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Authorizing Interpretation

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> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it as judges make it, which is to say as though they were "finding" it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.[1]

In one of his essays, the literary critic Steven Mailloux recounts a story—a story with a bit of hard law and a bit of a moral. Mailloux writes:

> The Space Act of 1958 begins, "The Congress hereby declares that it is the policy of the United States that activities in space should be devoted to peaceful purposes for the benefit of all mankind." In March 1982, a Defense Department official commented on the statute: "We interpret the right to use space for peaceful purposes to include military uses of space to promote peace in the world." The absurdity of this willful misinterpretation amazed me on first reading . . . . With just the right touch of moral indignation, I offered my literary criticism class this example of militaristic ideology blatantly misreading an antimilitaristic text.
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> "But . . . the Defense Department is right!" objected the first student to speak. Somewhat amused, I spent the next ten minutes trying, with decreasing amusement, to show this student that the Reagan administration's reading was clearly, obviously, painfully wrong. I pointed to the text. I cited the traditional interpretation. I noted the class consensus, which supported

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1. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

> me. All to no avail. *It was at this point that I felt the "theoretical urge . . . ."*[2]

At this point, it is easy to understand what Steven Mailloux wanted. What he wanted was something which would show (conclusively) that his student and the Defense Department were wrong. What he wanted was some *intellectually defensible regulatory scheme* that could serve to *control the interpretation* of the Space Act of 1958. What he wanted, in short, was an "interpretive theory," a "normative theory," or what I will simply call, "theory."[3]

Among American legal thinkers, these intellectually defensible regulatory schemes—these "theories"—have been very much in demand. In part, this demand has been intense because the stakes of "theory" have *seemed* so great to so many.

Perhaps this is difficult to believe in the context of the Space Act of 1958, but one need only change the putative object of interpretation from "The Space Act of 1958" to "The Constitution" to appreciate the Herculean stakes. It is in constitutional law that interpretive theory first made its most visible appearance—in the 1970s and 1980s. Since then, the same sort of projects and solutions have drifted over to the statutory context. Nonetheless—rightly or wrongly—the Constitution remains the most alluring object of the theoretical urge. For many, the promise of theory has seemed veritably the power to control "interpretation." And in turn, the power to control "interpretation" has seemed emphatically the power "to say what the law is."[4]

I think this is a mistake. In fact, as I will argue, it is several mistakes at once.

One mistake is to suppose that interpretation in constitutional law is subject to theory. This supposition, in turn, rests on either of two presumptions. One presumption is that constitutional law is itself already

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2. Steven Mailloux, *Rhetorical Hermeneutics*, *in* INTERPRETING LAW AND LITERATURE 345, 345 (Sanford Levinson & Steven Mailloux eds., 1988) (emphasis added). In his own words: "What I wanted was a *general theory* . . . that could supply rules outlawing my student's misreading." *Id.*

Now, in truth, Steven Mailloux overcame the theoretical urge rather quickly. He writes: If theory "is defined as the attempt to govern interpretations of particular texts by appealing to an account of interpretation in general," then it is "impossible." *Id.* at 352.

3. There are, of course, other kinds of (legal) theory. Among the kinds of intellectual enterprises that often go by the name of theory are those, for instance, of a descriptive, genealogical, evolutionary, and structural character. I have no truck here with these kinds of "theories."

4. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

a theory-governed enterprise, and therefore, as part of this enterprise, so is constitutional interpretation.[5] All that is necessary according to this view is to "crack the code" and find the theory that governs the development of constitutional law. According to this view, we must find and reveal the law of law—the already-ruling theory. A second, alternative presumption is that even if constitutional law is not presently a theory-governed enterprise, it can nonetheless be made so. Law, in this view, can be made to answer to paramount concerns—such as justice.[6]

The view that law is already or can be made into a theory-governed enterprise builds, I will argue, on a second, even more tenacious mistake. That mistake is to suppose that insofar as law advertises itself as reasoned and rational, it is itself subject to reason and rationality. This is a mistake that is hard to shake. It is perhaps harder to shake among legal academics than it is among judges.

For one thing, judges have the opportunity to see the law in action. Thus, they have the opportunity to recognize that law moves according to its own predilections—predilections that are not always reasoned and rational, but are indeed sometimes stunningly resistant to reason and rationality.

Legal academics, by contrast, have a largely different acquaintance with the law. Legal academics experience the law largely through the medium of appellate opinions. These, among other things, are sustained attempts to rationalize the pathways of the law. They are a kind of jurisprudential advertising. And what they advertise are the virtues of the law—including the virtue of reasoned decisionmaking. It is thus not surprising that when legal academics see law, they see reason at work—sometimes poor examples of reason, but reason nonetheless; not habit, inertia, power, tradition, and so on. Sometimes (perhaps most of the time) what they see are examples of poor reasoning, of insufficient reasoning. But that does not detract from the main point—namely that what they see is reason at work—not habit, inertia, power, tradition, or any other such modality.[7]

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5. *See* Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory*, 85 GEO. L.J. 1837, 1839 (1997) ("[W]e've come to think of what theory is—as grand, or complete, or unifying, or grounding; as a way to reveal the true sense of the practice, or what is really going on."). *See also* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

6. *See* Michael C. Dorf, *Recipe for Trouble: Some Thought on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1866-67 (1997).

7. Moreover, as members of the university community, legal academics have commitments to truth and reason. And yet at the same time, they also identify with the judiciary who expound this law. The resulting tension produced by this dual allegiance is typically avoided

With these mistakes in place and the stakes so high, it is not surprising that legal academics have been entranced by the promise of theory to control interpretation. Thousands of law review pages and scores of books have been and continue to be written, staking out and defending various theoretical claims to this critical activity called "interpretation."[8] Indeed, for a while, theory seemed like the only game in town—a jurisprudential version of capture the flag—where the flag was none other than constitutional interpretation itself.

WHY INTERPRETATION?

