In 1987 the American public was witness to extended coverage, on national television, of a seminar on appropriate methods of constitutional interpretation. The leading participant in that seminar was, of course, Judge Robert H. Bork, whose nomination to the Supreme Court was then the subject of hearings conducted by the Senate Judiciary Committee. With eloquence, passion, and considerable erudition, Bork espoused the view that the only legitimate interpretive posture for judges is a search for the original intention of the constitutional draftsmen, as expressed in the language of the text. Any other approach to interpreting the document, he contended, casts judges in the role of lawmaker rather than that of neutral arbiter. Bork was particularly offended by the Supreme Court’s recognition of certain individual autonomy interests as constitutionally protected against regulation by the democratically chosen branches of our federal and state governments.

Other witnesses who came before the Committee, and some of the Senators themselves, with passion equal to the nominee’s, though occasionally less erudition, insisted that Bork’s original intent version of the judiciary’s role in constitutional adjudication was deeply flawed. For these participants in the great seminar, the Constitution could have no static meaning. It could only be read...
as Justice William J. Brennan read it, in a manner "sensitive to the balance of reason and passion that marks a given age," and with an awareness of the particular balance we strike "as Twentieth Century Americans."

The positions on view in the Bork hearings represent extremes in the range of conceptions of appropriate Supreme Court jurisprudence. The outcome of their clash in 1987 was a defeat, if perhaps a temporary one, for the proponents of intentionalism. When the discussion renewed in hearings on the confirmation of Justice Anthony J. Kennedy, some of the passion had been spent, and the jurisprudential extremes were less clearly articulated. By the time of Justice Souter's confirmation hearings, when a different President still spoke of the illegitimacy of any interpretive posture which would permit judges to make law binding the other branches of government, the nominee was careful to avoid espousing any extreme position.

One conclusion that might be drawn from the contrasting outcomes of the Bork and Souter confirmation hearings is that the issues raised by pleas for a constitutional jurisprudence of original intention are no longer of great moment. The Senate's resounding rejection of Judge Bork's nomination might be considered definitive, a once-and-for-all repudiation of intentionalism by the elected

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6 See Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the U.S.: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 139 (1987) (statement of then-Judge Kennedy) ("[W]e can follow the intention of the framers in a different sense. They did do something. They made certain public acts. They wrote. They used particular words. They wanted those words to be followed.").

7 See, e.g., President's Remarks Announcing the Nomination of David H. Souter to Be an Associate Justice of the Supreme Court of the United States and a Question-and-Answer Session with Reporters, 26 WKLY. COMP. PRES. DOC. 1143, 1143-44 (July 23, 1990) (statement of President Bush praising then-Judge Souter for "recogniz[ing] the proper role of judges in upholding the democratic choices of the people through their elected representatives with constitutional constraints").

8 Indeed, he was at some pains to avoid taking any position at all when he could avoid doing so. See, e.g., Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the U.S.: Hearings Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 212 (1990) (statement of then-Judge Souter) ("I think to answer that question [regarding the morality of abortion] and to get into a matter of personal morality of mine, when it would not affect my judgment, would go far to dispel the promise of impartiality in approaching the issue, if it comes before me.").
body entrusted with the authority to establish the prerequisites for admission to the Supreme Court. So considered, the Senate's action shows a surprisingly unenlightened sense of self-interest. The most frequently heard objection to interpretive approaches that permit judges to look beyond original intention is the undemocratic character of judicial review, the way it frustrates expression of the will of the people through their elected representatives. Why, then, would (elected) Senators choose to reject a forceful defender of a constitutional doctrine devoted to maximizing the power of elected office holders? Our assumptions about the heady influence of power, and our knowledge of the power that comes with national office in this country, lead us to expect that these happy few will not willingly surrender what they have won. Moreover, the relationship between the Supreme Court and Congress over the years has often been tense: one need only recall legislative reactions

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9 See, e.g., Alexander M. Bickel, The Least Dangerous Branch 16-17 (1962) ("[T]he reality [is] that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."); John H. Ely, Democracy and Distrust 4 (1980) (noting the difficulties one encounters "in trying to reconcile [judicial review] with the underlying democratic theory of our government"); Robert H. Bork, Tradition and Morality in Constitutional Law, in American Enterprise Inst. for Pub. Policy Research, The Francis Boyer Lectures on Public Policy 9, 11 (1984) ("Constitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice..."). In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge."); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 2-4 (1971) (asserting as "a 'given' in our society" that "in wide areas of life majorities are entitled to rule for no better reason than that they are majorities"); Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), in Federalist Society, The Great Debate: Interpreting Our Written Constitution 1, 9-10 (1986) ("This belief in a Jurisprudence of Original Intention also reflects a deeply rooted commitment to the idea of democracy."); Edwin Meese III, Address—Construing the Constitution, 19 U.C. Davis L. Rev. 22, 29 (1985) (claiming that a jurisprudence of original intention "is very much concerned with process, and... seeks to depoliticize the law"); Richard A. Posner, The Constitution as an Economic Document, 56 Geo. Wash. L. Rev. 4, 21-22 (1987) ("any form of aggressive constitutionalism... diminishes the role of democracy"); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 149-52 (1893) (noting that when revising legislative enactments, courts intrude into the "political conduct of government").

10 As Woodrow Wilson observed some time ago, "[t]he natural, the inevitable tendency of every system of self-government like our own and the British is to exalt the representative body, the people's parliament, to a position of absolute supremacy." Woodrow Wilson, Congressional Government: A Study in American Politics 203 (World Publishing ed. 1983) (1885).
to some of the criminal procedure decisions of the Warren Court,\(^1\) and the recurrent, though largely unsuccessful, efforts in Congress to impose various limitations on the jurisdiction and remedial authority of the federal courts.\(^2\) It would indeed be surprising if the Senate were to decide to resolve such long-standing turf battles by abandoning the field to the judiciary.

But there are other reasons for thinking that the pronouncement of the Senate that rejected Bork was not the last word on the place of original intention in our constitutional jurisprudence. It is not cynical to observe that, had the Senate majority been of the same political party as the President, the great seminar on interpretivism would never even have occurred. It is, perhaps, cynical (but no less accurate) to suggest that behind the positions taken by Senators on overarching constitutional principles, there lurked concerns over constituents' views respecting the outcomes, however theoretically justified, of cases involving particular issues. The issues that next time arouse the interests of voters, and thus of Senators, may be something other than those of privacy and


\(^2\) Among the various proposals of this sort, none of which was enacted, were the following: S. 951, 97th Cong., 2d Sess. (1981), which proposed that federal courts be prohibited from issuing desegregation orders involving busing beyond a neighborhood school; H.R. 867, 97th Cong., 1st Sess. (1981), which proposed the elimination of federal court jurisdiction in abortion cases; H.R. 326, 97th Cong., 1st Sess. (1981), which proposed the elimination of federal court jurisdiction in public school prayer cases; H.R. 14,553, 94th Cong., 2d Sess. (1976), which proposed limitations on the allowable scope of busing orders (see Arthur J. Goldberg, The Administration's Anti-Busing Proposals—Politics Makes Bad Law, 67 NW. U. L. REV. 519 (1972); Note, The Nixon Busing Bills and Congressional Power, 81 YALE L.J. 1542 (1972)); and H.R. 11,926, 88th Cong., 2d Sess. (1964), which proposed the elimination of federal court jurisdiction over state legislative apportionment cases (see Robert B. McKay, Court, Congress, and Reapportionment, 63 MICH. L. REV. 255, 268 (1964)).
autonomy in matters of sex and reproduction which were the principal focus of attention in the Bork, Kennedy, and Souter confirmation hearings. What the opinion polls show to be the prevailing matters of public concern may well be dispositive of any future Senate's attitude regarding judicial competence to resolve the constitutional questions involved in such matters. Interpretivism may, at such a time, prove more popular with Senators than it did in 1987.13

