

ORIGINALISM AND THE CONSTITUTION: DOES ORIGINALISM ALWAYS PROVIDE THE ANSWER?

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An endless stream of books and articles is written, and symposia—such as this one—are held, on the ever fascinating and intriguing subject of constitutional interpretation. Obviously, it is a matter of great importance. If the Supreme Court would only adopt the correct method of constitutional interpretation, the Court would get its constitutional decisions right. Because we have arrived at a system of government in which the Court's constitutional decisions determine the most basic issues of domestic social policy for the nation as a whole, there could hardly be, it would follow, an issue of greater consequence.

The dispute over methods of constitutional interpretation, however, is based almost entirely on a fiction, because Supreme Court rulings of unconstitutionality rarely, if ever, turn on an issue of interpretation. The fact is that the Constitution has very little to do with constitutional law. This was true of the Court's first ruling of unconstitutionality in *Marbury v. Madison*¹ in 1803, of its historically most significant, *Dred Scott v. Sandford*² in 1856, and of the perhaps most significant of its more recent, *Planned Parenthood of Southeastern Pennsylvania v. Casey*³ in 1992.

There could hardly be a more purely or egregiously political decision than *Marbury*.⁴ Chief Justice John Marshall sat on a case in which he was personally involved, and berated his political opponent President Jefferson, by finding a violation of a plaintiff's rights in a case in which the Court lacked jurisdic-

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

2. 60 U.S. (19 How.) 393, 455 (1856).

3. 505 U.S. 833, 901 (1992).

4. See MORRIS R. COHEN, *THE FAITH OF A LIBERAL* 178 (1946) ("Possibly the clearest instance of the logical and historical absurdity of a decision declaring an act of Congress unconstitutional was the case of *Marbury v. Madison*, which lawyers have, for over a century, worshiped with blind piety.") (citation omitted).

tion. He then seized the occasion, probably concocted, to establish judicial review by fabricating a statutory provision that did not exist⁵ to find that it violated a constitutional prohibition that also did not exist.⁶ In *Marbury*, Chief Justice Marshall established not only judicial review, the power of judges to invalidate policy choices made by other government officials,⁷ but also that ordinary standards of integrity, truth, and logic do not apply to Supreme Court decisionmaking. Judicial review was born in sin and has rarely risen above the circumstances of its birth.⁸

Judicial activism in constitutional law can most usefully be defined as a court declaring unconstitutional a policy choice that the

5. Quoting only a few words from a sentence in Section 13 of the Judiciary Act of 1789, Chief Justice Marshall purported to find that it added to the Court's original jurisdiction despite the fact that the sentence did not mention original jurisdiction. He "interpreted" the statute not to avoid, but to create, a constitutional question.

6. The Court held that Section 13 of the Judiciary Act of 1789 violated Article III, Section 2 of the Constitution by adding to the Court's original jurisdiction, which the section does not prohibit. Moreover, several members of the legislature that passed the Act were also members of the constitutional convention.

The section of the Judicature Act of 1789 which Marshall declared unconstitutional had been drawn up by Ellsworth, his predecessor as Chief Justice, and by others who a short time before had been the very members of the constitutional convention that had drafted its judicial provisions. It was signed by George Washington, who had presided over the deliberations of that Convention. Fourteen years later, John Marshall by implication accused his predecessor on the bench, the members of Congress such as James Madison, the Father of the Constitution, and President Washington, of either not understanding the Constitution (which some of them had drawn up), or else willfully disregarding it.

COHEN, *supra* note 4, at 178–79.

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138, 180 (1803) (declaring the Constitution the "supreme law of the land" and the Supreme Court the final arbiter of the Constitution).

8. The Court's next exercise of judicial review against a federal law, fifty-three years later in *Dred Scott v. Sandford*, invalidated a congressional attempt to limit the extension of slavery to new territories, 60 U.S. (19 How.) 393, 455 (1856), and helped bring on the Civil War and its more than 620,000 battlefield deaths. See Lino A. Graglia, *Judicial Review: Wrong in Principle, A Disaster in Practice*, 21 MISS. C. L. REV. 243, 246 (2002). This one example of the use of the power should be taken as proof enough that judicial review is not a good idea. It certainly demonstrated the prescience of de Tocqueville's warning that "if ever the Supreme Court came to be composed of rash or corrupt men, the confederation would be threatened by anarchy or civil war." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 151 (J.P. Mager ed., George Lawrence trans., Perennial Classics 2000) (1835).

