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Framers Intent: The Illegitimate Uses of History

Pierre Schlag*

I. INTRODUCTION

The number of law review articles devoted to state constitutional law seems to have increased noticeably since the early 1970s. In most cases, the authors of these articles either plead for the invigoration of state constitutional rights or set forth their understanding of how these venerable, yet obscure documents are to be activated.¹ While the call to invigorate state constitutions is growing louder and more frequent, the method is uncertain.² One of the most significant difficulties in giving life

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1. Compare Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) (advocating the invigoration of state constitutional provisions) with Sundquist, *Construction of the Wisconsin Constitution—Recurrence to Fundamental Principles*, 62 MARQ. L. REV. 531 (1979) (discussing the tools available to construe state constitutions).

The suggestion that reviving state constitutional rights is less than wonderful does not surface very often. For a rare example advocating restraint by the state judiciaries, see Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979).

2. One of the signal difficulties in giving life to state constitutions lies in determining the relative roles of the state and federal constitutions: given the continuous judicial elaboration of the federal Constitution and the relative desuetude of state constitutional provisions, when and how should state judges turn to their own constitutions? For an attack on the selective instrumentalist use of state constitutional charters to achieve desired political ends, see Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Linde, *supra* note 1, at 383, 387-89. These commentators argue that observance and application of state constitutional law prior to the invocation of federal constitutional commands is mandated by accepted legal conventions such as federalism and the hierarchy of sources of law. Collins, *supra* this note, at 5-6; Linde, *supra* note 1, at 383.

Despite the principled arguments of these commentators, it seems difficult to deny that much of the judicial and scholarly interest in activating state constitutional provisions stems from political dissatisfaction with the Burger Court's constitutional work product. For examples of sweeping indictments of this output, see Blum, *Cases that Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 HARV. C.R.-C.L. L. REV. 713 (1980); Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361 (1979).

A related explanation for the interest in reviving state constitutions is that the Bur-

to state constitutions lies in ascribing specific content to constitutional provisions that are as abstract as they are grand.³ One source for the interpretation of constitutional provisions is likely to be the "framers intent."⁴ The reasons for this are several.

ger Court's decisions fail to congeal into understandable constitutional doctrine: the work product has become so refined, so contradictory, and so unstable that it is difficult to decipher its meaning. Not only does the proliferation of doctrinal labyrinths serve to undermine constitutional rights (see Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984)), but it also makes the work of judges more difficult. Not surprisingly, state court judges would like to decide constitutional cases on the basis of doctrine that is easier to understand—doctrine, for instance, of their own making.

3. Knapp, *The Origin of the Constitution of the State of Washington*, 4 WASH. HIST. Q. 227, 233 (1913). See Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 711 (1983). See also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). The Washington Declaration of Rights, for instance, contains some rather grand provisions. See, e.g., WASH. CONST. art. I, § 5 (freedom of speech); WASH. CONST. art. I, § 10 (administration of justice); WASH. CONST. art. I, § 30 (rights reserved).

4. As will be seen, ascribing meaning to the terms "framers" and "intent" is no easy task. See *infra* notes 38-42 and accompanying text. Commentators interpreting state constitutional provisions and state judges writing opinions routinely turn to an articulation of the framers intent in ascribing meaning to those provisions. See, e.g., Moore, *Constitutional Debt Limitations on Local Government in Idaho—Article 8, Section 3, Idaho Constitution*, 17 IDAHO L. REV. 55, 57-58 (1980); Comment, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation*, Buse v. Smith Criticized, 1981 WIS. L. REV. 1325, 1327-28. See also State v. White, 97 Wash. 2d 92, 110, 640 P.2d 1061, 1071 (1982) (discussing the framers intent in interpreting WASH. CONST. art. I, § 7).

Commentators setting forth the means by which state constitutional provisions might be interpreted often prescribe examination of the original understanding to give meaning to constitutional provisions. See, e.g., Sundquist, *supra* note 1, at 535.

Commentators obviously differ on the role that the framers intent should play in the interpretation of constitutions. See *infra* note 15. To my knowledge, however, it has never been argued that the framers intent is the only authoritative text that must be enforced by judges in deciding constitutional cases. The briefs for recourse to the original understanding concede that it is the text that must be enforced; the framers intent is merely evidence of the meaning of that text. See, e.g., Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 384 (1981) ("For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration.") (emphasis in original).

Arguments that totally reject the importance of framers intent are relatively rare. Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811, 813 (1983). Early examples include ten-Broek's five articles (see *infra* note 31) and Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). While candid rejection of the original understanding as a norm for constitutional interpretation is indeed rare, the recognition of the import of the original understanding combined with a de facto dilution of that understanding by the articulation of other sources of constitutional interpretation is relatively frequent. See, e.g., Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); see also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 226 (1980). Brest subordinates the original

First, the act of imbuing grand constitutional provisions with specific content is an enterprise stalked by the spectre of arbitrariness.⁵ Reference to the framers intent seems an attractive option because it gives the appearance of reducing the arbitrariness of the interpretive act both substantively and methodologically. On the plane of method, framers intent seems to prescribe a fixed procedure for determining the meaning of constitutional provisions—one that is susceptible to independent verification.⁶ The search for the framers intent also seems to place substantive limits on the interpretation of constitutional provisions.⁷ The scope and content of substantive interpretations are limited by the available evidence of framers intent: there is a fixed quantum of data to examine and the interpretive act is restricted to the understanding of that limited portion of historical data.

A related explanation for the attractiveness of inquiries into framers intent is the political and psychological comfort that this method of interpretation bestows upon the judiciary.⁸ Insofar as this "intentionalist" mode of interpretation is seen as a way of giving effect to the decisions of the framers (a group of people who cannot respond), reliance on framers intent appears to reprieve judges, practitioners, and legal scholars from responsibility for the moral and political character of their actions. Recourse to framers intent seems to insulate these actors from criticism by transforming them into mere conduits for decisions made by others.⁹

understanding under a five-part theory of constitutional adjudication that is "designedly vague." *Id.* He assigns presumptive, "important but not determinative" weight to the original understanding. *Id.* at 229. ~

5. See *infra* notes 21-29 and accompanying text.

6. See *infra* text accompanying notes 30-35.

7. See *infra* text accompanying notes 36-49.

8. Insofar as Washington state court judges are elected for limited terms and can be acquainted with the expression of citizen displeasure at the polls, their need for the conceptual means to legitimate constitutional decisions is rather high. See Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 495-96 (1984). Framers intent can serve as a useful shroud for decisions that might otherwise seem politically offensive or illegitimate. It is in this sense that the original understanding provides political comfort. Psychological comfort is provided insofar as framers intent allows the definition of an appropriate judicial role and obviates the intellectual impetus for existential angst about the scope and content of judicial responsibility. See *infra* note 9 and accompanying text.

9. As Saphire suggests, "In essence, the framers' intent is an artifact which we (viz. judges and constitutional theorists) have created to satisfy our sense of order and our

A third explanation for the appeal of intentionalist analysis lies in the fact that this type of interpretation corresponds well with the dominant positivist legal philosophy that has been the wellspring for the legal education many contemporary jurists have received.¹⁰ Similarly, interpretation of the framers intent fits neatly with social contract theory, which remains one of the major political justifications for American liberal constitutionalism.¹¹

In this Article, I will present a series of attacks on intentionalism. My efforts are aimed at eroding the high ground that the intentionalist position appears to enjoy in the interpretation of state and federal constitutions. Currently, one almost has to justify departure from the framers intent in advancing a nonconforming constitutional interpretation.¹² This Article is an attempt to reverse this assumed burden of persuasion.¹³

I am interested in addressing generally the theoretical foundations for intentionalism.¹⁴ Thus, my attacks on intentionalism

innate need to have those who have preceded us share our responsibility for the world we confront." Saphire, *Judicial Review In the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 779 (1983).

10. See *infra* text accompanying notes 96-107.

11. See *infra* text accompanying notes 89-95.

12. Berger notes, for instance, that opposition to intentionalism has only recently surfaced. Berger, *Lawyering vs. Philosophizing: Facts or Fancies*, 9 U. DAYTON L. REV. 171, 198 (1984). Writing in 1981, Monaghan remarked, "Professor Brest stands virtually alone . . . in attempting to provide a complete theory for disregarding original intent." Monaghan, *supra* note 4, at 381. Brest now has company. See Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-500 (1981); Saphire, *supra* note 9, at 747; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 786-804 (1983). Nevertheless, most constitutional commentators seem reluctant to dismiss the importance of the framers intent and, rather than rejecting it outright, they undermine its significance by submerging its commands in a sea of competing authoritative sources of interpretive construction. See Monaghan, *supra* note 4, at 374 ("[T]heir preference is to analogize constitutional interpretation to the evolutionary, open-ended, case-by-case approach characteristic of the common law method of adjudication."). See *infra* note 13.

13. If intentionalism indeed serves entrenched psychological and political needs, then it is questionable whether an appeal on the plane of reason is of any use. Nevertheless, I suspect that the mythology of framers intent is not working very well any more: the convention of intentionalism seems to be passing from a source of substantive legal meaning into a ritualistic exercise of proper legal form. Soon we may scuttle even the form.

14. Because my arguments against intentionalism are of a theoretical nature, they are obviously not exhaustive of the objections one might make to intentionalism in specific contexts. For instance, in Washington State the full proceedings of the Constitutional Convention are not available in published form. Utter, *supra* note 8, at 512. This absence of historical material could serve as the basis for developing context-specific arguments that intentionalist modes of analysis are peculiarly ill-suited for the Washing-

are applicable to the interpretation of the federal Constitution as well as to state constitutions, such as that of Washington State. Apart from examples referring specifically to the federal Constitution or to the Washington Constitution, references to the constitution and to constitutional law are meant in this generic sense.

At the outset, I must caution that examination, or in my view construction, of the framers intent is neither irrelevant nor necessarily illegitimate for purposes of constitutional interpretation. Inquiry into the sources and origins of the constitution is appropriate to the extent that the process of examining those sources and origins yields a possible meaning for constitutional provisions—a meaning that we would not otherwise have imagined. Second, the process of reacquainting ourselves with our past is likely to yield an enhanced political self-understanding. Of course, the examination and retrieval of other cultural and historical artifacts (such as French literature, Roman law, or German social theory) might serve those two functions equally well. Indeed, thus far the only role I have allotted to the quest for the original understanding is an educational one. In terms of constitutional interpretation itself, I think that reference to the framers intent can have only one legitimate role: it can serve to situate a constitutional decision. A picture of the original understanding can serve as the context against which a constitutional decision that follows or repudiates that understanding can be understood or justified. Again, one might note that French literature, Roman law, and German social theory might perform this function equally well.

What I fervently oppose is according any legitimating weight to the framers intent. Reference to the framers intent does not and should not be taken to justify any constitutional decision. The only legitimate role for the framers intent in constructing a constitutional decision is that of providing contextual meaning. The framers intent can merely serve as a stage set, a background against which the constitutional decision sets off its meaning. My attack on intentionalism is thus aimed at those theories of constitutional interpretation that claim that the framers intent has binding authority, an *a priori* claim of legitimacy, or even “presumptive validity.”¹⁵

ton Constitution.

15. For Berger, the original understanding has binding authority, at least when that

Many judges and scholars take framers intent as a given in our constitutional jurisprudence—the fixed point from which constitutional interpretation must proceed. One has to linger long in the dark to find the justifications for this constitutional blind.¹⁶

One justification for intentionalism is the notion that framers intent is a check (or some would argue, the only check) on the exercise of judicial power. Under this view, recourse to framers intent is justified by virtue of the fact that it prevents judicial legislation or precludes judicial subjectivity.¹⁷

A second justification relies upon contract imagery to justify recourse to the framers intent. In one version, we have the claim that the constitution is a written document and that since the document is law, it is to be interpreted in the same manner as

intent can be known. R. BERGER, *GOVERNMENT BY JUDICIARY* 407 (1977) (with respect to the fourteenth amendment to the United States Constitution: "Given the clarity of the framers' intention, it is on settled principles as good as written into the text."). For Monaghan, the original understanding, while entitled to *a priori* legitimacy, must be tempered by the constraints of stare decisis. "While original intent may constitute the starting point for constitutional interpretation, it cannot now be recognized as the only legitimate mode of constitutional reasoning. To my mind, some theory of stare decisis is necessary to confine its reach." Monaghan, *supra* note 4, at 382. For a discussion of the difficulties posed by adding stare decisis to the constitutional interpretive brew, see Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 7-12 (1979). For Brest, the original understanding of the United States Constitution is entitled to presumptive weight. See Brest, *supra* note 4, at 237.

