Essay

Tradition and Insight

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> Why should not we have a poetry and philosophy of insight and not of tradition?[1]

American law requires applicants for citizenship to learn two things: the Constitution and the English language.[2] Not the tax laws, not the drug or traffic laws, not the Model Penal Code, but the political blueprint of the nation and the language in which it is written. Why should we care if new citizens know the Constitution? It does not touch on their immediate concerns or activities as some other societal prescriptions might. But it is essential in another way: not to touch, but to teach. The Constitution educates Americans about the political values that permit this nation to survive and to mature. The Framers wrote the Constitution to teach future generations of Americans the lessons they had learned about political freedom. The Constitution and its traditions are the core of our political education.

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1. Ralph W. Emerson, *Nature* (1836), *in* 1 THE COLLECTED WORKS OF RALPH WALDO EMERSON 7 (Alfred R. Ferguson ed., Belknap Press 1971).

2. *See* 8 U.S.C. § 1423 (1988) (requiring applicants for citizenship to acquire "an understanding of the English language" and "a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States").

The didactic influence of the Constitution did not end with the framing. It has also extended to those who would interpret the document in specific legal settings throughout American history. Readers of the Constitution, therefore, need not be consumed with resolving whether the Constitution should be understood as a single authority or as a principal text to be supplemented by other sources. Instead of asking what, if anything, we may add to the Constitution to make it more comprehensible to modern government, we should be asking what the Constitution can add to our modern comprehension of government. Indeed, I will argue that what we have consistently termed constitutional "interpretation" may be better understood as constitutional "cognition," that is, the process of reading the Constitution as a source of learning, and using the insights so gained to seek context and understanding as a precursor to resolving specific constitutional issues. Unlike conventional approaches to interpretation, which search for answers within a text or its history, this cognitive approach uses the text and its historical or societal context to achieve a kind of consciousness, which provides the insight necessary for informed judgment.

Interpreters who adopt this cognitive approach will view themselves as humble students of the law rather than as exalted lawgivers. They will examine the traditions from which our political culture springs, including the Constitution itself, as sources of knowledge, not as commands. The interpreter's task is not to declare the dictates of the past, but to receive and "recollect" the past—a less attractive job, perhaps, but more consistent with the task of self-education.[3]

"Tradition"—generally undefined by its users[4]—has been an important source of authority for almost all schools of constitutional interpretation. Originalists look to the way things have been done to see what the Framers intended. Textualists look to the way things were done to determine what the all-important words meant to the community for which they were written. Even non-originalists look to the way things have been done to see what the Framers would have intended if they had lived today. For some, tradition is determinative; these I call traditionalists. For others—I will call them rejectionists[5]—tradition is irrelevant to the constitutional inquiry. For still others, who I suspect form the vast majority, tradition is a powerful rhetorical device to be brought out when it is favorable (and only to the extent that it is favorable) to the writer's conclusions.

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3. Achieving humility itself is not easy, *see Meno* ¶ 80a-b, *in* THE COLLECTED DIALOGUES OF PLATO 363 (Edith Hamilton & Huntington Cairns eds., 1961), which is perhaps why we instinctively choose the lawgiver role over the student role.

4. I discuss my understanding of the term in the text accompanying notes 14-22 *infra*.

5. The term is Professor Grey's. *See* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1-5 (1984) [hereinafter Grey, *The Constitution as Scripture*].

Each of these three understandings of tradition in the interpretation of constitutional terms has some appeal.[6] Even the third, apparently unprincipled, use of tradition enjoys powerful iconic influence and can lend legitimacy and comfort in the frightening quest for meaning. But each understanding contains a major flaw as well. Missing from each of the three camps is a theory to support its chosen use of tradition. The traditionalists have not told us why the actions or decisions of people long dead should determine the resolution of present-day constitutional inquiries. The rejectionists have not explained why—or more importantly, how—they reject the past and the traditions that gave rise to everything that we all (including those very rejectionists) are today, in favor of some indeterminate, forward-looking alternative. And those who use tradition selectively—calling it forth whenever they find a snippet that supports an argument to which they have already committed—are perhaps least able to provide a philosophical, analytical, or even logical argument to justify their use of tradition.

To the extent that traditions represent judgments that others in other times have made, they can provide an attractive resource to those uncomfortable with making judgments of their own. Many judges and academics have doggedly campaigned to relieve judges of the duty (and the opportunity) to judge,[7] spurring an impassioned quest for external sources of value determination.[8] One such source is tradition, grasped in the hope that the judgments of others, either past (such as the Framers or the great interpreters of the Constitution) or present (such as public opinion), can provide an external and unimpeachable standard for resolving difficult constitutional issues. Thus the temptation arises to allow tradition to take on both legitimacy and power in constitutional adjudication, unanchored to any reason for that status. Tradition replaces insight.

Indeed, in recent years the Court's reliance on tradition in resolving constitutional issues has increased, particularly at the hand of Justice Scalia. Scalia has personally authored at least fifty-three opinions that relied expressly

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6. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (Scalia, J.) (insisting that any protected liberty interest "be an interest traditionally protected by our society") *with* Robin West, *The Ideal of Liberty: A Comment on* Michael H. v. Gerald D., 139 U. PA. L. REV. 1373, 1380 (1991) (suggesting possibility that one might "derive the content of liberty not from historical tradition, but from liberal ideals").

7. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 20-68 (1977) (arguing that Fourteenth Amendment should be read only to validate Civil Rights Act of 1866); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 386 (1981) ("the making of constitutional law simply ought not be like the making of common law"); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (asserting that judges should not reflect changes in original values underlying Constitution). Those who are comfortable with the idea that judges will actually use judgment are satisfied with—indeed prefer—vague standards for constitutional adjudication. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225-26 (1980) [hereinafter Brest, *The Misconceived Quest*]. Those who are not as comfortable tend to deride this imprecision. *See* Monaghan, *supra*, at 386.

8. As Dean Sandalow described it, "[t]he uneasiness, often the agony, and always the responsibility that accompany a difficult choice are softened by the belief that real choice does not exist." Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1038 (1981).

on tradition to resolve constitutional issues.[9] The rest of the Court also apparently relies with increasing frequency on tradition in its consideration of constitutional terms. When two Justices disagree in these cases, the focus of dispute is apt to be *which* tradition to follow, not *whether* the evidence of tradition has any place at all in the analysis.[10] That type of dispute creates an appearance of arbitrariness and fosters arguments about how to select the proper tradition, masking what I claim is the more important question: what role tradition ought to play in the analysis.

In this Essay, I argue that we may appropriately rely on tradition in developing constitutional law only when we are self-conscious about how and why we invoke tradition. This conclusion suggests that the traditionalist view —that the past is dispositive of constitutional issues—cannot be justified. Yet the rejectionists' view, by dismissing all that has gone before as irrelevant, asks the impossible feat of both exorcising from ourselves the influences of our own traditions and ignoring the lessons our society has learned over time. Neither extreme captures the spirit of the constitutional plan, and the middle course—selective use of tradition—lacks any theoretical integrity.

As an alternative, I argue that the Constitution should be viewed as part of a body of tradition that can teach present and future generations the principles that will allow society not merely to change, but to mature—to develop a certain degree of autonomy and capacity for independent judgment while still appreciating the value to be gained from the wisdom and experiences of prior generations. Both the constitutional interpreter and the document itself are creatures and creators of tradition. Each brings its dual perspective on tradition to the interpretative endeavor. Tradition thus has an important place in understanding the Constitution and in shaping its appropriate effect on contemporary legal issues, and it is time that tradition's proper role be acknowledged unapologetically. The past should not, however, be considered an inexorable force that impedes the maturation of the polity. Tradition must be neither defied nor deified.

I do not attempt to make a historical case for this call to self-consciousness in approaching tradition. To do so, even if possible,[11] would be to suggest

9. Search of LEXIS, Genfed library, US file, (April, 1992) (search "written by Scalia and tradition," modified to eliminate nonconstitutional cases).

10. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Michael H. v. Gerald D., 491 U.S. 110 (1989).

11. It certainly is possible to make a case for the proposition that the Framers intended the Constitution to grow in non-intentionalist ways. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs"); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 190-91 (1969) (asserting that "most satisfying justification of the use of history" is that Framers intended such use); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1156-57 (1987) (Constitution "intended merely to complement, not to replace" earlier tradition of fundamental law). But the particular kind of non-intentionalist growth, in which the Constitution is used for its value in teaching, is dependent on a theoretical, rather than historical, justification.

that what the Framers "actually" intended should control the manner in which we now use the tools which they gave to us. The question is one of legal theory. I argue that it makes sense to look at the document as a pedagogical instrument, brilliant, rich, and abiding, available for our education about what it means to be Americans and how to carry on in that spirit over time. This Essay is about the maturing of American society and the role that tradition plays in that process.

In order to explore the role that tradition ought to play, this Essay will address in Part I the various roles that it *has* played in case law and commentary. I discuss several possible theories justifying the use of tradition, and note the limitations of each. Emerging from that analysis is the conclusion that tradition is important, indeed essential, to the process of constitutional interpretation, but cannot alone substitute for the personal judgment of the decisionmaker. By providing a sort of catalogue of reasons why tradition is invoked, I hope to begin to demystify the authority surrounding tradition. After placing tradition alongside other sources of authority in coequal status, I will describe the self-conscious approach to tradition, which allows judges to judge and not to hide behind the talismanic power that tradition has so long held. In Part II, I will draw together the lessons that emerge from my deconstruction of past use of tradition and suggest by illustration how a more self-conscious interpretation might work.[12]

I. How Does Tradition Affect Constitutional Meaning?

> Coming to terms with the presence of the traditions from which we are derived is, or should be, a fundamental part of the process of growing up.[13]

It is not at all clear that the word "tradition" is used with the same intended meaning by all who utter it. When I speak of tradition and its usage in the interpretation of constitutional law, I have in mind what seems to be only a subordinate dictionary meaning (recognizing that a dictionary meaning is itself nothing more than a tradition): "a continuing pattern of culture beliefs or practices."[14] That is, tradition encompasses any combination of acts or statements that together demonstrate a set of community values or illustrate a common belief system. This definition is necessarily broad. It includes acts of

12. There is more to be said about tradition, and I plan to tackle some remaining issues in a forthcoming paper, Rebecca L. Brown, *The Dark Side of Tradition* (work in progress, on file with author). In that piece I will address how traditions arise, how to understand conflicting traditions, and what better arguments may exist for including tradition in constitutional inquiry.