Constitution does not clearly prohibit⁹—“clearly” because in a democracy the view of elected legislators should prevail over the view of unelected judges in cases of doubt.¹⁰ By this definition all or nearly all Supreme Court rulings of unconstitutionality are activist. Belief in the Court’s insistence that such rulings are based on an interpretation of the Constitution can be likened to the belief in the fable of the Emperor’s new clothes.¹¹ Both beliefs are based on a need strong enough to overcome reality: the need to believe or be seen to believe a quasi-official opinion.

The Emperor’s tailors were clever enough to convince him that they had made him a beautiful, though invisible, new suit of clothes.¹² Unable to believe, or unwilling to admit, that their Emperor had been fooled, his loyal subjects also admired the clothes until an innocent child, heedless of politics and propriety, pointed out that the Emperor was naked.¹³ The Court is analogous to the Emperor’s tailors in regard to its rulings of unconstitutionality. Although such rulings are obviously pure policy judgments, the Court wraps them in imaginary constitutional prohibitions, which professors of constitutional law, like the Emperor’s loyal subjects, then claim to see, in the confident expectation that few others will be bold or observant enough to point out that the alleged prohibitions are entirely imaginary.

The only significant difference between the Emperor’s tailors and the Court is that once the child pointed out the nonexistence of the clothes, everyone agreed that the Emperor was indeed naked. Pointing out that the Court’s rulings of unconstitutionality are baseless and simply expressions of the policy preferences of a majority of the Justices—as all candid observers have done

9. The opposite, a ruling holding constitutional a policy choice that the Constitution clearly forbids, is extremely rare. *Home Bldg and Loan Ass’n v. Blaisdell*, 290 U.S. 398, 447–48 (1934) may be the clearest, if not the only, example, and in any event should be seen not as activism, but restraint, permitting the result reached in the ordinary political process to prevail.

10. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893).

11. This is not a new perception. See COHEN, *supra* note 4, at 175 (“All peoples have pious fictions and sacrosanct expressions which make free thought and honest speech seem improper. . . . Men who dare to call the Emperor naked when he has no clothes have been pointing out that time-honored national dogmas in regard to our constitutional system are full of logical fallacies and historical errors.”).

12. HANS CHRISTIAN ANDERSEN, *THE EMPEROR’S NEW CLOTHES* 18 (Abbeville Press 2001) (1837).

13. *Id.* at 24.

from the beginning¹⁴—seems not to make the slightest difference. The need to believe is simply too great, for the alternative is to admit that the rulings are pure policy judgments that should be left to elected legislators subject to majority will, the *bête noire* of the liberal American intellectual.

Proponents of activist judicial review cannot simply admit that they prefer policymaking by judges—a version of Plato’s government by philosopher kings¹⁵—to policymaking by elected legislators, at least on some issues of basic social policy. Nor is it possible to argue that the Court’s rulings of unconstitutionality are mandates of the Constitution in any ordinary sense. Liberals continue, therefore, to devise in a flood of books and articles ever more subtle and clever methods of constitutional interpretation, which purport to show that the Court’s rulings of unconstitutionality can be somehow connected to the Constitution and therefore are not pure policy judgments. Their only effect, however, is to obscure the fact that nothing was being interpreted.

The Constitution is a very short document, much of it obsolete, easily printed with all amendments and repealers on a dozen or so pages, and very little of it is even purportedly involved in most putative constitutional decisions. Most rulings of unconstitutionality involve state, not federal, law, and nearly all of those purport to be based on a single constitutional provision (the Fourteenth Amendment), a single sentence of that amendment (the second sentence of the first section), and ultimately on one of two pairs of words (“due process” and “equal protection”).¹⁶ Recognition of this fact should be enough in itself to end debate about methods of constitutional interpreta-

14. See, e.g., MAX FREEDMAN, ROOSEVELT AND FRANKFURTER 383 (1967) (quoting Felix Frankfurter’s statement to President Franklin Roosevelt: “People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution.”); Richard A. Posner, *Foreword, A Political Court*, 119 HARV. L. REV. 32, 40 (2005) (“But the Supreme Court when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature’s. It cannot abdicate that power, for there is nothing on which to draw to decide constitutional cases of any novelty other than discretionary judgment.”).