16. If, as Saphire suggests, the quest for the original understanding is an obligatory bow to accepted legal convention, then it makes sense that the justifications for intentionalism would be underdeveloped. Saphire, *supra* note 9, at 779. We are not likely to spend time justifying something we take to be a given. Berger, a prolific proponent of the intentionalist school, has set forth some justifications for intentionalism and has responded several times to critiques of intentionalism, but he has sought largely to fight his battle on intentionalist grounds. See R. BERGER, *supra* note 15, at 363-72. Thus, the bulk of his volleys are restricted to arguments about what the framers actually thought rather than what we should think about what they thought. While attacks on Berger's work seem to occupy many pages in the law reviews, one gets the feeling that the battle is not really joined. Indeed, many of the attacks on Berger's works are aimed not at his historical research, but at his political theory or his jurisprudential tenets. See, e.g., Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation* (Book Review), 5 HASTINGS CONST. L.Q. 607, 608 (1978) (attacking rigid adherence to framers intent); Perry, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Book Review), 78 COLUM. L. REV. 685, 690-91 (1978) (suggesting that Berger's history is accurate, but that his political theory is all wet).

As Berger himself observes: "I may be allowed to emphasize that I have never attempted to formulate a general theory of interpretivism; my goal has been more modest and quite narrow." Berger, *Mark Tushnet's Critique of Interpretivism*, 51 GEO. WASH. L. REV. 532, 533 (1983) [hereinafter cited as Berger, *Critique*].

17. See *infra* text accompanying notes 21-28.

other legal documents. As with contracts, if the words are plain and clear on their face, they are to be given effect. If they are not, then one must seek out the parties' intent.¹⁸ Closely tied to this analogy is the social contract mythology: the constitution is a social compact that derives its legitimacy from the consent of the governed. Recourse to framers intent is mandated in order that one may distinguish that which the governed have consented to from that which they have not.¹⁹

A third justification for intentionalism can be teased out of the teachings of legal positivism. This school of jurisprudence lends intellectual status to the otherwise unappealing assertion that the framers intent is quite simply a given of our legal system. From the positivist perspective, departure from the intentionalist tradition is nothing but extra-legal adventurism. Debates about the wisdom of abandoning the framers intent, according to this school, are matters for political dispute, or perhaps for philosophical inquiry, but not the stuff of which law or legal decisions are made.²⁰

II. CONSTRAINING JUDICIAL REVIEW

The paradox of judicial review has loomed large in the pages of the law reviews.²¹ Most simply stated, the problem is one of identifying the constraints that can serve to define the legitimate role of the judicial branch when it enforces constitutional provisions.²² Recently, on the federal plane, the problem has most often been cast as one pertaining to the so-called counter-majoritarian difficulty: what grounds suffice to authorize the judicial branch to invalidate the actions of democratically elected and therefore politically accountable officials?²³ On the

18. See *infra* text accompanying notes 62-65.

19. See *infra* text accompanying notes 89-95.

20. See *infra* text accompanying notes 96-101.

21. For a sampling of the literature on judicial review in the federal context, see *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Judicial Review and the Constitution—the Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

22. There is obviously a multitude of ways in which one can describe the exquisite conundrum of judicial review, and, depending upon how one frames the problem, different theoretical solutions seem plausible. For an interesting statement of the questions that an acceptable theory of judicial review must answer, see Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037-38 (1980).

23. For an attempt to treat the problem of judicial review in these terms, see J. ELY, *DEMOCRACY AND DISTRUST* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS AND*

federal level, the problem is seen as particularly poignant given the fact that Supreme Court justices are appointed for life and hence seem to be less accountable to the electorate than is the legislature or even the executive branch.²⁴ In the context of the Washington State Constitution, this problem is perhaps less pressing because the state judges are elected by the people for limited terms, and the people retain the ability, at least in theory, to throw the rascals out.²⁵ Nevertheless, even in these mitigating circumstances, the problem of judicial review remains perplexing, for it is assumed that the judiciary's authority in constitutional cases is limited to enforcing the state constitution. A series of oppositions to the appropriate judicial role is then offered to delimit judicial authority. Thus, it is said that judges deciding constitutional cases cannot and should not: (1) legislate;²⁶ (2) enforce their own subjective value judgments;²⁷ or (3) engage in policy decisions or make new law.²⁸

HUMAN RIGHTS (1982). The problem of judicial review, cast in terms of the counter-majoritarian difficulty, is clearly captured in Judge Bork's observation: "Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971). The conundrum of judicial review is, therefore, how to decide which governmental branches shall have the authority to reconcile the scope and content of majority and minority freedoms. For another statement of the problem of the counter-majoritarian difficulty, see A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962).

24. This is a routine assumption of the judicial review literature. See, e.g., J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); M. PERRY, *supra* note 23, at 9. For a rare and provocative instance in which a legal scholar questions (and finds wanting) the customary assertion that our political process is by and large democratic and generally works fairly well, see Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 241-46 (1981) (taking J. ELY, *supra* note 23 and J. CHOPER, *supra* this note, to task for their unrealistic characterization of American political life as democratic).

25. The term of a Washington Supreme Court judge is six years. WASH. CONST. art. IV, § 3.

26. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (comparing *Roe v. Wade*, 410 U.S. 113 (1973), unfavorably, as a species of judicial legislation, with *Lochner v. New York*, 198 U.S. 45 (1905)).

27. Bork, *supra* note 23, at 3.

28. Bork, *supra* note 23, at 3-12; Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976). As Perry notes: "There is no plausible textual or historical justification for constitutional policymaking by the judiciary—no way to avoid the conclusion that noninterpretive review, whether of state or federal action, cannot be justified by reference either to the text or to the intention of the Framers of the Constitution." Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 275 (1981). Perry does attempt to provide a functional justification for noninterpretive review. See M. PERRY, *supra* note 23.

Intentionalism is offered as a response to these problems of judicial legislation, subjectivity, and creativity. It is offered as a means to constrain the indeterminacy that would otherwise afflict constitutional interpretation.²⁹ The argument can be cast either in methodological or in substantive terms.

From the methodological perspective, recourse to the framers intent serves as a procedural constraint on judges. This argument maintains that insofar as the interpretation of constitutional intent is constrained by a well-defined process of exhuming an original intent, judicial arbitrariness can be limited by mandating observance of correct historical research. This "process" justification has some appeal. If indeed there is an established method for discerning the framers intent, judicial arbitrariness will be constrained by the necessity of following the procedure and the subsequent verification by others. Anyone, or at least any historian or lawyer, can check to see that the court has followed the proper procedure in giving meaning to constitutional provisions.³⁰

29. This is indeed part of the brief advanced on behalf of "interpretivism," that school of thought which claims that constitutional meaning must be fairly derived from the text of a constitution. For a strong presentation of this view, see Bork, *supra* note 23, at 8 ("Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights."). See R. BERGER, *supra* note 15, at 363, 365. Part of the intentionalist's argument is the notion that if one abandons the original intent, then constitutional interpretation is cast adrift on seas of arbitrariness and judicial usurpation of power is the inevitable result. Justice Story long ago suggested that the intent of the framers might serve to give determinate meaning to the constitution:

Let us then endeavor to ascertain, what are the true rules of interpretation applicable to the constitution; so that we may have some fixed standard, by which to measure its powers, and limit its prohibitions, and guard its obligations, and enforce its securities of our rights and liberties. . . . The first fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 399, 400 (1970). Berger endorses the view that recourse to the intention of the framers serves to prevent judicial arbitrariness and usurpation of power. Berger, *supra* note 12, at 195-96.

30. Inquiry into the intent of the framers is very hard work. Given the mass of potentially relevant evidence on the original understanding and the conflicting inferences that can be derived from the historical data, there is some question as to whether judges would have the time and capacity to engage in such monumental historical quests, or whether, instead, judicial commitment to the original understanding would leave them captives of conflicting scholarly retrievals of the original understanding.

In short, it seems unclear that a process view of intentionalism is likely to serve the cause of determinacy; it is likely, rather, to create a class of "historical experts" whose scholarly results will no doubt conflict. Choice among the historical accounts is likely to occur by means of leaps of faith as judges endorse one particular historical account with-

This process justification quickly collapses, however, because there are no set rules governing the proper procedures of historical research for ascertaining the framers intent.³¹ In contrast to the interpretation of statutes, we have quite simply never developed conventions to govern the discovery of an original understanding.³² Moreover, even if an analogy between constitutional and statutory interpretation could be maintained, the

out having the time or the capacity to determine its veracity, except at the most abstract level. See Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1033 (1977).

31. Brest, *supra* note 4, at 209-22; Dworkin, *supra* note 12, at 498-500; Saphire, *supra* note 9, at 772-80; tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 664 (1938); Tushnet, *supra* note 12, at 793-96. All of these authors note that the quest for the original understanding requires the articulation and justification of the rules that will govern the inferences drawn from the relevant evidence. TenBroek's comprehensive examination of the use and validity of the framers intent in United States Supreme Court decisions convincingly demonstrates that the rules for ascertaining framers intent in constitutional law are far from settled. His study is reproduced in five articles appearing in the California Law Review. All but one of the articles have the same title. See tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 437 (1938); 26 CALIF. L. REV. 664 (1938); 27 CALIF. L. REV. 157 (1939); 27 CALIF. L. REV. 399 (1939). The other article is tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 287 (1938) [hereinafter cited as tenBroek, *Admissibility*].

32. See *supra* note 31. Nor would it help to suggest that the methods of statutory construction can be transposed to those of constitutional interpretation. The problems of constitutional interpretation are quite clearly of a different order than those of statutory construction:

Statutes are usually specific efforts to accomplish individual or highly related ends. As such, the conditions surrounding their origin and the intent of the legislature in passing them are matters possessing an informative value. They are the instruments of relatively small bodies composed of members presumably capable of understanding and using comparatively exact and technical language. Secondly, aside from the fact that statutes aim to meet temporary and changing conditions and the fact that they are generally judicially construed before these conditions have passed away, there is the extremely important circumstance that legislative bodies meet in frequent session and hence may change the words used if their actual intention is not effectuated. But not so constitutions! They are vastly more general, and are intended to be relatively permanent. As a result of these two factors, the judicial function of moulding constitutions by construction is proportionately greater than in the case of statutes, and the court's freedom of decision is less restricted. Moreover, constitutions are framed and adopted by different bodies, and if the intent of those who gave the instrument force, is to be sought, the matter of numbers alone seems preclusive, and the meaning of language must be taken from its most common, untechnical, and uniform use. Finally, if the original intent is not carried out by the courts, there is not the ready opportunity to revise and restate which exists in the case of statutes.

tenBroek, *Admissibility*, *supra* note 31, at 289-90. A standard treatise on statutory construction is J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* (4th ed. 1972).

implications of this analogy might be damaging to the intentionalist position. Though we have developed fairly sophisticated rules for determining legislative intent, these rules are so sophisticated that they can be stated as a series of counterpropositions. For each maxim of statutory interpretation, there is a countermaxim that will allow the opposite conclusion.³³ Of course, if the same scenario of opposed rules for discerning intent were replicated in the constitutional context, the original impetus for looking to the framers intent—namely constraining judicial arbitrariness—would be defeated.

There is nothing terribly surprising about the development of opposed rules of interpretation for the construction of legislative intent. The opposed nature of the rules serves to introduce flexibility and discretion in the construction of legislative intent (while maintaining the appearance of order and uniformity on the formal plane). In turn, flexibility and discretion in the interpretive enterprise are supported by at least two strong judicial attitudes. First, the judicial construction of legislative intent is understandably influenced by a perceived need to figure out what the legislature actually intended. Second, judges are generally unwilling to allow canons of construction to dictate results without side glances at the outcomes these canons would produce. Thus, both a concern for the legislature's actual intent and instrumental aims may well require abandoning or subverting interpretive rules.³⁴ If the interpretation of statutes cannot eas-

33. K. LLEWELLYN, *THE COMMON LAW TRADITION DECIDING APPEALS* 521-35 (1960). There is also a classic debate about whether our rules of statutory construction are or should be aimed at deciphering legislative intent or statutory meaning. See J. Sutherland, *supra* note 31, at §§ 45.06, 45.07. Moreover, one can dispute what is meant by legislative intent along a subjectivity/objectivity spectrum. Compare Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-72 (1929) (describing legislative intent as the aggregation of individual intents of legislators and dismissing the concept as an unknowable fiction) with Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888-93 (1930) (describing legislative intent in terms of its objective manifestations and in finding it a compelling guide for statutory interpretation).

