However, not all strict originalists draw such an absolute line. Some admit that change is appropriate when the circumstance was not envisioned under the original Constitution.[105] They stop short, however, of an interpretative model that would allow courts "to reach results which are *contrary* to the Framers' known intent . . . ."[106] They would allow enhancements to the original application only when there is not sufficient evidence that the issue was originally conceived and of how it was resolved.[107]

The strict intentionalists are correct in arguing that some of the provisions of the Constitution are inflexible. Some provisions define such requirements as the age of the President, the number of representatives to be elected from each state, and the process for the enactment of laws. Such specific and clear provisions are primarily procedural in nature.[108] For purposes of clarity and stability, such provisions were not designed to be interpreted so as to change with the evolution of our society.

Government could not effectively and efficiently operate if constant bickering over the meaning of procedural provisions occurred. In the

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103. Tushnet, *supra* note 41, at 787. Strict originalism not only prevents courts from vindicating rights that are now implicit in the original underlying principles of the Constitution, but it may also unduly restrain the other branches from acting in areas where societal changes have occurred since the drafting of the Constitution. Under these changed circumstances these governmental branches should be authorized and competent to act. *Id.*

104. *See, e.g.*, Monaghan, *supra* note 2, at 279-80.

105. *Id.*

106. *Id.* at 380 (emphasis in original).

107. *See, e.g., id.* at 379.

108. *See* U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 3, cl. 1; U.S. CONST. art. I, § 7; U.S. CONST. art. II, § 1, cl. 5. *But see* Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985):

> [E]ven a seemingly determinate clause such as the minimum age for presidents remains indeterminate. It is possible that the age thirty-five signified to the Framers a certain level of maturity rather than some intrinsically significant number of years. If so, it is open to argument whether the translation in our social universe of the clause still means thirty-five years of age.

context of individual rights, however, the need for stability and predictability is not as great as in the procedural context.[109] In this context, the "right" resolution is more important than efficiency. Just as with the procedural provisions, the wording of the provisions that are relevant to individual rights indicates the appropriate method of interpretation for those provisions. Because the provisions are not written in clear, direct, and specific terms, the text implies that a moderate originalistic interpretation is appropriate.[110]

B. Moderate Originalism and the Constitution

Moderate originalism is more flexible and allows the Constitution to grow. It thus avoids some of the shortcomings of strict originalism. Growth under a theory of moderate originalism, however, differs from noninterpretivistic growth.[111] "[Moderate originalistic] growth is made possible . . . by the Constitution's 'briefly indicating certain fundamental principles whose general purport is clear enough but whose specific implications for each age were meant to be determined in contemporary context.' . . . Noninterpretivistic growth takes place along different lines;

109. There are two major types of constitutional provisions that relate to individual rights. One type of provision limits the powers of the State and grants rights to individuals and against majority rule. These features of the Constitution protect individuals or political minorities from the official acts of the majority or those elected (or appointed) to represent their interests. *See, e.g.*, most provisions of the Bill of Rights; U.S. CONST. art. I, § 9, cl. 2 (Writ of Habeas Corpus is not to be suspended except as defined in the Constitution); U.S. CONST. art. I, § 9, cl. 3 (no ex post facto laws or Bills of Attainder); U.S. CONST. art. I, § 10, cl. 1 (states may not issue ex post facto laws, Bills of Attainder, or laws that impair contracts); U.S. CONST. art. III, § 2, cl. 3 (trial by jury in the state where the crime was allegedly committed); U.S. CONST. art. VI, cl. 3 (no religious test to qualify for office of "Public Trust" of the United States); U.S. CONST. amend. XIV (Due Process Clause). The second type of provision limits the powers of the State, but is more concerned with setting standards than with directly granting rights. The First Amendment contains an example of both of these features. The Free Exercise Clause of this amendment is a right-conferring provision. However, the Establishment Clause is more concerned with limiting governmental power and setting standards of proper governmental conduct. Of course, liberties may indirectly flow from the limitation or denial of the powers of the government. These rights, however, are generally collective in nature and should be treated differently. *See* Simien, *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 566-74 (1988).

110. Of course, this is not a universal rule. There are instances of individual rights guarantees where the language is very clear, specific, and direct. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law . . . ."). The purpose of this Article is not to critique or analyze those cases in which such language has not been given clear import. Instead, its purpose is to demonstrate that in the context of the numerous individual rights provisions that are less clear, moderate intentionalism and resort to natural law theories are appropriate and necessary.

111. See *supra* notes 1-88 and accompanying text regarding criticism of noninterpretivistic growth.

it is extra-constitutional in substance."[112]

When courts engage in moderate originalistic interpretation, they determine the original meaning of a constitutional provision based on either the original meaning of the text or the original intent.[113] This meaning is determined within: (1) an historical perspective, by looking to the general nature of the entire document,[114] (2) the specific concerns that were to be addressed and the original application of the provision, and (3) the nature of the society that drafted the provision, including the prevailing political philosophy. Most important, the moderate originalist looks to the constitutional principles that originally underlay the relevant provisions and their specific applications. Accordingly, courts applying the moderate originalist model must determine how changes in the relevant operative factors might lead to variations from the original application of the Constitution in order to advance more effectively the underlying principles.[115]

Under the theory of moderate originalism advocated here, changes in the operative factors have a different effect on those areas in which the language is less clear than those in which there are clear and specific procedural provisions. Provisions relating to individual rights were

112. S. BARBER, *supra* note 90, at 23 (footnote omitted) (quoting from J. Ely, *Constitutional Interpretivism*, 53 IND. L.J. 399, 400 (1978)).

113. As with any theory of interpretation, moderate originalism has as many versions as proponents. The characteristics and content of the theory as described here shall be generally recognized features, not necessarily containing all of the features of all forms of moderate originalism, or those with which all moderate originalists would agree.

114. *See* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Palmer, *Liberties As Constitutional Provisions*, in LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 56 (W. Nelson and R. Palmer eds. 1987).

115. Depending on what underlying principles support the provisions in question, different operative factors become relevant to this inquiry.

One operative factor that has changed and may affect all constitutional adjudication is the class of persons to whom constitutional protections extend. "The Constitution was adopted by propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales . . . ." Simon, *supra* note 35, at 1492. Another overriding change in operative factors is that at the time the Constitution was drafted, not only was slavery sanctioned, it was a significant factor in the socioeconomic fabric of our society. Slavery had a profound impact on some of the decisions made in Philadelphia. *See* Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93 (1989). A civil war and several constitutional amendments have reversed many of the effects slavery had upon the original intentions. Additional principles have been incorporated and the application of previously included principles have been molded to more closely reflect those principles and the changes they have made. See *infra* note 222 for indications that the original Framers understood that slavery was inconsistent with many of the principles upon which our government was established. These changes not only affect the scope of coverage, but also affect the entire dynamics of the Constitution and our society.

designed with specific applications.[116] As demonstrated by their vague terms, however, they were designed to grow and develop as needed to advance their underlying principles. Therefore, in determining whether these underlying principles have been satisfied in light of changes in the operative factors, courts cannot be limited to the original specific application. In light of these changes, courts must determine how specific applications must change in order to advance the original underlying principles.

Using this model of interpretation, three scenarios are relevant to a claim that an individual rights guarantee of the Constitution should lead to a specific result: (1) the interpretation originally was considered as part of and necessary to the underlying principles; (2) the operative factors relevant to the provisions in question have changed; and (3) the interpretation might not be justified under either of these scenarios, but for other reasons is tempting.[117]

Interpretation consistent with the original underlying principles would be appropriate under an originalistic interpretive model. Under the second scenario, the Constitution must be interpreted to advance its original underlying principles. When the operative factors relevant to the underlying principles have changed, however, there must be changes in the court's interpretation to assure that these principles are advanced. Under the last scenario, there is no valid basis under moderate originalism for a change in the interpretation.[118]

Moderate originalism involves more than a determination of the original meaning and specific application of the Constitution at its inception. This meaning and application originally attempted to advance principles that were believed to pre-date and exist independently of the Constitution. Moderate originalism requires a search for these underlying principles. In other words, courts should attempt to determine what

116. For example, the primary considerations in the addition of the Fourth Amendment were the then-recent experiences of the colonists with the British writs of assistance.

117. For discussion of other theories of interpretation, see *supra* notes 2-111 and accompanying text.

118. Under moderate originalism, technological advances are also relevant to interpretation, but in a different manner. Technological advances may support the development of new means of protecting original underlying principles. As our society advances technologically, it may be necessary for courts to meet new challenges to the underlying principles. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967). There can be no meaningful protection of these underlying principles unless they are also protected from intrusions by means which were not originally envisioned. Technological changes might also affect the nature of society and the operative factors relevant to the original underlying principles. As a result, in order to advance these principles, the specific application of the Constitution might have to change to address these differences.

the text was designed to achieve in the broader sense rather than merely its specific application,[119] and that the results reached by courts advance those original underlying principles.[120]

Moderate originalism recognizes that the Constitution is not a document once written and unchanging. As John Agresto states:

> The highest and most complex attribute of judicial review is its potential ability to help the nation as a whole govern itself and direct its progress in the light of constitutional principles; not only principles that need to be applied to new circumstances, but principles that—like the colonial ideas of sovereignty and equal right and even constitutionalism itself—must grow, develop, and expand.[121]

Moderate originalism is not without its critics. Much of the criticism, however, spills over from a critique of strict originalism and a failure either to perceive or to admit the differences between strict and moderate originalism.[122] As an example, moderate originalism would allow an interpreter to consider a change in societal attitude about equality as a change in some of the operative factors that affect the underlying princi-

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119. "All law, the Constitution not excepted, is a purposive ordering of norms. Textual language embodies one or more purposes, and the text may be understood and usefully applied only if its purposes are understood." Monaghan, *supra* note 2, at 353.

120. How then would a judge who wanted to be guided by the Constitution deal with the indeterminacies of the privileges and immunities clause, the due process clause, and the Ninth Amendment? . . . Try to ascertain the general values the framers sought to serve either through specific clauses or the Constitution as a whole, and construe the rules accordingly in changing circumstances.

S. BARBER, *supra* note 90, at 25-26.

121. J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 54-55 (1984). In further defense of moderate originalism, then Justice, now Chief Justice Rehnquist of the United States Supreme Court stated:

> The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. . . . Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such course of conduct. Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.

Rehnquist, *supra* note 27, at 694. *But see* S. BARBER, *supra* note 90, at 19 n.12 (describing Justice Rehnquist's views as strict originalism).