But why capture *this* flag? What is it about "interpretation" that makes its capture seem so valuable? Above, I suggested that the power to control "interpretation" has seemed emphatically the power "to say what the law is."[9]

But why would that be? Why, to put it more precisely, does one have to claim that one is doing interpretation in order to acquire the power to say what the Constitution means? Or to put it yet another way, why does the power to say what the Constitution means have to be clothed in the trappings of "interpretation"?

This seems like a silly question: how else, after all, can one lay claim to announce what the constitution means? But *there are* other options. One could say, for instance, that the Constitution is so clear that it is not in need of any interpretation.[10] One could also rely on some jurisprudential equivalent of the oracular tradition—the notion that the speaker is a privileged announcer of the meaning of the Constitution. Now, of course, in our legal community, in our law, such claims will likely be rejected as naive, misguided or covertly dependent upon some unacknowledged prior moment of interpretation. In our legal community, in our law, such claims will not usually work.

But that is precisely the point: What is it about our legal community or our law or whatever that requires a claim that one is "interpret-

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through a presumption that law is already an enterprise subject to reason.

8. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); MICHAEL PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

9. *Marbury*, 5 U.S. at 177.

10. *See* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 20 (1984).

ing" the Constitution?

One answer is that the very idea of "interpretation" is linked to deeply entrenched jurisprudential understandings. Specifically, interpretation is linked to the rule of law and to legal objectivity.[11]

Begin with the often heard refrain that judges "must find the law not make it." Why does this distinction between "finding law" and "making it" or between creating law and interpreting it hold such power over the legal (and the popular) imagination? One answer is that this formula is an expression of some rather basic notions about the rule of law and, indeed, the very identity of law.

The distinction expresses the basic rule-of-law insistence on a separation between the law maker and the law interpreter. In the statutory context, this is a separation between the legislature and the courts.[12] In the constitutional context, this is a separation between those who made or make the Constitution (whoever that might be) and those who interpret it (most importantly, the courts).

The critical point here is the abstract one: the rule of law is structured in the form—*law maker* creates *law* interpreted by law *interpreter*. If the law maker becomes the law interpreter or vice versa, then the rule of law will not only cease to make sense, but it will cease to exist, except as a kind of pleasant (or unpleasant) fiction.

The distinction between the law maker and the law interpreter is linked to other rule-of-law notions—such as the view that law must be objective, fixed, stable, public, and neutral. The intelligibility of the distinction between the law-maker and the law-interpreter requires that there be some medium that enables communication between the two. Once the law maker and the law interpreter are separated there must be something that links the two—something that ensures that the law made corresponds (at least roughly) with the law interpreted. Within the legal community, that "something" is understood to be an "objective"

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11. As a cautionary note, please understand that I am certainly not endorsing rule of law virtues or objectivity as right, coherent, or even as possible. My only claim is that notions of rule of law and objectivity (1) are entrenched in legal culture and thus not easily discarded, and (2) are intertwined with ongoing needs to do law by interpreting it.

12. The rule of law requires that the courts be free from interference by the legislature (the requirement of an independent judiciary). The courts themselves must refrain from legislating (the requirement of "following the rules laid down"). On the other side, the legislatures must be free from overly particularistic interference by the courts (the requirement of generality). And the legislature itself must refrain from engaging in adjudication. For discussion of these basic principles, see GEORGE FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 11-27 (1996); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210-29 (1994).

law. Get rid of that of that "something"—get rid of an "objective" law that binds, at least roughly, the law made with the law interpreted—and the rule of law collapses.[13]

Then, too, the distinction between the law maker and the law interpreter is marked out by the thing called "law" itself—the law cast as a stable, objective identity. This "objective" law serves as the marker by which the law maker and the law interpreter are separated in their activities. Without such a marker, it becomes impossible to determine when law making ends, and law interpretation begins. Law creation interacts with law interpretation—but the two would become indistinguishable. It is the marker—this "objective" law—that enables the activities of law-making and law-interpretation to establish themselves as such and as distinct from the other. Get rid of the marker and the two activities become indistinguishable meaning-generating practices.[14]

INTERPRETING WHAT AGAIN?—MISSING OBJECTS

The observation that constitutional meaning must be drawn from the Constitution sounds underwhelming. Indeed, it verges on the trivial. And yet, as I will try to show, the implications are far from trivial.

One implication is that for constitutional interpretation to take place, there must be an object of interpretation.[15] And there must be some effort to "respect" that object of interpretation.[16] Respect is a deliberately vague term that can acquire a variety of meanings depending upon the local activity pursued (i.e., musical performance, art history, etc.).

Much of the time, of course, the meaning of the object of interpretation is *not seriously*—that is to say, not pragmatically—in question. The statement, "I'll have a Big Mac, an order of fries, and a large Coke," uttered *in the proper context*, does not usually create insuperable hermeneutic difficulties. Neither do its constitutional equivalents,

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13. There are, of course, more sophisticated attempts to reconstruct the rule of law and legal objectivity that draw on the work of thinkers such as Gadamer or Wittgenstein. What is interesting here about these more sophisticated approaches is that they are all tailored to resurrecting at least some modest version of the objectivity of law. The road to meaning may lead through Vienna, but the ultimate destination remains the same.

14. This point helps explain why even those interpretive legal theories that renounce "objectivity" nonetheless depend upon and indeed reaffirm some residual objectivism. They simply can't do without it.

15. *See* Joseph Raz, *Why Interpret?*, 9 RATIO JURIS 349, 351 (1996).

16. UMBERTO ECO, INTERPRETATION AND OVER-INTERPRETATION 43 (1992).

such as the requirement that the President be thirty-five.

But this is not always true. In many cases—in constitutional law, as elsewhere—it is very hard to figure out what the object of interpretation means. Consider how hard it is to try to figure out the meaning of some technical philosophical text, or a sixteenth-century poem, or a really bad film, or a painting by Jackson Pollock (and so on). The difficulty is to retrieve a meaning—when none is obviously apparent.