Despite its apparent decisiveness for the strategy and tactics of the nomination process—a legacy of nominees who have left no such conspicuous pre-nomination paper trail as Bork's, and have come before the Senate anxious to avoid articulating anything like a philosophy of constitutional interpretation—the great seminar on methods of constitutional adjudication was, as to the merits of the case, inconclusive. That is not to say that it was unimportant: quite the contrary, it marked the continuation, in a most public arena, of contention over the proper interpretive stance of the Article III judiciary in constitutional cases, a conflict which has raged unceasingly since Marbury v. Madison14 was decided in 1803. This conflict has, moreover, commanded more serious academic attention in recent years than at any time in the past.15 This level of scholarly

13 The lecture from which this paper is adapted was delivered prior to the nomination of Clarence Thomas to be an Associate Justice. The author was a witness at the hearings on his confirmation. The subject matter of those hearings and the manner in which they were conducted will undoubtedly be the subject of extensive commentary, most of it, one may anticipate, critical. For present purposes, it need only be observed that nothing in this latest round of confirmation hearings suggested the need for any change in the general evaluation offered above.
14 5 U.S. (1 Cranch) 137 (1803).

A far-from-complete list of the extensive law review commentary includes Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013 (1984); Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063 (1981); Paul Brest, The
interest suggests that the debate over intentionalism will therefore continue. So long as it does, it will remain politically and intellectually significant because it calls into question, and elicits defenses of, the legitimacy of our most symbolically important political institution. An independent judiciary exercising the power of judicial review has been the unique American contribution to political science—to political philosophy, if you prefer. Thus, it is worthwhile reflecting upon the challenges raised by those who espouse intentionalism as the only true creed.

I. THE CONSTITUTION AS LAW: LESSONS OF POSITIVISM

Intentionalism is grounded in a positivist or authoritative jurisprudential perspective on the nature and sources of law. For the positivist, all law is no more than the expressed will of some authoritative sovereign, and nothing is law that does not fit this definition. Judges, on this view, are no more than spokespersons for lawmakers external to themselves.  

The element of positivism in intentionalism is evident in Bork's presentation of the role of the judge:

If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislatures and executives. There is no other sense in which the Constitution can be what article VI proclaims it to be: "Law."  

What does it mean to say that a judge is bound by law? It means he is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment.

The positivist jurisprudence espoused by Bork has the great virtue of bringing to philosophical discussions a needed splash of the cold water of reality. By reminding us that there is an element of will in law, it calls our attention to the fact that one cannot divorce law from effective sanction, and that sanction cannot be effective without a capacity and a willingness on the part of the sovereign to use its authority to impose it. The authority behind

16 Ezra Thayer gave us a useful description of positivism:
[For the positivist, a] law . . . is a general command issued by the sovereign power in any state to political inferiors, and enforced by a sanction. No rule, whatever its nature, is properly called a law if it lacks any of these essential features. The type of law in this sense is written statute law, the express command of the sovereign. A body of customary rules, such as the common law, is brought within the definition by the maxim that what the sovereign permits he commands. The judge who administers the common law is regarded as the sovereign's agent, with a delegated power of oblique legislation.


18 Id. at 5.

19 The term "sovereign" as used here means a political organization having the
the law, however, is that of the repository of contemporary sovereignty; in our system of government, this refers to the collective voice of those temporary agents whom the people periodically designate as the repositories of legislative authority. If those agents are dissatisfied with a common law rule, they will displace it by statute; no longer enforced, such a rule is no longer law. If those agents are dissatisfied with a judicial interpretation of a statute, they will change it by amendment; the old understanding loses all authority, displaced by a new one. On this view, law does indeed represent the will of an authority external to the judges, to which the judge should defer precisely because it is authoritative.

Recognizing the claims of positivism does not necessarily commit one to an intentionalist theory of interpretation. But such an approach does sit comfortably with our American version of democratic theory. Despite renewed scholarly interest in Aristotelian republican theory, which emphasizes individual participation in self-government, our system is not so much republican as it is representative. Its one essential feature is the periodicity of representation: legislators, and the chief executives who participate in the legislative process by virtue of their veto powers, are designated as the agents of the sovereign people only for defined terms, and lack power to bind their successors.

This is a feature of all our written constitutions, state and federal, and we would regard as illegitimate an effort by incumbent legislators to extend their own terms or to entrench against their successors their own policy choices. This basic principle of American government strongly supports, I suggest, the correctness of an original intentionalist stance with respect to the interpretation of statutes. Such a

ability to maintain a practical monopoly in the use of force to effect sanctions in a defined geographic area.

20 For leading examples, see Frank Michelman, Law's Republic, 97 YALE L.J. 1493 (1988), and Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539 (1988).


22 Discernment of the original intention even of legislators, however, presents problems as well. See RONALD DWORKIN, LAW'S EMPIRE 313-54 (1986) (noting the difficulty later interpreters face in determining the intent, premises, and purposes of legislators with respect to the statutes they enact); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 538-40 (1947) (arguing that judges ought not to be concerned with "delv[ing] into the mind of legislators or their draftsmen, or committee members").
stance acknowledges both the present authority of the representative branches to make rules that bind judges and the authority of their successors in office to change those rules.\(^\text{23}\)

When we consider constitutional law, however, positivism and its original intentionalist corollary contribute to the discussion not a splash of the cold water of reality, but rather, a hot gust of legal fiction. The positivist fiction is that the Founders—meaning either the Constitutional Convention in 1787, or the First Congress which drafted the Bill of Rights, or the Thirty-Ninth Congress which drafted the Fourteenth Amendment, or the state conventions and legislatures which ratified these efforts—were as much the representatives of the sovereign people, and thus have as legitimate a claim to sovereign lawmaking authority, as any temporary incumbents in government. The (equally fictive) intentionalist corollary is that contemporary judges owe the same deference to the intentions of the Founders that they owe to those of contemporary legislators.

Acceptance of this story requires some degree of suspension of critical reasoning, for the indisputable fact remains that in the here-and-now, the Founders’ law cannot be divorced from sanction. The sanction behind constitutional law is not derived from the long-deceased Founders, whose only present power is to intercede for us in heaven. The sanction of constitutional law—and thus the status of the Constitution as law—is entirely dependent upon the will of those who presently embody the sovereign authority of the people: the temporary agents in control of an effective government. That government may choose to enforce the constitution as its law, but this choice is not preordained by virtue of some authority in the Founders to make law binding on future generations. The document provides in Article VI that it is itself “the supreme Law of the Land,”\(^\text{24}\) but it gains no authority as law from these words—rather, it is law only insofar as the present political community is willing to enforce it as such.

The legislators of the founding generation were realistic in this respect when they passed the statute authorizing the federal executive to use armed force to enforce the judgments of federal


\(^{24}\) U.S. Const. art. VI, cl. 2.
they appreciated that the judicial power of the United States to which Article III referred would come to nothing if separated from the power possessed by the entire federal government. Members of the Forty-Fifth Congress, who in 1878 voted to forbid the use of federal troops for ordinary law enforcement purposes, were similarly realistic: they fully appreciated how much harder they were making it for courts to see to it that the Fourteenth Amendment was observed as part of this country's "supreme Law."