122. Professor Simon notes the primary criticism that nonoriginalists have for moderate originalism:

> Suppose, for example, that the creators of the fourteenth amendment wanted to achieve the goal of "equal treatment" for blacks and whites, but believed that segregation of facilities was not unequal. If a later generation believed that segregation as it had developed did not provide equal treatment, is it more faithful to the framers' intended meaning to permit or prohibit the disagreeable practices? Should the interpreter rely on current or past interpretations of the "equal treatment" concept?

Simon, *supra* note 35, at 512.

ple of equality. A moderate originalistic interpreter also would consider changes in the socioeconomic environment in which the question of equality must be decided. At one time separate but equal facilities may have been equal. Because of economic growth and development and the value of interaction in a new economic and social atmosphere, however, separate has become unequal. The factors for determining equality in 1868 were different from those of a society in which many intangible factors have a significant impact upon the ability of one to effectively operate in and advance within that society. It is only by considering the changes in these operative factors that a modern court may determine if the state is denying a citizen the principle inherent in the requirement of equal protection of the laws. Changes in these types of operative factors are not ignored under moderate originalism.[123]

There are other criticisms of moderate originalism, but they too are more appropriately applicable to strict originalistic approaches. Some commentators argue that it is impossible to achieve the necessary determinacy about original application of the Constitution for originalism to work.[124] It is not necessary, however, for a moderate originalistic interpreter to determine the original constitutional application. It is far more important to determine the underlying principles in the original document and later amendments. This inquiry does not require as much precision as one in which courts are required to enforce only the original specific applications of the Constitution.[125]

Originalism is also criticized for its reliance upon history. Critics charge that when judges rely upon history they are vesting themselves

123. "[O]nly [the] . . . great outlines [of the Constitution are to] . . . be marked, its important objects designated . . . . That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

In Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), the Court struck down the use of poll taxes in state elections. It did so despite the fact that at the time of the adoption of the Fourteenth Amendment poll taxes were commonplace. The Court reasoned that it has

> never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

Id. at 669 (citations omitted) (emphasis in original).

As indicated at *supra* note 12, this Article is limited to a discussion of the appropriate interpretive model for the original Constitution and Bill of Rights. Reference to other provisions such as the Fourteenth Amendment are merely to demonstrate the application of the model rather than to indicate that the interpretive model advocated here is appropriate for these other provisions.

124. *See, e.g.*, Tushnet, *supra* note 41, at 799-800.

125. Determining the original application of the Constitution would, of course, be useful. This would provide additional insight into the Constitution's underlying principles.

with the discretion that originalism was designed to limit.[126] However,

> [o]ur system . . . provides no way to enforce constitutional theory coercively; and if it did, the problem of how to constrain the constrainers would merely shift up one level. In consequence, constitutional theory can constrain judges only by creating standards for criticism and, to the extent that the standards are internalized by the judges, for self-criticism.[127]

Within the secular world, there must be some vehicle by which disputes are resolved or else government by the rule of law cannot exist. In a government of multiple branches, this resolution is most efficiently made when one branch is charged with the responsibility. It would not be possible to allow two (or more) branches to exercise authority to resolve disputes over the application of laws—including disputes over what the Constitution requires. If more than one branch had such authority, it would create the substantial probability of a dispute between the branches. Accordingly, one branch must have the singular authority to act as final arbiter of whether the government has exceeded its authority.[128]

There is no method to constrain unconditionally the discretion of that branch of government ultimately vested with the power of interpreting the Constitution.[129] Constraint results from guidelines, and guidelines result from the use of a theory of constitutional interpretation tied to principles. These principles exist as standards to those who must decide and as bases upon which to critique their decisions. Accordingly, we should be less concerned with trying to absolutely constrain judges and more concerned with discovering appropriate principles of constitutional interpretation. Proper judicial interpretation and constraint will flow from the discovery, promulgation, and acceptance of these principles.

Moderate originalism is also criticized for not providing sufficient guidance to judges searching for answers in constitutional adjudication. Just as more than one principle might explain a judicial decision or series of decisions, many underlying principles may be construed to explain

126. *See* Tushnet, *supra* note 41, at 799-800.

127. *Id.* at 784 n.9.

128. Of course, a branch other than the judiciary could have been selected for this purpose. However, under our system, the judiciary was selected. *See supra* notes 15-17 and accompanying text.

129. For a more complete discussion of whether judges do and ought to have discretion, see H. HART, THE CONCEPT OF LAW, Ch. VII, 121-50 (1961); R. DWORKIN, *supra* note 62, at 14-130; Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest For The Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975).

constitutional choices.[130] This argument has two implications—that it is impossible or overly difficult to ascertain the underlying principles of the Constitution and, again, that judges are not sufficiently constrained.[131]

Admittedly, it would be difficult to determine original underlying principles in all instances.[132] Even contemporaries to the Constitution had differing views about the document's meaning. This divergence in views, however, may not be so significant. Although the constitutional contemporaries might have disagreed over the specific application of the Constitution, this disagreement may have been bonded in the same underlying principles. Because modern courts should be more concerned with the underlying principles than the specific application, this divergence is not inconsistent with moderate originalism.

Further, many provisions were addressed adequately in the contemporary writings to make clear their underlying principles. The precedents of courts closer in time to the drafting of the Constitution are also helpful in reconstructing the original underlying principles. Many provisions may be reconstructed without significant difficulty based on this evidence.[133] If nothing else, courts have the text of the Constitution from which to attempt to derive these principles.[134] There will be times when the text will not be sufficiently revealing. An in-depth historical and philosophical inquiry into the society that adopted the Constitution, however, will also aid in the inquiry.[135]

Moderate originalism does not tie interpretation of the Constitution to the meaning it had in 1787 (or when the relevant amendments were incorporated). Because the overriding feature of this interpretive model is that judicial interpretation must advance the original principles underlying the Constitution, however, it leads to more consistent results than those interpretive models in which the original Constitution is not given binding effect. Despite this consistency, judges are required to consider changes in the operative factors relevant to underlying principles. For that reason, this method of interpretation is better able to serve the evolving needs of the nation than strict originalism. These advantages provide

130. *See* Sandalow, *Constitutional Interpretation*, *supra* note 2, at 1061.

131. See the preceding discussion of judicial constraint, which will not be further addressed here.

132. *See* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 155-61 (1969).

133. Monaghan, *supra* note 2, at 377.

134. "[T]he language of the constitution itself remains. Whatever the difficulties, that language constitutes the best evidence of original intention." *Id.*

135. Even if it were conceded that in some instances courts might fail in their attempts to determine underlying principles, they would at least be striving for an appropriate resolution. To paraphrase a well-known adage, "there's no surer route to failure than not trying."

significant practical reasons to support moderate originalistic adjudication in individual rights litigation.

For an originalist, however, the advantages of moderate originalism are not sufficient. Resort must also be had to the original interpretive intent. It would be a hypocrisy to advocate the binding nature of the original Constitution and yet ignore the original interpretive intent.[136] There is substantial evidence that the original interpretive intent was that the Constitution should be interpreted in a moderate originalistic fashion.[137] Moreover, as discussed below, the better evidence indicates that moderate intentionalistic interpretation was the preferred approach by the Framers.[138]

1. The Constitution as a Statute for Purposes of Interpretation

The idea of constitutional limitation on governmental power was not an invention of our founding fathers. Resort to "constitutional law" was a common practice in English political controversy long before the Declaration of Independence.[139] The innovation of American constitutional law was the reduction of a constitution to a single written document.[140] Accordingly, there was no precedent on how such a document should be interpreted. It is fairly well settled, however, that at the time of the Constitution's drafting and ratification, the prevailing view was

136. Brest, *supra* note 12, at 215-20; Powell, *supra* note 12, at 886; Nelson, *The Eighteenth Century Constitution as a Basis for Protecting Personal Liberty*, in LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 15, 47 (1987).

137. *See infra* notes 139-66 and accompanying text.

138. However, this intentionalistic approach placed a heavy reliance upon the text in determining intent. *See infra* notes 186-90 and accompanying text.

139. *See* C. BOWEN, THE LION AND THE THRONE 452-53, 482-84, 495-99 (1956). Except in rare cases, however, under English "constitutional law," the English judiciary did not normally declare statutes to be void. *But see* Calvin's Case, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1608) and Dr. Bonham's Case, 77 Eng. Rep. 646 (1610).

140. Powell, *supra* note 12, at 902. The history of constitutional law, however, depended heavily upon written documents, in part explaining the trust that our nation's founders placed in the power of the written word to protect rights and limit government. As Professor Clinton points out:

> The ultimate faith of the framers of the Constitution in the power of the written word is not surprising. Eighteenth-century American society emerged from western European traditions in which written documents played powerful roles in controlling human behavior and shaping the structure of, and limits on, governmental power. Biblical texts and their interpretation had stirred major revolutions in both thought and deed in Europe. The English legal tradition, while lacking a formal written constitution, had long relied on written documents to limit the prerogative of the Crown and therefore the operation of government itself.

Clinton, *supra* note 9, at 1187 (footnotes omitted).

that the Constitution should be interpreted as a statute.[141] Therefore a brief review of the prevailing thoughts on statutory interpretation is necessary.

2. *Protestantism, Enlightenment, and Statutory Interpretation*

At the time of the drafting and ratification of the Constitution, "[t]he cultural influences of Enlightenment rationalism and British Protestantism combined in an unlikely alliance to engender a suspicion of any sort of interpretation at all."[142] A primary theme of the Protestant Reformation was that the word of God, as contained in the text of the Scripture, was not to be interpreted.[143] The Protestant bias against interpretation was reinforced by the Enlightenment movement. The leaders of the Enlightenment movement saw many evils in interpretation. They felt that Scriptural interpretation led to the "theological absurdities and religious oppression perpetrated by the established churches, and saw the niggling interpretation of complicated or obscure laws as a relic of feudal misrule and political tyranny."[144] It was thought that interpretation of Scripture, so prevalent in the Catholic tradition, was a corruption of the Word of God as contained in the Scriptures.[145]

This distrust of interpretation spilled over into the political sphere. It was felt that the "advantages of a known and written law would be lost if the law's meaning could be twisted by means of judicial construction. . . . [T]he judiciary could undermine the legislative prerogatives of the people's representatives by engaging in the corruptive process of interpreting legislative text."[146]

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141. As a result, the common-law statutory interpretive influences shaped original constitutional interpretive theory. *See* Powell, *supra* note 12, at 894, 903-05; Berger, *supra* note 12, at 314. Even the Anti-Federalists agreed that the Constitution should be analogized to a statute for the purposes of interpretation. Powell, *supra* note 12, at 905. *But see* P. BOBBITT, CONSTITUTIONAL FATE 10 (1982) (concluding that British rules of statutory interpretation did not play a substantial part in shaping original interpretive intent).