This retrieval enterprise—call it *interpretation-as-retrieval*—is aimed at retrieving the meaning of the object of interpretation. Now all modes of interpretation common to law or legal thought—whether intentionalist, constructivist, conventionalist, hermeneutic, or even deconstructive—will all (or at least claim to) seek the retrieval of the meaning of the object of interpretation. There is in short no such thing as interpretation in general. Interpretation is always interpretation of something—even if that something should turn out to be a nothing or [something] different from a something. Interpretation as retrieval is the sort of enterprise that may or may not work. If it doesn't work, and you nevertheless do come up with a meaning, you are faking it. In interpretation-as-retrieval, the interpreter doesn't quite know what the artifact, practice, or text means or even whether it means anything at all. The interpreter is not in possession of a meaning. The interpreter is not only lacking confidence in meaning, but the interpreter may be lacking confidence that there is any meaning to be found. This disturbing encounter with hermeneutic vacancy might occur for any number of reasons.

Silence. The interpreter may be looking for the wrong sort of meaning—the kind of meaning where the artifact has simply nothing to say. Imagine, for instance, reading the Yellow Pages looking for the meaning of life or reading C.F.R. for moral advice. Neither the Yellow Pages nor C.F.R. are meaningless, but they are silent, or at least greatly lacking in insights, on such matters.

Impoverished Artifact. The practice, artifact or text may be hermeneutically deficient in some way—lacking meaning. Think, for instance, of the legendary script typed by the chimpanzee. Or think of contemporary advertising: as Budweiser (a division of Anheuser Busch) would say, "Why ask Why?" In all these cases we have the semblance of meaningful communication, yet something crucial to meaning is missing.

Missing Evidence. It may be that crucial evidence is missing. Think of a parchment in which the middle portion is missing. Or think of the bottle that washes up on shore with a message saying,

"Capsized 8/12/97. Having a great time . . . ."

Self-Contradiction. Think of messages that contain the seeds of their own negation. Think of the AT&T voice telling you, "Have a nice day and thank you for using AT&T." Does AT&T really mean that you should have a nice day? How can AT&T possibly mean for you to have a nice day when, in fact, it repeatedly wishes this upon you automatically, without consideration of *your* circumstances or even any consideration of who *you* are?

Interpretive Vertigo. Finally, consider that this typology of hermeneutic embarrassments is itself not hard and fast. Indeed, many of these problems overlap. And for someone who is looking for a meaning that is not (or not yet) present, it will not often be clear which of these problems is at work. Indeed, one of the great difficulties of interpretation-as-retrieval is that since the meaning is not or not yet present, one often wonders why it continues to elude. This kind of interpretation can induce a kind of interpretive paranoia: Is there really no meaning there (is it me?) or is the meaning eluding me (is it *it*?)? Or as the joke goes (except in reverse): Just because I keeping missing the meaning doesn't mean it is there. Now in the examples above the hermeneutic embarrassments are not only unlikely to occur, but even if they should occur, nothing untoward is likely to follow. In constitutional law, by contrast, the situation is quite different. The hermeneutic embarrassments are quite likely to occur and when they do, there will be consequences.

I will forego listing examples—though my sense is that just about any constitutional law case will exhibit one or more of the hermeneutic difficulties described above (and then some). Which of the hermeneutic difficulties is at stake will itself be just one more hermeneutic difficulty to be resolved.

The fact that there can be and that there is controversy on these matters does not refute my point, but rather confirms it. Consider that if there were no such thing as constitutional silence, artifactual impoverishment, missing evidence, self-contradiction, or interpretive vertigo, then interpretation of the Constitution would be a rather straightforward matter—something which virtually everyone concedes it is not.

Now, at the same time, it is important not to exaggerate the problem. From the perspective of pragmatics, we already have a solution. The solution in the case of the Constitution is to take the pronouncements of the Supreme Court about what the Constitution means as themselves authoritative.

In other words, we take the pronouncements of the Supreme Court

as themselves forming a part of the Constitution and thus as sources of authority. This is certainly what the Supreme Court itself does. It treats its own lines of precedent as, by and large, coterminous with the Constitution itself. Sometimes a little originalist history or framers' intent is thrown in or something of that ilk, but by and large, it's just one damned line of precedent after another. It is in this way that the Constitution is literally made to build on itself.

The result of this sort of "common law" strategy is that the hermeneutic embarrassments of silence, poverty, missing evidence, self-contradiction, and interpretive vertigo become filled with Supreme Court pronouncements. Even if, at their inception, these Supreme Court pronouncements are inventions or creations, nonetheless at some point (1) they become part of the Constitution and (2) they become authoritative sources in their own right.

This self-authorized juris-genesis is not without a certain logic. Supreme Court precedents become inscribed in the social and political institutions and practices of the nation. And as they acquire this material or social dimension, it becomes more difficult to deny these precedents authoritative status. Moreover, precedent becomes authoritative because later case law depends upon maintaining earlier precedent.

Nonetheless, there is something bizarre going on. Precedent can only acquire the weight of authoritative precedent if we take the words of the Supreme Court as authoritative pronouncements on the meaning of the Constitution. We do, of course. Someone is reputed to have said, "The Supreme Court is not final because it is right. It is right because it is final." But even that bit of wisdom is not right. Rather, if the Supreme Court is right or final, it is because we believe it when it tells us so.

How did we get here? The Supreme Court has claimed to engage in interpretation; we have accepted that claim, and thus, we treat the Supreme Court's pronouncements as authoritative. And if we treat the Supreme Court's pronouncements as interpretations and as authoritative, it is because the Supreme Court does. *In a phrase, the Court has over many generations successfully authorized not only its own interpretations of this or that clause, but indeed its own forms of interpretation.* Moreover, it turns out that these forms of interpretation construct over time the kind of constitution (a rich constitution composed of many precedents) that authorizes its own creation by the Supreme Court.[17]

17. One of the crucial moments came early. *See* McCullough v. Maryland, 17 U.S. (4

What a move. The Court interprets the Constitution, and finds through interpretation that its own precedents become themselves part of the Constitution. At that point, the Court can interpret its own precedent in a way to authorize itself to extrapolate the meaning of the Constitution, including its own precedent.