34. To the extent that one is forced to take into account the contingency and ambiguity of communication and meaning structures, interpretive rules will tend to come in opposed dualities in order to permit the recovery of meaning and the interpretation of communication. The more we are forced to recognize the complexity and ambiguity in the expression of intention, the more a commitment to the accurate articulation of that intention leads to the development of conflicting interpretive rules. In short, the more we are concerned with the substance of legislative intent, the less willing we are to allow interpretive rules to do our work for us in constructing that legislative intent. Ironically, the concern for substance need not lead to opposed dualities in interpretive construction. Another option is to reduce reliance on interpretive rules and allow the object under

ily be protected from the centripetal attraction of an actual legislative intent nor from the centrifugal pull of instrumentalist influences, resistance against these forces seems even more doubtful in constitutional interpretation. It is unlikely that judges would follow interpretive rules to discern framers intent simply out of respect for procedure. Indeed, judges committed to intentionalism are understandably interested in deciphering the true and real intent of the framers. If interpretive rules appear to preclude discovery of the true intent of the framers, then so much the worse for the rules.³⁵ If better methods of "discovering" framers intent are invented, then so much the worse for procedural certainty. Should it come to pass that the framers seem to have intended something truly silly or truly inadequate, some way will no doubt be found to make the interpretive rules make the framers intend something else. In sum, it seems difficult to deny that the process of discovering the framers intent becomes governed in part by the desire to reflect accurately the substance of that intent as well as the opposed urge to transform that intent into something more attractive.

This brings us to the second version of the justification of intentionalism as a constraint on judicial arbitrariness. This theory posits that there is or was a substantive framers intent lurking in the depths of history waiting to be discovered. Because it is there, it can be found and any attempt to describe that intent can be evaluated against that intent itself. The perils of consti-

inquiry to guide our search. This approach, however, seems inconsistent with the legitimation needs of our system of adjudication because it denies fundamental values of liberal legalism such as neutrality, uniformity, and order. For a discussion of the importance of these values in liberal legalism, see R. UNGER, *KNOWLEDGE AND POLITICS* 63-103 (1975). For a discussion of the instrumentalism attendant upon the interpretive legal enterprise, see Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765, 771-73 (1982).

35. Tushnet notes that evidentiary rules in the search for the framers intent can be based on generalizations of what more detailed inquiries would likely have shown to be true. Tushnet, *supra* note 12, at 794. If evidentiary rules are based upon this justification, then they are based upon generalizations about how human beings act or communicate. This type of basis for interpretive or evidentiary rules seems always open to refutation by counterfactuals or by the development of a new vision of how human beings act or communicate.

Interpretive rules can also be based upon what Tushnet calls policy judgments. *Id.* at 795. Hence, he suggests that in recovering framers intent, one generally looks to the expression of that intent on formal occasions rather than in the private letters or the diary of the framer. This rule, which could be based on policy grounds, might well serve to exclude some highly relevant or reliable evidence of framers intent. Obviously, rules grounded on policy judgments can be undermined by re-evaluating the original policy choices.

tutional indeterminacy are dissipated according to this view because there really is an intent that can be discovered if only one tries hard enough and uses the proper methods of historical research.³⁶ Or so the theory goes.³⁷

It does not go very far. Brest,³⁸ Dworkin,³⁹ and Saphire⁴⁰

36. Dworkin suggests, for instance, that the intentionalist "argues that in spite of the difficulties every effort must be made, with the resources of history and analysis, to discover what the collective intention of the constitutional framers was on disputed matters of interpretation. They believe that dogged historical study indeed will reveal important and relevant original intentions." Dworkin, *supra* note 12, at 476.

37. Maltz suggests that the argument about the impossibility of discovering framers intent is flawed:

[The argument] misconceives the main thrust of interpretivism. Interpretive theory demands neither perfection nor certainty—any more than certainty is a prerequisite for reliance on perceived legislative intent in cases of statutory interpretation. The interpretivist asks only that the judge make her best effort to divine the framers' intent and then apply that intent in the case before her as accurately and faithfully as possible.

Maltz, *supra* note 4, at 813.

Maltz' argument needs to be situated. If indeed the intentionalist claims that the original understanding itself places constraints on judicial interpretation, then the showing that the recovery of the actual intent is impossible defeats that claim. If, on the other hand, the intentionalist is merely claiming that the process of recovering framers intent places constraints on the judiciary, then what we have is a "process" justification with all its attendant shortcomings. See *supra* notes 30-35 and accompanying text. Finally, to suggest that intentionalism requires only best efforts by the judge does not serve the cause of showing that intentionalism provides a source for attaching determinate meaning to the constitutional provisions. In fact, it is quite the reverse: the use of "best efforts" terminology betrays that those efforts might well come to naught—and if they come to naught, determinacy vanishes.

38. Brest has identified the points of indeterminacy afflicting the construction of framers intent. Brest, *supra* note 4, at 209-22. For the framers intent to be determinate, it must be perceived in the linguistic and social contexts that were contemporaneous with its adoption—an impossible task since the 20th-century interpreter cannot eliminate the accretions of 20th-century experience and understanding. *Id.* at 208. Since the intentionalist cannot ascribe individual intention votes to each person who participated in the process of adoption, ascertaining institutional intent in the strictest sense is impossible. Consequently, the intentionalist is limited to using circumstantial evidence to ascertain consensus positions or general intent. *Id.* at 214.

Adoption is not an act but a process involving several acts. This protracted political process itself necessarily masks the framers intent. *Id.* at 214-15. Where different sets of players may have had different intents, who are the framers? The drafters? Which ones? The people? Their representatives? *Id.* Where the process involves simultaneous adoption of several disparate provisions (e.g., the Bill of Rights), how can the intentionalist deduce which intent goes to which provisions? *Id.* How may intent be discovered and meaningfully enunciated when some participants had one intent, some had another, and a third group had no intent at all? *Id.* How does the intentionalist control for a participant who may want "his absence of intention (i.e., 'no intent') treated as a vote against a provision encompassing certain circumstances? *Id.* at 215.

One task of the intentionalist is to determine the interpretive intentions of the adopters, or "the canons by which the adopters' intended their provisions to be inter-

have articulated a number of convincing reasons to suggest that, indeed, the framers intent is constructed rather than discovered.⁴¹ Their basic arguments are that a person attempting to reconstruct framers intent must face a set of perplexing theoretical questions about what intent means and how it is evidenced. Some examples illustrate the challenges these legal scholars have issued: an intentionalist must provide a theory or at least an account of who the framers were. What counts as the intent of a framer: hopes, expectations, fears? How does one aggregate a collective "framers intent" from the assorted thoughts of individual framers? In case of conflict, does one follow their abstract or concrete intentions?⁴² Unfortunately, for the intentionalist, troublesome questions such as these cannot be answered by an

preted." *Id.* (footnote omitted). One particularly thorny question for the intentionalist is, "[h]ow much discretion did an adopter intend to delegate to those charged with applying a provision?" *Id.* at 216. Similarly, the intentionalist must "ascertain the adopters' interpretive intent and the intended breadth of their provisions." *Id.* at 220. "Even if she can learn how the adopters intended contemporaries to construe the [provisions], she cannot assume they intended the same canons to apply one or two hundred years later." *Id.*

To be coherent, intentionalism must distinguish the adopter's intentions concerning constitutional resolution from the adopter's personal view. How? *Id.* The intentionalist's final task is "to translate the adopter's intentions into the present." *Id.* "The act of translation . . . involves the counterfactual and imaginary act of projecting the adopter's concepts and attitudes into a future they probably could not have envisioned. [This act places her] in a fantasy world more of her own making than that of the adopters." *Id.* at 221.

Finally, one must consider the possible existence of historical documents as yet undiscovered that may alter or contradict our interpretation of framers intent. *Id.* at 231.

39. Dworkin argues that, while we might share a "concept" of the framers intent, we are not agreed upon any of the several competing "conceptions" of that intent. Dworkin, *supra* note 12, at 477-78. Because the identification of the framers intent requires a choice among competing conceptions of the framers intent, the intentionalist must choose and ultimately defend the choice of a conception in terms of a substantive political theory. *Id.* at 498. The intentionalist must face several difficult questions. What counts as an intention: desires, expectations, or hopes? *Id.* at 483-85. Who counts as a framer: delegates to a constitutional convention, drafters, or the people? Should the intentions of those who were against constitutional provisions count as well? *Id.* at 482-83. Upon what basis should the intentionalist distinguish among the absence of intent, a negative intent, and an intent to delegate? *Id.* at 485-87. By what principle can one aggregate or combine a series of individual framer's intentions into a collective framers intent? *Id.* at 487-88. In case of conflict between an abstract and a concrete intention, which is to be given legal effect? *Id.* at 488-91.

40. Saphire, *supra* note 9, at 750-77 (concise and convincing development of the arguments offered by Dworkin, *supra* note 12, and Brest, *supra* note 4).

41. These arguments are reminiscent of early 20th-century legal realist writings on statutory interpretation. See Radin, *supra* note 33, at 868-72. For a critical examination of the United States Supreme Court's use of framers intent in constitutional decisions, see tenBroek's articles, *supra* note 31.

42. See *supra* note 39.

examination of the framers intent alone. Nor can they be answered by appeal to universal characteristics of modern legal consciousness, since if there are such universal characteristics, they might be described most candidly as persistent and irreconcilable dualities.⁴³ In short, the intentionalist position greatly underestimates the significance of the interpretive techniques or premises that we bring to bear upon the construction of framers intent. Moreover, the intentionalist position fails to recognize the extent to which these interpretive techniques or premises are or can be contested and controverted.

Intentionalism requires not just that we discern what the constitution meant for the framers—nor even merely what they intended the constitution to mean. Rather, it demands much more complex, contingent and open-ended inquiries into what the framers intended their constitution to mean and into what significance this intended meaning has for us and our constitution.⁴⁴ For even if the framers viewed the world as possessing intrinsic determinacy, we suffer from the absence of any consensus on a determinate mode of legal interpretation.⁴⁵ The problem with intentionalists is that they greatly underestimate their own conceptual contributions to the framers intent that they claim to discover—contributions that rest on the contingent

43. See R. UNGER, *supra* note 34, at 29-62.

44. As Tushnet frames it, an appropriate understanding of the framers intent requires a hermeneutic approach: "In that tradition, historical knowledge is seen as 'the interpretive understanding of [the] meanings' that actors give their actions. 'The historian must enter the minds of his or her subjects, see the world as they saw it, and understand it in their own terms.'" Tushnet, *supra* note 12, at 798 (footnote omitted). In addition, the historian must return to the contemporary world and transpose the meanings discovered about the past world into the present. In keeping with this injunction, Tushnet notes that an appropriate view of intentionalism would require that one read the constitution as proscribing those practices that are functionally equivalent to the practices that the framers intended to prohibit. *Id.* at 800. Thus, Tushnet argues that even if the framers of the fourteenth amendment to the United States Constitution did not intend to prohibit segregation in public education, the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), might still have conformed to the framers intent insofar as education today occupies a position that is the functional equivalent of the freedom to contract in 1868—a liberty interest that the framers did intend to protect from racial discrimination. See Tushnet, *supra* note 12, at 800-01; *contra* Berger, *Critique*, *supra* note 16, at 546-47. For a discussion of the insights that hermeneutic theory brings to constitutional interpretation, see Leedes, *An Acceptable Meaning of the Constitution*, 61 WASH. U.L.Q. 1003 (1984).

45. For an interesting account of the breakdown of classical legal consciousness and its clean and rigid taxonomies, see Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RESEARCH IN LAW & SOC. 3 (1980).

grounds of our own meaning structures.