It was not until 1798 that there was any widely accepted notion that the Constitution should be viewed as a compact (contract) rather than a statute. The delay in the emergence of this theory of the Constitution was, at least in part, due to the fact that during the drafting and ratification stages neither Anti-Federalists nor the Federalists viewed the Constitution as a compact. Powell, *supra* note 12, at 904-05.

142. Powell, *supra* note 12, at 887. The influences of the Enlightenment movement and British Protestantism upon American political thought cannot be overemphasized. One or both "formed part of the mental furniture of virtually all literate Americans" during the early years of the formation of our country. *Id.* at 893.

143. *See* R. BROWN, THE SPIRIT OF PROTESTANTISM 67-68 (1961).

144. Powell, *supra* note 12, at 892.

145. *Id.* at 890.

146. *Id.* at 892.

It was also thought that judicial interpretation of statutes violated notions of separation of powers, believed by many to be necessary for rational and free society.[147] But, as a practical matter, disputes within the temporal world had to be resolved through "the rich common law tradition of legal interpretation."[148] According to this tradition, courts had the authority and the obligation to determine the intention that underlay the text.[149] As an invention born out of necessity, however, this interpretation was to be severely limited.

Although few dispute that the courts' authority to interpret statutes was to be limited, there is a heated debate over the extent and source of this limitation. At the two extremes in this debate are H. Jefferson Powell and Raoul Berger.[150] Professor Powell asserts that the discretion common law courts exercised in statutory interpretation was limited by rules that required them to interpret by reference to the "intent" of the text, without reference to such devices as legislative history.[151] On the other hand, Raoul Berger contends that the discretion of these courts

147. *Id.* at 892-93.

148. *Id.* at 894, 897.

The tensions between the anti-interpretive traditions of Protestantism and Enlightenment and the interpretive tradition of the common law may not have been as strong as might appear. Despite the rich tradition of the common law, there was still a distrust of judges as interpreters of the law. The need to resolve disputes, however, even when statutory law may not have appeared clear forced acceptance of the common law practice. As a result, the recognition of a final interpretive authority in the common law tradition may have been more a function of the practical necessity for dispute resolution in the temporal world than an actual disagreement in principal with the anti-interpretive traditions of Protestantism and Enlightened rationalism. When issues center upon one's religious or philosophic views of "right" and only a god or conscience demands justification of one's actions, there is room for individualized interpretation not subject to review. Disputes within the temporal world, however, are at least two-sided. Therefore, other than in a system of anarchy, there must be a final arbiter of what is "right" so that disputes might be resolved.

149. *Id.* at 894.

150. *Compare* Powell, *supra* note 12, *with* Berger, *supra* note 12.

151. Powell, *supra* note 12, at 894-902. Although Professor Powell refers to this approach as intentionalism, it appears merely to be nonoriginalist textualism in disguise. For a similar conclusion, see Clinton, *supra* note 9, at 1187.

Some argue that the care with which the language was drafted and the concealment of the convention records indicates that the text was to take precedent over intent. *See* Palmer, *supra* note 114, at 141; Powell, *supra* note 12, at 903. However, these assumptions are not supported by the history of the Convention. The careful drafting of the language is only evidence that the drafters understood the importance of language, particularly for the specific, procedural provisions in which much of this care in drafting was used. *See* discussion *supra* notes 109-10 and accompanying text. The primary reason for the concealment of the records after the adjournment of the Convention was to prevent the Anti-Federalists from abusing them in the anticipated struggle over ratification. Clinton, *supra* note 9, at 1195. During the Convention, the records were probably concealed in order to facilitate open discussion by the delegates. *Id.* at 1195 n.60. James Wilson argued in favor of preserving the records of the Convention because he thought that, "as false suggestions may be propagated, it should not be made impossible to

was limited because they were required to interpret statutes by resorting to legislative intent.[152]

Although Professor Powell makes an interesting argument, Raoul Berger has the better point on this issue.[153] Professor Powell admits that at common law, words were to be taken "according to the . . . intent of the parties."[154] He explains, however, that this does not mean what a modern-day reader might think. Professor Powell argues that this confusion results from ambiguity in the meaning of the word intent.

> This simple principle[] concealed a significant ambiguity, because its salient term—intent—was by no means unequivocal in meaning. The English nouns 'intention' and 'intent' were derived from the Latin *intentio*, which in medieval usage could refer either to individual, subjective purpose or to what an external observer would regard as the purpose of the individual's actions. The English derivatives of *intentio* inherited a similar ambiguity: the 'intent' or 'intention' of a document could denote either the meaning that the drafters wished to communicate or the meaning the reader was warranted in deriving from the text.[155]

Thus, he concludes that, to understand the import of the common law's focus on "intent," we must determine in what sense the word itself was used.[156]

Professor Powell goes on to attempt to support his thesis with a historical study that spans four hundred years.[157] From this review, he

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contradict them" with the records. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 648 (M. Farrand ed. 1966).

152. Berger, *supra* note 12, at 298-308.

153. Raoul Berger's arguments for *strict* intentionalism are less persuasive. *See* discussion *supra* notes 91-110 and accompanying text.

154. Powell, *supra* note 12, at 894 (quoting Hewet v. Painter, 80 Eng. Rep. 864 (1611)).

155. *Id.* at 894-95 (footnotes omitted).

156. *Id.*

157. Professor Powell begins his study with jurist and parliamentarian, John Selden.

> Although Selden insisted that the 'one true sense' of a document is that which 'the Author meant when he [wrote] it' (the modern intentionalist's definition of 'intent'), he also asserted that the court determines 'the intention of the King' solely on the basis of the words of the law, and not by investigating any other source of information about the lawgiver's purposes.

Id. at 895 (quoting J. SELDEN, TABLE-TALK: BEING THE DISCOURSE OF JOHN SELDEN ESQ. 44 (London 1699)). Powell goes on to cite other common law treatises (*e.g.*, 1 J. POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 244 (London 1790) ("the law always regards the intention of the parties [by applying the parties' words] to that which, in common presumption, may be taken to be their intent")). Finally, Professor Powell reviews the judicial practice and concludes that this practice showed a lack of willingness to resort to tools such as legislative history in determining the meaning of statutes. Powell, *supra* note 12, at 897 n.60 (" 'And the Judges said they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the Act, as their own direct words, for *index animi sermo*' ['the word is the sign or indicator of the

concludes that "[t]he late eighteenth century common lawyer conceived an instrument's 'intent'—and therefore its meaning—not as what the drafters meant by their words but rather as what judges, employing the 'artificial reason and judgment of law,' understood 'the reasonable and legal meaning' of those words to be."[158] He also concludes that the "[p]olitical and legal scholars in both Britain and the American colonies viewed strict judicial adherence to the legislature's language as a constitutional necessity, because the 'known, fixed laws' could be properly established or altered only by 'the whole legislature,' which spoke only through its enactments."[159]

The shortcomings of Professor Powell's conclusions result partly from a fallacious leap in logic. He concludes that because judges used "artificial reason and judgment of law"[160] to determine meaning, legislative intent became irrelevant. This reasoning presupposes that this "reason and judgment" was used to the exclusion of the legislative intent.[161] This is not necessarily so. "Reason and judgment" could well have been devices for determining meaning when the intent was not known.

Professor Powell admits the ambiguity of the word "intent" but does not cite convincing evidence that his conclusion is more reasonable than the conclusion that intent meant the legislative intent. Indeed, logic

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soul']." (quoting Edrich's Case, 5 Co. Rep. 118a, 118b, 77 Eng. Rep. 238, 239 (C.P. 1603))). Professor Powell has been criticized by assertions that he selectively used quotations and citations. *See e.g.*, Berger, *supra* note 12, at 300 ("But [when] Powell [quoted from *Edrich's Case*, he] overlooked Coke's immediately following sentence: 'And it would be dangerous to give scope to make a construction in any case against the express words, *when the meaning of the makers doth not appear to the contrary.*' " (emphasis provided in secondary source)). For a gentler approach to such criticism, see Clinton, *supra* note 9, at 1186. For additional common law citations which supported resort to the legislative intent in statutory construction, see Berger, *supra* note 12, at 300-06.

158. Powell, *supra* note 12, at 895-96 (footnotes omitted) (quoting Prohibitions del Roy, 12 Co. Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (1608); Talbot *qui tam* v. Commanders and Owners of three Brigs, 1 Dall. 95, 100 (Pa. 1784). Professor Powell contends that the text should be interpreted to mean what it meant at the time of its writing. *Id.* at 948. However, since he places so many handicaps upon modern-day interpreters in ascertaining this meaning, one must conclude that this approach is nonoriginalistic in nature. Professor Powell's approach seems to ignore "the important interpretive distinction between originalist textualism and ahistoric textual analysis . . . ." Clinton, *supra* note 9, at 1194.

159. Powell, *supra* note 12, at 898 (quoting from L. LEDER, LIBERTY AND AUTHORITY 86-87 (1968)).

160. *Id.* at 896.

161. The fact that English jurists would not look to legislative history does not prove Professor Powell's point. That practice merely stemmed from a belief that such evidence was, under then-current methods of legislative history keeping, incompetent rather than from a conclusion that legislative intent was irrelevant.

dictates that the latter is the more plausible explanation.[162] The purpose of judicial interpretation is application of the meaning of law to a dispute in litigation. The parties to this "law" might be individuals agreeing to a contract, legislators making statutes, or a society adopting a constitution. But in each case, the words are merely the "media through which [the parties'] meaning is conveyed."[163] Because the words do not have life of their own force but live only through the parties, it would seem more plausible that the ambiguity in the meaning of the word "intent" should be resolved by favoring the intent of the parties over the "intent" of the words.[164]

Finally, Professor Powell's thesis is not supported by the history that immediately followed the Convention.[165] Many of the members of the Convention and others active in the ratification process continued in public service in the newly formed government. In this capacity, they were often called upon to discuss publicly their understanding of the meaning of the Constitution, often resorting to their recollection not just of the text but of the intent of the parties at the Convention, at the state ratification conventions, and in Congress.[166]

C. Moderate Intentionalism and the Constitution

1. Whose Intent Counts?

When commentators and courts speak of intentionalism, they often refer to the intent of the prime movers in the drafting or ratification pro-

162. There is also evidence in the Constitutional Convention that the words themselves were not to be the only source of interpretive evidence. When the Convention turned its attention to what later became Article III of the Constitution, a debate arose as to the need to limit the judicial authority under that provision. James Madison asserted that it may have been "going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (M. Farrand ed. 1966). However, the debate ended, without changing the wording, when it was "generally supposed [by the members of the Convention] that the jurisdiction given was constructively limited to cases of a Judiciary nature." *Id.*

163. Attorney-General v. Malkin, 41 Eng. Rep. 866, 868 (Ch. 1845).

164. Professor Powell's arguments do no more than support the contention that it was the citizenry's collective intent which is more significant than the intent of individuals or groups involved in the process of drafting and ratifying the Constitution. *See infra* notes 167-90 and accompanying text.