Not a bad trick by any means—and certainly nothing to sneer at. Moreover, this process can keep going for quite some time. The distinct advantage is that this hybrid creation-interpretation of the Constitution can be done in the name of interpretation—thereby avoiding any apparent threat to the rule of law or to the objectivity of law. Over time, what we get is an accumulation of variously self- or cross-referenced authoritative materials. These are received as largely coterminous with the Constitution.

Early in the history of our Constitution, all this worked well enough. For one thing, the number of elaborations of the Constitution was relatively modest. For another, after a few stumbling blocks,[18] the legal community became accustomed to the notion that the authoritative pronouncements of the Supreme Court (and perhaps a few other well-positioned people) were indeed statements of what the Constitution in fact means.

In the middle period of the Constitution—say the first three-quarters of the twentieth century—it was still possible to believe in the process of Supreme Court self-interpretation as sensible—as legitimate, convincing, and persuasive. Case followed case, and the beauty of it was that they arranged themselves into lines, pointing towards the future.

But as the cases accumulated and the lines multiplied, an odd effect began to take shape. At some point, the Supreme Court process of creating as it interprets and interpreting as it creates produced an increasingly bizarre object of interpretation—a kind of "super-full object."[19] This is the kind of interpretive object that overflows with a multiplicity of meanings—some of which are conflicting, and incompatible. At that point, one has the sort of interpretive object whose identity can only be secured through the forceful imposition of some disciplining gesture.

Indeed, consider what it is that the Court is interpreting when it claims to be interpreting the Constitution. What we have are a host of

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Wheat.) 316 (1819) (exhibiting a wonderful variety of interpretive strategies).

18. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (holding the U.S. Supreme Court has appellate jurisdiction over the highest court of any state).

19. Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1704-08 (1996).

possibilities—none of which, viewed in isolation, is particularly extravagant or fanciful. The combination of these possibilities, however, does yield an object of interpretation that is really quite remarkable in its capacities to generate meanings—including conflicting and incompatible meanings. Consider the possibilities. The Constitution is:

a text;
a broad outline;
an expression of a political theory;
a government charter that, by turns or simultaneously, establishes, facilitates, restricts, and frustrates the operation of various political institutions;
a starting point open to elaboration by the various institutions it establishes or recognizes;
an ultimate statement of the limits and identities of the various legal/political institutions it establishes;
a closed set of rights and powers;
an open set of rights and powers;
and so on.

And this, of course, only states the possibilities that we can ascribe back to the Constitution of 1787. Beyond that, we have a whole series of potential accretions to the present Constitution, including:

various case law precedents;
interpretive glosses by other branches of government;
established practices and traditions instituted or tolerated by the judiciary, the legal culture, or the broader culture;
popular understandings;
modes of legal reasoning once used or currently in use;
various constitutional values, virtues, icons, vices;
and so on.

At this point we have an abundance of hermeneutic riches—and as one looks at the Constitution or its sub-parts it becomes difficult to distinguish

the canonical from the spurious,
the authoritative from the derivative,
the enduring from the ephemeral,
the law from the tosh,
the central from the peripheral,
and so on.

At this point, we are fast losing the object of interpretation. We have, in short, such an explosion of meaning in constitutional law that it is no longer clear what the object of interpretation might be.[20]

Ironically, this richness of meaning has produced a troubling vacancy at the heart of the Constitution and its parts. The vacancy is that there is nothing definitive to tell us how to arrange or how to use this richness of Constitutional meaning. There is nothing we can retrieve *from the Constitution itself* to tell us which strand, which principle, which analogies, which sources of law to use when. If we are able to find such a meaning, we must supply it ourselves. Now, the problem is not that we cannot supply such meanings: apparently we do. The question is, however, what are we supplying and is it convincing?

There is an ironic sense in which too much meaning has created a hermeneutic vacancy at the heart of the Constitution. Moreover, once one thinks about it, there is reason to suspect that perhaps this vacancy at the heart of the Constitution was always there. Indeed, if it was possible for the Court and the commentators to read so much into the Constitution, it may well be—and this is not a criticism—because there was so little there to begin with. There was so little there to resist the imputation of meaning.

THE CRISIS OF INTERPRETATION

Sometime in the late part of the twentieth century, there came a crisis of interpretation in constitutional law. I do not mean that a crisis was explicitly recognized as such. Rather, I think various forces collided in a way that threatened a received understanding of how to interpret the Constitution. The rise of theory can be understood in part as a response prompted by this crisis of interpretation.

This crisis of interpretation was, I think, prompted by the confluence of several forces. The first was the impending loss of the object of interpretation. Without a steady object of interpretation, constitutional interpretation was fast becoming a confused and confusing activity. The second was a politicization of constitutional law—that is, a conscious recognition of the politicized character of constitutional disputes.

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20. This point is to be distinguished from the often-repeated complaint that the laws are multiplying at an excessive rate. In the history of our nation, such complaints began early and were thereafter made often. My point here is that the objects of interpretation, such as the Constitution or its subparts—became increasingly complex and indefinite.

A third force was the felt necessity to retain commitments to the rule of law and to interpretation. These are contradictory impulses, and much of the early and late theoretical literature, as will be seen, bears the mark, the intellectual self-contradictions produced by this conflict.

In the early days of theory, constitutional rights were clearly sites of contested meanings and frames. The meanings of substantive provisions of the Constitution multiplied. Doctrinal subdivision proliferated. Amidst the pastiche of ad hocery, the proliferation of doctrine, and the multiplication of constitutional meanings, there emerged an uncanny vacancy. Fundamental legal entitlements or prohibitions like the Constitution seemed vacant at their core—vacant not in the sense that we could no longer identify the prototypical case. We could still do that. But the core entitlements became vacant in a different way. They became vacant in the sense that they could no longer tell us much of anything about which of their many meanings, doctrines, or ad hoceries should prevail when. The steering mechanisms seemed to have disappeared.

In the absence of a strong shared frame for selecting appropriate doctrinal tests or constitutional meanings, law became overtly politicized. Indeed, once the object of interpretation was lost, politics, appealing or not, became a necessary source of decision-making. Indeed, once the interpretive object is lost and the meanings and frames multiply, nothing short of a forceful political intervention can compel one result as opposed to another. Politics becomes the necessary force to affirm that this *one object* counts as the object of interpretation and this *one vision* is what its interpretation yields. Indeed, what else is there?