One can find even in the statements of intentionalist proponents the glimmer of the difficulties that I am attempting to illuminate. Thus, Monaghan states:

At the risk of considerable oversimplification, I suggest that the constitutional clauses range from the most particularized, bright-line demarcations to a set of provisions characterized by the need for ongoing interpretation and application not to the "views of contemporary society," *but to the contemporary manifestations of problems identified by the Framers.*⁴⁶

Writing about the problem of applying the fourth amendment to wiretaps, Berger asserts, "[i]nterpretivism met the situation without much difficulty. It sufficed to identify the sorts of evils against which the provision was directed and to move against their contemporary counterparts."⁴⁷ In these two statements of the intentionalist position, we see evidence of a recognition that it is not enough to identify the framers intent—one must also transpose the meaning of that intent into the present. Monaghan and Berger appear to claim that this transposition can be accomplished by analogy.

What should count as a valid analogy? What the framers perceived as a valid analogy, or what we perceive as a valid analogy? The former is impossible to know, and the latter is quite clearly a construction we build ourselves. The suggestion that inquiry into the past and into the framers world can be reduced to analogical reasoning simultaneously reveals and disguises the complexity and contingency of the intentionalist enterprise. The use of the term "analogy" shrouds the fragility of the intentionalist project because analogy is a basic tool in the trade of the lawyer.⁴⁸ To suggest that analogical reasoning is fraught with uncertainties and with a multitude of decision points seems strange to the lawyer. What is at stake, however, is not simply the sort of micro-analogy intrinsic to the common law, but rather an exercise of macro-analogy between one society (that of the framers) and another (our own). The analogical transposition of framers intent into our own meaning structures, as they apply to our society, presents problems of an entirely different

46. Monaghan, *supra* note 4, at 362-63 (emphasis in original).

47. Berger, *Critique*, *supra* note 16, at 536.

48. See Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833 (1982).

order from the micro-analogies of common-law reasoning.⁴⁹

As will be seen, the historical inquiry into the meaning that framers intent has for us can be subjected to a series of problematic inquiries. The transposition of framers intent into our own meaning structures confronts some dualities that render indeterminate the products of historical inquiry into the framers intent. For example, is the meaning of framers intent: (1) absolute or conditional; (2) general or specific; (3) narrow or broad; or (4) weak or strong? These four dualities are offered to show that the construction of framers intent is beset by indeterminacies. It is worth noting that these dualities have practical significance insofar as they can be used to attack most ostensibly authoritative articulations of the framers intent.

A. *Absolute or Conditional*

One of the questions that must be posed in discerning the framers intent pertains to the conditions that might possibly qualify this intent. For instance, suppose that we uncovered evidence suggesting that the framers of the fifth amendment to the United States Constitution intended that the due process clause apply only to prohibit departures from the judicially accepted or legislatively defined procedures in criminal cases.⁵⁰ This evidence could serve to substantiate an absolute intent of the framers that due process means only the application of procedural due process in criminal cases. The same evidence, however, could also serve to substantiate a conditional intent—one that

49. The reason that it is inappropriate to liken the micro-analogies of the common law to the macro-analogies between the world of the framers and our own is that accepted conventions of common-law reasoning narrow the range and content of the analogies that might be drawn. The nature of the transactions (e.g., contracts, torts, etc.) that form the subject of common-law analogies is severely constrained in terms of the number of relevant actors, actions, and time and spatial dimensions. The common law is not interested in a dispassionate inquiry into the causes of some cognizable harm, but rather in determining whether the causes fit neatly within a limited set of defined categories. Thus, there is a rich and ornate frame of reference that guides common-law analogies. By contrast, the construction of intertemporal analogies between our past and present culture can be based on no artificially restricted frames of reference except the horizons of our own thought. Those horizons can hardly be likened to the severely curtailed horizons that common-law concepts and categories place on common-law analogies.

50. I do not know that there is anyone who supports such a view. Some commentators, however, are of the view that the fifth amendment due process clause means procedural due process and no more. See, e.g., W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1102-10 (1953).

attaches the meaning of the clause to conditions that may or may no longer hold true. The framers intention to limit the clause to procedural due process in the context of criminal cases might well have been dependent upon a picture of government with a fairly restricted role—only rarely imposing grievous loss on individual action outside the criminal-law context. In other words, whatever meaning the framers attributed to the due process clause might have been dependent upon an image of government that was gradually erased by the regulatory expansionism of the administrative state.

Even if we find that the framers intent with regard to the due process clause was indeed dependent upon an image of the state as occupying a fairly restricted role, we can still hold to the view that the framers intent is absolute. That is, we can still say that the framers intended the due process clause to mean procedural due process in criminal cases, and no more—regardless of whether the state is restricted in its role or has a pervasive administrative character. On this account, the fact that the state has changed in character and no longer conforms to the image of the state that the framers envisioned does not mean that the framers limitations on the meaning of procedural due process must automatically be lifted. The framers might well have intended their understanding of procedural due process to be absolute.

The framers may, however, have intended their understanding of procedural due process to limit the application of that clause only upon the assumption that the state would not invade most sectors of social and private life. If so, then the framers intent might be called conditional: the framers conditioned their understanding of the meaning of the due process clause upon the existence of a restricted state. Upon the gradual erasure of this condition, through the emergence of the modern administrative state, the framers limitation on the meaning of the due process clause would have to be lifted and the observance of that clause could no longer be confined to the observance of procedural due process in criminal cases.

No doubt some would argue that the question whether the framers' understanding of any constitutional provision is conditional or absolute requires an appeal to historical evidence. "Just what evidence is there to suggest that the framers' understanding of the due process clause is conditional?" they might ask. If there is none, then the framers intent is absolute. This is

a burden-of-persuasion argument. The implicit rule is: If there is no evidence of the conditionality of the framers intent, then the framers' understanding is absolute. But why should this be so? Why should we assume that in the absence of evidence to the contrary, framers always intend meaning in absolute terms, particularly when, to us at least, theories of absolute meaning seem strange, if not decidedly wrong? Perhaps the answer lies in the supposition that legal or even lay consciousness at the time of adoption of the constitution was steeped in absolutist conceptual schematics. If the framers had meant to abandon selectively this conceptual structure, surely they would have left evidence behind documenting this exotic departure.

There is a major problem with this line of argument. Even if there were evidence that the framers systematically thought in absolute terms, this would not be much help to us in determining their intent. Most of us no longer believe that the meaning of a part remains constant as the context is changed. Rather, the meaning that a person ascribes to a part is understood in terms of the context.

Most of us do not believe that an intended meaning ascribed to a particular piece of text (that is, a constitutional provision) can remain constant when the meaning of the social reality of which it is a part changes. To put it quite simply, even if the framers were to shout from the depths of history that indeed they do think in absolute ahistorical terms, we would not believe them. It would be as if someone were to say to us, "The words I speak always mean the same thing regardless of the context in which I utter them, and I expect you to understand me this way." We would respond to that person by saying something like, "Well, yes I understand: what you say makes sense in some contexts—but surely you do not mean to say that it makes sense in all contexts?" In short, one can claim that the framers intent was governed by absolute meaning structures only at the unbearable expense of abstracting the framers from any historical or human context. This expense is unbearable, for it cannot be paid in the currency of empirical fact, and the intentionalists have not paid the bill in what they consider the foreign exchange of normative justification.

There is simply no reason to believe a group of people who would say that the way they mean things is not conditioned by any context. Yet that would be precisely what we would be doing if we accepted the view that the framers always under-

stood constitutional provisions in an absolute sense. Finally, even if there were hard evidence to suggest (what now should seem facially implausible) that the framers always intended meaning in absolute terms, we would want to ask whether this absolutist view of meaning was itself conditional.

The problem of absolute and conditional intent is a significant one. Not only can it surface in the interpretation of almost all constitutional provisions, but unless one can claim that the framers intent is absolute, one is then forced to consider what possible images, visions, and conceptions conditioned the framers understanding of constitutional provisions.

Generally, one can attack any particular articulation of framers intent by asking under what conditions the framers intended that intent to operate, and by then arguing that those conditions are absent or no longer obtain. Generally, one can answer such an attack by claiming that the framers intent was not conditional in the manner suggested, but rather was intended to be accorded absolute meaning with regard to the context under discussion. If it is possible to argue these positions and all positions in between, then the search for the original understanding is bedeviled by indeterminacies of significant proportions.

B. General Intent or Specific Intent

One question that can be asked in the search for the original understanding is whether the framers viewed a constitutional provision as general or specific. Some constitutional provisions radiate a majestic generality, whereas others are confined to the articulation of almost embarrassing detail. Quite independently of how the text might read, an inquiry into framers intent must question whether the framers viewed the provision in the same way. Provisions that to us smack of generality (for instance, the first amendment's protection of freedom of speech and press) might well have been viewed as a code for prohibitions of very specific practices, such as prior restraints.⁵¹ Simi-

51. The struggle over the licensing laws was certainly not forgotten. And there can be little doubt that the First Amendment was designed to foreclose in America the establishment of any system of prior restraint on the pattern of the English censorship system. Indeed, it was argued in some quarters that this was the sole purpose of the First Amendment and that, following Blackstone, it was not intended to embrace subsequent punishment of publications.

Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 652 (1955).

larly, provisions that detail entitlements (such as the fourth amendment's protection of houses, persons, papers, and effects against unreasonable searches and seizures) might well have been viewed by the framers as a general command protecting persons generally from unreasonable government intrusions.⁵²

The question whether a constitutional provision was seen as general or specific by the framers has both methodological and substantive ramifications. On the substantive plane, one who claims that the framers intent is specific is led to view the list of practices forbidden or authorized by the framers as closed at the time the constitution was adopted.⁵³ On the other hand, if the framers intent is seen as general, then the list of practices forbidden (or authorized) calls for supplementation.⁵⁴ On the methodological plane, if the framers intent is specific, then all that a judge, a litigant, or a scholar can do is decide whether particular instances of present-day conduct fall within the category of conduct proscribed (or permitted) by the framers. The process of decision here can be likened to measuring the present case to the "four corners" of the original understanding. Mechanical jurisprudence is not only authorized, but required. On the other hand, if the framers are seen as having held a general intent in adopting a particular constitutional provision, then any application of the provision to present-day conduct requires argumentation and derivation from the framers intent. Because a general intent informs the meaning of the provision, there is some distance between the substantive meaning of the constitutional provision and any concrete application; this distance needs to be bridged by argument and derivation.

52. Thus, in terms of privacy interests that were susceptible to government invasion in the 18th century, houses, persons, papers, and effects might well have been a nearly exhaustive list.

53. To the extent that it is not empty, Monaghan views the ninth amendment in this "specific" sense. Even if the ninth amendment provides "for an external schedule of rights, a *showing is necessary that this was not understood to be a list closed as of 1791.*" Monaghan, *supra* note 4, at 367 (emphasis in original). Compare Monaghan's views of the first amendment, *infra* note 54. Monaghan, in the case of the ninth amendment, seems to adopt a burden-of-persuasion argument: absent evidence to the contrary, the ninth amendment was enacted with specific intent.

54. For instance, Monaghan allows that "the first amendment . . . encompasses subjects presumably out of the Framers' specific contemplation but within their general purpose." Monaghan, *supra* note 4, at 363. Hence, Monaghan seems to endorse a "general" reading of the first amendment, which allows for analogical development of its scope or content. In support of this construction, the intentionalist might say that the framers of the first amendment had a "general" intent.

The problem, of course, is that it is not clear whether the framers intended any given constitutional provision to be general or specific. Nor is it clear how one would go about making that determination. Sometimes the text of a provision is so grand in its sweep that one is tempted to conclude that the framers must have had a general intent. It bears noting that in this case, however, it is the text and not the intent of the framers that guides the intuition. And quite clearly, the intuition might well be wrong: the due process clause is certainly grand enough to encompass current application of the clause, yet it may be doubted that the framers intended the clause to be so sweeping.⁵⁵

The problem captured by the opposition of general and specific intent lies in the fact that it is exceedingly difficult to determine whether the framers viewed a constitutional provision as general or specific. Even if one finds evidence that a sweeping textual provision was intended to apply to a limited list of government practices, one cannot know whether that list is exclusive or illustrative. Even if one obtains evidence that the list is exclusive, perhaps it was exclusive but only in the context of the proper interpretation of the constitutional provision at that time.