165. *See* Clinton, *supra* note 9, at 1197-1208.

166. Among these were Abraham Baldwin, Benjamin Bourne, Jonathan Dayton, Elbridge Gerry, Charles Pinckney, Theodore Sedwick, Roger Sherman, William Smith, and even James Madison. *See id.* at 1197-1200 and references cited therein. For reasons discussed in the next subsection, the intent of these persons should not be considered as binding. However, the very fact that their intent was offered in explanation contradicts Professor Powell's thesis.

cess.[167] This understandable tendency, however, should not obscure the relevant inquiry into whose intent gave binding force to the Constitution.[168]

Many persons and groups can be considered as prime movers in the drafting and ratification of the Constitution and the Bill of Rights.[169] But despite the contributions of these prime movers, the Constitution is not the product of any one of them[170] or even their collective work. It is a product and Constitution of all the citizenry.[171] Therefore, the relevant question is not, "What were the intentions of the prime movers?"[172] These persons and groups were only representing the citizenry at large.[173] The relevant inquiry examines the collective intent of the citizenry.[174] They were the ones represented in the Constitutional Conven-

167. *See* S. BARBER, *supra* note 90, at 11; Rehnquist, *supra* note 27, at 693; Monaghan, *supra* note 2, at 375 n.130; Monaghan, *The Constitution at Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 125-26 (1978); J. ELY, *supra* note 2, at 17-18; and McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 407 (1819).

168. In an earlier Article, I am guilty of this tendency, which I now consider to be an error. *See* Simien, *supra* note 109, at 539-42.

169. These groups included the drafters, the members of the Continental Congress that sent the Constitution to the states for ratification, the members of Congress that voted on amendments, and the ratifiers in the various ratification conventions or state legislatures.

170. The Constitution is a document that "emerged as a result of compromises struck after hard bargaining." Monaghan, *supra* note 2, at 392.

171. *See* Berger, *supra* note 12. As stated in the preamble to the Constitution, it was "We the People [who did] . . . ordain and establish this Constitution for the United States of America." See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 453-547 (1969), for a discussion of how notions of popular sovereignty affected the Constitution.

172. The intentions, notions, and statements of the individuals during the process of drafting and adopting the Constitution may be helpful in determining the underlying principles. While turning to these tools, however, one must not lose sight of the fact that the intent of these individuals or groups is only relevant to the extent that it sheds some light on the underlying principles incorporated into the Constitution when it became the Constitution for the nation.

173. Many times in this capacity their individual views were not the ones they had vowed to support. In some instances, the local delegates to the state conventions earned their election by vowing to either support or oppose the Constitution. Others were formally instructed as to how they should vote. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235, 269 (1989).

174. This view of intentionalism negates many of the criticisms leveled against intentionalism in general. For example, four states did not ratify the Constitution until it was officially operative (only nine states were needed). This raises the question of the significance of the intent at the post-ratification conventions. *See id.* at 268. Under the approach advocated here—particularly with its strong reliance upon the text of the Constitution, *see infra* notes 186-90 and accompanying text—the intent at the ratification conventions of specific pre- and post-ratification states becomes less significant. The relevant inquiry is not state-specific. The intent within the states is only *evidence* of the collective intent of all of "We the People." This intent is also evidenced by many factors including the text of the Constitution.

tions, the Continental Congress, the Congress, and the various state ratification conventions and legislatures.

I make these statements fully aware that not only did much of the citizenry not participate in the ratification process, but that they could not participate due to qualification requirements. Furthermore, in many instances, some of those eligible for participation may not have formed any intent as to particular provisions or even underlying principles. Because no universally accepted interpretation existed for all of the constitutional provisions or of the Constitution's underlying principles, there was no true collective intent.[175]

There was, however, at least nonspecific agreement on two important points: (1) the incorporation and meaning of some of the underlying principles that relate to individual rights, and (2) that other principles not *expressly* enumerated in the Constitution were implicitly incorporated within the Constitution's protection of personal liberty.[176] This sort of nonspecific agreement does not form a true collective intent about a document which must be applied in specific cases. Thus, as the term "collective intent" is used in this Article, it must be understood to mean the understanding, as to underlying principles, the average person who read and considered the import of the Constitution would have had.[177] This view of collective intent might also be called the original, objective understanding of the document.[178]

The major difference between the proposed approach to constitutional interpretation and statutory interpretation as discussed above is that the former relies upon the intent of the represented and the latter upon the intent of the representatives. This difference in approach to interpretation is justified by the different processes in the adoptions of and functions served by statutes and constitutions. Within a representative system, statutes are enacted by representatives of the citizenry, acting within their authority to bind the citizenry. This legislative authority

175. This would be so even if the relevant group were much smaller than the populace of the United States in the period from 1787-1791. The larger the group, however, the more pronounced the potential for lack of true collective intent.

176. *See infra* notes 191-272 and accompanying text.

177. This view of collective intent apparently was also what was meant by the founding fathers when they spoke of the intent of the people. *See infra* notes 181-85 and accompanying text.

178. This approach differs from Professor Powell's approach, which is discussed *supra* notes 142-66 and accompanying text. Under Professor Powell's approach, the intent of the text is to be derived only from the text itself. Under the proposed approach, however, resort to any available means of ascertaining the original understanding of the document would be appropriate.

flows from and is granted by constitutions.[179]

Constitutions, on the other hand, are the master rule of law. Without this master rule of law, there is no representative authority nor any government. Therefore, assent to a constitution must be derived from the whole of the people and it is their intent that becomes relevant, not that of the representatives.[180] One may argue that in the adoption of our Constitution the people's assent was given to the prime movers when the representatives to the various conventions and legislatures were elected. However, that would not comport with the original understanding.

For example, in referring to the Constitution, James Madison, viewed by many as the father of the Constitution, stated that "it was the duty of all to support it in its true meaning, as understood *by the nation* at the time of its ratification."[181] In addition, the conclusion that the citizenry as a whole formed the relevant body of intention for constitutional interpretation was supported only seven years after the Constitution was ratified. When the Jay Treaty was negotiated in 1796, the House of Representatives sought a resolution calling for the negotiation papers used by the American representatives to the treaty. The call for this resolution evoked a lengthy debate on the authority of the House to concern itself with the process of treaty making.[182] During this debate, members of the House argued that the interpretative intent manifested at the Constitutional Convention and in the state ratification conventions was that the Constitution should be interpreted as understood by the general populace.[183] For example, William Smith, who had served as a delegate to the South Carolina Ratification Convention, argued that in interpreting the Constitution, one should refer to the period during the drafting and ratification. From this basis he asserted that the Constitution should be interpreted in "the general sense of the *whole nation* at the

179. As used here, the term "constitutions" includes the documents, traditions, customs, and rules of the various societies that establish a government and delineate its functions.

180. The Constitution establishes a republican form of government. *See supra* note 20 and accompanying text. However, the Constitution should not necessarily be interpreted in light of these republican theories. That form of government is an outgrowth and function of the government formed. Because the Constitution is the master rule of law and predates this form of government, republican theory does not necessarily dictate the appropriate model for constitutional interpretation.

181. 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 245 (1865) (emphasis in original). For other similar statements by James Madison, see *infra* note 192.

182. Article II, § 2 provides that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties . . . ."

183. *See* Clinton, *supra* note 9, at 1198-1208 and materials cited therein. The interpretative intents of the persons in the House of Representatives at that time are not controlling on the issue of appropriate constitutional interpretation. Such interpretive intent, however, is strong evidence of the prevailing interpretive theory and objective understanding on this point.

time the Constitution was formed . . . ."[184]

President Washington declined to comply with the House Resolution that was ultimately passed. In doing so, he sent a message to the House, which relied not only upon his memory of the Constitutional Convention but also upon the debates in the state ratification conventions. James Madison responded to President Washington's message, particularly his reliance upon his memory of the Constitutional Convention. Madison asserted that the Convention members' interpretive intent was of little significance:

> But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.[185]

2. *Role of the Text*

At this late date, to the extent that any true consensus existed, it would be extremely difficult to recreate the consensus of understanding

184. 5 ANNALS OF CONG. 495 (1796) (emphasis added). Benjamin Bourne also argued (with citation to the North Carolina ratification debate) that in attempting to interpret Art. II, § 2, the House should heed and "obey the voice of the people." 5 ANNALS OF CONG. 574. During this debate, Alexander Hamilton, just as he did when helping to write *The Federalist*, took pen in hand and wrote under a pseudonym (this time Camillus). He asserted that true constitutional interpretation would look to "the sense of the Community, in the adoption of the Constitution[, which sense is evidenced and influenced by] the writings for and against the Constitution and the debates in the several state Conventions." 20 THE PAPERS OF ALEXANDER HAMILTON 23-24 (H. Syrett ed. 1974); *see also* 2 THE FEDERALIST NO. 78, *supra* note 17, at 467 (relying upon the "intention of the people" for guide as to the meaning and interpretation of the Constitution). Some opponents to the treaty placed less reliance upon these sources of interpretive intent. For example, Edward Livingston, who introduced the resolution, contended that the Constitution should be interpreted by resort to its wording. 5 ANNALS OF CONG. 635 (1796).

185. 5 ANNALS OF CONG. 776 (1796). Similar comments were made by James Madison in other contexts. In 1821, Madison wrote that the meaning of the Constitution must be sought in its text, but if it "is to be sought elsewhere, it must be not in the opinions or intentions of the Body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. [sic] all the authority which it possesses." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447-48 (M. Farrand ed. 1966) (Letter to Thomas Ritchie (September 15, 1821)). That same year, Madison wrote to J.G. Jackson, asserting that the Constitution should be supported "in its true meaning as understood *by the Nation* at the time of its ratification." *Id.* at 450 (Letter to J.G. Jackson (December 27, 1821)) (emphasis in original). Some nine years later, Madison was still claiming that the Constitution should be interpreted by reference to the manner in which it was "understood by the [ratifying] Conventions, *or rather by the people* who thro' [sic] their Conventions, accepted & ratified it." *Id.* at 489 (Letter to Andrew Stevenson (November 17, 1830)) (emphasis added).

that led to the ratification of the Constitution. Therefore, in attempting to recreate the collective intent, reliance must be placed on the text of the Constitution itself. This is particularly true when the text is sufficiently clear to provide substantial guidance as to its meaning and its underlying principles. When courts try to determine the intent of a group (*e.g.*, the legislature that passed a statute), the text is the only thing upon which there was expressed collective agreement. Thus, the text itself is often the best indicator of that group's objective understanding.[186] The logic of this conclusion is multiplied where the relevant intent is not that of a small group but the objective understanding of the American populace between 1787 and 1791.