And yet, despite the loss of the object of interpretation and the accompanying politicization of law, the commitment to the rule of law and the objectivity of law remained. These enduring, pervasive, and basic commitments meant that neither "interpretation" nor its "object" could be relinquished. No matter what the situation, judges and legal scholars had to continue claiming that they were, in fact, doing interpretation.

SEND LAWYERS, GUNS, AND LEGAL THEORISTS

The confluence of these forces helped to produce the rise of interpretive theory in constitutional law.[21] Interpretive theory promised

21. There are, of course, many other stories to be told about the rise of theory, including

access to the "true" object of interpretation. It promised to tame politics and to guide it in desirable directions. And it promised to do all this without surrendering claims to the rule of law and objectivity.

All this would be done in the name of interpretation. It would, in fact, be done by re-authorizing interpretation itself. In other words, the activity known as constitutional interpretation would be re-constructed in a way that achieved all of these objectives. From 1970 to 1998, the technique of constitutional theory has been the same.

Whichever theorist we are talking about—Robert Bork, Bruce Ackerman, Owen Fiss, whoever—the theoretical move is always the same. Some crucial and recurrent problem of the Constitution is identified and extracted from the fabric of the Constitution. The problem could be the legitimacy of judicial review,[22] or the counter-majoritarian difficulty,[23] or the inter-temporal difficulty.[24] The problem is then abstracted and essentialized. It is restated in the crisp and elegant aesthetic of theory. It is elevated and celebrated as the most crucial, the most important problem—the one from which all solutions must flow. (The problem is then resolved.) The solution—whether we are talking about the legitimacy of judicial review, the counter-majoritarian difficulty, the inter-temporal difficulty or whatever—is always the same. The solution is always to follow the proper interpretation of the Constitution—namely, the one required by the theory being offered.[25]

The next move is to make the solution a privileged entry point into constitutional interpretation, relegating all others to a subordinate and derivative status. The result of these theoretical gestures is to deliver up a cleaner object of interpretation—one that appears to have a coherent internal structure.

This work is attended by a political moment. The choice of which concern and which solution to privilege and how to privilege them is informed by certain political agendas. Conservative theorists tend to frame the crucial concern in static spatial terms. This privileges the kinds of problems and issues that remain unchanged throughout

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the doctrinal exhaustion of the various fields, the absence of jobs in graduate schools, and so on. I am not claiming to tell the only story about the rise of theory.

22. *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-11 (1971).

23. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

24. *See* Bruce A. Ackerman, *The Storrs Lecturers: Discovering the Constitution*, 93 YALE L.J. 1013, 1045 (1984).

25. *See* Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1922-23 (1991)

time (and are thus congenial to conservative politics). Conservatives try to privilege authority and related concerns such as judicial restraint and legal objectivity. Their crucial aesthetic move is almost always to find techniques of interpretation that *control and constrain* the penumbra to make it as close as possible to the core.[26] This effect is produced typically through an operation of imposing limits and boundaries.

Liberal theorists tend to frame the crucial concerns in dynamic temporal terms. This privileges problems and issues which themselves change across time (and are thus congenial to liberal politics). Liberals try to privilege change and related concerns such as progress and adaptation. The crucial aesthetic move of liberals is to find techniques of interpretation that *redeem and justify* the expansion of the core out towards the periphery. This effect is produced typically through the operation of extending centrifugal forces—such as principles, implications and so on.

The aesthetic dimensions of liberal and conservative politics are hardly a perfect match relative to their respective normative agendas. The reason is simple—both conservative and liberal politics have instrumental agendas that may or may not be served in any given context by their prototypical aesthetic moves. For instance, as many have noted, conservatives tend to be expansive and liberals tend to be confining where property rights are concerned. The reason for this occasional discrepancy between aesthetics and normative agendas is that conservatism and liberalism are themselves constituted in both aesthetic and normative terms. To put it simply, there is a normative as well as an aesthetic aspect to being a conservative. And there is a normative and an aesthetic aspect to being a liberal. Sometimes, for both conservatives and liberals, the characteristic aesthetic and normative commitments may be at war with each other. Indeed, notice the discomfort experienced by conservatives when their political strategy compels them to endorse fluid, flexible, expansionary principles. Notice as well the same sort of discomfort among liberals when their political strategy compels them to insist on static, constraining, fixed hard lines.[27]

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26. The canonical core/penumbra distinction is announced in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

27. This is but an instance of the "rules versus standards" dialectic. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

Meanwhile, both conservatives and liberals can pursue their constitutional politics in the name of interpretation. Both conservatives and liberals begin by interpreting some key strand of the Constitution and end up with something which, not surprisingly, resonates with at least some part of what the Constitution means.

Moreover, the final product—the "theory"—looks deceptively like law itself. Consider the constitutive aesthetic features of what is typically considered "theory" in American legal thought. "Theory" is typically considered to have *authority* in the sense that the interpretive norms it articulates are and must be followed. Second, "theory" is *self-legitimating* in the sense that, through normative justification, it authorizes its own interpretive acts. Third, such theory is *general* in the sense that it is capable of application to a broad range of interpretive acts. Fourth, it is *context-transcendent* in the sense that such a theory is supposed to determine its own relation to acts of interpretation (and not the other way around). Fifth, theory is *autonomous* in the sense that it generates (or at least is supposed to generate) its own form and content independently of any external environment or perspective.

Notice that, in combination, the defining aesthetic characteristics of "theory"—*authority, self-legitimation, generality, context-transcendence, and autonomy*—come very close to a traditional image of "law" itself. Theory—the kind of theory I have described—is a mimesis of law itself. It looks very much like a kind of meta-doctrine—a doctrine of the doctrine issued by the judges of the judges.

Legal theory simply apes the constitutive gestures of the positive law itself—substituting slightly different content—in the name of an elegant aesthetic and this or that political project. Legal theory is simply a kind of law that seeks to become a law unto itself.[28]

The theorists try to re-authorize interpretation in their own image. And since there are many theorists engaged in this activity, we end up with a variety of competing theories of interpretation—each of which claims to have accessed the true Constitution.