Once we recognize that the status of the Constitution as law depends upon the political will of a present political community, we must face the question why that community should so commit itself. It is here, in answering this question by counseling us to embrace the Founders' law simply because it is the Founders' law, that the positivistic intentionalism that Bork and others advance as the only justifiable basis for judicial review loses credibility. The purported authority of the Founders to make laws binding on future generations should be no more convincing to the late twentieth-century American mind than was the divine right of kings to that of the late eighteenth-century. Thinking members of the contemporary political community must know that the traditional ground on which the intergenerational authority of constitutions is placed—that once upon a time our ancestors entered into a social compact on behalf of later generations then only a lustful gleam in their eye—is no more than a rhetorical device either to describe the result, or to provide a framework for thoughtful speculation about the nature of political society. The Founders were not representative in the sense that the President and the Congress are representative. If


27 Rawls, of course, deploys the idea of the social compact in this fashion, using the mechanism of the veil of ignorance to investigate the question of what rights should be considered fundamental. See John Rawls, A Theory of Justice (1971).
positivistic intentionalism is, as its sponsors urge, the only defensible foundation for judicial review of legislation enacted by the elected branches, it is a singularly shaky foundation. If that is all there is, there may be nothing; certainly nothing that can be regarded as an adequate response to Thomas Jefferson's protest against the intergenerational tyranny perpetrated by constitutional permanence.\textsuperscript{28}

Thus, far from legitimating the Supreme Court's exercise of the power of judicial review, positivistic intentionalism, thought through to its conclusions, can in the long run only accomplish the opposite result. We have no difficulty regarding our periodically elected agents as repositories of legitimate law-making authority—they are, after all, chosen by us, the present generation, to act in that capacity. The process by which we elect them is a far-from-perfect method of assuring that all contemporary voices will be heard.\textsuperscript{29} Imperfect as it is, however, the American electoral process does strongly legitimate the regime, and confers on its acts the imprimatur of the people's sovereign authority.

\textsuperscript{28} "[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, 1789, at 395-96 (Julian P. Boyd ed., 1958). Madison's response points out the structural difficulties that would arise from too easy access to constitutional revision—an argument of political expediency rather than Founder's authority. See Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, 1789-1790, at 147-50 (Julian P. Boyd ed., 1961); see also THE FEDERALIST NO. 49, at 313-17 (James Madison) (Clinton Rossiter ed., 1961) (arguing that attempts at constitutional revision would most likely take place at times when "the ordinary diversity of opinions on great national questions" had been stifled by a common danger, would be incapable of providing a check on the popularly elected legislative branch, and would, if resorted to too frequently, "deprive the government of that veneration which time bestows").

\textsuperscript{29} It is generally conceded that incumbency, for example, affords a significant electoral advantage which has the effect of entrenching current officeholders in power, regardless of their party affiliation. As a consequence, "outsiders" have a very difficult time winning elections; their (potentially) distinct points of view will thus tend to be excluded from our system. Dissatisfaction with this state of affairs has produced movements in some quarters to limit the number of terms a member of Congress may serve. See Timothy Egan, Building on Mistrust of Officials, Voters in West Try to Limit Terms, N.Y. TIMES, Sept. 28, 1991, at A1. Of course, other democratic societies—Germany, Ireland, and Israel, for example—insist on proportional representation to ensure that significant minority viewpoints are not wholly excluded from participation in government.
But who elected the Founders? The answer to that question is plain: we did, if anyone did, and each prior generation has before us, and if the Constitution is to remain a form of higher law, each succeeding generation must do so again—for no one else can.

When I say that we elected the Founders, you may ask whether this election is any less fictional than the supposed original social compact which gave the founding generation authority over those to come. A realistic answer to that question is yet another question: how else can we characterize what we have been doing down through the many years since Marbury in refraining from interfering with the Court’s assertion of the power of judicial review? Presumably we need not have been so accommodating: conceding that the multiple supermajorities required to amend the Constitution are a substantial impediment, this mechanism has always been available to the representative branches, state and federal, and could have been brought into play to curb the power of the judiciary at any time. In addition, there is the clear textual commitment of authority to the legislative branch to determine, by its control over the jurisdiction of the Article III courts, what issues those courts may consider. These very real powers have been exercised quite sparingly, however. The fact that our periodically chosen representatives defer to the continued exercise of judicial review stands as an ongoing contemporary election of the Founders as lawgivers—we elect the Founders by endorsing the pronouncements handed down by their present spokespersons, the Supreme Court. The law

30 Cf. supra note 9 and accompanying text (noting the undemocratic character of judicial review).

31 The process has been resorted to for the purpose of overruling a decision of the Supreme Court only four times. The resulting amendments and the decisions they "reversed" are as follows: the Eleventh Amendment (1798) (responding to Chisholm v. Georgia, 2 U.S. 363, 2 Dall. 419 (1793) (broadly interpreting the jurisdiction of federal courts to hear suits brought against the states)); the Fourteenth Amendment (1868) (responding to Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (holding that African-Americans could not be deemed U.S. citizens)); the Sixteenth Amendment (1913) (responding to Farmers’ Loan and Trust Co. v. Pollock, 157 U.S. 429 (1895) (striking down federal tax on income from municipal bonds as an unconstitutional infringement on the states’ power to borrow money)); the Twenty-Sixth Amendment (1971) (responding to Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that Congress had no power to establish a voting age for state and local elections)).

32 See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.”); see also U.S. CONST. art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”))
attributed to the Founders is, after all, only the constitutional law announced by the Court. This process of election-through-endorsement is cumbersome, but not significantly more so than the entire complex system by which we periodically authorize temporary agents to govern us.

The great outpouring of scholarship exploring theories that justify judicial review thus serves the useful purpose of advancing reasons why each succeeding generation should or should not reelect the Court as the voice of the Founders. That scholarship is useful toward this end, however, only to the extent that it is convincing to the contemporary mind. A constitutional order predicated upon our fictive consent to the will of the Founders, which is what positivistic intentionalism amounts to, is not likely to be so. Unless something more is placed on the scale, the Constitution as law must be found wanting. Convincing reasons must be identified if present generations are to be persuaded to

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33 "We are under a constitution, but the constitution is what the judges say it is..." Charles Evans Hughes, Address before the Elmira Chamber of Commerce (May 3, 1907), in Addresses and Papers of Charles Evans Hughes 133, 139 (1908).


35 See Brest, Misconceived Quest, supra note 15, at 225 ("Even if the adopters freely consented to the Constitution...this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind succeeding generations.").
adopt the Court's version of the Founders' law as an expression of the contemporary sovereign will.

A reason sometimes advanced for looking upon the Founders as authoritative lawmakers is that the Constitution was an unusually brilliant product of a particularly virtuous historical moment, a prophetic moment in which inspired people agreed upon an order of things—a constitution—which so completely accords with right that it deserves to be treated as a form of revelation.\(^{36}\) Given such a premise, judges would, or at least should, conform their rulings as nearly as possible to the intention of the prophets. Like the fiction of the forever-binding social compact, however, the fiction of the Founders as prophets requires that we suspend our critical reasoning to too great a degree. Although it is true that the 1787 Constitution was a genuine innovation in the processes of government, it was far more a compromise of what today we would recognize as principle and virtue than an embodiment of either. The federal structure which it entrenched, for example, has occasioned many proud defenses, sometimes on the Aristotelian ground that only small states can act with republican virtue,\(^{37}\) sometimes as an illustration of the Whig principle that self-limiting government serves to protect against tyranny.\(^{38}\) The reality is that

\(^{36}\) In *The Tempting of America*, Bork resorts frequently to religious imagery in support of his intentionalist theses. The Constitution, he says, is "an object of veneration, a sacred text." *Bork*, supra note 17, at 351. The very name of his book evokes the biblical fall of Adam and Eve, an evocation repeated in the first chapter, entitled "Creation and Fall," which commences with a reference to a Supreme Court Justice’s "covetous glances at the apple that would eventually cause the fall." *Id.* at 19. He refers to the Constitution as "[t]he orthodoxy of our civil religion," *id.* at 153, and identifies "[t]he heresy that dislocates it" as "the introduction of the denial that judges are bound by law." *Id.* at 4. He even asks for "devotion to the philosophy of original understanding." *Id.* at 9. Conceding that it may not be feasible to turn back the clock by overruling nonintentionalist precedents, he nonetheless urges that "[t]here are times when we cannot recover the transgressions of the past, when the best we can do is say to the Court, 'Go and sin no more.'" *Id.* at 159. The use of such imagery by constitutional popularists is not unique. *See*, e.g., CATHERINE D. BOWEN, MIRACLE AT PHILADELPHIA at ix (1966) (asserting that the Constitution was a miracle, and that "[e]very miracle has its provenance, every miracle has been prayed for").