15. PLATO, REPUBLIC 193, 197 (G.M.A. Grube trans., 2d ed. Hackett Publishing Co. 1992).

16. U.S. CONST. amend. XIV, §§ 1–2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

tion. No one really believes that the Court decides a myriad of complex and difficult issues of social policy by studying those four words. What, for example, was Justice Blackmun interpreting in *Roe v. Wade*,¹⁷ “due” or “process”?

The Court has purported to find in those two pairs of words justification for its seemingly unlimited policymaking power. The words are said to be “open-ended,”¹⁸ which is true, but only because the Court made them so by depriving them of their intended meaning or any specific meaning. The oxymoronic doctrine of “substantive due process” was invented to convert the Due Process Clause from a guarantee of procedural regularity to a prohibition of any limitation of liberty—that is, any legislative policy choice—the Court considers “unreasonable.”¹⁹ The Court similarly converted the Equal Protection Clause from a requirement of equal law enforcement into a prohibition of any classification or discrimination—that is, again, any legislative policy choice—the Court considers “unreasonable.”

The result is to transform the two clauses from meaningful restrictions to simple transfers of policymaking power from legislators to judges. The Court thus granted itself the power to remove any policy issue it chose from the ordinary political process and assign it to itself for final decision. No debate about methods of interpretation can change the fact that the Due Process and Equal Protection Clauses were not meant to be what the Court has made of them—*carte blanche* grants of judicial policymaking power. If the Fourteenth Amendment could be restored to its original meaning as a federal guarantee of basic civil rights, the result would be to greatly reduce the scope of constitutional law and reinstate the constitutional system of representative self-government in a federalist system created by the Constitution.

If further proof of the irrelevance of the Constitution to constitutional law should be needed, it can be shown scientifically. A scientist can determine whether it is chemical X that causes a certain solution to turn blue by simply compounding the solution

17. 410 U.S. 113, 164–65 (1973).

18. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

19. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 873, 901 (1992) (giving states freedom “to enact laws to provide a *reasonable* framework for a woman to make a decision that has such profound and lasting meaning,” while reserving the right to determine for itself what is reasonable by invalidating portions of the state statute under review as placing “an undue burden on a woman’s choice”) (emphasis added).

again without chemical X. If it still turns blue, he can conclude that chemical X is not the operative agent. Though controlled experiments are rare in the social sciences and law, one has, in effect, occurred on the issue of the constitutionality of school racial segregation. Everyone knows, or thinks they know, that the Equal Protection Clause was the basis for the Court's holding that school racial segregation was unconstitutional in *Brown v. Board of Education*.²⁰ What if it were possible to test that hypothesis by running the case again without the Equal Protection Clause?

As if to serve the cause of science, this is what in effect happened when on the same day as *Brown*, the Court also decided *Bolling v. Sharpe*,²¹ involving school segregation in the District of Columbia, to which the Equal Protection Clause does not apply.²² That fact had no effect on the result. School segregation was also held unconstitutional—the liquid still turned blue!—in the District of Columbia,²³ only now, the Court told us, because it is prohibited by the Due Process Clause of the Fifth Amendment²⁴—which would seem to make the Equal Protection Clause of the Fourteenth Amendment, which also has a Due Process Clause, irrelevant. We must be willing to believe that a provision adopted in 1791 as part of a Constitution that recognized and protected slavery also prohibits racially segregated public schools.²⁵ The Due Process Clause just happened to be, the Court apparently thought, the best constitutional provision available. If Due Process was not available, the Court simply would have had to resort to some other instrument—perhaps the prohibition in Article I, Section 9, against discrimination among sea ports²⁶—because reaching any other result, Chief Justice Earl Warren said for a

20. 347 U.S. 483, 493 (1954).

21. 347 U.S. 497 (1954).

22. *Id.* at 499.

23. *Id.* at 500.

24. *Id.* at 499 (“The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.”).