In short, the first and essential move in constitutional interpretation is always the same one: "Assume I've got it (the Constitution) right; now let's talk."[29] Everyone constructs the constitutional object they

28. This is, indeed, one reason that more traditional doctrinal thinkers were so upset by the "theory" people. From the perspective of the more traditional doctrinal scholars, the theorists were simply undisciplined upstarts who failed to show the proper deference to positive law.

29. This move is also not without its own impressive pedigree. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Chief Justice Marshall derives the power of judicial review from

wish to interpret. And then they fight. But since no theorist has a privileged claim on the baseline understanding of the identity of the Constitution, it is an interesting question why these people find it worthwhile to argue with each other.

Why bother having disputes about how best to interpret the Constitution when, indeed, there is no baseline agreement on the identity of the object of interpretation itself? The same could go for a number of other currently popular flash points for the constitutional conversation. The current debate about what *fidelity* to the Constitution requires or implies confronts the same difficulty. To all the disputes about how best to show fidelity, the question must be asked—preferably with a tone of utter incredulity: "Fidelity to *what* again?"

If we don't know the "what" and, what's more, the "what" seems so congenially encompassing, what's the point in having a conversation about how to interpret this "what"? Or how to show fidelity to this "what"? Indeed, even if "interpretation" or "fidelity" is a constraining or guiding concept, it ceases to be very constraining or guiding when the object of interpretation remains so generously unspecified and so obligingly protean. Why insist on "interpretation" at all? Why do all these theorists insist that they are engaged in "interpretation"? Why not drop the conceit?

The answer, I think, goes something as follows. The theorists are people who try to lay down the law of the Constitution—specifically their law. But much as they may want to, they can't very well simply declare that the Constitution is subject to their theory. So instead, they use the classic legal strategy of claiming that they are "interpreting" the Constitution. In other words, they try to show that the theories are themselves derived from or expressive of the Constitution.

Interpretation is thus a kind of vehicle that enables the theorists to construct and offer up new, more appealing objects of interpretation. It is in the name of interpretation that Ackerman gave us "transformative moments,"[30] Sager gave us a justice-seeking Constitution,[31] and so on.

But it didn't work. It didn't work for a number of reasons, of

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a constitution—namely his—that always and already authorizes judicial review . . . over and over again). This is not a criticism. What else could he, as a Supreme Court Justice, do? "Jurisdiction undecidable. Case dismissed or not dismissed. Remanded for disposition not inconsistent with this opinion?" Not likely.

30. BRUCE ACKERMAN, WE THE PEOPLE—FOUNDATIONS 266-94 (1991).

31. *See* Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 417 (1993).

which I will mention five. In hindsight, these will seem rather obvious, if not banal.

First, the theories were supposed to provide a clean and elegant restatement of the real identity of the Constitution. Theory was supposed to separate the authoritative from the derivative, the core from the periphery, the enduring from the ephemeral, the law from the tosh (and so on). The process by which this distillation occurred was through an abstraction of one aspect of the Constitution and its enshrinement as superior to all others. Despite the elegance of this theoretical move—*and isn't this the theoretical move par excellence?*—it was also crudely reductionist.[32] Theory allows the Constitution to be re-presented as a cleaner, more elegant version of its former self—but also a far less inclusive version as well. The excluded aspects do not go away. They remain—ready to impeach the theory.

Second, despite their pretense to "interpreting" the Constitution, it was apparent that the theories were engaged in some jurisprudentially suspect activity. Theory promised access to the "true," the "real," the "essential" object of interpretation (the Constitution). But instead, theory was seen by many to be an illegitimate attempt to substitute a theoretical object of interpretation for the real one.

The problem then for theory was that its kind of interpretation was simply not authorized—not by the Constitution nor by constitutional practice. And, not surprisingly, the Court and the courts studiously avoided theory. In refining and distilling the object of interpretation, the theorists believed that they were offering the legal community what they wanted—a cleaner object of interpretation and a more elegant form of interpretation. But this was not the law's desire, this was theory's desire. The kind of interpretation offered by theory was simply not the kind of interpretation wanted by the courts. To be blunt: theory offered the courts something they didn't want and didn't need.

Third, theory did not so much "discipline" the object of interpretation as fuel its disaggregation. Indeed, theorists succeeded in articulating previously unrecognized aspects of the object of interpretation. Indeed, as theorists pointed out, the Constitution is:

> a text,[33]
> a "recipe,"[34]

32. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1 (2d ed. 1988).

33. *See* Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279 (1992).

34. Lawson, *supra* note 5, at 1833 ("The Constitution of the United States is a recipe—a

a "principal symbol,"[35]
a way of disciplining the present for the future,[36]
a justice-seeking thing,[37]
an expression of a political theory.[38]

With each theoretical breakthrough, the identity of the Constitution became less, not more, defined. One or two theories might conceivably discipline the object of interpretation. Twenty-five theories, by contrast, just creates a mess.

Fourth, for many, playing the normative theory game became uninteresting—intellectually or politically.

On the political level, it is of no consequence, except to the extent that it occupies a certain amount of resources in the legal academy and sustains a certain picture of law as subject to rational elaboration.

On the intellectual level, the game is either incredibly easy or impossible. If the theory game consists simply of showing that one's own abstract conceptualization has some substantial resonance in the Constitution and some appealing normative implication, then the game is incredibly easy. Indeed, "The Constitution" will obligingly furnish a rich database to produce and support a multiplicity of theories. And normative abstraction will likewise, in virtue of its abstract character, be genially compliant in yielding good normative implications. The strategy here is to come up with a sufficiently plausible jurisprudence and then affirm with conviction, institutional pedigree, wit, charm, or simple browbeating that what is plausible is also right. That does not mean that there is not a lot of hard work to be done marshaling numerous tiny bits of data, doctrines, and philosophical authorities as the theory battles become (like law itself) increasingly intense and exquisitely detailed. But so long as everybody does the hard work competently, the end point will always be the same—namely, a draw.