\(^{38}\) Madison observed:

The accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary
we have a federalistic structure because one section of the American Empire believed in a forced and the other in a free labor system—the intricacies of that structure were a means of permitting these irreconcilable systems of economic organization to co-exist under the same flag.\textsuperscript{99} Compromises designed to preserve something the present generation universally recognizes as morally reprehensible can hardly be credited by thinking people today as the product of a virtuous prophetic moment.\textsuperscript{40}

One might argue that although the 1787 version of the revelation was incomplete, the Framers were far-sighted enough to provide for its completion and perfection in the post-Civil War amendments. In this version of the prophetic moment as justification for an entrenched constitution, the Founders in the Thirty-Ninth Congress become the perfecters of the revelation. They relate to the Founders in the 1787 Constitutional Convention like

\begin{quote}

to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to everyone, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.
\end{quote}

\textsc{The Federalist} No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Madison attributed this principle of government to Montesquieu. \textsc{Id.} See generally \textsc{Herbert Butterfield, The Whig Interpretation of History} (1965).

\textsuperscript{99} Perhaps the best illustration of this point is the amendment provision in Article V, which contains the proviso that “no Amendment which may be made prior to the Year [1808] shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no state, without its Consent, shall be deprived of equal Suffrage in the Senate.” \textsc{U.S. Const. art. V.} The cross references to Article I, § 9 are to the preservation of the slave trade (cl. 1) and to the capitation tax (cl. 4). The latter, in turn, refers to the requirement that direct taxes be apportioned by population, counting slaves as “three fifths of all other persons.” \textsc{U.S. Const. art. I, § 2, cl. 3.} Equality in the Senate preserved for the slave states an effective veto over other forms of legislation inimical to their interests.

\textsuperscript{40} Indeed, our historical experience in the three decades prior to the Civil War suggests that when an indisputable intention of the Founders—preservation of slavery—is significantly at variance with the perceptions of virtue of a substantial portion of the people of later generations, that intention will be rejected. Appeals to prophetic Founders were made on both sides of the abolition debate, but ultimately proved to be ineffective in preserving the 1787 version of constitutional federalism, at least as such federalism was interpreted by the Supreme Court in cases such as \textsc{Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).} For a description of the slavery debate, and the abolitionist predicament concerning original intent, see \textsc{generally Antislavery Reconsidered} (Lewis Perry & Michael Fellman eds., 1979); \textsc{Louis Filler, The Crusade Against Slavery} (1960); \textsc{Louis S. Gertelis, Morality and Utility in American Antislavery Reform} (1987).
Matthew, Mark, Luke, and John relate to the Prophets of the Old Testament. Those perfecting amendments, however, were not the result of the 1787 Founders’ foresight. Rather, the political structure that those Founders set in place was so rigid that the Thirteenth, Fourteenth, and Fifteenth Amendments, though nominally adopted according to the forms of Article V, had to be imposed by the winners upon the losers of a bloody war.  

Although the Nineteenth Amendment enfranchising women may be perceived by most as an illustration of the perfectibility of the Founders’ revelation through the amending process, only a minority will be willing to swallow such an assertion with respect to the Eighteenth Amendment’s enactment of prohibition; the wisdom of the Twenty-Second (limiting presidential eligibility for office) and Twenty-Sixth (voting age at eighteen) is also far from unanimously acknowledged. The framers of our Constitution, whether in 1787, in 1789, in 1864, in 1919, in 1951, or in 1971, have been politicians, no more endowed with virtue than are politicians generally. Some of their decisions have proven over time to have been wise and virtuous. Others have been both unwise and unjust. The prophetic moment justification for regarding the Founders as authoritative lawgivers to whose intention the courts must always defer turns out, when subjected to critical reasoning, to be no more satisfactory than the fictive social compact justification.  

41 See M. Mantell, Johnson, Grant, and the Politics of Reconstruction (1973) (describing the national political conditions in which the amendments were written and ratified); J. McPherson, Abraham Lincoln and the Second American Revolution 131-52 (1990) [hereinafter McPherson, Second American Revolution] (describing how the experiences of the Civil War drove the North to forcibly redefine concepts of liberty against state power); J. McPherson, Ordeal by Fire: The Civil War and Reconstruction 491-591 (1982) [hereinafter McPherson, Ordeal by Fire] (describing how the first Reconstruction Act conditioned Southern state readmission to Congress on ratification of the Fourteenth Amendment). The debate over the formal legality of the Fourteenth Amendment, while of little practical consequence, has been lively. See, e.g., J. B. James, The Framing of the Fourteenth Amendment (1956); Joseph L. Call, The Fourteenth Amendment and Its Skeptical Background, 13 Baylor L. Rev. 1 (1961); Ferdinand F. Fernandez, The Constitutionality of the Fourteenth Amendment, 39 S. Cal. L. Rev. 378 (1966); Pinckney G. McElwee, The Fourteenth Amendment to the Constitution of the United States and the Threat That It Poses to Our Democratic Government, 11 S.C.L.Q. 484 (1959); Walter J. Suthon, Jr., The Dubious Origin of the Fourteenth Amendment, 28 Tul. L. Rev. 22 (1953).  

42 Bruce Ackerman argues that at certain “constitutional moments” the people “place a constitutional meaning upon a sustained series of electoral victories and legislative successes that is very different from the meaning ordinarily attached to any single episode.” Ackerman, supra note 15, at 1055-56. When the electoral victories
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So, let us conduct discussions about the legitimacy of judicial review—of the Constitution as a form of higher law—on a realistic premise; the premise that constitutional law is not the law of the Founders, proceeding from the will of the Founders, but the law of the contemporary sovereign agents of the people, proceeding from their willing acceptance of it as such. This premise is advanced not as a reason for rejecting intentionalism as the appropriate rule of interpretation, but only to blow some of the fog away. It permits us to see that intentionalism is useful only to the extent that it contributes to a convincing justification for continuing to tolerate the authority of the Supreme Court to suspend the operation of state or federal legislation. For some exercises of that authority a reference to the Founders’ intention may be all that is required. For others, it may not be enough, if for no other reason than because neither a subjective intention nor an objective statement of that intention is readily discernible.43

II. A DIFFERENT INTENTIONALISM: A TEXTUALIST READING OF THE FOURTEENTH AMENDMENT

There are, of course, varieties of intentionalism. One version holds that what counts is the actual subjective intent of those responsible for the constitutional text. This understanding is implicit in, for example, the Supreme Court’s setting of the agenda for reargument in Brown v. Board of Education.44 Recall that the

are convincing enough that all three branches of the federal government acknowledge a new constitutional rule, a structural amendment has occurred in a manner different from the formal manner specified in Article V, but equally legitimate. Id. Triumphant majoritarianism is thus the indication of a prophetic moment. What is missing in Professor Ackerman’s justification is an explanation of the reason why the triumphant majority must have sustained a series of victories to establish the legitimacy of its new insights. As Alexander Bickel observed, “[p]rinciples that may be thought to have wide, if not universal, acceptance may not have it tomorrow, when the freshly-coined, quite novel principle may in turn prove acceptable.” BICKEL, supra note 15, at 177.


44 345 U.S. 972 (1953).
Court requested briefs marshalling evidence on the question whether "the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated ... or understood ... that it would abolish segregation in public schools." The same sort of intentionalism underlay the famous dispute between Justice Black and Charles Fairman over the question of incorporation, a dispute which proceeded from the common premise that the actual subjective intention of its Founders was dispositive of whether the Fourteenth Amendment made the Bill of Rights applicable to the states.