13. Jaroslav Pelikan, The Vindication of Tradition 53 (1984).

14. The Random House Dictionary of the English Language 2006 (2d ed. 1987) [hereinafter Random House Dictionary].

a legislature, government practices that might more comfortably fall under the rubric of "history," and even rhetorical statements by individuals that purport to capture the mores of society. The important element that distinguishes this concept of tradition from the dictionary's primary definition is time. I would not restrict tradition to those continuing patterns that have survived a prescribed number of generations.

I do not select perhaps more common meanings of the term "tradition," such as "a long-established or inherited way of thinking or acting" or "the handing down of statements, beliefs, legends, customs, information, etc., from generation to generation,"[15] because they presuppose that the practice at issue has withstood the test of time. For my purposes, the longevity of a practice is not decisive. Those who look to "consensus" or contemporary social values for the interpretation of constitutional provisions rely equally on tradition, in my view; they merely look to traditions of recent vintage.[16] The substance of what I am looking for in considering the role of tradition is a reliance, in the interpretation of constitutional terms, on evidence of what a society believes (or professes to believe) with respect to its values and aspirations for itself. In order to constitute tradition, a practice must manifest judgment.

The element of judgment is what distinguishes tradition from "custom," another term that comes up in the opinions of the Supreme Court and in works of legal philosophy. I understand that term to represent a "habitual practice,"[17] that is, an act repeated again and again without any pretense of expressing societal normative judgments. While tradition has a prescriptive element in understanding a certain community, custom is merely descriptive.[18] For example, the recognition of marriage as a societally approved status constitutes a tradition, whereas driving on the right side of the road represents a custom.[19] Traditions are manifestations of judgments; customs are

15. *Id.*

16. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899-2900 (1992) ("'[T]akings' jurisprudence . . . has traditionally been guided by the understandings of our citizens . . . ."); Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1239, 1245 (1990) (arguing that text should be interpreted as Framers would see fit at time when case is before court).

17. RANDOM HOUSE DICTIONARY, *supra* note 14, at 494.

18. The distinction is reminiscent of that recognized by Ronald M. Dworkin, who distinguishes a social rule, merely describing behavior, from a normative rule, connoting the speaker's endorsement of the value of the rule. Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855, 859-60 (1972). In a somewhat different, but perhaps instructive, context, Professor Dworkin asserts that only the normative rule (what I am analogizing to tradition) can be a source of a duty. The mere fact that people do something is not enough. *Id.* at 860.

19. Hart refers to this type of practice as "habit." *See* H.L.A. HART, THE CONCEPT OF LAW 51 (1961).

manifestations of preferences for predictability and continuity.[20] Because the distinction between the two lies largely in an interpretation of a social phenomenon, a certain practice could be both a custom and a tradition.[21] The determinative question is whether the contemporary community continues to do something simply because it was done in the past or instead takes the next step and consciously decides that the practice has value independent of its history. I argue that practices embodying judgment—what I call tradition—and the values they represent should be viewed as a source of enlightenment and guidance in the quest for political maturity. The discerning judge should distinguish those practices from other practices whose sole virtue is long-standing repetition.

Tradition has become one of the few sources of authority in constitutional interpretation that ostensibly need no justification.[22] It has influenced the resolution of disputes involving both the separated powers of government and individual rights. But those who invoke the authority of tradition, even those who give it the power to determine outcomes, rarely, if ever, feel the need to explain its relevance, as if its value to the task of constitutional interpretation were self-evident. I take issue with that assumption, and explore theories that might explain how tradition is relevant to constitutional interpretation.

A. *Tradition as Evidence of Framers' Intent*

Perhaps the most prevalent, at some level the most plausible, yet also the most problematic justification for relying on tradition is its potential value in ascertaining the intent of the Framers. It seems so comfortingly legitimate to argue that because the government has done something since the beginning of the Republic, it must be constitutional.[23] Under this theory, tradition does not

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20. *Cf.* Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 2-3 (Eric Hobsbawm & Terence Ranger eds., 1983). Hobsbawm draws a distinction between tradition and convention. In his view, traditions are practices based on ritualistic or symbolic considerations (such as powdered wigs for judges), whereas conventions are practices based on pragmatic considerations (such as steel helmets for soldiers). He argues that the overwhelming, perhaps even essential, power of tradition inspires leaders to invent traditions for the purpose of establishing legitimacy in all areas of public and private life.

21. *Cf.* Dworkin, *supra* note 18, at 860 (arguing that difference between person's statement of social rule and statement of normative rule turns not on type of rule involved, but rather on attitude that statement displays toward rule). For example, our society has developed a forty-hour workweek as a standard for most occupations. That could be considered a *custom*, an accommodation that satisfies certain needs for uniformity or stability, but would not necessarily reveal anything about the substantive values of the society. Alternatively, when compared to practices elsewhere in the world or in history, the forty-hour week could be considered a *tradition* of placing value on the protection of workers from exploitation in the workplace.

22. Examples of the Supreme Court's reliance on tradition without explicit justification can be found in notes 25-31 *infra*.

23. *Cf.* Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1099 (1992) (providing a critique, based on empirical evidence, of claim that Supreme Court overwhelmingly uses originalism in statutory interpretation).

possess inherent authority, but provides presumptive, or even conclusive, evidence of intent, which is dispositive. Thus, tradition indirectly but inevitably controls the outcome of any inquiry cast in these terms.

Although proponents of this intent theory rely on different types of tradition as evidence of intent, they share a belief that what the Framers intended should govern constitutional interpretation today. Much has been written to demonstrate the inadequacy of the pure intentionalist approach.[24] In brief, intentionalism suffers from difficulties in determining whose intent should control, whether there is any meaningful collective intent, what to do when there is no evidence of original intent regarding the matter at hand, and how to avoid abnegation of all progressive insight gained since the founding of the nation. These obstacles apply to intentionalism itself, and a full analysis of intentionalism is beyond the scope of this Essay. This Essay focuses on the particular problems that intentionalists encounter when they use tradition as evidence of the elusive intent which intentionalism demands.

Very early in its history, the Supreme Court began regularly to incant the principle that "it is most probable, that the members of the first congress, many of them having been members of the convention which formed the constitution, best knew its meaning and true construction."[25] That principle comprised the most direct expression of a search for intention through evidence of historical or traditional practice. That is, if the first Congress engaged in a practice or authorized someone else to do so, then the Framers must have intended that practice to be constitutional. In addition to evidence about the first Congress, more tenuous arguments have arisen that the practices of states,[26] communities,[27] or people in general,[28] at the time of the framing of the Constitution—or before, or after—should be evidence of the intended meaning of a constitutional term.

1. *The First Congress*

The Supreme Court has interpreted evidence that the first Congress either took, approved, or acquiesced in some action as a virtually irrefutable

24. *See, e.g.*, Brest, *The Misconceived Quest, supra* note 7; Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

25. Stuart v. Laird, 5 U.S. (1 Cranch) 298, 307-08 (1803); *see also* Myers v. United States, 272 U.S. 52, 136 (1926); Parsons v. United States, 167 U.S. 324, 339 (1897).

26. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 788-89 & n.11 (1983) (holding Nebraska Legislature's practice of opening sessions with prayer does not violate Establishment Clause because that practice "is deeply embedded in the history and tradition of this country").

27. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2681 (1992) (Scalia, J., dissenting) (describing "customary features" of high school graduations).

28. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824) ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation.").

indication of the constitutional validity of that action.[29] This use of history—of the *traditions* established by the members of the first Congress—usually rests on one or a combination of assumptions, which, I will demonstrate, are flawed. First, looking to the first Congress to find the intent of the Constitution's framers assumes that members of the first Congress are an appropriate and useful proxy for the members of the Constitutional Convention; following originalism, the Framers' intent dictates the meaning of the Constitution and, where that intent is unclear, the first Congress' intent is controlling. Second, so far as interpretation of the Bill of Rights is concerned, this use of history assumes that the first Congress' understanding should carry great weight, because that Congress proposed the Bill of Rights for ratification. Finally, reliance on the utterances of the first Congress sometimes presupposes an extraordinary intelligence and foresight of the members of that body.

The first of these assumptions postulates that "a considerable number" of members of the first Congress had attended the Constitutional Convention or were familiar with the interchanges that occurred there:[30]

> Even the then members of the Congress who had not been delegates to the convention, which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds.[31]

Conceding for the moment the plausibility of this argument, one must still acknowledge that evidence from the first Congress allows us not to see what went into the initial development of the constitutional language, but rather, in a way, to go back after the drafting and ask the same people how they would apply that language to a specific issue in factual context. This is an originalist's dream—to hear the Framers interpret their own words!

The initial plausibility of this argument fades a bit as one considers that the roles of the members of the first Congress were very different from the roles of the Framers, even to the extent that the individuals overlapped (only

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29. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (asserting that fact that first Congress provided for congressional chaplains powerfully suggests that practice does not violate First Amendment); Marsh v. Chambers, 463 U.S. 783, 788-90 (1983) (same); Williams v. United States, 289 U.S. 553, 573-74 (1933) (relying on Judiciary Act of 1789 as evidence of constitutional intent); Myers v. United States, 272 U.S. 52, 175-76 (1926) (same); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (same); Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 457-58 (1851) (same); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 417-18 (1821) (same); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401-02 (1819) ("[P]ower now contested was exercised by the first Congress . . . and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 352 (1816) (relying on Judiciary Act of 1789 as evidence of constitutional intent); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 308-09 (1803) (same).