The theory game can also be impossibly difficult. If the theory game consists of showing, through a legitimate and conclusive form of

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recipe for a particular form of government.").

35. Michael Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 564 (1985) ("[The constitutional text] is a principal symbol of, perhaps the principal symbol of, the aspirations of the tradition.").

36. *See* Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1614 (1997).

37. *See* Sager, *supra* note 31, at 417.

38. *See* Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 FORDHAM L. REV. 1469 (1997).

argument, that one's own theory of the Constitution is correct, then the game is lost before one even starts. There will always be some constitutional remainder left excluded by the theory which will undermine, corrode, and ultimately destroy the theory's claims of comprehensiveness. It will, in other words, destroy the theory's claim to be a theory of the object it purports to address—or, in short, to be a theory at all.

A fifth reason that constitutional theory failed was that it was not well poised for its ambitions. If the mission required the creation or institution of reformed or new objects of constitutional interpretation, legal theory and moral philosophy were particularly poorly situated to deliver. The construction of new objects of interpretation is an essentially creative activity. It is the sort of thing that requires rhetorical acuity and artistic talent. (Notice it is Ronald Dworkin—probably the most rhetorically adept contemporary legal theorist—who has been the most successful in creating and instituting his legal theory.)[39] Meanwhile, the dreary aesthetic of analytical philosophy (think Rawls)[40] with its compulsion to subdivide its own seemingly endless taxonomies was particularly poorly suited for such a creative, artistic, and rhetorical endeavor.

There is another important reason that moral philosophy and legal theory were unsuited to the rhetorical tasks. They were and, even in their present form, remain relentlessly normative. If what we are missing and need to create are attractive constitutional objects of interpretation, it will not help much if we hear over and over again from the theorists that the solution is to get some. This advice may be true, but it is assuredly not helpful. It is like telling the drowning man that he should try to find dry land.

And, indeed, as the analogy shows, not only is normative theory useless (either we reject the advice or we don't need it), but it is also relentlessly perverse. It is perverse because it repeatedly asks us to engage in a theoretical conversation about what the drowning man should really do, when in fact none of this advice can possibly help. Not only does normative theory fail to tell the drowning man anything he doesn't already know, but at some point it becomes apparent that the normative theorists are not even talking to the drowning man at all. The hook-up has been cut or it was never there. The normative theorists are in their academic yacht having a pleasant, normative conversa-

39. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

40. Think especially of the latest book: JOHN RAWLS, POLITICAL LIBERALISM (1993).

tion about what the drowning man should do, while the drowning man drowns. "Our normative theory," they say, "indicates that you shouldn't drown." Or in a more sophisticated vein: "We should all try, given the materials available, to come up with the best theory that will best serve to keep our drowning man from drowning."[41]

There is a general point here. Whatever normative legal theory may be able to do, what it cannot do is remedy ontological deficits in the authoritative structure of an interpretive practice. To put it more simply, mere normative prescription of what ought to be done within an enterprise cannot supply or replace the authoritative foundations essential to the enterprise when these are already missing.[42] On the contrary, the movement runs in the other direction: it is the perception of missing foundations that leads to the anxious, frenetic and, in this context, largely useless enterprise of normative theoretical prescription.[43]

WAITING FOR THEORY

The zenith of theory's empire was reached in 1986 when Ronald Dworkin published his opus.[44] This was the boldest, most extraordinary gesture of theory yet. It has not been matched. This is why some ten years later, American constitutional thinkers (including me) are still returning to this work—a work that continues to have pride of place in American jurisprudence.

For Ronald Dworkin, the enterprise of adjudication lies in coming up with the moral theory that best fits the authoritative legal materials. The question of what counts as the authoritative legal materials is, among other things, determined by the best moral theory. And the question of what counts as the best moral theory is answered, among other things, by the determination of the relevant authoritative legal materials. The last element lies in coming up with a good theory of "fit" between the authoritative legal materials and the best moral theory,

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41. *See* DWORKIN, *supra* note 39.

42. *See* Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053 (1993).

43. *See id.* That is not to say that all normative prescription is useless or ineffective. I have never said that. I have said merely that it is useless in achieving its goals when the normative prescription cannot (and does not) influence a person or institution capable of putting the prescription into effect. What is controversial in my views (and I have noticed that they seem to be somewhat controversial) is merely that I believe this to be the generalized condition of the legal academy and the overwhelming majority of its work-product. *See generally* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 167-72 (1990).

44. *See* DWORKIN, *supra* note 39.

binding them together.

The question, then, of how to interpret the Constitution depends upon coming up with the best theory that best fits the institutional materials. Dworkin is such a great rhetorician that one can easily be seduced into thinking that he has provided a solution.[45] His solution, albeit stated in much fancier jurisprudential language, is "Do the best you can do."[46]

Now, in fairness to Dworkin, he is actually saying a bit more than that. He is saying, *try to come up with the best plan that best fits what it is you can do.* The best plan is . . . well, the best. Of course, if it is going to be the best plan, it must be one that is appropriate to *you.* In other words, you cannot simply invent the best plan out of thin air. Instead, you must come up with the best plan drawn from an examination of what *you* can do—given your strengths, weakness, capacities, etc. In addition, you will want to have a *theory of fit.* That is, you will want to be able to tell how much you are willing to give up on a really good plan to have one that is more realistic in light of your capacities. Just how much do you want to stretch yourself for the sake of a really good plan? Conversely, given who you are, how realistic is this stretching? The theory of fit will answer these questions. The theory of fit will, in turn, be a function of the proposed plan and your own proposed self-assessment.

Notice that this has a familiar ring. What is called for is to bring four variables into equilibrium. *Do* (try to come up with) *the best* (the best moral theory) that *you* (the authoritative materials) *can do* (the best theory of fit).

This prompts a question: Is anything being said here? Isn't this elaborate construction simply a restatement of the problem, such that the problem is now being offered as if it were the solution? Dworkin's law—like our own—is characterized by a dissonance between the actual authoritative legal materials and our own moral ideals. How are the two reconciled? Dworkin offers the answer: We must try to come up with the best theory that best fits the authoritative materials. This sounds good. But then a moment's pause: Why would anyone consider this a solution—let alone a good solution? Isn't this a little bit like suggesting that the solution to the problem is to try the best one can to make the problem go away?