Consequently, as a general rule, the text will be the best indicator of the original, objective understanding of the Constitution. Therefore, in determining the underlying principles of the Constitution, there should be a strong presumption that the text's meaning is controlling over the individual statements or even the statements of any one group.[187] Only when clear evidence exists of an objective understanding contrary to that expressed in the text should that interpretation be preferred to the text.[188]

Despite strong reliance upon the text of the Constitution, the term intentionalism is preferred to textualism.[189] Proof of the original, objec-

186. "Lord Chancellor Hatton, writing in 1677, [concluded that] . . . 'when the intent is *proved*, that must be followed; . . . but whensoever there is departure from the words to the *intent*, that *must be well proved* that there is such meaning." Berger, *supra* note 12, at 302 (quoting C. HATTON, A TREATISE CONCERNING STATUTES, OR ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 14-15 (London 1677) (emphasis added).

187. As stated in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202-03 (1819) (emphasis added):

> [A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected *chiefly* [though not exclusively] from its words. . . . But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

188. [E]vidence ought to be very strong to justify a construction inconsistent with the ordinary meaning of the words used. That such cases may exist cannot be doubted, for the words being only the media through which the meaning is conveyed, it is immaterial what words are used if we are sufficiently informed what meaning they are intended to bear . . . .

Attorney-General v. Malkin, 41 Eng. Rep. 866-68 (Ch. 1845).

189. Some might view this model of interpretation as a hybrid between intentionalism and textualism. Such a view, however, is not well-founded. While there is a strong reliance upon the text, the ultimate aim of the model is the enforcement of the objective understanding of the Constitution.

tive understanding (intent) would always trump the provision's language. If there is sufficient evidence that the average person would have understood the text to have a meaning contrary to what appears to be the clear import of the words, this understanding would prevail.[190] In addition, several provisions of the Constitution are not sufficiently precise to provide adequate guidance as to their meaning or underlying principles. Most provisions relating to individual rights fall into this category. In these circumstances, resort to other considerations is not only desirable but necessary. For all provisions, reliance upon their historical development and the then-prevailing notions of political and legal philosophy is very important. For the less clear provisions, however, it is even more important because there is no text which provides significant insight into their meaning.

III. Natural Law and Original Intent[191]

Moderate originalism requires modern-day judges to consider not only the original application of the Constitution, but also its underlying principles. These principles are best understood by studying the political philosophy of the people who adopted the Constitution. In this section, I will demonstrate that natural law theories were a substantial component of the prevailing political philosophy of the people of 1787-1791. Through this demonstration I hope to show that natural law theories are not only consistent with originalist adjudication but are a necessary component of it.

190. The only purpose of reliance upon the language is as evidence of the objective understanding. If the language is clear, it will be difficult to overcome the presumption of what was intended by the provision's approval.

191. *See supra* note 13 for an explanation of how the term "natural law" is used in this Article.

My purpose in writing this section is not to engage in a detailed exposition of natural law theories. Such detail is contained in many of the cited works. Some of these works include: H. BRAGDON & J. PITTENGER, THE PURSUIT OF JUSTICE (1969); A. KELLY & W. HARBISON, *supra* note 13; C. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 1760-1776 (1933); A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1947); B. PATTERSON, *supra* note 57; R. POUND, *supra* note 13; R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 (1955); P. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT (1971); R. STOREY, OUR UNALIENABLE RIGHTS (1965); Kelly, *Where Constitutional Liberties Come From*, in FOUNDATIONS OF FREEDOM (A. Kelly ed. 1958); Palmer, *supra* note 114; and Rowsome, How Blackstone Lost the Colonies: English Law, Colonial Lawyers, and the American Revolution (1972) (unpublished dissertation). My purpose is merely to demonstrate that these theories cannot be ignored in an originalistic approach to constitutional interpretation.

A. European Natural Law Influences and Colonial Thought

The concept of natural and inherent rights was not a creation of the Bill of Rights,[192] the American Constitution,[193] or even the colonial American cry for independence.[194] Prior to the colonization of America, it long had been thought that certain rights were not created by governments or constitutions. Therefore, when the colonists decried British policies by asserting that laws, constitutions, and even bills of rights did not create all rights, they rested upon principles of much antiquity.[195] By

192. At no point does the Bill of Rights purport to create rights. All of the provisions appear to proceed upon the assumption that the enumerated rights already existed, and that the Bill of Rights is merely a recognition of this fact. As stated in the debates on the adoption of the Bill of Rights, "The amendments reported are a declaration of rights; the people are secure in them, whether we declare them or not . . . ." 1 ANNALS OF CONG. 742 (J. Gales ed. 1789) (statements of Representative Roger Sherman on Aug. 13, 1789). In introducing the draft of the Bill of Rights to Congress, James Madison expressed concern that a bill of rights might be construed as an indication that the people had retained only those rights in the declaration. He clearly indicated, however, that this was not the result of the bill of rights that he drafted and introduced. He guarded against this perception by the inclusion of what later became the Ninth Amendment. 1 ANNALS OF CONG. 455-57 (J. Gales ed. 1789).

193. Prior to the inclusion of the Bill of Rights, the Preamble provided that "We the People of the United States, in order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." At the time that the Preamble was written, there was no intent to include a Bill of Rights in the Constitution. Both history and logic support the conclusion that the Preamble's reference to these blessings of liberty was a reference to the rights that formed the basis for the eloquently stated complaints in the Declaration of Independence some eleven years earlier.

The Constitution should be construed in light of its Preamble. *See* Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (1791), *reprinted in* 8 PAPERS OF ALEXANDER HAMILTON 105 (H. Syrett ed. 1965); *see also* Powell, *supra* note 12, at 899 (citing British authority for the proposition that a statute's preamble was indicative of the intent of the statute). Accordingly, the Constitution's statement in the Preamble is of interpretive value.

194. "We hold these Truths to be self-evident, that all Men . . . are endowed by their Creator with *certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.*" The Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

Without the recognition of the existence of these unalienable rights, the Declaration of Independence would have lacked legitimate support:

> [I]t is only by recognizing that rights exist prior to and independent of governments that they can serve effectively to measure or evaluate governments. Hence, it was the rights of man and not of Englishmen that the Declaration [of Independence] relied on when making the case against the king and for independence; after all, the king (or king-in-parliament) had the authority to define the rights of Englishmen and could be expected to know better than Jefferson, Adams, and Franklin what they were.

W. BERNS, TAKING THE CONSTITUTION SERIOUSLY 28 (1987).

195. Today, our political discourse relies on beliefs of human rights independent of any governmental recognition of those rights. In a 1984 State Department report, the Iranian government was criticized for its treatment of religious minorities. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984 (Report submitted to the Committee on Foreign Relations, U.S. Senate, and the Committee on Foreign Affairs, U.S. House of Representatives, by the Department of State 1235 (February 1985)). "But Iran can be blamed for this only if

the time these protests were heard in the colonies, the prevailing political thought was that natural law theories contributed to the definition of the relationship of men in society and that the "law of the time and place was only declaratory."[196]

Colonial political theory was derived primarily from seventeenth and eighteenth century writers on natural law and the English legalists.[197] Natural law theories based upon the notion that certain principles are inherent in the very nature of the universe and of mankind, however, are much older.[198] Examples of natural law theory date back to Plato's *Republic*, in which he advocated a concept of absolute justice that did not depend on human enactment.[199] These ancient natural law

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freedom of conscience is truly a human right, belonging to man as man, and not merely an American or peculiarly Western idea of a human right . . . ." W. BERNS, *supra* note 194, at 29. However, natural law theories are not without their critics:

> [A]ll the many attempts to build a moral and political doctrine upon the conception of a universal human nature have failed. Either the allegedly universal ends are too few and abstract to give content to the idea of the good, or they are too numerous and concrete to be truly universal.

R. UNGER, KNOWLEDGE AND POLITICS 241 (1975); *see also* J. ELY, *supra* note 2, at 54 ("[O]ur society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles . . . ."). Of course for the true originalists, the validity of natural law theories is irrelevant. All that is relevant is the original understanding of and belief in such theories. *See supra* note 13.

196. Pound, *Introduction* to B. PATTERSON, *supra* note 57, at iii. A unified attempt to define the details of natural law did not exist. Instead, our Founding Fathers were content simply to provide that man had immutable and unalienable rights and privileges that were derived from the "nature of things," allowing the details of the contours of these rights to be later discovered. C. LEBOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW 109 (1950).

197. Although many legal philosophers were widely read and their ideas found prominent place in revolutionary propaganda, only the more educated colonists were well versed in the writers prior to the seventeenth century. In addition, few European legal philosophers had the impact of Locke or Sidney. C. MULLETT, *supra* note 191, at 78. *But see* Murrin, *supra* note 95, at 41 (concluding that Locke did not have as significant an impact on colonial thinking as some might ascribe). However, much of the pre-seventeenth century writings influenced the later writers, who in turn significantly influenced early Americans. Therefore, a brief review of earlier thought is appropriate.

198. A. KELLY & W. HARBISON, *supra* note 13, at 36.

199. The question posed by the Greeks was "What . . . is behind positive law? From Heraclitus to the Stoics the answer returned was 'God' or 'Nature', and natural law was the permanent and universal law." C. MULLETT, *supra* note 191, at 14. The Greek views on natural law were transmitted to the Romans through Cicero. In Rome, "the abstract nature concepts of the Greeks [were transmuted] into natural law." *Id.* at 15. While the Greeks sought to show the connection between positive laws and the immutable background of natural justice, the Romans regarded natural law as the source of positive law. This positive law could be no more than declaratory of the natural order. *Id.* at 15-16. The Roman versions of natural law did not come directly to colonial America. The version that crossed the Atlantic included sources foreign to the ancient Romans (*e.g.*, the Bible). The Roman natural law theories, however, did influence American political thought. *Id.* at 16-18.

theories were carried over into the medieval period.[200]

The rise of what is considered as the modern era of natural law theories came about in the late sixteenth century. The society in which these political theorists lived was one in which the State was freed from ecclesiastical control, decentralized by feudalism, and theoretically allied to the Holy Roman Empire. The natural law theories were relied upon to answer the problems created by the rulers' (usually monarchs) refusal to acknowledge superior controls by any political or religious body. Natural law theories were viewed as a potential source of restraint on the power of the monarch.[201]

In the seventeenth century, many who sought to restrain the powers of the monarch relied upon a union of natural law theories with the social compact doctrine.[202] Johannas Althusis (d. 1683) was perhaps the first to join modernized natural laws theories with the Calvinist compact doctrine.[203] Thereafter, John Locke,[204] John Milton,[205] James Harrington, and Algernon Sydney[206] (all of whom were English), and Samuel Pufendorf,[207] Emmerich Vattel,[208] and Jean Jacques Burlamaqui[209] (all

200. *Id.* at 35.