45 Id. at 972. On reviewing this evidence, the Court found that it was "[a]t best ... inconclusive" as to the subjective intention of the members of the Thirty-Ninth Congress with respect to segregated education. See Brown v. Board of Educ., 347 U.S. 483, 489 (1954). The Court suggested that the Amendment's history was inconclusive because of the status of public education in the South, where "[e]ducation of Negroes was almost nonexistent, and practically all of the race was illiterate." Id. at 490. Although the Court's conclusion was consistent with the prevalent narrow view of the purposes of the Fourteenth Amendment at the time, more recent scholarship, focusing on the brief period of Reconstruction, suggests that the drafters were at that time perceived to have had broader purposes which were later ignored. See, e.g., MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 216 (1986) ("[The final draft of the Fourteenth Amendment] clearly protected national rights, not simply those under state law."); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 1 (1985) [hereinafter KACZOROWSKI, JUDICIAL INTERPRETATION] ("Between the years 1866 and 1873 ... the lead theory-of national civil rights authority under the Thirteenth and Fourteenth Amendments posited a virtually unlimited national authority over civil rights."); Robert J. Kaczorowski, To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War, 92 AM. HIsT. REV. 45, 68 (1987) ("Congressional framers of the Fourteenth Amendment ... thought they were reconstructing American government and basing it on a revolutionary constitutional foundation, but the Supreme Court decided against this revolutionary constitutionalism in a reactionary resurgence of states' rights ...."); Robert J. Kaczorowski, Searching for the Intent of the Framers of the Fourteenth Amendment, 5 CONN. L. REV. 368, 370 (1972-73) ("[T]he framers intended to provide the national government with full authority over civil rights, which they believed to be the same as the privileges and immunities of the United States citizenship."). The Freedmens Bureau certainly was active in promoting education among the recently freed slaves by coordinating the establishment of schools in occupied territory. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 144, 602 (1988); MCPHERSON, ORDEAL BY FIRE, supra note 41, at 398-401.

46 From this common starting point, the disputants reached diametrically opposed conclusions. Justice Black's position, elaborated in his dissenting opinion in Adamson v. California, 332 U.S. 46 (1947), was that the historical record of submission and ratification (which he detailed in a lengthy appendix to his opinion, see id. at 92-123) indicated that those responsible for the passage of the Fourteenth Amendment intended thereby to make the Bill of Rights applicable to the states. Id. at 71-72 (Black, J., dissenting). In response, Professor Fairman contended that the historical...
A different version of intentionalism focuses not on the subjective intention of the Founders but on the words they used, placed in their contemporaneous historical and legal context. This version asks not, "What result did the Founders intend to bring about with these words?" but rather, "What result can we reasonably expect judges to reach when they apply those words?" This version, which I will refer to as objective intentionalism or textualism, is, I suggest, more useful than that which prompted the Supreme Court's request for supplemental briefs in *Brown I* and the Black-Fairman debate.

History in the hands of lawyers and judges is rather malleable. Thus, an intentionalist approach to constitutionalism often will be no more certain or objective in determining outcomes than would an injunction to judges to decide cases in accordance with the value judgments they see embodied in a given provision. The malleability of a historically based intentionalism may be illustrated by reference to the famous *Slaughter-House Cases*, in which the Supreme Court interpreted the Fourteenth Amendment for the first time. The plaintiffs were butchers who challenged the Louisiana law establishing a slaughterhouse monopoly, thereby preventing them from working at their trade. Among other constitutional provisions, the butchers relied on the Privileges and Immunities Clause of the Fourteenth Amendment, arguing that these included a privilege against abridgement of their rights to work and to enjoy the fruits of their labors. A majority of the Court held that the Clause could not be invoked to protect a citizen against the legislative power of his own state, relying on what it contended was the intention of its drafters to make no essential change in the federal-state relationship with respect to the protection of civil rights. The dissenters insisted that the Amendment's purpose was to afford national

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47 See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 430-31 (1985) (describing how "linguistically articulated rules . . . exclud[e] wrong answers rather than point[] to right ones. . . . An interpretation is legitimate (which is not the same as correct) only insofar as it purports to interpret some language of the document and . . . the interpretation is within the boundaries at least suggested by that language.").

48 83 U.S. (16 Wall.) 36 (1872).

49 Id. at 74.
protection for the "full enjoyment of every right and privilege belonging to a freeman." 50

Examining the legislative history, one finds some evidence that the draftsmen of the Clause subjectively intended it to refer to certain specific fundamental privileges and immunities. 51 The record of the Thirty-Ninth Congress is, however, murky water in which to fish for any single subjective intention regarding the appropriate resolution of the issues which would arise in the interpretation of the Fourteenth Amendment. Justice Black and Professor Charles Fairman, looking at the same materials, drew opposite conclusions. 52 Raoul Berger looking at those materials concluded that Brown v. Board of Education and Baker v. Carr 53 are examples of judicial lawmaking inconsistent with the Founders' intention. 54 More recent historical scholarship rather convincingly suggests that Berger and Fairman are wrong about the intentions of Republican politicians in 1864. 55

50 Id. at 123 (Bradley, J., dissenting).
51 I refer to those listed by Justice Bushrod Washington in Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230). Judge Washington's list was read into the record by Congressman Howard, in an attempt to indicate what the opinion of the judiciary might be as to the nature of the privileges and immunities of citizenship. It included the following:

[P]rotection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind . . . . The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State . . . [and] the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised.

CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866); see also CURTIS, supra note 45, at 92-130 (analyzing arguments against the application of the Bill of Rights to the states and concluding that the Thirty-Ninth Congress intended the states to be bound by the Bill of Rights through the Fourteenth Amendment).
52 See supra note 46.
55 See CURTIS, supra note 45, at 100-05, 117-20; KACZOROWSKI, JUDICIAL INTERPRETATION, supra note 45, at 135-66; MCPHERSON, SECOND AMERICAN REVOLUTION, supra note 41, at 131-52; cf. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 40-63 (1988) (arguing that the intention behind the Amendment was to strike a balance between providing full protection for blacks and preserving the existing balance of federation).
All these efforts seem to me somewhat misdirected. By 1864, the role of the Supreme Court as the final expositor of the Constitution as law had long been accepted. Thus, the relevant inquiry is not what the Founders intended with respect to the future resolution of such issues as school desegregation or voting rights, but what meaning the Court could reasonably be expected to give to the words used in the text.

Textualism, as distinct from subjective intentionalism, demands an examination of language as well as context, since the meanings of words often change depending on the contexts in which they are used. A textualist approach to the Privileges and Immunities Clause of the Fourteenth Amendment would lead a judge to reason as follows: first, the judge would take note of the Clause's placement in the larger text of which it is a part—it appears in the second sentence of Section 1. The judge would then notice that the Clause protects the privileges and immunities of "citizens of the United States," a term drawn from the first sentence of Section 1, which sets forth a definition of national citizenship, hitherto absent from the constitutional text. The Slaughter-House justices reading Section 1 were certainly aware that it resolved an antebellum dispute over whether national citizenship was derivative of state citizenship, and that in doing so it necessarily overruled the resolution of that same dispute announced by the Supreme Court in Dred Scott v. Sandford. They must also have been aware that "privileges and immunities" was not a term invented by members of the Thirty-Ninth Congress, but was rather an eighteenth-century usage, which had appeared in both the Articles of Confederation in 1777 and in the original Constitution in 1787, although in neither case was a definition provided.

56 60 U.S. (19 How.) 393 (1856).
57 The 1777 usage provided that "the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states." ARTICLES OF CONFEDERATION art. IV (U.S. 1777). The context in which the term appears impliedly assumes that there are privileges and immunities associated with being a free citizen of a state.