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45. *See* Stanley Fish, *Dennis Martinez and the Uses of Theory,* 96 YALE L.J. 1773 (1987).
46. This is Stanley Fish's point. *See id.* at 1793.

I wouldn't want to argue against this position. On the other hand, why would *anyone* want to argue against this position? It's nearly empty. Isn't this close to what everybody is already doing? Indeed, why isn't Justice Scalia or Justice Ginsburg or Professor Lino Gralia or Professor Duncan Kennedy already a Dworkinian? The only answer I can come up with is that none of them is trying to come up with a theory. But even then Dworkin might argue, as he has in other contexts, that they are mistaken about what they are actually doing—that really, they are trying to come up with a theory, they just don't know it.

If we can take Dworkin's work as the apex of theory, we get the essence of theory's answer about how to do interpretation. What theory has to say ultimately is that it would be a good idea to get a theory of interpretation.

That advice is not entirely empty, but it is useless. What it forgets is that interpretation is nested in certain local interests and desires. The reason we sometimes do interpretation in constitutional law (or call our activity interpretation at all) depends upon the embedded local grammars of constitutional law. Interpretation responds to the local grammars that give rise to a felt need to interpret in the first place.

Notice that this is true of theory, too. Theory itself is a response to embedded local grammars. But this does not save theory. On the contrary, theory is a response to the grammars of the legal academy—particularly the elite legal academy. Theory is one product of a legal academy that constructs legal academics as certain kinds of persons. These are the kinds of persons who want many things at once. They want simultaneously:

> to exercise normative power or political influence over the development of the law;
> to exercise the professional talent for which they received formal training—namely appellate advocacy—an enterprise of norm selection and norm prescription;
> to avoid having to work with the aesthetically and normatively unappealing mess of positive law and doctrine;
> to work at some professional task that provides some intellectual interest.

Not only do they want these things, but indeed wanting these things is who they are. There is thus no question for them—absent a major gestalt shift—of wanting something else.

Where then does that leave us as far as constitutional interpretation is concerned? It leaves us where we already are—namely, with a rath-

er indeterminate or, if you want, underdetermined or non-determined object of interpretation and a wealth of plausible interpretive moves—a kind of mishmash of concerns, themes, principles, aesthetics, and so on.

This mishmash contains moves that allow the object of interpretation, "The Constitution," to precipitate into an object of stark clarity and fixity—call this the "objectivity move." Or it can devolve into an object of magnanimous mutability—shedding *almost* all the attributes that one would normally ascribe to an object—call this the "mutability move." It can, in short, assume an extraordinary array of identities.

But, of course, none of this gets rid of the problem of interpretation. How then should the Court decide which interpretation to follow?

Notice that, as familiar as this question may be, it is a bizarre question. Notice the manner in which the question is posed. You are asked which kind of interpretation the Court should follow. This is a radically de-contextualized question. The Court is itself an abstraction. What matters, arguably, is not what the Court thinks, but what five justices think and, sometimes, merely what one justice thinks.[47] The Court is an abstraction in another sense: its personnel and their proclivities keep on changing. Presumably, the kind of interpretation that should be followed depends upon which kind of interpretation the justices could conceivably follow. The answer you might give would presumably differ depending upon whether we were talking about the Vinson Court, the Warren Court, or the Rehnquist Court.

Notice, too, the bizarre nature of the question given our professional identities—yours and mine.

If you are a lawyer, the question of how to interpret the Constitution is not professionally important. You don't have a choice. The question of which kind of interpretation to follow is never a real question for you. You will follow the kind of interpretation that is in the interest of your client to follow.

If you are a student or a legal academic, then deciding which kind of interpretation to follow is a bit unreal. What precisely is being asked? What you—given your political or aesthetic or jurisprudential commitments—would choose? Is this what is being asked? But, unless we bring these commitments out on the table (which we usually don't), why would that be an interesting question? Perhaps you are being asked instead, what mode of interpretation you, as someone who

47. *See* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989).

wants the respect of peers and colleagues, would follow? But why does that matter? The problem here is not only that it is not clear what question is being asked, but it is not clear why we should be interested in the answer.

Now, in the context of real stakes, the questions can matter. They matter, for instance, in court because they have consequences. But that is an instrumentalist perspective. And the thing about instrumentalism is that there's no such thing as instrumentalism in the air. It is not the sort of thing that can be done in the abstract. To put it differently, a question asked in court about the propriety of an interpretive approach is not the same question asked in the classroom or in the law review article. And this remains true even if the same *exact words* are used in all three contexts.

IMPLICATIONS

How do those facing real stakes decide which interpretation to follow? The question of what interpretation to follow in constitutional law is answered in a series of ungrounded and non-rational moments of moral or political or aesthetic commitment. The moments are framed within often well-elaborated jurisprudential frameworks. The frameworks are themselves selected in ungrounded, non-rational moments of commitment.

Sometimes, these moments of commitment are experienced as or are reported to be choices. Whether they are, in fact, choices again depends upon the jurisprudential frameworks that are operative. It would be wrong to deny that choice is possible. At the same time, it would be wrong to suppose that because some moment is experienced as or reported to be a choice, it therefore is.

Contemporary jurisprudence from the extreme right to the extreme left seeks to rationalize law according to some dominant matrix. This is true, ironically, even of some of the critical legal studies jurisprudence that anchors law in the rationality of politics and moral choice. The desire to produce such dominant matrices—whether anchored in tradition, craft, moral choice, or whatever—is the desire that there be law and that this law be one's own.

This is not an ignoble desire. It is, however, ultimately futile. Futility is not a ground for inaction. It is merely a symptom of mortality. In that spirit, let me conclude by saying that there is never any answer to a question of constitutional interpretation other than to do the

right thing.[48] This, of course, is not terribly helpful if one is looking for guidance. But the fact that it is not very helpful does not mean that there is anything else to say. There isn't.

48. *See* Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 27 TEX. TECH L. REV. 1157 (1987).