In short, even if one can decipher the substantive intent of the framers with regard to a specific provision, there is simply no good way to determine how far one might analogize away from that substantive intent. No doubt in some cases the framers meant to prohibit (or permit) only a limited group of well-understood practices. If so, judicial analogy must remain very close to the epicenters of framers intent. In other situations, however, no doubt the framers intended a constitutional provision to be general in meaning. When this is the case, the imagery of a central framers intent, or even of epicenters of framers intent, is inappropriate. Rather, the original understanding can best be captured in the imagery of a cloud from which the emanations might well extend relatively far.

The point again is that we are unlikely to come upon solid

55. Curtis, *Review and Majority Rule*, in *SUPREME COURT AND SUPREME LAW* 177 (E. Cahn ed. 1954) (suggesting that the sweep of the fifth amendment's due process clause was limited to procedural due process), *cited with approval* in R. BERGER, *supra* note 15, at 200; Monaghan, *supra* note 4, at 364. *See also* W. CROSSKEY, *supra* note 50, at 1102-10 (concerning the intended meaning of the due process clauses in the fifth and fourteenth amendments).

evidence of whether any particular framers intent is most accurately described in cloud or epicenter imagery. Again, it is our choice whether we see clouds or epicenters, and we are thrown back into the wash of indeterminacy.

C. *Narrow or Broad*

A third problem confronting the search for the original understanding is captured by the opposition of broad and narrow. Sometimes one can find evidence of framers intent, but often it is difficult to relate evidence of that intent to particular constitutional provisions. The problem then lies in determining whether the evidence of framers intent governs the meaning of the whole constitutional text or only of some of its parts. If it is the latter, one must determine which parts are governed by that intent.

Even when some evidence of framers intent can be tied to a particular constitutional provision, one must decide whether that intent is limited to the interpretation of that particular provision or whether it extends to give meaning to other constitutional provisions. For instance, suppose we uncovered evidence that the framers did not intend Washington's cruel punishment clause to prohibit the state from offering a choice as to means of death to convicts sentenced to capital punishment.⁵⁶ Is this evidence as well that the framers did not intend the due process clause to prohibit forcing convicts to make such choices? Perhaps it is because the framers thought that the provision most likely to prohibit this choice was the cruel punishment clause. Therefore, the argument would go, the framers had a broad intent to permit choice of capital punishment.

On the other hand, perhaps the fact that the framers intended the cruel punishment clause not to prohibit such choice was specifically tied to their understanding of that clause. The point is that inferences can be made either way. One can rely on the inference that, because the framers thought about choice of punishment in terms of the cruel punishment clause, they were concerned only with the interpretation of that clause. On the other hand, one can defeat that inference by suggesting that the framers related their thought about punishment by choice to the cruel punishment clause because they never

56. WASH. CONST. art. I, § 14.

thought about whether other clauses, such as the due process clause, might serve to prohibit such choices. The problem, of course, is that it is unlikely that historical evidence can serve to make one inference substantially more appealing than the other.

D. Weak or Strong

Another dimension affecting the construction of framers intent is the inquiry into the degree of intensity with which a particular belief was held. Constitutions are in large part acts that compromise opposed values and concerns. A constitutional text is usually riddled with provisions that place qualifications on its commands and dictates. Thus, frequently a question arises as to the intensity with which the framers supported a particular value, process, or institution. Even in terms of contemporary legal texts, the communication of the intensity that a value or principle might hold is quite problematic. For instance, precisely what does it mean to say that the first amendment enjoys a "preferred position"?⁵⁷ Possible interpretations include nebulous injunctions such as "err in favor of freedom of speech" or "decide in this direction."⁵⁸

It is quite unlikely that the framers left behind any more cogent evidence of the strength of their intent. How is intensity to be measured? By the frequency with which a particular concern is articulated? By the strength of the language in which it is advanced and supported? By the relative paucity of utterances constraining its commands? Here, too, the framers intent proponent must choose and defend a theory of interpretation that guides the assessment of the intensity of any given piece of framers intent.

E. The Illusory Claim of Interpretive Determinacy

In summary, a discouraging degree of indeterminacy can be discovered in the construction and understanding of framers intent through an examination of the four oppositions: absolute or conditional; general or specific; broad or narrow; weak or strong. Thus far I have treated the four oppositions in isolation,

57. *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

58. The point is not that the statement is meaningless. See McKay, *The Preference for Freedom*, 34 N.Y.U. L. Rev. 1182, 1184 (1959) (suggesting that the terms are useful in communicating a speech-protective attitude). The point is that communication of intensity is difficult to modulate.

as if they were self-contained problems facing the quest for the original understanding. However, the indeterminacy produced by each of these oppositions acquires dynamic proportions when one views them in combination. Thus, it may well be that a particular piece of framers intent might be *conditional* upon a reading of a *strong* and *general* intent illuminating a given constitutional provision. Or, it may be that any given piece of framers intent cannot easily be situated within the four oppositions. For instance, a particular sample of framers intent might well be interpreted as evidencing a strong or a broad intent, but as between the two, the evidence might well be indeterminate.

Thus far, I have also supposed that there is some evidence of framers intent that would allow the historian to reconstruct that intent. However, there are some situations in which there is no evidence of framers intent. This possibility haunts the reconstructive enterprise, for the intentionalist must have some criteria to determine when the evidence of framers intent is indeed so doubtful, so incomplete, or so indeterminate that reconstruction is not warranted and reference must be made to some other source of constitutional interpretation. The framers cannot supply any principle on this issue: it is one that we must construct and justify. What is required of the intentionalist, therefore, is nothing short of a theory of what can count as meaning and what cannot.

This problem has significant ramifications, for it is evident that the process of drafting and adopting a constitution is rife with compromise, deferral, and suppression of meaning. Intentionalists reproduce the view of constitution-making as a careful, deliberative, and rational process.⁵⁹ Such a view of legislative and political activity is unrealistic. Reflection on current political decision-making suggests that those who drafted and

59. The reproduction of the appearance of rationality is accomplished largely by sins of omission in the intentionalist writings. We rarely see intentionalist writings that impeach the utterances or letters of famous framers on the grounds that they were ailing, depressed, stupid, or having marital difficulties. The failure of the intentionalists to treat the framers as three-dimensional human beings (who do not always say what they mean or mean what they say) stems from the fact that the intentionalists are not terribly interested in what the framers actually thought, but rather in more formal expression of those thoughts. Of course, this intentionalist abstraction of the framers results in a formalistic fictionalization of the intent to be discovered. I suppose that it is acceptable to engage in formalistic fantasies as long as one has a good reason for doing so and one remembers where the fantasy ends. Intentionalism seems to have no good reason and to constantly treat the fiction as if it had truly occurred.

adopted constitutions were as involved in the suppression of issues and meaning as they were in elucidating either. If we treat the adoption of a constitution as a deliberative and rational process executed by wise and disemboweled intellects, it is because constitutional interpretation as a form of legal practice requires us to see things that way, not because that is the way it was. The problem for the intentionalists is that they have not given us very good reasons to view the framers or their creative efforts that way.

This brings us to a general problem facing the intentionalist enterprise. Some theory or at least some criterion must be advanced and defended to determine the boundaries between what conceptual baggage we can bring to bear upon reconstruction of framers intent and what the framers must supply us from the shadows of history. This problem entails a trade-off. In reconstructing framers intent, we perforce bring our own conceptual schematics to bear upon the reconstruction of that intent. The more careful we are in attempting to understand the framers in terms of their own conceptual or jurisprudential apparatus (one that we might well view as wrong, incomplete, and perhaps incoherent), the more difficult the work of translating the framers' thought into our own language becomes. On the other hand, the more we impose our own conceptual schematics, our own views of what constitutes proper reasoning, the less we will be able to claim that we have discovered their actual intent. Ultimately, the framers intent proponent must offer some criterion to allow delineation of the boundaries between what we can bring to bear upon reconstruction of framers intent and what the framers must themselves supply.

Ultimately, I do not think that intentionalism can be justified on the grounds that such a method serves to constrain the judiciary. Not only is the recovery of framers intent fraught with the need for contingent contemporary conceptual construction and its attendant indeterminacy, but one must admit that there are instrumental concerns and normative dimensions that attend the search. In other words, the transparently political tenor of constitutional interpretation makes it exceedingly difficult to reconstruct framers intent without side glances at the results one wants to obtain.

The intentionalist can offer responses to the argument that the recovery of the framers intent is plagued by indeterminacy. The intentionalist might do some historical research to suggest

that the four dualities discussed above, while a feature of modern thought, not only did not exist at the time of the framers, but, indeed, did not correspond to any categories of their thought.

However, not only would this argument miss the point, but it would also be dangerous to the intentionalist position. If the framers did not organize their thoughts along the lines suggested by the four dualities, there is great doubt that we could ever translate their thoughts into our own. If the four dualities were unknown to the framers, they would have had what we could only take to be a curious and exotic way of thinking. To concede (and I do not) that it is possible to reconstruct the world view of the framers and to understand the way they thought, is not to say (1) that we can *practice* their style of thought, or (2) that we can give operative meaning to their style of thought within our own. The intentionalist greatly underestimates the difference between understanding foreign cultural modes (that is, that of the framers) and the abilities to practice in those modes. For example, an atheist can have some understanding of what it means to do God's will, but can never follow or interpret God's will. In the same sense, it is an open question whether we can realize the framers intent.

If the intentionalist is to meet the problems raised by the four dualities, he or she will have to make the brief in the present. The intentionalist will have to suggest that, indeed, the four dualities are not formal oppositions that have any hold on modern legal consciousness, or that they do not afflict the reconstructive enterprise of intentionalism.

The intentionalist might take another tack by suggesting that if the four dualities are features of modern legal consciousness, then they afflict all other theories of constitutional interpretation as well. This is no answer in the context of the discussion at hand. My arguments are aimed at refuting the intentionalist claim that recourse to the framers intent is justified by the need to constrain the judiciary and to make constitutional interpretation determinate. To suggest that all other theories of constitutional interpretation are indeterminate, of course, cannot establish that intentionalism is determinate.

The intentionalist might take another approach and suggest that the cost of labeling intentionalism indeterminate necessarily leads to the interpretive bankruptcy of conceding that the constitution is meaningless. Or, to put the argument in language

more familiar to the intentionalist: If the framers intent is indeterminate, then the constitution means nothing and does not bind anyone. There is a fundamental mistake here: to say that an interpretive structure (such as intentionalism) is indeterminate is not the same as saying that it is meaningless. Intentionalism is not to be rejected because it is indeterminate; it is to be rejected because the claim of intentionalism to determinacy is wrong, and there is nothing else to recommend intentionalism to us.

This last observation might well propel the intentionalist to retreat to a comparative perspective. The intentionalist might well argue that even if recovery of the framers intent cannot make constitutional law entirely determinate, nevertheless intentionalism is more determinate as a theory than any other competing interpretive vision of the constitution. There are several objections to this argument. First, if we are to begin measuring levels of determinacy in interpretive theories, the first prize might well be awarded to the textualists, not to the intentionalists.⁶⁰ It might be that the textualist who claims that the text is to be enforced to the extent of its plain meaning has provided the most determinate theory.⁶¹ It is difficult to award prizes, however, because it is hard to determine how one might frame a neutral competition between alternative theories of constitutional interpretation. Do we measure the determinacy of each theory under its idealized conditions, or rather in terms of possibly imperfect social, institutional, and intellectual conditions? And if the latter, whose account of those imperfect conditions should we use to determine the grounds upon which each interpretive theory is to be tested? Finally, and equally vexing, we do not have a metric by which to ascertain relative levels of determinacy.

Even if intentionalism could claim the prize for interpretive determinacy, however, the victory would be a hollow one. The

60. Strict textualists would take the words of the constitutional text as the exclusive source of constitutional meaning. See Brest, *supra* note 4, at 205-06. For the words of the text to have any meaning, they must be placed in context—which raises the problem of defining the *appropriate* context. For further arguments suggesting that the textualists perhaps do not deserve first prize for determinacy, see Brest, *supra* note 4, at 205-09; Wofford, *supra* note 4, at 511-23.

61. In criticizing the recent efforts to develop theories of judicial review, Van Alstyne considers such a suggestion. Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 225-32 (1983).

argument for intentionalism on the ground that it is a cure for interpretive indeterminacy is at best an incomplete justification. To claim that intentionalism serves the cause of determinacy does not furnish sufficient reason for interpretation to proceed from that perspective when there are other sources of meaning that seem equally determinate. Intentionalism requires further justification.