25. U.S. CONST. art. I, § 2, cl. 3; *id.* art. IV, § 2, cl. 3.

26. U.S. CONST. art. I, § 9, cl. 6 (“No preference shall be given by any regulation of Commerce or Revenue to the Ports of one state over those of another.”).

unanimous Court, was “unthinkable.”²⁷ Reasoning that would be rejected in a discipline with the intellectual integrity of, for example, astrology, is perfectly acceptable, the *Bolling* opinion illustrated, in the make-believe world of constitutional law.²⁸

The real issue is not how the Court should interpret the Constitution in deciding constitutional challenges to policy choices, but whether it should confine itself or be confined to interpreting the Constitution rather than declaring laws “unconstitutional” on some nonconstitutional ground, such as natural law, neutral principles, moral philosophy, or tradition. Although many of our most brilliant legal minds have devoted themselves to showing that decisions made on these “nonoriginalist” grounds are based on something other than the Justices’ policy preferences,²⁹ the reality, as John Hart Ely eloquently pointed out,³⁰ is otherwise. The inescapable consequence is to convert constitutionalism into a cover for rule by judges. The supposed debate about methods of interpretation is, therefore, in reality a debate about who should govern.

Justice Hugo Black, in *Griswold v. Connecticut*,³¹ strongly objected to the Court reading the Due Process Clause of the Fourteenth Amendment to provide a warrant to invalidate any law a majority of the Justices considers “unreasonable.” Justice Black clearly recognized that such a standard converted the amendment into a “natural Justice” provision that deprived it of specific meaning.³²

27. The Court found it “unthinkable that the same Constitution would impose a lesser duty on the Federal Government” than *Brown* found it imposed on the states, *Bolling*, 347 U.S. at 500, even though several constitutional provisions impose different duties on the state and federal governments. The Bill of Rights, for example, originally applied only to the federal government, see *Barron v. Mayor and City Council of Balt.*, 32 U.S. (7 Pet.) 243, 250 (1833), and the Contracts Clause, Article I, Section 10, Clause 1, applies only to the states. The result in *Bolling* was “gibberish both syntactically and historically.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 32 (1980).

28. If the Court had the least interest in maintaining the pretense of the relevance of the Constitution to constitutional law, *Bolling* could have provided an excellent, costless opportunity. It was indeed “unthinkable” that segregation would continue in the District of Columbia, *Bolling*, 347 U.S. at 500, not because of the Constitution, but because Congress would have ended it if the Court would have let it have the honor of doing so. Congress ended segregation at once, without needing or wanting the permission for delay (“all deliberate speed”) the Court granted in *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 301 (1955).

29. See RONALD DWORKIN, *LAW’S EMPIRE* 88 (1986).

30. ELY, *supra* note 27, at 15; Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

31. 381 U.S. 479 (Black, J., dissenting).

32. *Id.* at 511–12.

Interpreting a written Constitution is one thing, he correctly insisted; declaring laws unconstitutional because they are deemed unfair, unjust, or unreasonable is quite another and is simply an exercise of policy-making power.³³ His solution, unfortunately, was not to urge that the Fourteenth Amendment be limited to its purpose of guaranteeing basic civil rights, but to argue, much more ambitiously and questionably, on the basis of his historical research, that it was meant to “incorporate” the Bill of Rights, making its restrictions applicable to the states as well as to the federal government.³⁴ His historical argument for incorporation is untenable,³⁵ and the Court has rejected it, but only to adopt instead the even more untenable doctrine of “selective incorporation.”³⁶ This doctrine suggests that the Court apply only selected restrictions of the Bill of Rights (now nearly all of them) to the states exactly as they would be applied to the federal government.³⁷

Besides being historically dubious at best, “incorporation” is not a plausible reading of the Fourteenth Amendment for several

33. *See id.*

34. *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (“My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.”) (citations omitted).

35. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding?*, 2 STAN. L. REV. 5, 78–82, 139 (1949). *But see* MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 99–105 (1986); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1238–43 (1992).

36. *See* *Ohio ex. rel. Eaton v. Price*, 364 U.S. 263, 274–76 (1960) (Brennan, J., concurring).