30. Myers v. United States, 272 U.S. at 174.

31. Knowlton v. Moore, 178 U.S. 41, 56 (1900).

eighteen actually served in both bodies).[32] Unlike the Constitutional Convention, Congress does not meet in secret, and thus may be influenced by a great number of factors other than the belief that a particular measure is or is not within the letter of the Constitution. Even James Madison voted in Congress for a bill that he later, in a private capacity, stated to be unconstitutional.[33] It has been observed of legislators in general that "in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it."[34] Thus, even an identity of persons is not useful without an identity of motivations as well.[35]

The problem of *whose* intent controls, endemic to any intentionalist argument,[36] is exacerbated in this situation in which the interpretation emanates not from any of the individual drafters, nor from the collective body of drafters, nor even from the state ratifying bodies,[37] but from an entirely different collective body with its own internal dynamics. The history of the executive removal power, finally resolved in *Myers v. United States*,[38] demonstrates how inappropriate it is to equate the intent of the first Congress with the intent of the Framers. This illustration underscores the difficulty of measuring the intent—the common will of a majority or supermajority—of *any* collective decisionmaking body simply by looking to the decisions that body yields. The difficulty is magnified when one looks to that body's decisions to infer the intent of a predecessor body.

In *Myers*, the Court relied heavily on the first Congress' so-called "decision of 1789," which recognized a presidential power to remove executive officers. In the debates preceding that congressional "decision," James Madison had urged Congress to declare that the *Constitution* granted the President the removal authority, rather than simply declaring that Congress, at its discretion, would allow the President removal authority. He led a group, call it *A*, who believed that the Constitution granted removal power to the President alone. He had two groups of opponents: *B*, who thought that Congress, rather than the Constitution, determined the issue, and *C*, who thought that the

32. Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 157, 177 n.89 (1939). The Supreme Court has put the number at seventeen. Lynch v. Donnelly, 465 U.S. at 674 (1983).

33. James Madison, untitled manuscript, *reprinted in* Elizabeth Fleet, *Madison's 'Detached Memoranda'*, 3 WM. & MARY Q. 534, 558 (1946).

34. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155-56 (1893).

35. *Cf.* Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 116 (1790) (passed by first Congress and requiring that persons convicted of certain thefts "be publicly whipped, not exceeding thirty-nine stripes"); Act of July 23, 1866, 14 Stat. 216 (1866) (passed one week after Congress proposed Fourteenth Amendment and providing for racial segregation of District of Columbia public schools).

36. *See* Farber, *supra* note 24, at 1091. *But see* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 245-51 (1988) (stating that originalist judges need only to determine a shared area of agreement among relevant actors).

37. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 144 (1990); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 359 (1992).

38. 272 U.S. 52 (1926).

Constitution provided for *joint* power of removal shared by the executive branch and the Senate. Through a masterful manipulation of the principles much later identified by Kenneth Arrow,[39] Madison engineered two votes on amendments. One vote divided his two opponent groups one way (*A* was joined by *B* and opposed by *C*); the second vote divided them the other way (*A* was joined by *C* and opposed by *B*). The result was that Madison's group, *A*, was the only faction to get its way both times, so its view prevailed—even though there was no majority that supported both amendments proposed by Madison. The combined effect of the amendments was to create a congressional "decision" suggesting that, as a constitutional matter, the President has the sole power to remove executive officials.[40] The Court later took this legislative "decision," with no discussion of its background, as powerful evidence of the intent of the Framers regarding the meaning of the constitutional terms and upheld the President's constitutional power to remove officials.[41]

A more theoretical objection to the assumption that members of the first Congress are an appropriate and useful proxy for the members of the Constitutional Convention is that it ignores a principle that we know was of vital importance to the very existence of the Constitution: the principle of separated powers. By enumerating the powers of the respective branches of the federal government, the Framers ensured that no law of the United States would be enacted and interpreted by the same institutions or individuals, no matter who nor how well intentioned those individuals were. Complete judicial obeisance to the inferred beliefs of the first Congress, on the ground that "Founding Fathers know best," effectively renounces the separation of powers principle where it matters most: in constitutional interpretation. By giving the first Congress the last word on what the Constitution means, the Court alters the balance between the branches in a way that ordinary deference to Congress in legislative matters does not.[42] In effect, adopting such an approach to constitutional interpretation would allow the first Congress to usurp forever the Court's duty of constitutional interpretation as to any matter on which that Congress spoke.

A second argument often used to support the idea that special weight should be given to actions of the first Congress, particularly in interpreting the Bill of Rights, is that the first Congress had some institutional advantages with

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39. See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) and text accompanying note 116 *infra*.

40. These debates are discussed in detail in MILLER, *supra* note 11, at 61-64.

41. The *Myers* case is discussed further at text accompanying notes 70-74, *infra*; *see also* Scalia, *supra* note 7, at 851-52 (defending *Myers* as example of appropriate "originalist" enterprise).

42. Although the objectives of statutory construction may be no less controversial than those of constitutional interpretation, there is one obvious difference in that Congress is the sole creator of legislation. The people take part in legislation *indirectly* by voting for members of Congress, but they took part *directly* in legitimating the Constitution by assenting to its ratification.

respect to understanding the Bill of Rights, since that Congress proposed the Bill of Rights for ratification by the states.[43] But history contradicts this assumption:[44] "The first 10 Amendments were not enacted because the Members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution."[45] Even most originalists today take the position that it was the ratifiers and not the drafters of constitutional language whose intentions have importance to constitutional meaning.[46]

A third assumption sometimes used to support the authoritative nature of the acts of the first Congress is that the members of the first Congress possessed extraordinary abilities and therefore deserve special deference. Chief Justice Marshall specifically relied on this factor in *McCulloch v. Maryland*,[47] in which he addressed the constitutionality of the national bank. He noted that:

> [t]he power now contested was exercised by the first Congress elected under the present constitution. . . . After . . . being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. . . . It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.[48]

But not long before, when John Marshall himself had held an act of the first Congress unconstitutional in *Marbury v. Madison*,[49] he never mentioned or considered the identities or talents of the enacting legislators. Thus, while the views of those closest to the process that led to and followed the framing of the Constitution may provide insight into its meaning, the views of that Congress or of its individual members cannot provide irrebuttable evidence of the "meaning" of the Constitution.

Overall, even if one accepts the validity of an intentionalist approach to understanding the Constitution, the traditions established by the first Congress are not flawless indicators of the intent sought. Thus, they cannot be dispositive of constitutional issues today.

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43. Myers v. United States, 272 U.S. at 174.

44. *See* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 10-34 (1957) (discussing amendments recommended by state ratifying conventions).

45. Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting).

46. *See* BORK, *supra* note 37, at 144; Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 676-77 (1991).

47. 17 U.S. (4 Wheat.) 316, 401-02 (1819).

48. *Id.* at 401-02.

49. 5 U.S. (1 Cranch) 137 (1803). Professor Van Alstyne has argued that the provision struck down in *Marbury* did not need to be interpreted in such a way as to render it unconstitutional. William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 14-16. Thus, perhaps there is no anomaly in the Chief Justice's failure to consider the wisdom of the enacting legislature in this case.

2. *Other Traditions*

Acts of the first Congress are not the only form of tradition that has garnered attention in the quest for the Framers' intent. The tone was set very early on, in *Gibbons v. Ogden*,[50] in which the Court (per Chief Justice Marshall again) called upon the presumptive intent of the Framers, the ratifiers, and indeed "all America," to incorporate the concept of navigation into the term "commerce":

> All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.[51]

The Court's fondness for inferring an original understanding of constitutional terms from longstanding common practices has continued throughout the Court's history. In *Walz v. Tax Commission*,[52] the Court considered the constitutionality of a state property tax exemption for church-owned property. It found that:

> [f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.[53]

Although the Court used no expressly intentionalist rhetoric such as that quoted above from *Gibbons*, it is difficult to conceive of any coherent explanation for the Court's comment except that these "deeply embedded" concepts influenced the Framers of the Constitution.[54]

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50. 22 U.S. (9 Wheat.) 1 (1824).

51. *Id.* at 190.

52. 397 U.S. 664 (1970).

53. *Id.* at 676-77.

54. By contrast, notice that Justice Brennan's concurrence in *Walz* put the historical evidence in a slightly different light:

> The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemptions. This Court's interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation. As Mr. Justice Holmes observed in an analogous context, in resolving such questions of interpretation "a page of history is worth a volume of logic." The more longstanding and widely accepted a practice, the greater its

In considering whether a state legislature may constitutionally open its sessions with prayer, the Court again devoted a substantial portion of its opinion to documenting the pre-Revolutionary practices of the colonies, the practices of the first Congress, and subsequent practices of the Congress up until the present day. It concluded that such prayer is "deeply embedded in the history and tradition of this country."[55] The historical evidence was valuable to the Court's analysis because it "sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the first Congress—their actions revealed their intent."[56] Thus, the Court inferred an original understanding of the constitutional terms based on traditions antedating and postdating the framing of the Constitution by hundreds of years.

Further examples of the Court's search for longstanding tradition are quite plentiful. The Court continues to attribute the "greatest weight" to evidence of national traditions in establishing the intent of the Framers, and consequently, the correct interpretation of the Constitution.[57] This evidence has been considered virtually irrebuttable.

The principal flaw in this use of tradition is that it defies logic by appealing to actions substantially prior or subsequent to the drafting of terms as evidence of the drafters' intent in selecting those terms. Two recent opinions by Justice Scalia illustrate the problem. In his dissent in *Lee v. Weisman*,[58] he argued that a long tradition of prayer in public ceremonies—going back to the Declaration of Independence and continuing to the present—confirms the validity under the First Amendment (as incorporated through the Fourteenth) of prayer at public school graduations.[59] Yet in an opinion issued only five days later, Justice Scalia, writing for the Court in *Lucas v. South Carolina Coastal Council*,[60] dismissed the dissent's reliance on tradition as evidence of the intent underlying the Takings Clause, on the ground that the "practices

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impact upon constitutional interpretation.