III. THE UNEASY ANALOGY OF CONSTITUTIONAL TEXT TO OTHER TEXTS

One of the justifications for the intentionalist utopia is the analogy of constitutional text to the text of other written documents, such as statutes or contracts.⁶² Berger, for instance, asserts that effectuation of the parties' intentions was a familiar rule of legal interpretation known to the framers of the United States Constitution.⁶³ He argues that this interpretive tradition formed the background of suppositions with which the framers of the Constitution constructed the document.⁶⁴ Even if there were evidence that the framers intended that their constitutional construction should be interpreted in light of their intentions, it would be circular to rely upon this evidence to justify interpretation based upon the original understanding.⁶⁵ At best, we might gain some insight into the interpretive frame of reference that the framers used in ascribing meaning to constitutional provisions, but we would still be lacking any reason to honor that meaning.

If the legal document analogy is a justification at all, it is because something other than the framers intent recommends the analogy to us. The analogy reduces to a tidy syllogism:

1. The constitution is law or a legal document.
2. The customary manner of interpreting law or legal documents when they are unclear is to examine the intent of the framers.
3. Therefore, the proper way to interpret constitutional provisions is to give them effect by recourse to the framers intent.

62. See J. STORV, *supra* note 29, § 399-400.

63. Berger, *supra* note 15, at 365-67.

64. *Id.*

65. Saphire, *supra* note 9, at 765.

Each of these steps in the syllogism may be questioned on its own grounds.

A. *Constitutions as Law or Legal Documents*

The idea that the constitution can be analogized to law or to a legal document radiates special significance in American constitutional jurisprudence because of Marshall's assertion in *Marbury v. Madison* that the United States Constitution is a written document and therefore "the fundamental and paramount law of the nation."⁶⁶ It is important to note that Marshall's argument was aimed at legitimating judicial review of legislative acts, not at limiting the scope of that review. Marshall's point was that the United States Constitution is law and that as such it may be applied by judges, not that the United States Constitution is only law or like all other laws or legal documents.

The problem with the analogy between written constitutions and other legal documents is that while constitutions are a form of law, it does not follow that we must look at constitutions and see only law. Nor would it follow that we must look at constitutions as being in the same genus of law as other legal artifacts, such as contracts or statutes.

First, let me suggest why it is inadequate to claim that constitutions are nothing but law. Certainly, constitutions are law in the sense that some of their commands may be enforced by the judiciary. But one must question in what other senses constitutions are law. For purposes of the syllogism, constitutions cannot be law merely in the sense that they are amenable to the same form of interpretation used in ascribing meaning to statutes or contracts. If that is the sense in which the assertion that constitutions are law is offered, then the syllogism reduces to a trivial argument by definition. If constitutions are law in the same sense as other legal artifacts, it must be because there is a similarity between constitutions and other legal artifacts other than the mere claim that they are to be interpreted in the same way (that is, by reference to the framers intent).

One might ask whether the mere fact that constitutions are judicially enforceable entails that they are to be interpreted in the same way as other legal artifacts. I see no reason to accept this proposition, and later I will offer reasons to reject it. For

66. 5 U.S. (1 Cranch) 137, 176 (1803).

now, it suffices to note that one would have to prove the second premise in the syllogism in order to establish this proposition. The problem with establishing the second premise of the syllogism is that the customary mode of interpreting legal artifacts can only be shown to entail a search for the original understanding, if indeed one can show that this is true of constitutions as well. This point has not yet been established, since we have not yet determined that constitutions are law in any sense other than the fact that they are capable of being enforced by judges.

Why should we consider constitutions to be law and only law? This would seem to be an extraordinarily parochial view of some rather grand moments in our cultural and political history. The suggestion that the grand acts of constructing a political order reduce merely to the production of law seems to miss the cultural and political dimensions of constitutional creation. Perhaps the claim is not so much that constitutions are only law, but rather that insofar as judges are concerned, the only part that they are authorized to see is law. In other words, the only dimensions that judges can take into account in interpreting the constitutions are those dimensions that can properly be called law, as opposed to those dimensions that are of a political, aspirational, or cultural order. This claim would rest upon a theoretical distinction between what can be called law proper, as distinguished from what are merely political or cultural phenomena. The plausibility of attributing content to such a distinction seems questionable. Even if we hold to the view that judges are only to see law when they look to the constitution (and to disregard anything else they might see), we need a justifiable notion of what law might mean. As we have seen, it does no good to suggest that law is defined by those customary modes of interpretation used to interpret legal artifacts. That suggestion is not only question-begging in terms of the syllogism, but, indeed, it brings about an infinite regress: what ensures that the customary mode of legal interpretation is itself law?⁶⁷

Affirmative reasons can be given for the view that constitutions are not to be viewed (even by judges) as merely law in the limited sense of being susceptible to the customary modes of legal interpretation. In the context of a broader vision of law, affirmative reasons can be given for the view that constitutions

67. For an inadequate answer to this question, examine the teachings of positivism *infra* text accompanying notes 96-101.

are not merely a species of legal artifacts, such as contracts or statutes. While contracts and statutes derive their meaning in large part from the interpretive legal norms applied to decipher their meaning,⁶⁸ constitutions by their very nature call into question legal practices including interpretive norms.⁶⁹

Constitutions, as most would admit, are claimed to be constitutive of a legal and political order.⁷⁰ There are two ways of looking at this last claim. One could say that constitutions are grand creative acts that sever subsequent political and legal discourse from prior history. If one holds this view of constitutions, it does no good to look behind the document for interpretive rules or framers intentions. According to this vision, the text stands above all law and all other cultural or historical sources of meaning. If one views constitutions in this manner, there is no reason to believe that constitutions are like the ordinary run of law. Rather, constitutions are above the law, and analogy between constitutions and law seems to be undercut by the claim that constitutions are grand creative discontinuities. If this view of constitutions is held, then, indeed, constitutions cannot be analogized to the ordinary run of law. Rather, constitutions are the measure that serves to situate and define all inferior law. Under this view, the constitution is itself the determinant of its mode of interpretation, and one must find in its text the source of its meaning.

The intentionalist does have an escape route. It can be suggested that constitutions are creative acts of radical discontinuity, but that the act or the text itself includes the intention of the framers. I see no reason why we should accept this definition of the constitutional text. Besides, the argument is self-defeating. Since the claim is that the constitution is law, it does no good to include the framers intent as part of the text: one would be left with the incoherent claim that the framers intent is law.

A more appealing alternative to this vision of constitutions as radical discontinuities can be advanced. Constitutions are constitutive of a political and legal order, but this constitutive effort is accomplished by ratifying, incorporating, and assuming

68. I am not implying that the conventions used to interpret statutes or contracts are free from contestation. See *infra* text accompanying notes 74-85. Nevertheless, within the interpretive community of judges and lawyers, there is some consensus on the identity and nature of the conventions to be used in statutory or contract interpretation.

69. See *infra* text accompanying notes 87-88.

70. See, e.g., Monaghan, *supra* note 4, at 384.

much of the history that has transpired before adoption of the constitution. If constitutions carry this mass of historical meaning, it is implausible that their significance should be restricted by the narrow and accidental character of the framers intent. It belies the nature of constitutions to suggest that all the meaning that they carry must be perceived from the tunnel-vision perspective of the customary mode of interpreting legal documents.

In sum, one may view a constitution as a radical act of discontinuity, in which case it is implausible that the constitution is law in the ordinary sense of the word. Or, one may view the constitution as a bridge between subsequent development and prior history, in which case it is implausible that the historical traffic should be barricaded by the tunnel vision of the customary rules of legal construction.

One does not have to accept either of these views of the constitution. What the intentionalist must do, however, is advance a vision of the constitution that makes plausible the idea that it should be looked at as if it were an instance of the ordinary run of law. No amount of evidence of what the framers thought they were doing can substantiate this claim. What is at stake is not what they thought they were doing, but what we think they have done.

There are many reasons that can be advanced to suggest that what the framers have done differs substantially from the ordinary run of statutory law or of contractual undertaking:

1. Constitutions are designed to be constitutive of an entire legal and political order.
2. Constitutions are created to endure over long periods of time.
3. Constitutions are created for and adopted by large numbers of people whose interests, political ideologies, and concerns may vary significantly.
4. The persons who create and adopt constitutions have no special expertise or experience in establishing entire political or legal orders.
5. Constitutions are popularly (whether correctly or not) viewed as the best textual embodiment of the principles governing and sustaining legal and political obligations within the community.

None of these five characteristics could be ascribed to typical contractual undertakings or statutory law. Given these signifi-

cant differences in origin and function distinguishing constitutions from contracts and statutes, it would take no mean argument to sustain the view that the rules to interpret constitutions should be borrowed from the conventions used to interpret contracts and statutes. But we are given no argument at all. Rather, the intentionalist proffers the vague abstraction "law" to envelop constitutions and contracts and statutes within the same interpretive shroud.

B. The Customary Manner of Interpretation

The second premise in the syllogism is the claim that the ordinary mode of interpreting legal documents or law is to examine the intent of the framers when the text is unclear. Obviously, this second premise cannot establish what the first failed to show, namely, that constitutions are law in the sense that they must be interpreted by recourse to the original understanding. Given that the second premise cannot encompass the first unless the first has been demonstrated, one must interpret the second premise to mean that the customary mode of interpreting legal documents (constitutions aside) is by recourse to the framers intent when the text is unclear.

First, it is necessary to understand some characteristics of the interpretation of contracts and statutes that distinguish this interpretation from the interpretation of constitutional texts. One of the premises allowing interpretation of contractual documents by reference to extrinsic evidence of the parties' intent is that the contractual document itself is but evidence of the contract.⁷¹ The justification for enforcement of contracts is that the parties have agreed to the terms. Thus, the agreement to be enforced by a court is not the contractual document, but rather the agreement that is evidenced by that document.⁷² The same

71. "Contract Defined. A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty." RESTATEMENT (SECOND) OF CONTRACTS § 91 (1979). See also 3 A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 539 (1960 & Supp. 1984); E. FARNSWORTH, CONTRACTS §§ 7.2-.3 (1982) (discussing the parol evidence rule); 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 604 (3d ed. 1961). See *infra* note 72.

72. Or as one commentator puts it, "[o]ne of the unassailable rudiments of contract law is that the written manifestation of assent is not the 'contract' but merely constitutes evidence thereof. The scope of the contract may or may not be coextensive with the documentation evidencing it." Murray, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342

cannot be said of constitutions. We do not view the text as evidence of the framers intent, which must be enforced. Rather, if framers intent is at all relevant, it is because it is evidence of the meaning of the text.⁷³ In constitutional interpretation, it is the text that is to be elucidated by reference to extrinsic evidence, not the framers intent that is to be illuminated by reference to the text.

The analogy of constitutional interpretation to statutory construction is perhaps tighter. In both cases it is the text that has to be illuminated. Even this analogy is strained. The objects of statutory attention are not as grand, abstract, or sweeping as those encompassed by constitutional texts. The objects regulated by statutes tend to be extant and recognizable real-world phenomena rather than values or concepts. The temporal horizons of statutes are much closer; statutes are rarely drafted with endurance in mind. In fact, statutes are often written from a comfortable incrementalist perspective. If the statute performs poorly in practice, or if new problems arise, there will always be time to amend. Legislators generally have some experience in drafting statutes. All these differences suggest that the analogy between statutory construction and constitutional interpretation may be fairly shallow.

Even if contractual and statutory construction can be analogized to the interpretation of the constitutional text, the claim is not particularly helpful to the intentionalist. If the customary mode of contractual or statutory interpretation is examined closely, one finds that, while the form of the interpretive process seems aimed at deciphering the intent of the parties, the substance of the interpretive enterprise is governed largely by instrumental concerns.

In the interpretation of a contract, a court that has concluded that a writing manifests a clear, exclusive, final, and complete integration of a contractual agreement is bound to enforce that agreement and to exclude extrinsic evidence contrary to the plain meaning of the writing.⁷⁴ Extrinsic evidence may, however, be used to supplement a partially integrated agreement as long as the evidence does not contradict the interpretation of the

(1975).