201. *Id.* at 36.

202. *Id.* at 35. The tendency to rely upon natural law theories as a source for limiting the powers of the monarch was reinforced by developments in the sciences, particularly astronomy and physics. These scientific developments seemed to demonstrate that all nature operated by immutable and eternal laws inherent in the nature of the universe itself. *Id.*

203. *Id.* at 37.

204. John Locke, who had a very significant influence on colonial political thought, and John Milton both felt there were unalienable rights and privileges that were possessed by every individual in the state of nature. These rights and privileges were reserved even in organized society. The limited government notions inherent in the Declaration of Independence have their roots in natural law theories. Kelly, *supra* note 191, at 13-18.

205. John Milton, who wrote *Areopagitica* in 1644, argued that, by the laws of God and nature, man has a right to defend himself against unjust laws. For a more in-depth discussion of the works of John Milton, see C. MULLETT, *supra* note 191, at 53-54.

206. Among the writers of the later seventeenth century, none was given more consideration by the colonists than Algernon Sydney. C. MULLETT, *supra* note 191, at 56. Sydney taught that if laws (and even constitutions) were contrary to the laws of God and nature, they were not just and should not be obeyed. WORKS OF ALGERNON SYDNEY 328 (1772).

207. Pufendorf's *Of the Law of Nature and Nations* (Kennett trans. 1710) contributed heavily to colonial American political philosophy. Among his followers were James Otis and James Wilson. C. MULLETT, *supra* note 191, at 27. Pufendorf's work shows a heavy influence by Hugo Grotius. *Id.* Otis, Wilson, and others were also influenced by Burlamaqui and Vattel. *Id.* at 30.

208. At least by 1775, Benjamin Franklin received a copy of Vattel's *The Law of Nations or the Principles of the Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, which was the most often cited work in support of the colonial rights. P. SIGMUND, *supra* note 191, at 99; A. NUSSBAUM, *supra* note 191, at 161. Vattel differed from other continental writers (with the exception of Montesquieu, who also appealed to the early Americans) because he emphasized fundamental law as separate and independent of natural law. C. MULLETT, *supra*

from the continent) used and developed the same body of ideas.[210] By the eighteenth century, natural law theory was universally accepted in the colonies in one form or another.[211]

In addition to the natural law theorists, English legal philosophers and jurists also influenced early American political thought. The earliest English legal philosophers studied by colonial Americans were probably Glanvill and Bracton. Although Glanvill did not contribute to the development of the American use of fundamental law, Bracton believed in and wrote heavily on natural law.[212]

Sir Edward Coke, author of *Institutes and Commentaries on the Common Law*, greatly influenced the colonial ideas on limited government.[213] Coke contended that the Magna Carta and the common law embodied fundamental principles of right and justice. He argued from this conclusion that the Magna Carta and the common law were therefore supreme and could bind the acts of Parliament and the king.[214] To many colonists, Coke was the highest legal authority, and to Coke, positive law was subject to the law of nature.[215]

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note 191, at 28-31. The most basic difference between natural law and fundamental law is perhaps that the former is immutable while the latter could be changed by the whole of the people. P. SIGMUND, *supra* note 191, at 99. This distinction might help explain the amending process built into the Constitution.

209. When Thomas Jefferson substituted Locke's trilogy (life, liberty, and property) with the one used in the Declaration of Independence, he may have done so because of the influence of Burlamaqui, who had already so modified Locke's teachings. Murrin, *supra* note 95, at 45.

210. A. KELLY & W. HARBISON, *supra* note 13, at 37.

211. As Roscoe Pound points out:

> In the philosophical jurisprudence of the eighteenth century the idea of natural law was universally accepted. Out of this theory of universal ideal law grew a theory of natural, that is, ideal, rights, demonstrated by reason as deductions from human nature—from the ideal abstract man. . . . [J]urists on the Continent held to four propositions: (1.) There are natural rights demonstrable by reason. They are eternal and absolute. They are valid for all men in all times and all places. (2.) Natural law is a body of rules, ascertainable by reason, which perfectly secures all these natural rights. (3.) The state exists only to secure men in these natural rights. (4.) Positive law, the law applied and enforced by the courts, is the means by which the state performs this function and is morally binding only so far as it conforms to natural law.

R. POUND, *supra* note 13, at 74. Of course, there was disagreement as to what these natural law theories required.

212. C. MULLETT, *supra* note 191, at 33-34; P. SIGMUND, *supra* note 191, at 98-111.

213. R. POUND, *supra* note 13, at 57; A. KELLY & W. HARBISON, *supra* note 13, at 44; Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 563 (1938) ("[I]t is upon the methods and constitutional views of Coke that the colonial lawyers were nurtured.").

214. A. KELLY & W. HARBISON, *supra* note 13, at 46.

215. C. MULLETT, *supra* note 191, at 44-46. The most famous application of Coke's views on the superiority of the common law (as declaratory of the natural law) is Dr. Bonham's Case, 77 Eng. Rep. 638 (1610), and on the superiority of natural law is Calvin's Case, 7 Co.

Blackstone, the other great English jurist of that era, was also widely read in the colonies and provided additional impetus to the revolutionary fervor.[216] Blackstone taught that "[h]uman laws contrary to natural law had no validity and that valid positive laws derived 'all their force and their authority, mediately or immediately, from this original.' "[217]

Although Coke and Blackstone were the most influential British jurists, other jurists also contributed to America's natural law tendencies. Chief Justice Hobart, whose work also was favored in the colonies, agreed with Coke and Blackstone that law in violation of natural law was a nullity. In *Day v. Savadge*,[218] Chief Justice Hobart held that a law which allowed a man to be a judge in his own case was contrary to natural law. He therefore concluded that this "[a]ct of Parliament, made against natural equity . . . is void in it self."[219]

B. Natural Law and the Call for Independence[220]

Throughout the period leading up to the American Revolution, the colonists invariably relied upon natural law theories as a bulwark against absolute parliamentary power.[221] Because all law was thought to have its base in natural law, it is not difficult to see why the dominant cry during the American revolutionary period was that any law that was inconsis-

Rep. 1a, 77 Eng. Rep. 377 (1608). *See* C. MULLETT, *supra* note 191, at 45; Rowsome, *supra* note 191, at 7-8.

216. C. MULLETT, *supra* note 191, at 65; R. POUND, *supra* note 13, at 60-63.

217. C. MULLETT, *supra* note 191, at 65 (quoting COMMENTARIES ON THE LAWS OF ENGLAND, vol. i, 29, 31 (Lewis ed. 1897)). Not all agree that Blackstone should be cited for a strong stance on natural law. Some feel that some of the statements in *Commentaries* about natural law are merely "exotic phrases" and do not comport with the overall tenor of the work. *See, e.g.*, C. MULLETT, *supra* note 191, at 65 n.89.

218. 80 Eng. Rep. 235 (1614).

219. *Id.* at 237. Edward Bulstode, Chief Justice of North Wales, was occasionally cited in colonial American propaganda pamphlets. He wrote that positive law depended upon the "law of God and the law of nature." C. MULLETT, *supra* note 191, at 49-50.

220. For a detailed discussion of the contributions that natural law made to the molding of revolutionary attitudes and propaganda, see C. MULLETT, *supra* note 191. As has been observed, "[t]he Declaration of Independence only said, though somewhat more effectively, what hundreds of known and unknown writers had been arguing briefly or verbosely since the days of James Otis's *Vindication of the House of Representatives*." *Id.* at 123.

Because natural law tended to justify a break from England or disobedience of English laws, one might argue that this reliance was more opportunistic than an indication of a true philosophical bent. However, history demonstrates that this reliance reflected the attitude with which the new nation was formed and the Constitution was drafted, ratified, and amended by the Bill of Rights. *See* Murrin, *supra* note 95, at 40.

221. C. MULLETT, *supra* note 191, at 79-80.

tent with natural law was void.[222]

When the initial disputes arose between the American colonists and England over the denial of what were perceived as fundamental and natural rights, the Americans did not desire independence. Accordingly, the call was for changes in English policies so that they would be consistent with the rights of Englishmen as well as natural law theories.[223] Even after fighting broke out, the Continental Congress resolved in July of 1775 that independence was not its desire. It condemned England's handling of the American colonies, however, and relied, in part, upon the "immutable laws of nature" in asserting the rights belonging to the colonists.[224]

In his arguments in the *Writs of Assistance Case* of 1761,[225] James Otis argued that "[a]n act against the constitution is void . . . ."[226] James Otis's contributions to importing natural law influences did not end after his arguments in the *Writs of Assistance Case*. In writing *The Vindication of the House of Representatives* in 1762, James Otis premised his argu-

222. Some early Americans realized that their reliance upon natural law theories in their struggle with England was inconsistent with slavery, which prevailed in America at that time. In fact, in the first draft of the Declaration of Independence, Jefferson, a slave owner, included a condemnation of slavery as a violation of the natural right of human liberty. P. SIGMUND, *supra* note 191, at 104. James Madison in *The Federalist No. 42* decried slavery as an "*unnatural* traffic." 1 THE FEDERALIST, *supra* note 17, at 287 (emphasis added). James Otis also condemned slavery as "a shocking violation of the law of nature" because "colonists are by the law of nature freeborn, as indeed all men are, white or black." Otis, *The Rights of the British Colonies Asserted and Proved*, in PAMPHLETS OF THE AMERICAN REVOLUTION 439 (B. Bailyn ed. 1965).

223. H. BRAGDON & J. PITTENGER, *supra* note 191, at 14-15. For example, in the Continental Congress' Declaration of Rights, reliance was placed upon the common law rights of Englishmen. R. POUND, *supra* note 13, at 75. But the rights flowing from the nature of the universe and man's relationship to it and the rights of Englishmen were considered the same. Therefore, the transition to reliance solely upon natural law theories was not difficult when the call was for independence. *Id.*

224. *See*, R. RUTLAND, *supra* note 191, at 26 (quoting *Extracts from the Proceedings of the Continental Congress* 3 (Philadelphia, 1774)).