37. The Court arrived at this position by a process of characteristically illogical reasoning in *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Court took as its major premise that the Due Process Clause of the Fourteenth Amendment makes applicable to the states those procedural protections of the Bill of Rights that are “fundamental to the American scheme of justice” and its minor premise that a jury trial for nonpetty criminal cases is fundamental. *Id.* at 149. Instead of then reaching the logical conclusion that a jury trial is therefore required in state criminal cases, the Court reached the conclusion that a jury trial in the manner specified by the Sixth Amendment is required despite the fact that not all Sixth Amendment requirements, such as number of persons and unanimity, are necessarily fundamental. *Id.* at 157–58.

reasons,³⁸ including that no state would knowingly impose on itself Bill of Rights restrictions as interpreted by the Supreme Court. Incorporation might, however, be thought to at least have the advantage that Justice Black claimed for it of confining the Court's rulings of unconstitutionality to "specific" constitutional provisions.³⁹ That, however, has turned out not to be the case. Various provisions of the Bill of Rights clearly preclude certain policy choices, but they are choices that American legislators—at least as committed to traditional American values as judges—are rarely tempted to make. Rather than simply enforcing these very rarely violated restrictions, the Court has used the Bill of Rights provisions as springboards for the creation of new and more expansive rights. The result is that the Court's rulings of unconstitutionality, supposedly based on specific provisions of the Bill of Rights, are not significantly different from the Court's substantive due process decisions—products of the Justices' policy preferences⁴⁰—Justice Black's insistence to the contrary notwithstanding.

The "freedom of speech" guarantee of the First Amendment, for example, far from being "specific," cannot mean what it says unless it is interpreted very narrowly—for which there is historical warrant—to prohibit only prior restraint on publication.⁴¹ Government must be able to and does abridge the freedom of speech in many ways (perjury, solicitation to crime, false advertising, agreements in restraint of trade, and so on).⁴² The result is that the Court's freedom of speech decisions do

38. Including that it would impose on the states the Seventh Amendment requirement of a jury trial in all civil cases involving more than twenty dollars, which even Justice Black would make an exception. See *Adamson*, 332 U.S. at 62–64 (Frankfurter, J., concurring) (arguing that incorporation is inconsistent with precedent and the understanding of the Fourteenth Amendment's text that prevailed at the time of its ratification by the States).

39. See *Adamson*, 332 U.S. at 75 (Black, J., dissenting).

40. See Yale Kamisar, *How Much Does It Really Matter Whether Courts Work Within the "Clearly Marked" Provisions of the Bill of Rights or With the "Generalities" of the Fourteenth Amendment?*, 18 J. CONTEMP. LEGAL ISSUES 513, 516 (2009).

41. See LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 261 (1960) (citing 8 ANNALS OF CONG. 2160 (1798)); see also Leonard W. Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767, 791 (1985) (stating that there are many sources "acknowledging that freedom of the press meant only no prior restraints").

42. See, e.g., 18 U.S.C. § 1621 (2006) (prohibiting perjury when an oath is sworn); 18 U.S.C. § 373 (2006) (prohibiting solicitation to commit violent crime); 15 U.S.C. § 52 (2006) (prohibiting false advertising); 15 U.S.C. § 1 (2006) (prohibiting agreements in restraint of trade).

not involve constitutional interpretation any more—or judicial policymaking any less—than its due process and equal protection decisions. It is not the First Amendment, even if “incorporated” in the Fourteenth, that has deprived the states of, for example, the power to effectively restrict pornography; determine the law of libel; maintain peace, quiet, and order in public places; prohibit nude dancing, flag burning, provocative arm-bands on children in schoolrooms, or parading vulgarities through a courthouse.⁴³ It is only because of Justice Kennedy’s vote, that the First Amendment prohibits the federal government from limiting political speech by a corporation.⁴⁴

Similarly, it was not the Establishment Clause of the First Amendment that prohibited the states from providing maps and magazines to parochial schools but permitted them to provide books.⁴⁵ Indeed, the rulings in which the Court has held unconstitutional state laws on religion are not only without basis in the Constitution like most rulings of unconstitutionality, but are in defiance of the Constitution.⁴⁶ The decisions base the denial of state power to regulate on matters of religion on constitutional provisions—the religion clauses of the First Amendment—that were meant to preclude the possibility of that denial.⁴⁷

The rest of the Bill of Rights is mostly concerned with protection of the criminally accused.⁴⁸ The Court’s criminal procedure decisions do not typically, if ever, involve interpretation and enforcement of these provisions, but rather the creation of new

43. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (flag burning); *Schad v. Borough of Mount Ephraim* 452 U.S. 61, 66 (1981) (nude dancing); *Miller v. California*, 413 U.S. 15, 23–24 (1973) (pornography); *Cohen v. California*, 403 U.S. 15, 26 (1971) (vulgarity); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (arm-bands); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (libel); *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963) (demonstrations that disturb public order).

44. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (holding that the First Amendment does not permit the federal government to limit a corporation’s political speech on the grounds that the speaker is a corporation and not a person).

45. *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (finding direct aid in the form of maps and magazines given to church-related schools to constitute “direct and substantial advancement of religious activity”), *overruled by Mitchell v. Helms*, 530 U.S. 793, 808 (2000); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238 (1968) (finding compulsory loan by local school boards of textbooks to children, even those attending religious schools, to not violate the First or Fourteenth Amendment).

46. See ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 144 (1982).

47. *Id.* at 14–15.

48. See U.S. CONST. amends. IV–VI, VIII.

and additional protections. The Warren Court, in particular, which made most of the Bill of Rights's criminal procedure provisions applicable to the states, seemed to base its decisions on a deep skepticism about the value of the criminal law and a belief that to create new impediments to its effective enforcement is to serve the cause of equality and justice.⁴⁹

The Fifth Amendment, for example, provides that no person shall be "twice put in jeopardy . . . for the same offense."⁵⁰ It is clear on the basis of common law precedent that this does not mean that a defendant cannot be retried after, for example, a hung jury, the incapacitation of jurors, or a reversal of his conviction on appeal.⁵¹ It is equally clear on the same basis that the Fifth Amendment does not preclude the state from appealing an acquittal.⁵² Such was the opinion of Justice Holmes⁵³ and the holding of a unanimous Court in an opinion by Justice Cardozo.⁵⁴ That decision was reversed by the Warren Court in an opinion by Justice Thurgood Marshall,⁵⁵ not because the Court adopted a different (and mistaken) "interpretation" of the Double Jeopardy Clause, but only because of the Warren Court's different attitude toward enforcement of criminal law.

It would be very difficult to find a ruling of unconstitutionality by the Court that realistically turns on constitutional interpreta-

49. See, e.g., Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1037 (1977) (arguing that the Warren Court's "innovations" in interpreting the Fourteenth Amendment's Due Process and Equal Protection Clauses as applied to the criminal procedure provisions in the Bill of Rights were motivated by a desire to achieve equality); Michael B. de Leeuw et al., *Ready, Aim, Fire? District of Columbia v. Heller and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 173 (2009) (arguing that the Warren Court's criminal procedure "innovations" were premised on skepticism of local police practices).

50. U.S. CONST. amend. V.

51. E.g., *Richardson v. United States*, 468 U.S. 317, 325–26 (1984) (hung jury); *United States v. Tateo*, 377 U.S. 463, 465 (1964) (conviction reversed on appeal); *United States v. Holley*, 986 F.2d 100, 103–04 (5th Cir. 1993) (juror incapacitation).

52. See *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (finding that the Fifth Amendment's double jeopardy prohibition is not violated by a state's appeal where a trial leading to acquittal was possessed of "substantial legal error"), *overruled by Benton v. Maryland*, 395 U.S. 784, 794 (1969).

53. See *Kepner v. United States*, 195 U.S. 100, 135–36 (1904) (Holmes, J., dissenting) (arguing that allowing states to appeal acquittals of criminal defendants does not violate the Fifth Amendment's double jeopardy prohibition).

54. See *Palko*, 302 U.S. at 328 (ruling that the Fourteenth Amendment does not forbid a state from appealing an acquittal in a criminal case where the original trial was tainted by legal error).

55. *Benton*, 395 U.S. at 794.

tion. Virginia did not lose the right to operate an all-male military school⁵⁶ because of Justice Ginsburg's reading of the Equal Protection Clause. The people of Colorado did not lose the right to deny special protection to homosexuals, or the people of Texas to prohibit sodomy, because Justice Kennedy had new insights into the meaning of the Equal Protection and Due Process Clauses.⁵⁷

But how about *District of Columbia v. Heller*,⁵⁸ the gun control case? Both Justice Scalia, for the five-member majority that invalidated the law, and Justice Stevens, for the four dissenters, engaged in extensive historical research on the issue of whether the Second Amendment guarantees an individual right to possess firearms.⁵⁹ Each Justice purported to interpret the Second Amendment in accordance with his research, but the fact that they arrived at opposite conclusions seems to indicate that the unconstitutionality of the District of Columbia's gun control law was unclear. It also happened that each side in *Heller* adopted the interpretation of the Second Amendment that was in accord with its apparent policy preference on the issue, resulting in the usual split between conservatives and liberals.⁶⁰ And that result, of course, happens in almost every controversial case: The same five-to-four split in "interpretation" consistent with ideological preferences regardless of the issue.