73. J. STORY, *supra* note 29, § 406 ("Nothing but the text itself was adopted by the people.").

74. 3 A. CORBIN, *supra* note 71, §§ 543, 583; 4 S. WILLISTON, *supra* note 71, § 630; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 71, § 215.

writing and extrinsic evidence may be used to show or clarify the meaning of an integrated agreement.⁷⁵ All this doctrinal flurry should read like gobbledygook, for it is as tidy in appearance as it is indeterminate in practice.⁷⁶ One can play rather freely with the questions of whether extrinsic evidence contradicts or merely clarifies the meaning of the writing and whether the agreement is integrated.⁷⁷ Thus, while the parol evidence rule can be mapped out in tidy statements of rules (and exceptions or limitations), it is quite clear that the parol evidence rule is an assortment of legal maxims sufficiently contradictory on the whole to allow the judge to exclude or include extrinsic evidence with relative ease.⁷⁸ In short, one must turn the parol evidence rule on its head in order to understand the function it plays in the process of judicial decision-making. Although presented as a set of determinate rules used to ascertain the true agreement of the parties, in fact, the parol evidence rule is used (self-consciously or not) to construct an agreement that corresponds to the judge's vision of the contract he or she wants to enforce or repudiate.⁷⁹ If one should interpret constitutional texts in the same "customary mode" in which one interprets contracts, this injunction reduces to the unseemly claim that one should interpret constitutional texts to make them mean what one wants them to mean. The analogy of constitutional interpretation to contractual interpretation is only helpful to the intentionalist if one forgets or greatly underestimates the extent to which the latter is instrumentally distorted.

The same arguments can be applied to the analogy of constitutional interpretation and statutory construction. As Karl Llewellyn demonstrated long ago, the maxims governing statutory construction come in a tidy package of contradictory pairs.⁸⁰ For each maxim there is a countermaxim or at least an exception of uncertain scope.⁸¹ Some contemporary commentators concede that statutory interpretation is largely controlled

75. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 71, §§ 214(c)-216.

76. See McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365 (1932).

77. *Id.* See *supra* note 76 and accompanying text.

78. *Id.* at 372.

79. *Id.* The judge's vision of the contract can be influenced by a number of instrumental concerns, including judicial economy, security of agreements, political values, and personal preferences.

80. See K. LLEWELLYN, *supra* note 33, at 521-35.

81. *Id.*

not by what the legislature intended,⁸² but by what the courts determine the statute should mean.⁸³ There are even some commentators who argue that this is all for the best.⁸⁴

One can claim, of course, that the instrumentalist leanings of modern contract interpretation and statutory construction are noxious and illegitimate. One can also claim that such instrumentalist inclinations are to be resisted. What is more difficult to claim, however, is that instrumentalist concerns play no part in the judicial construction of contracts and statutes.

In sum, considerable controversy exists over what the customary mode of contract or legislative interpretation is and over what it should be.⁸⁵ If there is significant controversy, then it is doubtful that one can speak of a "customary mode" of interpretation. One might as well speak of a customarily contested mode of interpretation. If forced to describe this customary mode of interpretation in an incontestable way, one might do well to include a qualification that the customary mode of interpretation consists largely of making a legal document mean what it should mean despite what its creators meant.

If the customary mode of interpreting legal documents were widely adopted in constitutional cases, the degree of instrumentalist distortion of intent would likely be much greater than it is in cases involving contractual or statutory issues. One of the reasons that instrumental distortion is not more rampant in contract cases or statutory cases is that judges and their audiences do not often view such cases as involving transparent and clean value conflicts or classic good-guy versus bad-guy dynamics. The same cannot be said for constitutional law. Judges and their audiences tend to see constitutional law questions as having fairly transparent, significant political and moral dimensions. Accordingly, if rules of construction such as those advanced by the intentionalists were adopted in constitutional cases, one would expect to see a great deal of instrumentalist distortion.

C. *Giving Effect to the Framers Intent*

This gets us to the last step in the syllogism: the "therefore" The short of it is that insofar as the two premises are

82. Thus, the modern trend in statutory interpretation seems to be to construe statutes in terms of their purpose, with due attention to the particularity of the policy or policies served by the statute. W. HURST, *DEALING WITH STATUTES* 65 (1982).

83. See *supra* note 82.

84. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 32, 82-88 (1982).

85. See *supra* note 33 and text accompanying notes 74-84.

inadequate, there can be no "therefore." But while the syllogism is gone, the intentionalist imagery dies hard.

One of the images associated with the contract or legislation analogy is that of "giving effect to the intention of the framers."⁸⁶ Intentionalists argue that, as with all other legal documents, the aim of judicial interpretation is to give effect to the intention of the parties.⁸⁷ There is something attractive about this view, for it appears to dispose neatly of the problem of judicial creativity and imperialism. If judges are merely to give effect to the intention of the parties, the judicial role as decision-maker is circumscribed, and decisions are legitimated to the extent that the parties are entitled to have their intentions effectuated.

If one takes seriously the notion of giving effect to the intention of the framers, however, one is led to advocate a form of adjudication resistant to the demands of *stare decisis*. In order to effectuate the intent of the framers, each constitutional case must be adjudged in terms of that intent. The judge must refer in each case to the original understanding, while banishing the accretions of meaning supplied by precedent. If the judge comes to rely upon precedent in interpreting the original understanding, then indeed the judge would be interpreting not just the original meaning, but that meaning as it has been supplemented and eroded by precedent. It is only if one views precedent as adding no meaning, no texture to the original understanding, that one can claim that reliance upon precedent does not destroy, supplement, or derogate from the original understanding.

Such a claim seems implausible, however. To the degree that precedent adds context, concreteness, and specificity to the original understanding, it changes that original understanding. Thus, the intentionalist truly committed to giving effect to the original understanding must reject *stare decisis* as an illegitimate constraint on the effectuation of the original understanding. It would do the intentionalist position no good to suggest that the framers viewed *stare decisis* as a legitimate form for abrogating the original understanding. Once the door to judicial abrogation is opened slightly, it is opened sufficiently to alter

86. Berger, *supra* note 15, at 364-65.

87. J. STORY, *supra* note 29, § 400.

the interpretive rules the framers intended the courts to use. The attempt to reconcile intentionalism with a system of adjudication based upon stare decisis is a license to bite the hand that feeds. Insofar as it is untenable to suggest that constitutional courts should abandon the method of stare decisis, the only adequate method for giving effect to the original understanding remains inconsistent with accepted features of our system of adjudication—not a pretty position.

Quite apart from these conceptual difficulties in giving effect to the original understanding, it is simply too late to resort to the purity of the intentionalist utopia. Too many constitutional cases exist that are viewed as inconsistent with the framers intent to revert back to their original understanding.⁸⁸ These departures from the rules of intentionalism have so significantly transformed the constitutional landscape that one can say to the intentionalist what can be said of almost any utopia: we cannot get there from here. The intentionalist's injunction to constitutional courts that they sin no more and return to the original understanding would require great feats of judicial activism and, more important, the reversal of historical trends in society at large. To give but one example, the judicial "imperialism" of the United States Supreme Court might well be blamed for the relative desuetude of the amendment process. If so, then true observance of the original understanding would require that we undo judicially creative precedents and replace them with the constitutional amendments that would have been enacted in their stead. Whether we are talking about Washington State or about the federal government, we can neither clearly identify nor redress all of the legal effects that the abandonment of the original understandings has caused. The plea for a return to intentionalism can no longer be read as a plea for a return to the original understandings: they are gone and gone for good. Instead (and rather ironically), the brief for intentionalism is a plea for a constitution that would surely be inconsistent with that intended by the framers: a constitution partially composed of intentionalist interpretations and partially composed of "erring" precedent. The brief for intentionalism is no longer a brief for fidelity to the framers. Rather, it is a brief for the adop-

88. Monaghan, while committed to the intentionalist project, concedes that stare decisis now has some claim on us in terms of the federal Constitution. Monaghan, *supra* note 4, at 393-95.

tion of a certain judicial methodology in constitutional cases.

Even if intentionalism could claim the inside track on the road to the original understanding, a troubling objection would remain to this image of giving effect to the intentions of the framers. When judges give effect to the intent of parties in interpreting contracts, or when judges give effect to legislative intent in construing statutes, there is an appearance of legitimacy that attaches to the judicial act. This appearance of legitimacy arises because the law announces that giving effect to the parties' intent is what judges are obliged to, and will in fact do. Contracting parties and legislators can expect that their legal inventions will be interpreted this way. Our legal practices have already determined in advance the extent to which judges will in fact give effect to the intent of the parties. As part of this advance determination, the parties have been forewarned that the style and substance of interpretation is subject to change.

In the interpretation of constitutional texts, however, giving effect to the intention of the parties does not bear the imprimatur of legitimacy, for it is not certain that the framers were entitled to rely on the view (if they did at all) that judges would give effect to their intent. Nor is it clear that we should be entitled to rely on the view that judges will give effect to the original understanding. One problem is that there is no settled legal practice for reconstructing the original understanding. Moreover, even if there were such a settled legal practice, the proponent of framers intent must offer some justification as to why the framers were entitled, or why we are justified in viewing them as having been entitled, to have the constitutional text interpreted in terms of their intent.

There are two answers to this problem—one to be found in social contract theory, the other to be found in the teachings of legal positivism, which is the view of law that underlies most of the argumentation advanced by intentionalists. The next sections are aimed at uprooting the social contract theory and acquainting legal positivism with social reality.

IV. THE SOCIAL CONTRACT ARGUMENT

Social contract theory is an old and much revered tradition in liberal political philosophy.⁸⁹ Many variants of the nature,

89. The obligatory references are to T. HOBBS, *THE LEVIATHAN* (1651); J. LOCKE, *TWO TREATISES ON GOVERNMENT* (1690); J. ROUSSEAU, *LE CONTRAT SOCIAL* (1762).

content, and origin of the social contract have been offered. Rather than investigating any particular version of the social contract, I will describe an amalgam of the basic structure of the social contract argument. Social contract theorists are, in essence, interested in ascertaining what constitutes a legitimate form of government and in articulating the source of that legitimacy.⁹⁰ For the social contract theorists, the legitimacy of government rests upon its origin in the consent of the people to curtail their liberties in exchange for security.⁹¹ The legitimacy of government thus rests upon the consent of the people at a particular point in time.

Modern contractarian thought, recognizing that the notion of an actual historically grounded social contract is utterly fictitious, has tried to resurrect the essential structure of the theory by removing the social contract from historical events. Rawls, for instance, sets forth a version of the social contract that emanates from the process of thinking about the just society under artificial intellectual conditions.⁹² To the extent that the social contract is removed from history, and that we are capable of deciding upon the validity of its terms or making a contribution to its content, social contract theory obviously does not help intentionalism at all.

One must go back to some historical notion of the social contract to justify intentionalism. Two versions of the social contract theory might help that school of interpretation. The first is the notion that the social contract was executed at a particular point in time, one conveniently located, for instance, at the time constitutions are adopted or ratified.⁹³ Still, that notion is not terribly helpful, for one would like to know why that generation was entitled to conclude such a compact on our behalf. To pursue the contract analogy, there is simply no evidence that we are in privity with the framers.

Arguably, the intentionalist could suggest that the legitimacy of the original compact lies in the fact that the framers have left us the power to alter its terms through the amendment

90. See J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 124-30, (1979).

91. For an exploration of the role of consent in liberal-democratic theory, see J. STEINBERG, *LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT* (1978).

92. J. RAWLS, *A THEORY OF JUSTICE* (1971).

93. This view of written constitutions as literal realizations of the social contract was apparently held by many in the 18th century. C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 161 (1969).

process. This argument, however, is question-begging insofar as one must justify the power of the framers to limit in this manner the means by which the compact may be altered.