225. This argument has been described, along with Patrick Henry's "Liberty or Death" speech, as "one of the most memorable moments of the years leading up to the Revolution" and to have "sounded a constitutional note which was to make its influence felt in the years that followed." D. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 133-36 (1968).

226. *Quoted in* J. AGRESTO, *supra* note 121, at 40. Otis was not referring to a written constitution because England had none at the time. In *A Vindication of the British Colonies*, Otis explained that he spoke of a constitution based on natural law theories. C. MULLETT, *supra* note 191, at 84.

John Adams echoed similar sentiments when he declared that "[y]ou have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe." *Quoted in* B. PATTERSON, *supra* note 57, at 20. In 1765, he also argued that the Stamp Act was void as it violated the rights granted to the colonists by natural law. R. POUND, *supra* note 13, at 64.

ments upon the writings of John Locke.[227] After the passage of revenue acts in 1764 and 1765, Otis wrote *The Rights of the British Colonies Asserted and Proved*. In this piece, Otis engaged in a systematic attempt to discover "the natural, political, and civil rights of colonists."[228] Otis argued that "[t]he Parliament cannot make 2 and 2, 5: omnipotency cannot do it . . . . Should an act of Parliament be against any of [God's] natural laws, . . . *their* declaration would be contrary to eternal truth, equity and justice, and consequently void."[229]

Samuel Adams joined the criticism of English policy in his series of letters to English officials wherein he argued that the English constitution "had its foundation in the law of God and nature and was the source of legislative power."[230] In arguing that the laws of nature acted as a supplementation to the English constitution, Adams referred to several sources including Locke, Blackstone, and history. One example he listed was the Magna Carta, which he found "derived its foundation in nature."[231]

The Declaration of Independence was drafted by a committee that included Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston. Thomas Jefferson was given the task of preparing the first draft.[232] In preparing the draft, Jefferson relied very heavily upon John Locke's writings justifying the expulsion of James II in the Glorious Revolution.[233] Jefferson's reliance on John Locke's theories is particularly evident in the opening paragraph of the Declaration of Independence. This paragraph is a slightly modified restatement of the primary thesis of Locke's *Second Treatise of Government*.[234]

It is not clear when the term "unalienable rights" was included in the Declaration of Independence. It may have been included as a change by John Adams at the time of the document's printing.[235] There is little

227. C. MULLETT, *supra* note 191, at 82.

228. *Id.* at 83. James Otis relied upon Coke's opinions in Calvin's Case, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1608) and Dr. Bonham's Case, 77 Eng. Rep. 646 (1610) and otherwise generally relied upon natural law theories. R. POUND, *supra* note 13, at 73.

229. Otis, *supra* note 222, at 454 (emphasis in original).

230. C. MULLETT, *supra* note 191, at 95.

231. *Id.* at 97.

232. R. STOREY, *supra* note 191, at 3.

233. H. BRAGDON & J. PITTENGER, *supra* note 191, at 15.

234. P. SIGMUND, *supra* note 191, at 98. The Declaration of Independence also makes indirect references to, among other English Documents, the Magna Carta, the Confirmation of Edward I of the same, the English Bill of Rights, and the Articles of Barons. R. POUND, *supra* note 13, at 75-76.

235. R. STOREY, *supra* note 191, at 3.

dispute, however, that the unalienable rights referred to in the Declaration of Independence were derived from natural law theories as rights "inherent in man as a human being, 'endowed by the Creator.' "[236]

C. Natural Law and the Drafting of the Constitution

The subsequent history of the new nation proved that its reliance upon natural law theories was not merely a battle cry in its struggle against Britain.[237] The natural law theory not only influenced colonial legal philosophy, but it also played a significant part in sparking the American Revolution and the call for a written constitution and a bill of rights.[238] In keeping with this philosophy, the Delaware delegates to the Constitutional Convention took an oath to "exert their abilities on behalf of the 'natural, civil and religious Rights and Privileges' of the citizenry."[239] This oath was indicative of the attitude with which the drafters approached the Convention. As stated in the Constitution's Preamble, one of the primary functions of a constitutional government is "to 'secure the blessings of liberty' or, they could just as well have said, to secure the rights with which all men are by nature endowed."[240]

In light of these influences and attitudes, how could the delegates to the Constitutional Convention of 1787 omit a bill of rights? Most constitutional scholars agree that there were two primary reasons. First, the prevailing view was that the rights derived from natural law were not subject to infringement whether they were incorporated into a document or not. Even without a bill of rights, the drafters felt secure in these

236. *Id.* at 4 (quoting from the Declaration of Independence).

237. James Wilson found support for the Constitution in his belief that it was based upon the same foundation as the Declaration of Independence. Kaminski, *Restoring the Declaration of Independence, Natural Rights and the Ninth Amendment*, in THE BILL OF RIGHTS: A LIVELY HERITAGE 141 (J. Kukla ed. 1987). Even long after independence was won and the government secure, Thomas Jefferson suggested that John Locke's *Second Treatise of Government* be "required reading at the University of Virginia Law School." W. BERNS, *supra* note 194, at 248.

238. As Alfred Kelly observes:

> The fundamental principle of constitutional liberty is the doctrine of limited government, by which we mean that the major processes for the exercise of political power in the state are checked, controlled and limited by form of law. . . . [T]here are only certain types of power that the government may exercise . . . [and those] correct forms of power may be exercised only according to certain prescribed processes. Very closely associated with the foregoing is another idea: that all individuals in the society enjoy certain rights and immunities against the state, of which they may not be lawfully deprived.

Kelly, *supra* note 191, at 7; *see id.* at 10.

239. R. RUTLAND, *supra* note 191, at 55 (quoting PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE 10 (Wilmington, 1927)).

240. Berns, *supra* note 13, at 51.

rights and in their belief that they formed a part of the new nation's constitutional law.[241] The second reason, and the one most discussed at the Convention, was that a government of designated powers could not infringe rights except as expressly provided for in the Constitution.[242]

The very lack of a bill of rights in the Constitution as originally drafted evidences the fact that the early Americans believed in the existence of rights other than those enumerated in the Constitution.[243] As C. Edward Merriam points out, for early Americans, "the great lesson of history was, that government always tends to become oppressive, and that it is the greatest foe of individual liberty."[244] In light of this great lesson, surely the nation's founders would not have instituted a new na-

241. Oliver Ellsworth objected when a motion was made to include a protection against ex post facto laws. The motion was ultimately passed. Ellsworth "contended that there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (M. Farrand ed. 1966). In later writings, Alexander Hamilton noted that "[c]ivil liberty is only natural liberty, modified and secured by the sanctions of civil society." 1 THE WORKS OF ALEXANDER HAMILTON (H.C. Lodge ed. 1904).

242. R. POUND, *supra* note 13, at 65. Hindsight tells us that this was not a good argument. There was substantial potential for expansion of federal governmental authority in the Necessary and Proper and Commerce Clauses. U.S. CONST. art. I, § 8. James Madison did not take the position that the federal government had only limited power to impinge upon rights. R. RUTLAND, *supra* note 191, at 192. In a letter to Thomas Jefferson he wrote, "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 2 THE PAPERS OF JAMES MADISON (R. Rutland & C. Hobson ed. 1977). He did, however, think that a bill of rights "might contain the seeds of harm" because "some of the most essential rights could not be obtained in the requisite latitude." *Id.* Others also feared that a listing within a bill of rights might be construed as exhaustive. James Wilson argued before the Pennsylvania ratifying convention in opposition to a bill of rights in the following terms:

> But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. . . . If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (J. Elliot ed. 1836).

243. *See* Berns, *supra* note 13, at 59-62. Berns argues that the entire Constitution was created to protect individual liberty through division of power and a system of checks and balances. See *also* Clinton, *supra* note 9, at 1222-23, concluding that natural law and natural rights theorists

> had a profound impact on the shaping of both our Constitution and the interpretive approaches taken to the document. The Constitution was not a set of popularly ordained principles that had force merely because of their authoritative declaration . . . . Rather, it was a carefully crafted document in which [the people's] representatives sought to design a government reflecting their understanding of natural rights principles.

244. C. MERRIAM, AMERICAN POLITICAL THEORIES 77 (1903).

tion designed "to form a more perfect Union, . . . and *secure the Blessings of Liberty*"[245] without providing constitutional protections for basic liberties.

The inclusion of a bill of rights, however, was not thought necessary for this purpose. When the Constitution was adopted, it was almost universally believed that individual freedom and personal liberty were possessed by all men and that it was not necessary to include their protection in the Constitution.[246] As the Declaration of Independence states, these truths were "self-evident" and did not require exposition.[247] It is impossible to read the debates at the Constitutional Convention "without coming to the certain conclusion that a Bill of Rights was not included [in the Constitution as originally drafted and ratified] because these rights were so inherent and fundamental that they need[ed] no constitutional recognition."[248]

D. Natural Law and the Ratification Process

Despite explanations, the omission of a bill of rights became a focal point in the ratification process.[249] Many thought it was a tragic oversight not to include protections for natural and other rights in the Constitution. Had it not been for Federalist concessions and promises to immediately seek a bill of rights to set forth these protections, key states would have been lost and the new nation doomed.[250]

The Federalists contended that no bill of rights was necessary while the Anti-Federalists argued that the Constitution be rejected because it lacked a bill of rights. Notably, both groups relied upon natural law theories for their arguments.

In arguing for the ratification of the Constitution despite the absence of a bill of rights, the Federalists asserted that there was no need to pro-

245. U.S. CONST. preamble (emphasis added).

246. Even many of those provisions in the original documents which might ostensively be considered to confer rights (Article I, §§ 9, 10, Article III, and Article IV), can be explained as being more concerned with the functioning of the system than with individual liberties. Palmer, *supra* note 114, at 88-102.

247. B. PATTERSON, *supra* note 57, at 7.

248. *Id.* At the Virginia ratification convention, the Anti-Federalists argued that the proposed constitution was flawed without a bill of rights. Relying upon the independent existence of rights under natural law theories, Governor Edmond Randolph attempted to diffuse this argument by asserting that a bill of rights was useless and unnecessary. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 68-71 (J. Elliot ed. 1836). And, as the Ninth Amendment (and its indirect reference to the Declaration of Independence) makes clear, there are rights not enumerated in the Bill of Rights which exist and are self-evident.