Even the most credulous observer cannot avoid concluding that this consistency is not a coincidence and that ideological differences, not different methods of interpretation, provide the explanation. In the early part of the twentieth century, the hard-headed and clear-eyed Justice Holmes, the leader of the legal realists, insisted that it was a myth that judges decided controversial cases by "finding" rather than making the law.⁶¹ That contention was a step in the direction of a more mature

56. *United States v. Virginia*, 518 U.S. 515, 557 (1996).

57. *See* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding Texas's anti-sodomy law to violate the Due Process Clause); *see also* *Romer v. Evans*, 517 U.S. 620, 635 (1996) (finding Amendments to the Colorado Constitution, which preclude any special protection for persons based on sexuality, to violate the Equal Protection Clause).

58. 128 S. Ct. 2783 (2008).

59. *Id.* at 2790–97; *id.* at 2827–31 (Stevens, J., dissenting).

60. *Id.* at 2790–97; *id.* at 2827–31 (Stevens, J., dissenting).

61. *See, e.g.,* *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 *DUKE L.J.* 449, 504 (1994).

and honest legal system. Explicit recognition that the Court's rulings of unconstitutionality are pure policy judgments, not the result of different methods of constitutional interpretation, would be a similar and even more significant step.

No one openly argues that leaving the final decision on basic issues of social policy to the majority vote of nine electorally unaccountable lawyers is an improvement on leaving it to elected legislators, but such is the system of government that has developed in this country. It is similar in this respect to that of Iran. There—as here—people vote and elect legislators who then pass laws, but the Guardian Council, selected by the Grand Ayatollah, makes the final decision about which laws go into effect,⁶² essentially performing the function that Justice Kennedy performs in our system. A major difference is that the Ayatollah's power comes from his recognized theological authority, whereas Justice Kennedy, lacking such or any other extra-judicial claim to authority, labors under the great disadvantage of having to pretend to be interpreting the Constitution, compounding the frustration of democracy with a requirement of deceit.

Our need is not to debate methods of interpreting the Constitution, because very rarely, if ever, does a ruling of unconstitutionality turn on an issue of interpretation. The problem is not that the Court misinterprets the Constitution, but that it treats it, especially the Due Process and Equal Protection Clauses, as if it granted the Court unlimited policy-making power, creating a system of government, contrary to the Constitution and to political prudence, of rule by unelected, life-tenured judges. Our need, therefore, is to inform the American people that constitutional law is a ruse concealing a system of government by judges that deprives them of their most important constitutional right—the right to self-government.

On the issue of originalism, it is not necessary or useful to say much more than that there is a difference between reading and

62. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], Art. 91, 94; Nazila Fathi, *One-Third of Iranian Parliament Quits in Protest*, N.Y. TIMES, Feb. 2, 2004, at A1 (explaining that members of the Guardian Council are “handpicked” by the Ayatollah).

writing, between an attempt to communicate with words and an attempt to receive the communication. There is only one method of interpretation: attempting to understand the author's communication. Because it is the ratifiers who gave the Constitution its authority, they are its effective authors, and it should mean to us what, as far as we can tell, it meant to them. We can usually determine this meaning simply by assuming that the words were used and meant to be understood in their ordinary sense. If the Constitution does not mean what it was intended or understood to mean, it tends to mean nothing and, therefore, almost anything that the interpreter wishes. Rather than acting as a limitation on government power, it thereby transfers that power to the final "interpreter," the Supreme Court.

Critics make two basic objections to this understanding of constitutional interpretation. The first is that we may not know the ratifiers' understanding of the Constitution's application to a contemporary issue or, more realistically, that they probably never considered the issue.⁶³ This contention is true, but the response should be that if a judge does not know that the Constitution was understood to preclude a particular policy choice, his conclusion must be that the choice is not constitutionally precluded. The judge's conclusion must not be that he can therefore invalidate as "unconstitutional" policy choices with which he disagrees on some nonconstitutional ground. The second objection is to ask why, even if we do know that the ratifiers understood the Constitution to preclude some policy choice, we should consider ourselves bound by it. Such an approach is both undemocratic and, as Jefferson pointed out, tantamount to being ruled by the dead hand of the past.⁶⁴ This argument, however, is not an objection to originalism, but to constitutionalism. It is a good reason to disfavor constitutional restrictions (why should it matter, for example, where President Obama was born?) and to avoid creating new ones or expanding those that we have. It is