The 1787 usage omits the reference to paupers and vagabonds but continues the exception for fugitives and slaves:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up.
Recognizing that a specific enumeration of the privileges and immunities of citizenship was not provided in the 1777, 1787 or 1864 texts, the *Slaughter-House* justices should reasonably have been expected to look to an eighteenth-century listing of them; after all, it was an eighteenth-century understanding that needed to be restored. They could have found, I suggest, no source more exactly meeting this need than the Northwest Territories Ordinance, adopted by the Continental Congress in 1787.58

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The Ordinance was the product of long and serious study concerning the creation of new states in the western territory acquired as a result of the peace treaty of 1783.59 The delegates to the Continental Congress were, with respect to this new, uninhabited territory, starting from scratch, and they addressed fundamentals. The Preamble of the Ordinance proclaimed that those fundamentals were to "be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent."60 One of those unalterable fundamental provisions was the prohibition of slavery in Article VI, but there were many more. The Ordinance included permanent guarantees of freedom of worship, of the benefits of the writs of habeas corpus, of trial by jury, of proportionate representation in the legislature, of bail, of judicial proceedings according to the course of the common law, and of moderate fines.61 The imposition of cruel or unusual punishments was permanently proscribed.62 There were permanent guarantees that property or services would not be taken without full compensation, and that previously formed contracts or engagements would not be interfered with.63 Even a recognition of the fundamental value of education was enumerated.64 Most of these guarantees were couched in language borrowed from bills of rights which had been adopted in certain of the original states after 1776.65 The

fugitive slave clause by omitting the proviso.

The Dred Scott Court also held that a descendant of an African, though born in the United States, could not be an American citizen. See Dred Scott, 60 U.S. (19 How.) at 406. That holding was flatly inconsistent with the text of the Articles of Confederation which says that "free inhabitants" are entitled without regard to ancestry to the "privileges and immunities of free citizens." ARTICLES OF CONFEDERATION art. IV. (U.S. 1777). A textualist would have observed that Section 1 of the Fourteenth Amendment by its terms restored that eighteenth-century understanding, by defining citizenship in terms of birth and nationality, not ancestry.


60 Northwest Ordinance, supra note 58, pmbl., § 14, at L.
61 Id. arts. I & II, at L-LI.
62 Id. art. II, at L-LI.
63 Id.
64 Id. art. III, at LI ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").
65 See BARRETT, supra note 59, at 60-62.
Ordinance characterized them as "the fundamental principles of civil and religious liberty, which form the basis whereon these [thirteen] republics, their laws and constitutions, are erected," and undertook "to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory." A textualist would go on to note, as part of the context relevant to understanding the Privileges and Immunities Clause, that the First Congress acted to ratify the Northwest Ordinance in short order, and then proceeded to copy it verbatim, except for the omission of the prohibition on slavery, in the statute drafted to govern the Southern Territories.

What have we, then? The appearance in the Fourteenth Amendment of the term "privileges and immunities of citizens;" the use of the same term in the Articles of Confederation; the contemporaneous effort in the Northwest Territories Ordinance to enumerate the unalterable fundamental rights of free citizens; and the plain purpose in Section 1 of the Fourteenth Amendment of overruling Dred Scott with respect to the unconstitutionality of Section VI of that Ordinance. With all of this, the Slaughter-House Court could quite plausibly have decided that the use of the term "privileges and immunities" reflected an intention to require the states to recognize at least those fundamental liberties to which the Continental Congress and the First Congress had attempted unsuccessfully to bind some of them. Indeed, given the context in

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66 Northwest Ordinance, supra note 58, pmbl., § 13, at L.
67 Id.
68 A textualist, congressional reenactment of the Northwest Territories Ordinance "to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory," id., and enactment of the Southern Territories Ordinance, see Territorial Government of Orleans, Act of March 2, 1805 in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1371-73 (Francis N. Thorpe ed., 1909), might have been characterized as laws "necessary and proper" to carrying out the federal government's obligation to guarantee to each state "a Republican Form of Government," U.S. CONST. art. IV, § 4, that is, one recognizing republican principles. But, in Permoli v. New Orleans, 44 U.S. 671, 3 How. 589 (1845), the Taney Court foreclosed any such incorporative interpretation of the territorial ordinances. Dealing with a municipal ordinance that prohibited the exhibiting of corpses and the conducting of funeral services in any Catholic churches in New Orleans, and that only allowed such funeral rites in a designated obituary chapel, the Court rejected a claim that the ordinance was inconsistent with the "forever unalterable" religious liberty clause of the Southern Territories Ordinance. Louisiana, the Court held, was not bound by that statute after admission to the union as a state. See id. at 695, 3 How. at 610.
which these words occur, no other interpretation of them seems plausible—certainly Justice Miller's reading of them does not.69

Had the *Slaughter-House* Court, then, been more truly intentionalist—more true to the likely meaning of the words in the context in which they were used—the *Palko-Adamson* debate over whether the Due Process Clause incorporated the Bill of Rights need never have occurred.70 Yet, oddly, no intentionalist voices are raised today for a reconsideration of the virtual elimination of the Privileges and Immunities Clause from Section 1 of the Fourteenth Amendment.71 The outcome of such an exercise in objective intentionalism would be unsatisfactory to the current generation of intentionalists, for they would find that the fundamental liberties referred to in the Northwest Territories Ordinance are largely those which the First Congress included in the Bill of Rights, and which in recent years, an activist Court has applied to the states.

A textualist approach conscientiously applied in the *Slaughter-House Cases* might not have produced a different judgment. The Court, considering what rights in the eighteenth-century were regarded as fundamental privileges and immunities of citizenship, could reasonably have concluded that the right to engage in the butchering trade was not among them. But by taking this approach the Court would have produced a quite different precedent: the *Slaughter-House Cases* would have stood for the proposition that the protection of fundamental civil rights, whatever those rights may be, is the responsibility of the national government not only in states

69 See *supra* notes 48-49 and accompanying text (discussing the *Slaughter-House* holding). Justice Miller's majority opinion further held that the primary purpose of the Fourteenth Amendment was to protect the rights of the newly freed slaves. It concluded that there was a distinction between the privileges and immunities inuring to state and national citizenship, and that state governments were responsible for protecting their citizens' fundamental rights. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872).

70 See *Bickel, supra* note 9, at 100-11. For two cases epitomizing the incorporation controversy, see *Adamson v. California*, 332 U.S. 46 (1947) and *Palko v. Connecticut*, 302 U.S. 319 (1937).

71 Bork declines to discuss the issue, observing that "[t]here is no occasion here to attempt to resolve the controversy concerning the application of the Bill of Rights to the states." *Bork, supra* note 17, at 93. One may ask why not, if intentionalism is a serious intellectual position. Coming as it does in the midst of a book devoted to proving the merits of intentionalism, Bork's unwillingness to take a stand with respect to a constitutional issue as central as the incorporation question must be considered suspect. His position with respect to the Privileges and Immunities Clause, meanwhile, is indefensibly dismissive. The Clause is waved away as a "dead letter," *id.* at 166, a "cadaver," *id.* at 180, a "corpse," *id.*, because Bork cannot ascertain its meaning. He has not looked very far in an effort to do so.
formed in the territories, but in all the states. Instead the decision elevated the notion that the protection of civil rights was primarily a state responsibility to the status of constitutional law—constitutional law that continues to produce problems six generations later.

One may question whether the different hypothetical precedent suggested by an objective intentionalist analysis would have received from subsequent generations greater or lesser respect as constitutional law than the one announced by the Slaughter-House Court. At the very least, however, such a different precedent would have avoided a great deal of analytical difficulty. Over the next six generations, Justice Miller’s version of the intention of the Founders in the Thirty-Ninth Congress led the Court into an increasingly more complex and less comprehensible effort to pour into the Due Process and Equal Protection clauses meanings with respect to fundamental rights which the chosen language of those clauses, viewed in context, does not obviously convey. Had the Slaughter-House Court not ignored the contextual meaning of the Privileges and Immunities Clause, lawyers and judges in later generations would have been spared the ordeal of grappling with such oxymorons as “substantive due process.”