Id. at 681 (Brennan, J., concurring) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)). Justice Brennan's view of the historical evidence did not bow to intentionalism. Rather, he appeared to view the longstanding national traditions as evidence that the practices should continue—a theory that I discuss in Part I.B., *infra*.

55. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

56. *Id.* at 790.

57. *See* Harmelin v. Michigan, 111 S. Ct. 2680, 2691-99 (1991) (finding disproportionate sentence does not violate Eighth Amendment, because state practices from 1778 to 1802, actions of first Congress, and traditions throughout nineteenth century suggest there is no constitutional proportionality principle, despite changing traditions in twentieth century); Lynch v. Donnelly, 465 U.S. 668, 675-78 (1984) (finding city's display of Christmas crèche does not violate Establishment Clause because "history is replete with official references to the value and invocation of Divine guidance" from early colonial period to present day); Ingraham v. Wright, 430 U.S. 651, 660 (1977) (noting corporal punishment of schoolchildren does not violate Eighth Amendment because practice "dates back to the colonial period" and "continues to play a role in the public education of schoolchildren in most parts of the country").

58. 112 S. Ct. 2649 (1992).

59. *Id.* at 2678-81 (Scalia, J., dissenting).

60. 112 S. Ct. 2886 (1992).

of the States *prior* to incorporation of the Takings and Just Compensation Clauses" are "entirely irrelevant."[61]

There, for the first time, a member of the Court alluded to the uncomfortable questions that had lurked behind its intentionalist uses of history all along: If tradition is relevant as evidence of the intent of the Framers, at the very least must it not be confined to tradition contemporaneous with the framing of the document and known to the Framers? Does evidence of *pre*-Constitutional tradition bear on the intent of the Framers, who clearly set out to make drastic changes in the political traditions of their nation? Is evidence of *post*-Constitutional tradition at all relevant to what the document originally meant? And, perhaps most complex of all, what era of traditions is relevant to consideration of individual rights as applied to the states through the Due Process Clause of the Fourteenth Amendment—traditions from 1789, from 1868, or, as Justice Scalia appears (incredibly) to suggest,[62] from the date at which the Supreme Court decided to apply the particular provision to the states via incorporation? The Court has never faced these questions, and, as a result, its treatment of tradition is simply an incoherent exercise in intentionalism.

Indeed, it would be extremely difficult, if not impossible, to establish a sound jurisprudence relying on tradition as evidence of intent, which would in turn be considered determinative. The legitimacy of such an approach would depend on the accuracy and completeness of available history. The Court would have to decide how to treat the discovery of conflicting traditions in a single time period. It would also have to explore an aspect of tradition that the intentionalists have never pursued—the extent to which the relevant group of drafters was both aware and supportive of the tradition. Without such formalistic guidelines for relevance—and the Supreme Court is not known for its historical meticulousness[63]—an intentionalist theory for following tradition in constitutional law is utterly unpersuasive.

B. *Tradition as Evidence of Common Consent*

The notion of "common consent"[64] as justification for government action is as old as enlightened political thought itself.[65] It seems plausible, therefore,

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61. *Id.* at 2900 n.15.

62. *Id.* To be fair, it is unclear whether Scalia's dismissal of pre-incorporation traditions in this case is driven by the timing or by his view of the correctness of those traditions on the merits. Because this is the only instance of which I am aware in which Scalia actually questions the merits of a tradition, I suspect he may be concerned about the timing.

63. *See* MILLER, *supra* note 11, at 3-7 (discussing studies showing Court's applications of history); *id.* at 68 ("The *Myers* case is not alone in utilizing history that is neither right nor relevant.").

64. *See* Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (Holmes, J.) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.").

65. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 301 (Peter Laslett ed., 1960) ("The *Liberty of man, in Society*, is to be under no other Legislative Power, but that established, by consent, in the

that in its efforts to evaluate the constitutionality of government action, the Court might naturally consider whether such common consent to the challenged action has been demonstrated over time.[66] Allowing a government action to continue without popular objection can theoretically provide evidence of consent to that action. By my own definition,[67] such a practice would not necessarily rise to the level of a tradition because it may or may not reflect a judgment of the polity to endorse the government's conduct.[68] Yet, as the "common consent" theory appears to go, evidence of longstanding acts of government is relevant to a constitutional analysis to the extent that such evidence suggests that those acts are legitimate because of the common consent to their continuation.

The consent theory borrows implicitly from the sector of constitutional law dealing with relations between the legislative and executive branches of government. In that area of inquiry, it has become commonplace to examine whether Congress has consented to a particular exercise of power by the executive branch. Congressional consent is often seen as bearing substantively on the constitutionality of that exercise. That is, subject to specifically enumerated constitutional constraints, if the President acts and Congress assents—either affirmatively or by failing to object[69]—then the Court will find the act to be valid under the Constitution.

The consent theory may suggest a plausible approach to some separation of powers issues. However, it would be a grave mistake to transpose that theory without modification to the context of individual rights. In the separation of powers universe the question is "Which branch has the power?" In the individual rights universe, the question is "Does the government have the power at all?" Congressional silence in the face of an exercise of power by the executive does not mean the same thing as popular silence in the face of an exercise of power by the government as a whole. While it may be reasonable to read the former silence as acquiescence, or even endorsement, it is not reasonable to so read the latter silence, which may simply reflect collective inertia within a large, ill-defined body of people.

Common-wealth . . . .").

66. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 18 (1975).

67. *See supra* notes 14-22 and accompanying text.

68. I discuss the ambiguity of popular silence at text accompanying notes 110-17 *infra*.

69. Congressional silence is, of course, ambiguous. *See infra* notes 110-17 and accompanying text. In situations where executive action threatens the stature or power of Congress as an institution, however, there would seem to be somewhat greater reason to read silence as acquiescence. In these circumstances, Congress would probably be aware of what the executive is doing and would probably have more unified interests in protecting its own constitutional prerogatives. Of course, those observations merely suggest tendencies and not inevitable conditions. There may be a legitimate objection to Justice Jackson's construct articulated in the *Steel Seizure Case*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring), or to the Court's application of it, to the extent it attributes intention to congressional silence.

Tradition, of sorts, has been important in the Court's efforts to identify consent between coordinate branches. For example, in *Myers v. United States*,[70] the evidence of acquiescence by the "encroached-upon" branch was highly probative. In that case, the Court was asked to resolve whether the President has the sole power to remove an executive officer, or whether instead the Senate, through its advice and consent role in the appointment of such officers, can reserve the right to approve those executive removals. Conclusive for the Court was Congress' acquiescence in longstanding executive practice. That evidence arose from a decision of the first Congress, in 1789, that the power of removal lay in the executive alone.[71] Thereafter, the Court found, "from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this Court at variance with the declaration of the first Congress, but there was, as we have seen, clear, affirmative recognition of it by each branch of the Government."[72] After 1863, however, a new practice evolved, in which "both Houses of Congress attempted to reverse this constitutional construction and to subject the power of removing executive officers appointed by the President and confirmed by the Senate to the control of the Senate."[73] The Court rejected Congress' efforts to withdraw its acquiescence to the executive's practice, because by the time it first formally did so, by enacting the Tenure of Office Act in 1867 (over President Andrew Johnson's veto), the President's sole removal power under the Constitution had already become firmly established—constitutionally valid.[74] Congress had given its consent by longstanding practice, and that consent gave the executive's position constitutional validity.

In the *Pocket Veto Case*,[75] the Court again turned to interbranch practice to resolve a dispute about constitutional power. The question was whether the President's failure to return a bill within the constitutionally prescribed ten days resulted in the bill's demise, which would be the case if Congress "by their Adjournment [had] prevent[ed] its Return,"[76] or in the bill's becoming a law, which otherwise happens when the President neither approves nor vetoes a bill. By the time the ten days had lapsed, Congress had adjourned between its first and second sessions. The Court's job was to decide whether this temporary adjournment was the sort that "prevent[s]" the return of a bill. Its answer was dictated by "the practical construction that has been given to [the text] by the Presidents through a long course of years, in which Congress

70. 272 U.S. 52 (1926).

71. *See supra* text accompanying notes 38-41 (discussing background of decision and its use by Court as evidence of Framers' intent).

72. 272 U.S. at 163.

73. *Id.* at 164.

74. *Id.* at 176.

75. 279 U.S. 655 (1929).

76. U.S. CONST. art. I, § 7, cl. 2.

has acquiesced."[77] That century-old construction was "that [the Presidents] were prevented from returning the bill to the House in which it originated by the adjournment of the session of Congress; . . . [a] construction . . . acquiesced in by both Houses of Congress until 1927."[78] Despite Congress' effort in 1927 to put forth a different view of the constitutional language, the Court held, in effect, that its change of mind came too late, because a constitutional "meaning" had already arisen and could not be altered through interpretation.

More recently, in *Dames & Moore v. Regan*,[79] the Supreme Court unanimously upheld an executive agreement settling claims against Iran arising out of the Iranian hostage crisis. Again, the Court found a basis for the President's authority in congressional acquiescence. Finding no statutory authorization for the President's suspension of claims pending in United States courts, the Court looked for a "'systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.'"[80] A custom of making executive agreements dating from 1799, along with various not-inconsistent acts of legislation, satisfied the Court that Congress had acquiesced in a longstanding executive practice.[81] Thus, at some point, the President had acquired *constitutional power* to make the agreement at issue.

The Court's theory seems to be that if the President has done something repeatedly over time with the knowledge and acquiescence of Congress, then the act of the President acquires constitutional validity. There are two ways to understand this theory. First, it is possible that the Court believes, as a matter of its own role in the tripartite structure of government, that it should not interfere in the affairs of the other two branches if they have participated, either tacitly or expressly, in a sharing of power between themselves.[82] That interpretation, while sensible if one accepts the premise that the other two branches have indeed worked out a sharing of power, neither explains the actual decisions that the Court reaches[83] nor prescribes what it ought to do

77. 279 U.S. at 688-89.

78. *Id.* at 691.

79. 453 U.S. 654 (1981).