63. See Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 14–15 (1986).

64. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON: 27 MARCH 1789 to 30 NOVEMBER 1789*, at 392 (Julian P. Boyd ed., 1958) (The "dead hand" maxim grew from Jefferson's famous contention "That the earth belongs in usufruct to the living: that the dead have neither powers nor rights over it.").

not a reason to allow judicial invalidation of policy choices as “unconstitutional” on nonconstitutional grounds.

Finally, I have answered the assigned question: Does originalism always provide the answer? The answer is “yes,” it does always provide the answer. The answer it provides is almost always “no” — the challenged law is not unconstitutional. The Constitution very wisely precludes very few policy choices and even fewer, as noted above, that American legislators might be tempted to make. The real objection to originalism, as Justice Brennan was candid enough to make clear, is not that it does not answer constitutional questions, but that it gives the wrong answer — “not unconstitutional” — leaving judges with too little of a policy-making role.⁶⁵ The nightmare of the liberal American intellectual, the typical elite academic, is that policymaking might be allowed to fall into the hands of the American people, who favor such policies as prayer in public schools,⁶⁶ capital punishment,⁶⁷ effective enforcement of the criminal law,⁶⁸ suppression of pornography,⁶⁹ and assignment of children to neighborhood schools.⁷⁰ The essential function of constitutional law and judicial review for the past half century has been to prevent the implementation of such policies by keeping policy-making power out of the hands of the American people, or their chosen representatives, and in the control of a cultural elite. “Faith in democracy,” Justice Brennan was candid enough to

65. See Brennan, *supra* note 63, at 15 (discussing how upholding only those constitutional claims that were within the specific intent of the Framers establishes a presumption against claims of constitutional right).

66. See John W. Fountain, *Prayer Warriors Fight Church-State Division*, N.Y. TIMES, Nov. 18, 2001, at A20 (anecdotally illustrating support for prayer in public schools and noting that several states have adopted “moment of silence” statutes allowing for silent prayer).

67. See, e.g., Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, 6 PIERCE L. REV. 387, 428 (2008) (citing statistics demonstrating long-term support for capital punishment among the American public in cases where criminal defendants are convicted of murder); Brenda Goodman, *North Carolina Man is 1,000th Person Executed Since 1976*, N.Y. TIMES, Dec. 3, 2005, at A17 (citing similar statistics).

68. See Hal Espen, *Higher and Higher*, N.Y. TIMES, June 6, 2004, § 7, at 8 (book review) (discussing the “war on drugs” and noting a majority of Americans favor stricter drug laws).

69. See Daniel Goleman, *New Studies Examine Sexual Guilt*, N.Y. TIMES, Aug. 20, 1985, at C1 (citing national surveys finding increased support for suppression of pornography).

70. See *North Carolina: Raleigh Changes Busing Policy*, N.Y. TIMES, Mar. 24, 2010, at A16 (discussing a recent example of a school board implementing a neighborhood school assignment program).

make this view explicit, "is one thing, blind faith quite another."⁷¹ "Unabashed enshrinement of majority will," he warned, could "permit the imposition of a social caste system or wholesale confiscation of property."⁷² We should be grateful to the Court therefore, Justice Brennan believed, for protecting us from majority rule.

When asked what form of government the Constitutional Convention created, Benjamin Franklin replied, "A republic . . . if you can keep it."⁷³ If he were alive today, we would have to admit, to our shame, that we have not kept it and that the most important and influential official in terms of domestic social policy during the last half of the twentieth century was an unelected, electorally unremovable official, Justice Brennan, whom most Americans could not identify. His belief, that the people cannot be trusted to govern themselves without the supervision and restraint of their presumed betters, has prevailed in direct contradiction to the belief on which the country was founded: a revolutionary experiment in popular self-government.⁷⁴

71. Brennan, *supra* note 63, at 16.

72. *Id.*

73. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., 1911).

74. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1439 (1987) (drawing on historical analysis to argue that popular sovereignty informed "every article of the Federalist Constitution, from the Preamble to Article VII").