It might be suggested that intentionalism is justified insofar as we evidence our consent to constitutional government by failing to revolt. There are two major errors in this argument. First, it is not clear that the absence of revolt necessarily implies consent in any meaningful sense. If consent is to be the linchpin for the justification of constitutional government, it must mean more than simply acquiescence, toleration, or resignation. Second, even if we did consent to constitutional government, it is incorrect to suggest that observance of the original understanding is a part of that whole in any practical sense. The United States Supreme Court, for instance, has treated the original understanding as little more than legitimating gloss for decisions reached on other grounds.⁹⁴

A second version of social contract theory might be helpful to the intentionalist. One of the major problems with the view of the social contract as corresponding to the definite political event of the ratification of a constitution is that there is no reason to suppose that this particular constitution is an accurate reflection of the social contract. To avoid this difficulty, the intentionalist might portray the social contract as a continuous historical temporization. The social contract would then be viewed as the continuous development of the political and social order by the successive consent and contributions of succeeding generations. Under this view, the constitution would then be a moment of particular lucidity or political self-consciousness in the development of an ongoing social contract. This vision of the social contract, while in theory more attractive, does not meet the argumentative needs of the intentionalist.⁹⁵ It leaves indefinite the limitations on what each generation may contribute to the social contract. Thus, rather than justifying recourse to framers intent, this vision of the social contract seems to afford each generation a free hand to revise the text of the unwritten,

94. See, e.g., cases cited by Monaghan, *supra* note 4, at 375 n.132 (noting that the Supreme Court resorts to framers intent even when the decisions seem diametrically opposed to the "actual" original understanding). See Saphire, *supra* note 9, at 779 (suggesting that framers intent serves to fulfill our needs for order and our desire to make past generations share in our responsibility).

95. Brest, *supra* note 4, at 225 (noting that our constitutional tradition incorporates major elements of nonoriginalism).

continuous social contract.

Finally, even if constitutions can be adequately justified on social contract grounds, the intentionalist must still establish that the original understanding is good evidence of the meaning and content of that social contract. This is a bridge that social contract theory alone cannot provide.

V. THE POSITIVIST UNDERPINNINGS OF INTENTIONALISM

I have reviewed three major justifications for intentionalism: the need to constrain judicial creativity, the legal documents analogy, and the social contract justification. As will be seen, the vision of law that animates each of these three justifications is supplied by legal positivism. It is because of the subtle but pervasive emanations of legal positivist jurisprudence in American legal thought that the three justifications have any facial plausibility at all.

Intentionalists seldom bother justifying their view that framers intent is binding, authoritative, or entitled to presumptive validity. If one pushes an intentionalist hard enough about why this is so, the response might well be something like this:

[Original intent] . . . is rather, a way of thinking about constitutional "meaning" that follows from the basic concepts that legitimate judicial review itself. The root premise is that the supreme court, like other branches of government, is constrained by the written constitution. *Our legal grundnorm* has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.⁹⁶

So there it is: recourse to the original understanding is a given of our legal order and that is the way it is. If pressed truly hard about why framers intent is part of our "grundnorm," the intentionalist will point out that this is not a question of law, but a question of the nature of political obligation—presumably, a matter for political philosophers to worry about, but definitely not one germane to the work of the legal scholar or practitioner. If we ask the intentionalist one more time why this is so, he or she might say, "If you understand what I am saying, you don't understand what you are asking."

In order to understand what the intentionalist is saying, one

96. Monaghan, *supra* note 4, at 375-76 (emphasis added).

needs to situate him or her within the tradition of legal positivism, which I take to be the last refuge of intentionalists. The intentionalist's retreat to the shrouds of legal positivism is revealed by Monaghan's use of the term "grundnorm" in the quotation above.⁹⁷ The "grundnorm," or the basic norm, is a term developed by Kelsen, a noted positivist, to help explain what constitutes a legal system.⁹⁸ Positivists teach that every legal order has something like a "grundnorm" or an ultimate rule of recognition that, for its legitimacy, rests upon social convention.⁹⁹ The function of the grundnorm or ultimate rule of recognition is to guide determination of what counts as law. An illustration might be helpful. Suppose a court interprets the Sherman Act¹⁰⁰ to ban horizontal price-fixing and awards damages to an injured plaintiff. How are we to know that the judge's decision is law? After all, the judge's decision might well be simply a statement of personal values, or it could be an opinion in the lay sense of that term. What then ensures that the judge's decision is binding law? The positivist will answer along the following lines: Courts are empowered to interpret statutes by reference to an established practice of interpreting precedent and statutory intent. As long as the judge grounds the decision in these sources of law, the decision is law.

Suppose we push the positivist further and ask what entitled legislatures to enact laws of this kind? The positivist will say that legislatures are authorized to enact laws upon following certain procedures set forth in the constitution. One can see that the positivist is plagued by the problem of infinite regress. If the determination of what counts as law lies in its source or origin, where is the final source or origin? Where is it that judges get the stuff out of which to make decisions? How can we be sure that they are not simply enforcing the common run of morals or their own idiosyncratic proclivities? Equally troublesome is

97. At another point, Monaghan asserts that the constitutional text "is our master rule of recognition." Monaghan, *supra* note 4, at 384 (citing H.L.A. Hart, a noted positivist). See H. HART, *THE CONCEPT OF LAW* 92-93, 97-103, 112-14, 141-42 (1961). The "ultimate rule of recognition" was a term developed by Hart to fulfill essentially the same function, in terms of defining the legal order, as Kelsen's "grundnorm." See *infra* note 104.

98. H. KELSEN, *THE PURE THEORY OF LAW, ITS METHOD AND FUNDAMENTAL CONCEPTS* 193-214 (1967) (discussing the nature and role of the "grundnorm," or the basic norm, in relation to the legal order).

99. See H. HART, *supra* note 97, at 102-07; H. KELSEN, *supra* note 98, at 201-05.

100. 15 U.S.C. § 1 (1982).

another question: How do we know that their decisions are not simply a direct product of their class backgrounds or their childhood?

The legal positivists have a wonderful answer to these problems, and it is none other than the *grundnorm* or the ultimate rule of recognition. Basically, the *grundnorm* sets forth the criteria for how law can originate. Ultimately, the reason that any piece of legal doctrine counts as valid law is that it can be traced back all the way to the *grundnorm*. If you should ask why the *grundnorm* counts as law, the positivist will chide you for being somewhat softheaded. That would be as silly as pondering whether the platinum meter bar in the Paris Museum is really one meter long. This is a silly question because it is that meter bar in the museum in Paris that defines what it means to be one meter long.¹⁰¹

Given the importance of the function of the *grundnorm* in the positivist vision of law, one would think that a great deal would be known about our own *grundnorm*. After all, it is the *grundnorm* that ensures the autonomy of the legal system: law is seen as a sphere of reasoning divorced from social and political influence. This insurance is more important than first appears. For scholars, it ensures that they can explain law without the difficulties of having to delve into its social origins.¹⁰² Lawyers and judges also appreciate this insurance, for it elevates their work from mere social interaction to the plane of reason. The *grundnorm* is also important because it allows a distinction between what is merely good or morally right and what is law. Scholars, practitioners, and judges all appreciate this contribution of legal positivism because it allows them to recommend or decide upon courses of action that are neither right nor good, but that serve the cause of law. In short, the *grundnorm* provides a great deal of psychological and ideological comfort that is very useful to the performance of the work of judges, practitioners, and legal scholars.

Let us then return to the question at hand. Given the importance of the *grundnorm*, one would think that a great deal is known about it and that much controversy surrounds the

101. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* I § 50, at 25 (G. Anscomb trans. 3d ed. 1968). See also H. HART, *supra* note 97, at 106.

102. See generally Goodrich, *The Rise of Legal Formalism: or the Defenses of Good Faith*, 3 *LEGAL STUD.* 248 (1983).

articulation of its contents and meaning. Not so.¹⁰³ Positivists seem to have accomplished little in specifying the contents or character of the grundnorm.¹⁰⁴ This omission is hardly surprising: a legal order is a complex phenomenon and the specification of the content of a rule that determines whether other rules or principles are of or outside the legal order must no doubt be a very complex task. At this point, one loses interest in the positivist end run. Ultimately, this use of the grundnorm or the ultimate rule of recognition appears as a mystification that artificially restricts the universe of what we can call law and suppresses troublesome questions about the origins of law and its relation to politics.¹⁰⁵

The intentionalists stand in a number of interesting relations to legal positivism. First, to the extent that intentionalists rest their case for framers intent on the tenets of legal positivism, they are wrong. Framers intent is a given of our legal order, but only if we believe the intentionalists when they say so. Obviously, we have the power to make them wrong in this respect, and many judges already have.¹⁰⁶ Second, there is another interesting parallel between the position of the intentionalist and that of the legal positivist. Framers intent is to constitutional law as grundnorm is to legal order. In both cases, the guiding concepts are abstract, indeterminate, and incapable of determining how they are to be given any concrete content or meaning, yet paradoxically authoritative. In both cases, normative issues are reduced to questions of fact.¹⁰⁷

103. Remarks of Sager, 56 N.Y.U. L. REV. 536 ("Kelsen could explain very little about the grundnorm . . .").

104. Kelsen and Hart offer us the grundnorm and the ultimate rule of recognition as abstract concepts that are useful from a theoretical perspective in explaining what counts as a legal system and what counts as a valid legal rule of such a system. Neither Kelsen nor Hart seems particularly interested in ascribing concrete meaning to the grundnorm or the ultimate rule of recognition. See H. HART, *supra* note 97, at 97-107; H. Kelsen, *supra* note 98, at 193-214. Obviously, Hart's and Kelsen's lack of interest on this question can hardly be taken as evidence that it would be impossible to give concrete meaning to the grundnorm or the rule of recognition. On the other hand, the absence of any concrete demonstration of the existence of a grundnorm or an ultimate rule of recognition casts doubt upon the *explanatory power* of the abstract concept.

105. See Goodrich, *supra* note 102.

106. Obviously, every judicial decision that intentionalists cannot reconcile with the original understanding and every judicial decision explicitly grounded on some source of interpretation outside the intentionalist universe is a denial of the intentionalist utopia. See *supra* note 94.

107. This seems to be one of the basic strategies of the positivist: reducing questions of normative or political dimensions to questions about the factual order. For an explora-

Third, legal positivism, like intentionalism, serves to carve out of the admittedly messy interrelations of the social world a seemingly clean and determinate role for judges. Just as positivism purportedly serves to sever from the legal order the input of the social order both on the level of meaning and on the level of social force, intentionalism excises from the interpretation of the constitutional text both normativity and social force. Of course, just as with positivism, the surgical cleanliness of the lesion belies the dirty hands that produce the latent infection.

Fourth, one can see in the clean legal universe offered by the positivist jurisprudence the source of the vision of law that forms the intentionalist arguments of judicial restraint, legal documents analogy, and social contract. For indeed, the intentionalist views constitutional law very neatly and very narrowly: the first step in the intentionalist argument is to analogize the constitutional text to the positivist vision of law. Hence, the argument from indeterminacy proceeds from the assumption that judges are to apply law, not make it. The analogy of a constitution to a contract or to a statute is a transparent effort to excise the normativity and political content of the constitutional text. The social contract theory is an attempt to reduce the question of political legitimacy to one of legal imagery.

VI. CONCLUSION

A conclusion in law review articles is usually a neat package summarizing what has gone on before. To do that here would be to replicate stylistically the substantive shortcomings of intentionalism. There is one more argument that the intentionalist usually marshals to support the worship of a generation past: the intentionalist can suggest that rejection of the framers intent amounts to a nihilistic assault on constitutional meaning. If the framers intent is not to be honored, warns the intentionalist, then the constitution means nothing and can bind no one. This alarmist argument is objectionable on two grounds. First, one is not compelled to jettison interpretive norms other than intentionalism (that is, the text, *stare decisis*, social theory, expectations of the body politic, moral arguments, etc.) unless somehow these sources of interpretation are compromised by the argu-

tion of the dialectical interplay between the order of facts and the normative dimension in framing legal theories, see Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 698-702 (1983).

ments raised against intentionalism. (I have not compromised these other interpretive norms.) The second objection to the alarmist argument turns upon its ambiguous use of the term "bind." On the one hand, it might be correct to say that judges are bound to enforce the constitution in the sense that they have a legal or moral obligation to do so. But note that this normative statement means virtually nothing given the fact that there is fundamental disagreement about the meanings and significance of the essential terms "enforce," "constitution," "legal obligation," and "moral obligation." On the other hand, there is a sense in which the slogan that judges are bound to enforce the constitution is simply wrong. To the extent that the constitution is not a determinate code, but rather a text requiring interpretation, judges create and recreate the bounds of the constitution that they enforce. As a descriptive matter, then, the claim that judges are bound to enforce the constitution somewhat overstates the force of the intellectual or conceptual constraints operating upon judges deciding constitutional cases. But to say that the constitution is indeterminate and that interpretation involves choice is not to say that either is meaningless.