80. *Id.* at 686 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). Notice that the issue was only one of divided power between the executive and legislative branches; that issue was distinct from any assertions of individual rights by claimholders.

81. *See, e.g.*, United States v. Belmont, 301 U.S. 324, 330 (1937) (recognizing power of President, without advice and consent of Senate, to enter into agreement incidental to recognition of foreign government).

82. This interpretation is a form of Dean Choper's argument that interbranch disputes should be considered political questions and left to the accommodation of the two political branches. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980).

83. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").

in matters of structural allocation of power in which Congress has withdrawn its acquiescence.[84]

A more likely interpretation, in light of the Court's holdings and dicta, is that in interbranch disputes the acquiescence of Congress actually has bearing on, but does not exclusively determine, the constitutionality of acts of the executive. Just as the principle of adverse possession changes property rights based on one party's claim and the other party's acquiescence, the Court allocates governmental rights to the branches based on the same type of claim and acquiescence. Justice Jackson's famous concurrence in the *Steel Seizure Case* comes to mind:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.[85]

Under this first of Justice Jackson's three categories, each branch has given whatever the Constitution entitles it to give toward a common end, and this relieves the Court of the need to demarcate the boundaries between congressional and executive power.[86] The Court need only confirm that the delegated authority is indeed constitutionally delegable and look for evidence of past practice that suggests "express or implied authorization," and it has its answer.

Justice Jackson's construct is helpful when the issue is *which* branch has the power, where the power lies in the overlap between Articles I and II. If the legislature has offered its consent to the executive, then the Court is safe in assuming, under Justice Jackson's "category one," that the President's action must be constitutionally valid.[87] This judicial accommodation to the political branches has the added virtue of tremendous pragmatic importance in running complicated government policy,[88] particularly in the foreign affairs sphere.[89]

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84. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (arguing that judicial deference to executive-legislative agreements improperly ignores effects on individual rights).

85. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

86. In practice, however, the Court in recent years has based findings of acquiescence on dubious signals from Congress. *See* HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 142 (1990) ("By treating ambiguous congressional action as approval for a challenged presidential act, a court can manipulate almost any act out of the lower two Jackson categories, where it would be subject to challenge, into Jackson's category one, where the President's legal authority would be unassailable.").

87. *See* Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1047-49 (1977) (arguing that meaning of Constitution changes through interbranch tugs-of-war).

88. *See Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on*

But the Court makes a serious error if it transplants the elements of Justice Jackson's consent theory (even implicitly) to constitutional issues about *whether* government has power at all, rather than *which* branch may do the act.[90] In cases in which interests beyond those of the branches themselves are at issue, no amount of consent among the branches should affect the constitutional analysis.[91] The Court unwittingly supported this view when it rejected Chief Justice Burger's argument, in *Nixon v. Administrator of General Services*,[92] that a statute requiring disposition of former President Nixon's papers unconstitutionally transgressed the separation of powers. While the Chief Justice pointed to a longstanding tradition of congressional acquiescence in the President's prerogative to dispose of his papers as he sees fit,[93] the majority showed concern for the public interest in disclosure of the presidential archives.[94]

Nevertheless, the Court and individual Justices persist in using arguments, even in cases involving individual rights, that rely on tradition as evidence that some government practice is constitutional.[95] Implicitly, they seem to suggest

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International Relations, 95th Cong., 1st Sess. 23 (1977) (statement of Harold G. Maier, Visiting Scholar, Brookings Institution).

89. *See* Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 917-19 (1986).

90. The cases and the commentary often appear to confuse two distinct issues: first, whether an action falls within the inherent powers of Congress or the President to begin with (a situation that may be addressed using the Jacksonian construct); and second, whether Congress has delegated power to the President to do the act. Cases involving an issue of statutory delegation of authority are often cited as if they were examples of the Jacksonian category one, congressional acquiescence. *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 124-25 (1958) (validating longstanding executive construction of passport statute, but finding challenged act beyond powers so created); United States v. Midwest Oil Co., 236 U.S. 459, 471 (1915) (even if executive does not possess power to withdraw public lands from the effect of laws permitting oil exploration without authority of Congress, longstanding acquiescence by Congress in repeated executive orders making such withdrawals may supply the needed authority). There is a critical analytical distinction between the question whether Congress has authorized the President to do something, perhaps by acquiescence (in which case the executive is merely *executing* the law, as it is constitutionally empowered to do), and the question whether Congress' acquiescence in an exercise of power by the executive *creates* independent constitutional power in the executive to do the act (in which case the executive is exercising some independent power other than its authority to execute the law). In this Essay, I am addressing the latter type of acquiescence, which contributes to the substantive accretion of executive power.

91. *See* INS v. Chadha, 462 U.S. 919, 944-45 (1983) (rejecting argument that because presidents had been signing statutes containing legislative vetoes for fifty years, legislative vetoes are constitutional).

92. 433 U.S. 425 (1977).

93. Burger's position was classic Jacksonian acquiescence analysis: "Since George Washington's Presidency, our constitutional tradition, without a single exception, has treated Presidential papers as the President's personal property. This view has been congressionally and judicially ratified . . . ." *Id.* at 539 (Burger, C.J., dissenting).

94. *Id.* at 457-58 ("We may assume . . . that this pattern of *de facto* Presidential control and congressional acquiescence gives rise to [Nixon's] legitimate expectation of privacy in such materials. . . . But . . . any intrusion must be weighed against the public interest in subjecting the Presidential materials of [his] administration to archival screening.").

95. I do not suggest that custom should not be considered in the course of some functional analysis of a constitutional issue, as empirical evidence on questions such as efficiency, potential for abuse, or consequences of a certain government practice. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (noting that nation's long history of tax exemptions for churches had not shown any tendency to support an establishment of religion). Nor do I take issue with the huge amount of interbranch negotiation on various matters, without judicial involvement, which currently takes place in the daily workings of the

that just as one branch may acquiesce in the actions of another, "the people" may be understood to give their consent to government interference with certain liberties if they permit that interference over time. The Court thus acknowledges an adverse possession of power.[96] "Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example."[97]

Several cases illustrate the point. In *Ingraham v. Wright*,[98] the Court addressed whether corporal punishment in public school violates the Eighth Amendment's ban on cruel and unusual punishment. The answer would depend on "the way in which our traditions and our laws have responded to the use of corporal punishment in public schools."[99] The Court found that the use of corporal punishment dated back to the colonial, pre-Revolutionary period of this country's history. It then demonstrated that it was not viewing the historical evidence as evidence of original intent, by emphasizing changes that had taken place in society since the framing of the Eighth Amendment. In the Court's view, these changes strengthened the state's case, not because of anything the Framers might have intended, but because the theory supporting corporal punishments in schools had evolved from a derivative, parent-based right to an inherent, state-based right to discipline school children.[100] The case can be understood to show, therefore, that tradition may be valued in non-intentionalist ways, as evidence that society has given over a power to the government by allowing tradition to continue and evolve over time.

In *Lee v. Weisman*,[101] the Court invalidated a prayer in public-school graduation ceremonies, and thus, according to the dissent, "la[id] waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."[102] Justice

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federal government. The nature of many issues, including the absence of any party with standing, will mean that the vast majority of interbranch disputes never reaches the judicial branch for resolution. *See* Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 238 (1992) (applauding nonjudicial resolution of interbranch disputes). My analysis applies only to cases that have come before the judiciary for resolution under the Constitution.

96. The Supreme Court has sent mixed signals on this issue. *See Walz*, 397 U.S. at 678 ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside."); *see also Chadha*, 462 U.S. at 944 ("[O]ur inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes . . . .").

97. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897) [hereinafter Holmes, *The Path of the Law*].

98. 430 U.S. 651 (1977).

99. *Id.* at 660.

100. According to the majority opinion, the underlying theory supporting the use of corporal punishment in schools had changed from a view that the authority of the teacher derived from the parents to a view that the state itself has the right to impose such punishment as reasonably necessary for education and discipline. *Id.* at 662.

101. 112 S. Ct. 2649 (1992).

102. *Id.* at 2679 (Scalia, J., dissenting).

Scalia's argument in dissent was that the *fact* of a tradition supporting such prayer was *itself* controlling in establishing the constitutionality of the practice. His opinion does not bear the signs of an intentionalist endeavor; instead, he looks at traditions at a relatively high level of generality, a perspective he has eschewed in other contexts,[103] and he relies on practices occurring both before the drafting of the Constitution and in the present day.[104] Thus, his tone of outrage appears to be based on the idea that the Court's judgment in the case undermined a government power that was *created* by longstanding tradition: an accretion of power based on adverse possession.

Justice Blackmun has also invoked the consent theory of constitutional interpretation. In *Lucas v. South Carolina Coastal Council*, when the majority invoked the Takings Clause of the Fifth and Fourteenth Amendments to strike down a state law barring a beachfront-property owner from building any structures on his land, Justice Blackmun dissented on grounds of tradition.[105] Relying on practices dating from 1606, 1802, the mid-1800's, and the early twentieth century, Justice Blackmun argued that governments had not paid compensation under the Takings Clause for any type of regulatory curtailment of property rights, but only for physical dispossession of property, which had not occurred in the present case.[106] His analysis suggests not that the Framers *intended* this interpretation of the Takings Clause, for he cited examples from every time period *but* that of the drafting of the Constitution, but rather that the people had over time established a norm which granted regulatory powers to the state without imposing an obligation to compensate. The people had, through centuries-old tradition, consented to this type of uncompensated taking. It was, therefore, constitutional.

A clear flaw in the consent theory of tradition is that if, in fact, government has acquired a claim to power by exercising it, then someone else has waived a right that it once possessed. As in the adverse possession context, someone must have held something and given it up to someone else by not asserting the right or disputing the claimed power.[107] The question in the individual rights setting must focus primarily on who has waived the right and how. Generally, in constitutional law, the waiver of a protected right is considered an individual matter, scrutinized case by case under all the circumstances to show that a specific person has knowingly and voluntarily given up a protection that she would otherwise have under the

103. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J.).