249. Kaminski, *supra* note 237, at 145.

250. *Id.* at 147.

vide for rights that were inherent in the nature of mankind and its relationship to the universe. One Federalist stated that "in exercising those [necessary and proper] powers, the Congress cannot legally violate the natural rights of an individual."[251] Another Federalist argued that "no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced."[252] James Wilson defended the omission of a bill of rights by arguing that "it would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges of which we are not divested, either by the intention or the act that has brought the body into existence."[253] In *The Federalist No. 84*, Hamilton asserts that the inclusion of a Bill of Rights would be "unnecessary." Hamilton also said that the Constitution is itself a bill of rights. He argued that the Preamble was "a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights . . . ."[254]

The Anti-Federalists used natural law theories to oppose ratification. John F. Mercer, author of *The Anti-Federalist No. 60*, argued that the plan be rejected because it did not include a bill of rights. He asserted that reason and history showed the defects in the new documents. He also argued that, under the British system, the colonists had been secured by the fundamental laws, which failed to protect them. From this he concluded that a bill of rights was necessary to secure "*the natural and unalienable rights of men* in a constitutional manner."[255] In a letter to Richard Henry Lee, Samuel Adams supported his opposition to the ratification of the Constitution by claiming that it was a danger to

251. Storing, *The Constitution and the Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 15, 25 (R. Goldwin & W. Schambra ed. 1985) (quoting *Essays by "Aristides,"* Md. J. & Baltimore Advertiser, Mar. 4, 1788).

252. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 162 (J. Elliot ed. 1836) (quoting Theophilus Parsons in the Massachusetts ratifying convention).

253. Address by James Wilson at Independence Hall, Philadelphia, Pennsylvania (Oct. 6, 1787), *quoted in* R. KETCHAM, ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 184 (1986).

254. 2 THE FEDERALIST, *supra* note 17, at 155. *The Federalist* contains other examples of the resort to natural law theories and the common understanding that the Constitution was not the exclusive source of civil protections. For example, in *The Federalist No. 83*, Hamilton argues that there should have been significant concern over the lack of protection for the right to jury trial in a civil case. He asserts that because the right to trial by jury was well-grounded in the common law, the right should continue to be recognized. *Id.* at 503.

255. THE ANTI-FEDERALIST PAPERS 176 (M. Borden ed. 1965) (emphasis added).

"our Struggle for the natural Rights of Men. . . ."[256]

E. Natural Law, the Bill of Rights, and the Ninth Amendment

The ultimate adoption of the Bill of Rights does not diminish the validity of the claim that even without the Bill of Rights the Constitution may limit the authority of the government to encroach upon individual liberty.[257] The American lawyers who contributed heavily to the revolutionary and constitutional movements[258] assumed the binding nature of fundamental law bound all official and governmental action.[259] Thus, although James Madison stated that some rights asserted (not created) in the proposed amendments were based on practice and on the nature of the political compact, he also noted that others found their basis in the laws of nature.[260]

256. 4 THE WRITINGS OF SAMUEL ADAMS 325 (H. Cushing ed. 1968) (Letter from Samuel Adams to Richard Henry Lee, Dec. 3, 1787). Although the Anti-Federalists throughout the country opposed the Constitution for different and often inconsistent reasons, they all agreed that the Constitution should have provided for the protection of natural and other rights. Kaminski, *supra* note 237, at 145. The Anti-Federalist argument was well summarized by Thomas Wait, publisher of the *Cumberland Gazette* of Portland, Maine. He argued that "[n]o people under Heaven are so well acquainted with the natural rights of mankind, with the rights that ever ought to be reserved in all civil compacts, as are the people of America." *Id.* at 143-44 (quoting Letter from Thomas Wait to George Thatcher, Portland, Me. (Aug. 15, 1788) (letter available at Thatcher Papers, Chamberlain Collection, Boston Public Library)).

257. The claims of the Anti-Federalists during the ratification process were the origin of the Bill of Rights. A substantial amount of the Anti-Federalist cry for a bill of rights, however, can be explained as an attempt to defeat the ratification rather than a true concern over the effects of the omission. Edmund Randolph, a former Anti-Federalist, claimed that the Anti-Federalist call for amendments was to disguise their true intent to defeat ratification of the Constitution. R. RUTLAND, *supra* note 191, at 167. Anti-Federalists therefore were not the driving force for a bill of rights because they considered the proposed bill of rights to be "half-measures." Palmer, *supra* note 114 (citing L. LEVY, EMERGENCY OF A NEW PRESS 261-62 (1985)). Once the fervor caught on and commitments were made at the ratifying conventions, however, the Bill of Rights became inevitable.

258. Of the fifty-five men who attended the Constitutional Convention, thirty-three were lawyers. H. LYON, THE CONSTITUTION AND THE MEN WHO MADE IT 185 (1936).

259. R. POUND, *supra* note 13, at 61.

260. 1 ANNALS OF CONG. 437 (J. Gales ed. 1789):

> In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature. In others instances, they lay down dogmatic maxims with respect to the construction of the Government; declaring that the Legislative, Executive, and Judicial branches, shall be kept separate and distinct. Perhaps the best way of securing this in practice is, to provide such checks as will prevent the encroachment of the one upon the other.

Furthermore, the Bill of Rights was not considered an exhaustive listing. The Ninth Amendment is a constant reminder of this fact.[261] When James Madison introduced the proposed Ninth Amendment to Congress he said it was designed to defeat the argument that "by enumerating particular exceptions to the grant of power, [the Bill of Rights] would disparage those rights . . . which were not singled out."[262] As originally submitted to Congress on June 8, 1789, the Ninth Amendment read as follows:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[263]

The failure to recognize the substantive significance of the Ninth Amendment makes it a hollow form of words with no particular meaning. However, "[n]othing in the Constitution should be taken to be idle and of no moment."[264] The Ninth Amendment calls modern constitutional scholars to the task of making "the natural law and natural rights as believed in by the founders of our polity effective political and legal instruments in the society of today."[265]

Therefore, it is an error to think that the basis of our rights against and the limitations of governmental power is found solely in the text of the Constitution and Bill of Rights.[266] The genesis of the Bill of Rights was a desire to "remove the fears and quiet the apprehension of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal government,"[267] but not to create rights.

As noted earlier, much individual rights adjudication centers upon some of the Constitution's open ended provisions. As a result, in order to advance the underlying principles inherent in the rights guaranteed by

261. "The enumeration [not creation] in the Constitution, of certain rights, shall not be construed to deny or disparage others *retained* by the people." U.S. CONST. amend. IX (emphasis added).

262. 1 ANNALS OF CONG. 439 (J. Gales ed. 1789).

263. *Id.* at 435.

264. Pound, *Introduction* to B. PATTERSON, *supra* note 57, at iii.

265. *Id.*

266. Storing, *supra* note 251, at 16.

267. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 177 (J. Elliot ed. 1836) (statements by John Hancock to the Massachusetts Ratification Convention). After the Massachusetts convention, similar calls for a bill of rights were made in every ratifying convention except Maryland. Storing, *supra* note 251, at 17.

the Constitution, these provisions must be read in light of the prevailing legal philosophy in early American society. A significant component of this philosophy was that popular government had to be reconciled with "higher standards of political morality"[268]—with natural law theories.[269] As part of an originalistic method of interpretation, it is not only proper but necessary to resort to natural law theories in determining and applying the principles that underlay the Constitution.

This interpretive approach is consistent with moderate intentionalism. The colonists realized that they had not discovered all of the principles inherent in natural law. Nor had they determined how best to advance those which had been discovered.[270] The accepted inalienability of some rights derived from natural law did not mean these rights remained static. The prevalent view of natural law was that "when [God] created man, . . . he laid down certain immutable laws of human nature and gave him also the faculty of reason to discover the purport of those laws."[271] The ascertainment of natural law and the rights it brings, however, is a process of discovery. As we acquire more knowledge about our species and its nature and the nature of our world, the application of the rights that are derived from these natural laws must evolve along with our understanding. In early American thought, the laws were immutable, but as the operative factors change—due to a better understanding or changes in circumstances—so must the specific application. It is only in this way that we better achieve the principles that underlie the laws of our nation.[272]

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268. Barber, *The Federalist and the Anomalies of New Right Constitutionalism*, 15 N. KY. L. REV. 437, 439 (1988).

269. "[T]he very persistence of such evocative, rather than sharply definitive, phrases attests the strength of our natural law inheritance . . . ." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 112 (1976). *See also* J. ELY, *supra* note 2, at 13 (the open-ended provisions are an "invitation to look beyond their four corners").

270. Thomas Waite argued in favor of a bill of rights:

> During the last fifteen or twenty years, it has been the business of the ablest politicians (politicians too, who were contending for the liberties of the people) to discover, 'and draw a line between, those rights which must be surrendered, and those which may be reserved'—*If not the whole truth*, yet, many great truths have been discovered, are now fresh in our minds, and I think OUGHT TO BE RECORDED.

Letter from Thomas Wait to George Thatcher, Portland, Me. (Aug. 15, 1788) (*quoted in* Kaminski, *supra* note 237, at 143-44) (letter available at Thatcher Papers, Chamberlain Collection, Boston Public Library) (emphasis added).

271. 1 COMMENTARIES ON THE LAWS OF ENGLAND 29 (Lewis ed. 1897).

272. *See* B. PATTERSON, *supra* note 57, at 54:

> As we become more civilized, we learn more about the natural forces of the world, such as the use and properties of our elementary minerals, steam, electricity, and other natural forces. We also increase in spiritual and intellectual growth and are capable of understanding natural rights and liberties that have always existed, but which have been beyond our limited intellect to comprehend.

IV. Conclusion

This Article presents and defends moderate intentionalism as a method of constitutional interpretation. This method yields better and more consistent results than other major methods that presently are being advocated. Moderate intentionalism provides guidelines absent in nonoriginalistic methods of interpretation. Like strict originalism, moderate intentionalism is bound by the original Constitution. Unlike strict originalism, however, moderate intentionalism is flexible enough to allow the Constitution to adapt in response to a changing society. This proposed method is also superior to textualism because intentionalism not only takes into account the plain meaning of the text, but also considers the underlying principles of the Constitution and is more consistent with original interpretive intent.

The suggestions made in this Article do not lead to easy answers in constitutional adjudication. The brand of moderate intentionalism advocated here requires interpreters of the Constitution to discover the nature and content of the underlying principles that support the rights guaranteed by the Constitution. These same interpreters must also reconcile conflicting interests protected by these various rights through applications of the Constitution that continue to serve its underlying principles. None of the inquiries necessary to make these determinations will have readily available answers or easy-to-follow directions. The proper resolution to these inquiries will be a difficult, and sometimes impossible, endeavor. If we are to strive for legitimate judicial enforcement of the Constitution, however, we must be willing to try.