One question, however, would still have remained: why should the late nineteenth-century Founders be accepted as any more authoritative sources of law with respect to fundamental rights which the states must recognize than were the late eighteenth-century Founders?

III. THE CRAFT OF JUDGING AND THE PERCEPTION OF LEGITIMACY

At this point, judicial craftsmanship suggests itself as a possible basis on which to found the legitimacy of judicial review. Alexander Bickel had this in mind when he observed that “courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.” Bickel’s assertion is generally sound. Still, in many instances, “the ways of the scholar” do not yield determinate answers to concrete questions; the constitutional

72 Michael Perry makes a similar point. See Perry, supra note 15, at 62-63 (“Given the import of the privileges or immunities clause, the equal protection and due process clauses were, in a strict sense, superfluous.”).
73 Bickel, supra note 9, at 25-26.
text is in some places so open-ended that it is fairly readable only as a recognition that there are fundamental principles—values if you prefer—on which our system of government rests. Bickel’s appeal to a scholarly tradition of judging suggests that by the use of reason, sound values can be identified and right answers given to questions about individual liberties left open by the constitutional text where majoritarian political judgments would be flawed. Thus, Bickel was apparently more sanguine about letting the Supreme Court act as “Platonic Guardians” than was Learned Hand.

The scholarly tradition in judging may therefore be a reason why the elected branches of the government should defer to the Court when it articulates fundamental values and states what results those values suggest, but it is hardly a reason why the elected branches must do so. Recognizing this difficulty of the nonself-executing nature of judicial power, Bickel argued that the Court must be careful not to undermine what authority it could command: “The Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent.” Where no such principle presents itself, Bickel counseled the Court to resort to the passive virtue of avoiding any pronouncement on constitutional law altogether. The Court, on this view, becomes a participant in the creation from time to time of a Lockean consensus over individual rights.

This contemporary social compact, like the whole social compact theory to which it is analogized, must, of course, be recognized as a fiction, a rhetorical device to describe the fact that most exercises of the power of judicial review are in fact accepted—grudgingly in

74 See id. at 239.
75 See LEARNED HAND, THE BILL OF RIGHTS 73 (1958) (“For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”).
76 BICKEL, supra note 9, at 239.
77 Bickel explained his position as follows:

[T]he Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may... “legitimate” legislation as consistent with principle. Or it may do neither. ...

...When the Court... stays its hand... then the political processes are given relatively free play. ...To this end, the Court has, over the years, developed an almost inexhaustible arsenal of techniques and devices.

Id. at 69-70. But see Gerald Gunther, The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1, 6-9 (1964) (criticizing Bickel’s position).
78 See BICKEL, supra note 9, at 30.
some instances—by the elected branches of government. It is one thing, however, to describe the Court as engaged in a search for the correct terms of an ideal social compact; as an abstract characterization of judicial review, this will do as well as any other. However, it is something else to say that having upon reflection and by right reason identified what it regards as a just conclusion, the Court ought nevertheless to defer to a contrary near-term majority opinion—for nothing would be so likely to undermine the authority of the Supreme Court. If the belief became general that the Court was, on the basis of its (often uninformed) projection of public opinion, picking and choosing when to apply the Constitution to protect individual liberties, it is not likely the enterprise would be regarded as legitimate.\(^{79}\) Let the cat of prudentialism out of the bag, and the people will have very little reason to accept the Court as an authoritative expositor of fundamental values superior to contemporary majority consensus. Bickel's prudentialism, while clearly more realistic than Bork's Founders' intentionalism, fails as a justification for permitting the Court to choose the values which give content to the open-ended texts. If the Court is free to compromise principle and virtue by bowing to the will of a current majority, even if only to the extent of exercising discretion not to decide, it becomes institutionally similar to the United States Senate. The judicial competence in matters of principle on which the special claim of the Supreme Court to expound the meaning of the Constitution is based is thereby wholly undermined.

Bickel thus posed for us in 1962 the majoritarian dilemma which others, notably Thayer in 1893, posed in the past.\(^{80}\) What Bickel brought to the discussion—largely missing before—was the recognition that constitutional law, like all law, depends upon the willing-

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\(^{79}\) This is far from insignificant. As has long been recognized, any regime loses authority with its citizens to the extent its decisions are perceived as illegitimate or unprincipled. See David Hume, Of the First Principles of Government, in Hume's Moral and Political Philosophy 307 (Henry D. Aiken ed., 1948) (“Nothing appears more surprising . . . than the easiness with which the many are governed by the few . . . . When we inquire by what means this wonder is effected, we shall find that, as force is always on the side of the governed, the governors have nothing to support them but opinion.”).

\(^{80}\) See Thayer, supra note 9, at 155-56. Thayer argued that American citizens should be made to appreciate “the great range of possible harm and evil that our [democratic] system leaves open, and must leave open, to the legislatures,” and to recognize “the clear limits of judicial power.” Id. at 156. Thayer also asserted that “[u]nder no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.” Id.
ness of a present government to enforce it by sanction. Thus compared to the intentionalists, he was quite successful in identifying the element of will in constitutional law and tying it to contemporary majority consensus.

What is missing in Bickel's justification for judicial review, as it is in the intentionalist justification and in all positivist justifications, is an explanation as to why minorities—losers in the political process—should accept majoritarian outcomes which they perceive to be fundamentally unjust. Majority support cannot alone legitimate law. This was a point made in our time most eloquently by Martin Luther King in his letter from a Birmingham jail. Apartheid is not wrong in South Africa merely because it is imposed by a minority against a disenfranchised majority. Apartheid in the United States was not right merely because it represented the will of a majority (as, in fact, at times it did). Indeed, it was illegitimate in both instances because we can by the use of reason conclude that individual human beings are equally worthy of the opportunity to participate in the good life afforded by an organized society. While the element of will in law makes intentionalism jurisprudentially useless as justification for judicial review, the majoritarian consensus justification is incomplete. It fails to explain why it would be illegitimate for minorities regularly to engage in civil disobedience, or even forceful resistance.

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81 See MARTIN LUTHER KING, JR., Letter from a Birmingham Jail, in WHY WE CAN'T WAIT 76 (1964):

An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow that it is willing to follow itself. This is sameness made legal.

Let me give another explanation. A law is unjust if it is inflicted upon a minority that as a result of being denied the right to vote, had no part in enacting or devising the law. Who can say that the legislature of Alabama which set up that state's segregation laws was democratically elected? Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?

Id. at 83.

82 Committed to positivism, Bork artfully analogizes departure from the intention of the Founders to civil disobedience, observing:

The person who understands these issues and nevertheless continues to judge constitutional philosophy by sympathy with its results must, if he is candid, also admit that he is prepared to sacrifice democracy in order that
Although Bickel's attempted resolution of the majoritarian dilemma was thus unsuccessful, it certainly proved to be seminal. Indeed, it is the starting point for most modern scholarship attempting to justify judicial review of legislation. Among those attempts, John Hart Ely's *Democracy and Distrust* has commanded considerable respect. Building upon the idea of majoritarian will as the source of legitimacy for all law, Ely urged that judicial review is appropriate only in those instances when the legislature acts against minority groups who may be subject to prejudice and are thus unable to successfully protect their interests through the political process. Ely's representation-reinforcing justification—unlike value-protecting theories of judicial review—is, he suggests, consistent with the underlying political premises of the American system of government. Intentionalists object that the process of political control of participation is dealt with in the Constitution explicitly, and that the Framers did not authorize the Court to second-guess that process. But the real deficiency in Ely's

his moral views may prevail. He calls for civil disobedience by judges and claims for the Supreme Court an institutionalized role as a perpetrator of limited *coup d'état*. He believes in the triumph of the will. It is not clear why he does not advocate rioting or physical force, so long, of course, as the end is good as he sees the good. Such a man occupies an impossible philosophic position. What can he say of a Court that does not share his politics or his morality? What can an admirer of the Warren Court say if the Supreme Court should become dominated by conservative activists? What can he say of the Taney Court's *Dred Scott* decision? He cannot say that the decision was the exercise of an illegitimate power because he has already conceded that power. There seems nothing he can say except that the Court is politically wrong and that he is morally justified in evading its rulings whenever he can and overthrowing it if possible in order to replace it with a body that will produce results he likes. In his view, the Court has no legitimacy as a legal institution.