104. *Cf.* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 n.15 (1992) (Scalia, J.) ("The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses" are "irrelevant" and unsupported by text of Takings Clause).

105. *Id.* at 2914-25 (Blackmun, J., dissenting).

106. *Id.* at 2914-16.

107. *See* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1101 (1981).

Constitution.[108] General, blanket, third-party, or implied waivers are rarely, if ever, recognized.[109]

In order for the consent theory to work, then, one would have to postulate that government action in an area of uncertain power and rights becomes valid—solidifying the power and negating the rights—after some period, because public acquiescence suggests a knowing and voluntary consent of the polity to that exercise of power. That, in turn, requires the assumption that the people had both knowledge of the practice and an incentive and opportunity to change it, and deliberately chose not to do so.

Professor Robert Nagel has elegantly advocated something close to this position: "The quiet flow of human conduct is not necessarily less eloquent than the excited noise of public debate."[110] He argues that what he terms "mute behavior," or the failure of the populace to object to the status quo, should be considered "a powerful endorsement of the way things are."[111] According to Nagel, "[i]f, in enforcing our Constitution, judges are to establish our values by interpreting our political history, then judges should interpret our whole history, not only what has been desired and said but also what has been accepted and left unspoken."[112]

Modern insights into collective decisionmaking and representative lawmaking provided by the public choice literature largely refute that contention about the meaning of popular silence, which is a necessary step in the acquiescence rationale. It is quite widely accepted now that "the silent voice of Congress does not *say* a damn thing!"[113] Even Justice Scalia, for whom tradition is an important source of authoritative constraint, has balked at using congressional silence as evidence of any sort of legislative intent when that question has arisen explicitly in the context of statutory interpretation:[114]

> The complicated check on legislation erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.[115]

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108. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 475 (1966); Griffin v. California, 380 U.S. 609 (1965).

109. *See generally* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.3 (1985) (describing waiver of right to counsel).

110. Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685, 700 (1990).

111. *Id.* at 699.

112. *Id.* at 701.

113. Laurence Tribe, *Separation of Powers and Selective Judicial Deference*, *in* 3 THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1980-81, at 184 (Dorothy Opperman ed., 1982).

114. *See* Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting).

115. *Id.* at 672 (citation omitted).

Add to Justice Scalia's list the further possibilities of ambiguity stemming from the representative status of legislatures, such as the chance that the silence might be attributable to the impossibility of aggregating individual preferences into societal preferences due to the cycling problems identified by Kenneth Arrow,[116] and that a small but powerful and well-organized interest group may be working to maintain legislative silence.[117] The result is that any assumption about the meaning of the polity's failure to object to any longstanding government practice is doomed to uncertainty and error. It thus is not a reliable foundation on which to rest a jurisprudence in which tradition sets up limits on potential assertions of individual rights.

C. *Tradition as Evidence of What is a "Right"*

The mirror image of the "consent" analysis discussed above is the use of tradition to establish an adverse possession of *liberty*, rather than of *power*. This approach looks to established spheres of individual autonomy in an effort to disable government from entering spheres that it has never entered before, recognizing unenumerated individual rights based on the failure of government to intrude upon certain areas of liberty over time. By acquiescing in the people's claim of immunity, the government, if it ever had power, has relinquished that power in favor of the people's right. Tradition is once again used for its evidentiary, rather than intrinsic, value, this time to identify areas of individual life that have been, and consequently must be, shielded from political incursion.[118]

The language repeatedly offered to establish the relevance of tradition to the constitutional inquiry is the statement that "[judges] must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"[119] Thus,

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116. *See* ARROW, *supra* note 39; DENNIS C. MUELLER, PUBLIC CHOICE II 384-99 (1989) (discussing Arrow's Theorem).

117. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 17-20 (1991).

118. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494 (1977) (family living arrangement); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (maternity leave); Wisconsin v. Yoder, 406 U.S. 205 (1972) (religion); Stanley v. Illinois, 405 U.S. 645 (1972) (paternity rights); Ginsberg v. New York, 390 U.S. 629 (1968) (obscenity); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives); Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting) (same); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private education); Meyer v. Nebraska, 262 U.S. 390 (1923) (teaching German in school).

119. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). These words have come to represent the hallmark of substantive due process. Yet, in *Snyder*, the Court referred only to procedural protections that must be afforded criminal defendants in order to avoid offending the Due Process Clause: "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*, 291 U.S. at 105 (citing Twining v. New Jersey, 211 U.S. 78, 106, 111, 112 (1908)). The cited pages of *Twining* discuss the original meaning of the Due Process Clause and conclude that the meaning of due process:

> may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown

tradition appears to have been envisioned as an opportunity to enlarge the universe of protected freedoms by supplementing enumerated rights with rights that have developed over time, through traditional recognition. As Justice Harlan, a principal architect of this use of tradition, wrote: "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. . . . The new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come.'"[120] For Justice Harlan, tradition appears to have been a source of guidance in the development of constitutional doctrine, without offering determinacy on any issue.

In a few cases,[121] the Court implemented (at least in part) Justice Harlan's vision of the use of tradition. But this approach created serious problems as well. The most striking legacy of Justice Harlan's view of the past in relation to the Constitution is that it has been turned upside down. He set forth a notion of constitutional protection to be considered rationally and deliberately against the background provided by history and tradition. He emphasized that the use of tradition would provide no "mechanical yardstick," no "mechanical answer."[122] Although the Court appeared to have largely adopted his view for a while,[123] tradition has more recently become almost a litmus test—an all but insuperable bar to the litigant who fails to invoke it in support of a new constitutional claim. This trend began in *Bowers v. Hardwick*,[124] in which the Court dismissed as "at best, facetious" a claim of historical support for the claimed right—and then appeared to assume that the analysis was therefore concluded.[125] The Court in *Bowers* made no effort, in Justice Harlan's words, to understand or incorporate "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has

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not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

211 U.S. at 100. My point here is only to discuss the use of tradition in establishing fundamental principles of the society, not to take issue with the validity of particular principles of substantive due process as they have evolved in the case law. Even within that framework, it is interesting that the very relevance of tradition to giving substance to the Due Process Clause—an ostensibly non-intentionalist use of tradition—can trace its roots back to an absolutely intentionalist analysis of the Due Process Clause.

120. Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (quoting Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

121. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (recognizing protection for "the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); Ingraham v. Wright, 430 U.S. 651, 675 (1977) (finding that "[b]ecause it is rooted in history, the child's liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations"); Roe v. Wade, 410 U.S. 113, 140 (1973) (holding right to abortion supported in part by finding that "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect"); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (recognizing a "right of privacy older than the Bill of Rights").

122. *Poe*, 367 U.S. at 544.

123. *See* cases cited *supra* note 121.

124. 478 U.S. 186 (1986).

125. *Id.* at 194.

struck between that liberty and the demands of organized society."[126] Rather, the absence of a particular tradition regarding the individual interest at stake, as defined by the Court,[127] became precisely the "mechanical yardstick" for the constitutional inquiry that Justice Harlan had disavowed.

Three terms later, in *Michael H. v. Gerald D.*,[128] the rhetoric of Justice Scalia's plurality opinion suggested that tradition is, was, and always had been, a *limitation* on the Constitution's protection of individual liberty.[129] Indeed, Justice Scalia even transformed an expansive call for "continual insistence upon respect for the teachings of history,"[130] which Justice Harlan had directed at the too-restrictive approaches of Justices Black and Stewart as an argument for widening the scope of individual rights protection, into support for judicial "*insistence* that the asserted liberty interest *be rooted* in history and tradition,"[131] which is a way to reduce dramatically or eliminate altogether the opportunity for litigants to establish a successful claim to constitutional protection.[132]

I am not the first to recognize that this use of tradition is but a thinly-veiled effort to cut off all possibility of progressive interpretation of the past.[133] What is important is that the very tradition that can be read to support development of broader individual rights over time is vulnerable to being harnessed into a limitation on individual rights—a ratchet allowing constitutional interpretation to go backward but not forward.

That danger is not due entirely to the misuse of the tradition arguments in cases like *Bowers* and *Michael H.* It is also due to a flaw in the theory itself. Even when applied forthrightly, the theory that traditions should supply the content of current constitutional liberties poses many pragmatic as well as philosophical problems. First, as Justice White recognized, "[w]hat the deeply

126. *Poe*, 367 U.S. at 542.

127. The definition of the relevant tradition is also a source of controversy. *See infra* notes 137-43 and accompanying text.

128. 491 U.S. 110 (1989) (plurality opinion) (upholding state law creating irrebuttable presumption that husband of married woman is father of her child, thus rejecting all interests of actual father).

129. *Id.* at 122-23.

130. Griswold v. Connecticut, 381 U.S. 479, 501 (1965).

131. *Michael H.*, 491 U.S. at 123 (emphasis added).

132. Holmes tells a story of "a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant." Holmes, *The Path of the Law*, *supra* note 97, at 474-75. Substitute "Constitution" for "statutes" and Holmes could have been describing Justice Scalia's approach to individual rights in *Michael H.*

133. *See Michael H.*, 491 U.S. at 139-40 (Brennan, J., dissenting). *See generally* David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1704-05 (1991) (discussing *Michael H.*); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1086-87 (1990) ("[E]ven if Justice Scalia's program were workable, it would achieve judicial neutrality by all but abdicating the judicial responsibility to protect individual rights."); Robin West, *The Ideal of Liberty: A Comment on* Michael H. v. Gerald D., 139 U. PA. L. REV. 1373, 1375 (1991) ("Scalia's position, if accepted, would undermine not only *Michael H.* but also virtually every major substantive due process case of the last twenty years.").

rooted traditions of the country are is arguable."[134] "'Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights.'"[135] The disquieting truth is that at any level of generality one might choose to identify the relevant culture—twentieth-century America, post-Revolutionary America, common-law tradition; or even Western civilization—there are traditions that all would agree are worthy of being perpetuated, traditions that all would agree are reprehensible and better buried, and traditions that would garner no agreement whatsoever. "To make the obvious and blunt point, there are ugly, even unspeakable traditions in our history."[136] We even have conflicting traditions at the same time and place: traditions of outlawing homosexuality or prostitution while not rigorously enforcing the statutes, traditions of professing norms of equality for all while subjugating various groups with infinite varieties of unacknowledged but widely accepted ostracism and prejudice, traditions of popular involvement in political change while registering one of the lowest voter turnout rates in any democratic system in the world. Identifying which practice in the face of conflicting traditions will be the one legitimated and relied upon in interpreting the Constitution is simply impossible without a theory explaining why tradition is relevant in the first place. No one has provided such a theory, and thus no one has rescued this use of tradition from the mire of caprice.

A second practical problem (again having strong theoretical implications) is choosing the appropriate level of abstraction.[137] Many scholars have persuasively demonstrated that the initial characterization of the search for societal traditions—whether, for example, one searches for historical support for a right "to engage in homosexual sodomy"[138] or a right of individuals to "define themselves in a significant way through their intimate sexual relationships with others;"[139] for a right "of the natural father of a child adulterously conceived,"[140] or a right "of a parent and child in their relationship with each other"[141]—often determines the outcome of that search.[142] Without a theory elucidating what the interpreter is looking for and why, the choice has consistently seemed arbitrary and indefensible.[143]

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134. Moore v. East Cleveland, 431 U.S. 494, 549 (1977) (White, J., dissenting).

135. GARRY WILLS, INVENTING AMERICA, at xiii (1978) (paraphrasing Willmoore Kendall), *quoted in* JOHN H. ELY, DEMOCRACY AND DISTRUST 60 (1980).

136. Strauss, *supra* note 133, at 1712. Even Robert Bork agrees, at times. *See* BORK, *supra* note 37, at 235 ("[N]ot all traditions are admirable.").

137. *See* Easterbrook, *supra* note 37, at 358-60 (stating that appropriate level of generality should be determined as part of text's meaning).

138. *Bowers*, 478 U.S. at 191.

139. *Id.* at 205 (Blackmun, J., dissenting).

140. *Michael H.*, 491 U.S. at 128 n.6 (Scalia, J.).

141. *Id.* at 141-42 (Brennan, J., dissenting).

142. *See* ELY, *supra* note 135, at 61; Brest, *supra* note 107, at 1084; Tribe & Dorf, *supra* note 133, at 1058.

143. Justice Scalia has attempted to claim the high ground by proclaiming that his choice is the only valid one. *See Michael H.*, 491 U.S. at 127-28 n.6. That assertion has prompted a deservedly strong rebuke.

A more substantive objection to the use of tradition to define constitutional liberties is that it tends to narrow the scope of potential protections for liberty even in the face of increasingly tolerant societal mores.[144] It defines liberty by reference to traditions which are themselves identified by reference to the past and thus "protect[s] the 'liberty' of the individual to conform to established historical traditions, rather than the liberty of the individual to rebel against them."[145] Perhaps even more important than its stifling effect on individual behavior is its regressive effect on community orientation: the reliance on tradition as a basis for the definition of constitutional protection is a societal statement of complacency. It suggests that where we have been is where we want to be, that "whatever has been tolerated in practice for a long time is good."[146]

Yet, our national history attests to the contrary. This country was founded because of dissatisfaction with the traditions under which our forbears were forced to live. The Constitution was written because of dissatisfaction with the early political traditions of the independent government.[147] Many of its provisions were devised specifically to alter traditional government practices. The country fought a civil war and dramatically changed its charter in order (at least in part) to put an end to the ancient tradition of slavery. Our heritage is as much about breaking with tradition as it is about following tradition.[148] The elevation of tradition to a binding or even presumptive norm betrays a most precious tradition of the American experiment: the tradition of finding a better way to run a country.[149]

See Tribe & Dorf, *supra* note 133, at 1086; West, *supra* note 133, at 1374-75.

144. *See* Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 346-48 (1992) (suggesting incongruity between originalists' expansive view of power-granting clauses and limited view of rights clauses).

145. West, *supra* note 133, at 1378-79.

146. Grey, *The Constitution as Scripture*, *supra* note 5, at 20.

147. Extremely important insights into this problem can be gleaned from GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992). Professor Wood persuasively demonstrates that the American Revolution both reflected and created a radical departure from the past. He questions *any* reliance on pre-Revolutionary tradition in interpreting the Constitution. Indeed, we might subvert the core revolutionary commitments that gave rise to the document by looking backward for its meaning. I plan to explore the consequences of Wood's historical insights for constitutional analysis further in a forthcoming paper. *See* Brown, *supra* note 12.

148. "The Jeffersonian was not confined by any particular tradition: he had sought to reform the Christian tradition, he had . . . set himself outside the English tradition. The past, through which other men had discovered human possibilities, was for him corrupt and dead." DANIEL J. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 225-26 (1960).

149. I do not wish here to enter the fray concerning the importance to be attached to the fact that our Constitution is written. *See, e.g.*, Grey, *The Constitution as Scripture*, *supra* note 5, at 14-15; Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 375 (1982) [hereinafter Levinson, *Law as Literature*]; Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 12 (1934). Surely one could argue that all breaks with tradition in American history precipitated formal, written changes in our national law, suggesting that, in the absence of constitutional amendment or other revision of positive law, tradition should reign. That argument, I think, begs the question, because in order to effect the kind of radical and immediate departure from tradition that was contemplated in the Constitution itself or in the Fourteenth Amendment, a written document was essential. Revolutions do not occur through the gradual evolution of national tradition. Yet that says nothing about whether less comprehensive change could or should be

Moreover, when we examine the origins of traditions, it becomes apparent that the source of tradition is largely majoritarian. Traditions are not formed by the few, the eccentric, the outcast, the marginalized. Rather, traditions arise from laws passed by legislatures and from practices recognized, approved, and absorbed by mainstream culture.[150] This is not necessarily either a good or a bad thing, but there is irony, as Professor Ely recognized: "[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."[151]

This majoritarian dilemma is complicated by the observation that our traditions are formed by many overlapping communities. Not infrequently, the traditions of a geographical, ethnic, religious, or political community will run at cross-purposes with the traditions of the larger communities—state and national—in which they are nested. Issues such as school desegregation or a woman's right to have an abortion illustrate this dilemma vividly. Whether or not one can justify the paradox of the majority's "protecting minorities from the value judgments of the majority," one still has to decide which majority is the relevant majority and thus which tradition will carry the day.

D. *Tradition as Authority in the American Civil Religion*

The work of some scholars suggests another possible way to justify reliance on tradition in constitutional interpretation: drawing an analogy to the interpretation of sacred text, in which tradition has special authority. These scholars have perceived in our society a reverence for the Constitution that rises to the level of a civil religion.[152] Occasionally, the correspondence is explicit, as when, for instance, Robert Bork appeals to religious tenets to support his view of constitutional interpretation: "[T]he main bulwark against heresy [is] only tradition."[153] This view might provide reason to impart to tradition an authoritative quality all its own, quite apart from the political

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effectuated without the need for a constitutional amendment. The various distinctions that have been drawn between our "Constitution" and our "constitution," or "the document" and "the Constitution" do not speak to the problems I am addressing in this article. *See, e.g.*, MILLER, *supra* note 11, at 150-51; Llewellyn, *supra*, at 15.

150. *See* Strauss, *supra* note 133, at 1708 ("[A] majority can make any practice constitutional just by sustaining it for a time."); West, *supra* note 133, at 1378 ("What is thus protected, at most, is the liberty to obey or conform to the dictates of relevant traditions, rather than the liberty to rebel against them.").

151. ELY, *supra* note 135, at 69. *But see* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586 (1993) (arguing that courts are not immune to majoritarian influence).

152. Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123; *see also* Robert Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985).

153. Robert H. Bork, *Tradition and Morality in Constitutional Law*, *in* VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS 166, 171 (Mark W. Cannon & David M. O'Brien eds., 1985). Bork suggests that in a constitutional democracy, the moral content of law is given by the morality of the framer or legislator. *Id.*

document that it enlightens. The value of tradition in that case would not be evidentiary, as in the various theories discussed so far. Rather, the value would be in its inherent authority: by rising to the level of tradition, a practice attains legitimacy and commands perpetuation.

Clearly there are some similarities between constitutional text and religious text. Neither is simply a book of answers, but rather a principal symbol of what Professor Michael Perry calls the "aspirations of the tradition."[154] Notions of community, tradition, and foundational text figure prominently in both constitutional and sacred-text interpretation. Moreover, the debate between those who consider the Constitution an exclusive text and those who would also consider an unwritten component to the Constitution strikingly tracks the debate that took place in the sixteenth century between the "Protestant" and "Catholic" factions of Christian doctrine.[155] The Protestant reformers, such as Martin Luther, emphasized the importance of Scripture to Christianity, while the Catholic Church supplemented Scripture with the independent authority of oral tradition.[156] The emergence of parallel dichotomies between textualism and traditionalism has led some scholars to pursue comparisons between the interpretative methodologies of sacred text and constitutional text. Because much of religious interpretation today relies heavily on tradition and history, the comparison appears to support a greater role for tradition in the interpretation of the Constitution as well.[157]

Several important differences, however, prevent acceptance of tradition in religion from automatically supplying a rationale for acceptance of tradition in constitutional interpretation in the same authoritative way. First, Scripture gains its validity from a source other than its own appeal to reason and judgment.[158] Its acceptance depends on its source, not what it seeks to accomplish or where it goes.[159] Although the Constitution may be revered, it is generally revered because of the "genius and character"[160] of its recognition of the great principles of liberty and representative government, not because it emanated from a source that itself commands respect and awe.

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154. Perry, *supra* note 152, at 561.

155. Levinson, *supra* note 152, at 125-26.

156. *Id.*; *see also* PELIKAN, *supra* note 13, at 9-12.