Bork, *supra* note 17, at 265 (footnote omitted). This argument misses the point. The Court is a part of the government, acting on the government's behalf. If most of the people believe that the Court is committed to a principled search for just limits on governmental authority, most of the people will refrain from civil disobedience of specific decrees with which they disagree. It is the availability of resort to such a sober second look by an independent judiciary that legitimizes the power of the majority to impose its will.

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84 See id. at 151-53. Professor Ely's theory is a refinement of Justice Stone's "discrete and insular minorities" notion, first propounded in the famed footnote four of *Carolene Products*. See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

85 See id. at 101-02.

86 Robert Bork is typical in this regard:
argument is more fundamental. The argument assumes that if the political process is open to all, any majoritarian outcome is legitimate. It implies that if, for example, men and women have equal access to the political process, as in all the states they do, then any majoritarian decision with respect to the regulation of sex and reproduction ought to prevail; thus, if a majority consensus were to emerge in favor of compulsory abortion as a means of population control, a law implementing that policy choice should be upheld. Yet Dr. King's point about civil disobedience was not merely an appeal for participation or representation in the political process. It was also a demand that the autonomy of each and every individual be respected. No doubt the Court's reinforcement of representation has a powerful appeal insofar as it promises majority consensus. This means very little, however, to those who, despite the "fairness" of the process, are the losers in it, and thereby suffer what they perceive to be a wrongful invasion of their autonomy.

Attempting to supply what is missing in both Bork's and Ely's arguments, more recent scholarship, building upon historical work which displaces Locke's stress on individual rights as the dominant eighteenth-century American ideal,\textsuperscript{87} has looked to republicanism, the idea that we as a community are engaged in a dialogue, the aim of which is to arrive at moral consensus. For Bruce Ackerman that effort involves looking backward at constitutional moments in which the political community agreed to change the Constitution by extra-textual means.\textsuperscript{88} For Frank Michelman and Cass Sunstein, that effort is forward looking, a self-revelatory normative discussion at

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The fact that the United States Constitution has provisions that require participation by certain groups and that we have a constitutional history of steadily expanding the suffrage does not give courts any warrant to go further than the Constitution already does in ensuring representation and suffrage. That expansion of participation and suffrage was accomplished politically, and the existence of a political trend cannot of itself provide the Court with a warrant to carry the trend beyond its own stopping point. How far the people decide not to go is as important as how far they do go.

\textsuperscript{87} See, e.g., POOCK, supra note 37, at 527 (rejecting the "Lockean paradigm" and suggesting that Aristotelian ideas about human virtue were "operative over wide areas of thought in the eighteenth century" and "provided a powerful impulse to the American Revolution"). But see GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 606-15 (1969) (documenting a shift away from classical humanist premises and an acceptance of Lockean principles in eighteenth-century American political thought generally and in the making of the federal Constitution in particular).

\textsuperscript{88} See Ackerman, supra note 15, at 1049-72.
the level of the community through which individual moral freedom is also achieved. Mark Tushnet, meanwhile, observes that, in contrast to the traditional liberal view of individual rights as pre-political, a republican understanding of human nature treats people not so much as bearers of individual rights than as "social beings who draw their understandings of themselves and the meaning of their lives from their participation with others in a social world that they actively and jointly create." In Tushnet’s republic there would be a shared understanding about the relationship between legal privileges and the public good.

This listing of the theorists of a communitarian justification for judicial review is far from complete. Moreover, the capsule summaries of their theories are vastly simplified, and therefore less than entirely accurate. But it is not the purpose of this paper to present an extended critique of their efforts to replace Locke, Kant, Mill, and Rawls with Hobbes, Machiavelli, and Rousseau as sources of principle in our republic. Rather, this emerging body of scholarship is referred to for the more limited purpose of comparison with the legal literature attempting to justify intentionalism.

Putting intentionalism aside, what is common in the theoretical literature about constitutional law since Ely’s decade-old effort is the recognition (1) that no theory which treats the constitutional text as alone dispositive is in any way sufficient, and (2) that a historical search for the Founders’ fundamental theory of government will produce evidence of conflicting traditions, one libertarian and individualistic, and one communitarian and republican. Neither tradition can be regarded as dominant. Both traditions suggest

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89 See Michelman, supra note 15, at 17-36; Michelman, supra note 20, at 1526; Sunstein, supra note 20, at 1554-55.
90 MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 10 (1988).
91 Id. at 276 (discussing the “mutual forebearance” which a genuine republicanism might foster).
92 For two recent critiques evaluating the contributions of the republican revivalist movement, see Richard H. Fallon, Jr., What is Republicanism, and is it Worth Reviving?, 102 HARV. L. REV. 1695 (1989), and Paul W. Kahn, Community in Contemporary Constitutional Theory, 99 YALE L.J. 1 (1989).
93 David Richards notes: American lawyers’ attitudes toward constitutional interpretation are formed in American law schools in which isolation from the larger dialogue of the university is self-justified on the basis of the lawyer’s need to master the autonomous legal traditions of bench and bar. Both academic and practicing lawyers thus gravitate to positivistic conventionalism, which in fact distorts the complexity of our interpretive practices and impoverishes the
that the Court must engage in a reasoning process which looks beyond the text of the Constitution in order to determine, as best it can, what are the appropriate limits of governmental intrusion upon individual liberty. If the issue is narrow and technical, resort to plain meaning may be all that is required by right reason. If the meaning is not plain, resort to historical context may illumine the reasoning process. But if the issue is, as in privacy cases, a conflict between community values and individual liberty, neither text alone nor history alone will serve the purpose. The Justices are not kings, because the sanction behind the constitutional law they announce is the will of the current political majority. They must, however, be philosophers, for without philosophy they cannot convince the current majority that their version of the fundamental law is in most instances superior. There is an element of will in constitutional law, but there is also an element of right reason.

contribution of the American law school and legal profession to what they should maintain and advance: the best interpretive and critical thought about constitutional interpretation.

The consequences of this failure are dramatically underscored by the superficial approaches that academic lawyers like Bork bring to the critical analysis of judicial interpretive conventions with which they substantively disagree. Such conventions are, as already argued [supra notes 27-42 and accompanying text], sometimes interpretively wrong, and it is a defect in positivistic conventionalism that it fails to capture the kinds of important and often true interpretive arguments that make this point and sometime change the law. However, critical interpretive arguments of this sort require the kind of critical education in both history and political philosophy that often best enable lawyers to make such true, reasonable, and convincing arguments. Even the most intelligent legal scholars, like Bork, lack this training, and thus sometimes make their criticisms in quite intellectually shallow ways that do them and their arguments no credit. Such scholars, often moved by apparent failures in the Supreme Court to have adequately discharged its interpretive responsibilities, become ideologues of fixed positions on substantive issues, and advance neither their own nor the nation's capacity to conduct reasonable debate over the central questions of interpretive mistake that should absorb the reason, not the passions, of a free people.

RICHARDS, FOUNDATIONS, supra note 15, at 297-98.