157. It is probably true that the analogy to Scripture is more helpful to the task of constitutional interpretation than the analogy to literature that has intrigued many constitutional scholars. On the analogy to literature, see Levinson, *Law as Literature, supra* note 149; Tribe & Dorf, *supra* note 133, at 1072; and James B. White, *Law as Language: Reading Law and Reading Literature,* 60 TEX. L. REV. 415 (1982). On the analogy to Scripture, see Grey, *The Constitution as Scripture, supra* note 5, at 3; and Perry, *supra* note 152, at 561. But that is not to say that the analogy can bear the weight that seems to be placed on it in attempting to secure a place for tradition in constitutional interpretation.

158. *See* Grey, *The Constitution as Scripture, supra* note 5, at 11-12.

159. *See* Michael S. Moore, *Do We Have an Unwritten Constitution?,* 63 S. CAL. L. REV. 107, 118 (1989); *see also* PAUL J. ACHTEMEIER, THE INSPIRATION OF SCRIPTURE: PROBLEMS AND PROPOSALS 14 (1980) ("[I]t would be fair to say that the truth claims of the church rest on the reliability of the truth claims of its Scripture.").

160. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

Surely the Constitution's unprecedented genesis in the people increases its legitimacy in some ways,[161] but it does not create an automatic entitlement to obeisance and power as a divine revelation purports to do. Similarly, Scripture has elements that cannot be comprehended by reason,[162] whereas the Constitution is generally thought to be a product and inspiration of reasoned judgment. Moreover, Scripture is what it is, take it or leave it. There is no opportunity for formally amending it, unlike the Constitution. The acceptance of religious tenets is an act of faith, not of social contract. Thus, even if it is appropriate to suspend judgment in favor of tradition in the case of religious interpretation (a controversial point in itself), it does not necessarily follow that interpreting the Constitution calls for the same suspension.

These points all suggest another: that Scripture, for the most part,[163] is believed to be the work of God, and therefore perfect.[164] The task of interpretation may well be thought to be a journey back to original truth—a backward-looking venture.[165] The Constitution, in contrast, is the work of men, with self-professed imperfections, as revealed in its own creation of an amendment process. Its goal is to set in motion a new nation with a spirit of its own, a tool for progressing toward some goal—"a more perfect Union," perhaps. It looks forward. It contemplates progress from the less perfect toward the more perfect. Any use of tradition that forces the polity to look backward for its own aspirations and truths seems fundamentally at odds with the enterprise of establishing a constitutional system of government.

A final point of distinction is that religious texts often focus on internal events—thought, morality, motivation, inspiration, devotion, and the like[166]—whereas the Constitution concerns itself exclusively with actions—particularly

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161. *See* HANNAH ARENDT, ON REVOLUTION 165-78 (Penguin Books 1990) (1963).

162. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1031 (1990) ("[Religion] always demands an 'intellectual sacrifice' that is incompatible with the uncompromising rationalism of philosophy.") (citing MAX WEBER, *Science as a Vocation*, *in* FROM MAX WEBER 129, 155 (Hans H. Gerth & Charles W. Mills eds., 1946)).

163. Professor Perry states that it is wrong to assume that sacred texts are always divinely inspired or authored, and he notes two situations in which that assumption is not true. He then limits his own analysis to the "interpretation of sacred texts that presupposes no more than that the texts are no more than human artifacts and repositories of human wisdom." Perry, *supra* note 152, at 562-63. With all respect for Perry's impressive and important work, I believe that this limitation assumes away the major issue of the degree of similarity between secular and sacred texts that might justify transporting interpretative theories from the one to the other.

164. *See* ACHTEMEIER, *supra* note 159, at 33 ("[T]he words in Scripture are the words that God, not man, has chosen.").

165. *Cf.* KARL LÖWITH, MEANING IN HISTORY 183 (1949) (describing theological view of history as a "movement progressing, and at the same time returning, from alienation to reconciliation, one great detour to reach in the end the beginning").

166. Certainly religious texts, especially non-Christian texts, can and do focus on behavior as well. While serious commentary on this aspect of comparative religious doctrine is well beyond the scope of this Essay, I do think it is fair to say that, in general, the goals of such behavioral rules in religious doctrine tend to be moral or spiritual betterment rather than, or at least in addition to, political harmony and prosperity.

government actions (but also individual actions as they affect or are affected by government actions).[167] Thus, the Constitution was designed deliberately to function irrespective of the good will or virtue of those subject to its commands,[168] a claim that would seem oxymoronic regarding a religious text. The dictates of past generations, therefore, may well have different values to the two types of community. In general, the differences in the dynamics, origins, and goals of sacred text and the Constitution militate against any wholesale judicial adoption of the methods of interpreting Scripture, particularly since tradition may carry special weight in religious orthodoxy as independent and compelling authority.

Yet, if one is willing to consider the interpreter as a student of the text, rather than as a seeker of answers, then there are important similarities between scriptural and constitutional interpretations. Both the Constitution and sacred texts are teaching documents, written for the betterment of their respective communities and their progeny. Indeed, the word "doctrine," common to both religious and constitutional literature, itself means "teaching."[169] And, insofar as Scripture is viewed as that which "gave structure to the traditions formulated by the church . . . [and] sought to keep the community true to those founding events which gave to the community its uniqueness,"[170] it strongly parallels an understanding of the Constitution that places that document in the role of embodying the aspirations of our community.

Thus, if we are willing to reject the quest for absolutes and binding force in our traditions, then there is much to be learned from the ancient model of religious interpretation as we struggle to find a proper place for tradition in understanding the Constitution. But the religious scholars are just as divided as the constitutional scholars on the issue of traditionalism, and accordingly, any help one derives from the sister discipline will necessarily reflect judgments one has already made about the development of the law. The religious school from which I choose to seek guidance takes the position that "[a]s new situations develop, old traditions are used in new and different ways. . . . Clearly, to expect a tradition to have one, and only one, meaning wherever it appears is to expect something of the Biblical materials that they do not intend to provide."[171] And political communities can also learn from

167. Incidentally, it is possible that the Court's current fondness for an "intent" requirement as a prerequisite for a finding of almost any constitutional violation is wholly out of step with the structure, purpose, and nature of the Constitution, insofar as it accords constitutional importance to the inner thoughts and motivations of individuals. *Cf.* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 84 (1987).

168. *Cf.* THE FEDERALIST NO. 51, at 319-20 (James Madison) (Isaac Kramnick ed., 1987) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

169. RANDOM HOUSE DICTIONARY, *supra* note 14, at 578.

170. ACHTEMEIER, *supra* note 159, at 124.

171. *Id.* at 82-84.

the theological position that "[t]raditions provide the cradle in which each new generation of the community is nurtured."[172] With that understanding, the religious model has something to offer the constitutional inquiry, but it cannot offer the comfort of certainty.

E. *Critique: The Construction of Tradition*

The discussion so far has focused on the various ways in which courts and commentators have suggested, expressly or tacitly, use of tradition as a determinative authority in the interpretation of constitutional law. Admittedly, there is something artificial in looking seriatim at all of the possible justifications for exalting tradition, and the weaknesses of each. When lined up like straw dolls, they are not difficult to knock down, one by one. Nevertheless, it would be a mistake to conclude that tradition consequently has no value at all to constitutional adjudication, and that anyone who invokes it must be either ignorant or deceitful.

The most interesting phenomenon is that despite the many logical and pragmatic difficulties with the traditionalist theories, tradition continues to appear, with increasing frequency from term to term, in large numbers of Supreme Court opinions.[173] It continues to be viewed as extremely influential, if not absolutely controlling, in deciding any constitutional case in which traditions can be cited on one side or the other. There must be something reassuring or rhetorically impressive about incantations of history or tradition.[174] They help the Court to maintain its authority, in part by strengthening the political bonds that hold the culture together—bonds that are themselves the product of traditions, and that contribute in turn to the Court's perpetuation of its own traditional approach to constitutional interpretation.[175]

Judges also *like* intentionalism.[176] It is no coincidence that intentionalist rhetoric is used in the same manner as traditionalist rhetoric, even by those Justices who would not expressly embrace an originalist perspective on the

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172. *Id.* at 126.

173. In the 1990 and 1991 Terms, for example, the word "tradition" appeared in 83 different cases, compared to 216 cases in the prior 10 Terms. Search of LEXIS, Genfed library, US file.

174. *See* MILLER, *supra* note 11, at 4 ("The Supreme Court's use of history as a principle of adjudication is evidently based on deeper needs of the American polity than legal criticism will be able to overcome.").

175. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982) (arguing that courts need not always seek doctrinal consistency in constitutional law because of courts' value in expressing societal ideals); *id.* at 185 ("Constitutional decisionmaking has . . . an expressive function."); Russell K. Osgood, *Governmental Functions and Constitutional Doctrine: The Historical Constitution*, 72 CORNELL L. REV. 553, 571 (1987) (Court may be exercising "expressive," rather than merely adjudicative, function).

176. *See* MILLER, *supra* note 11, at 4 ("[Judges] have persisted in claiming that the values their opinions may espouse are not their own but those of 'the law' to which they have looked for guidance."); Posner, *supra* note 24, at 1373 ("The dominant rhetoric of judges, even activist judges, is originalist, for originalism is the legal profession's orthodox mode of justification.").

Constitution.[177] What the traditionalist theories I have discussed have in common is that, whatever their particular trappings, they all share a backward-looking orientation. And however they are packaged, no matter who is invoking them or what the ultimate goal, these uses of tradition are all intentionalist. They rely on the judgments and choices of others from the past to determine the contours of constitutional protection today. Consequently they all serve as shields for judgment, and suffer to some extent from the much-documented weaknesses of originalism—"an utterly impoverished way of thinking about constitutional law."[178]

The shield offers but flimsy protection. Even brief investigation shows that objectivity, neutrality, and legitimacy are illusory when dependent on a theory of interpretation that yields to the judgments of others through traditionalism. The decisionmaker has choices to make. Initially, the choice to consider tradition as determinative is itself largely responsible for the outcome ultimately achieved.[179] So even at the very first step of the "objective" inquiry, judgment has been exercised, but not acknowledged.

The illusion of determinacy goes on from there. Once the constitutional interpreter has determined to embark on an inquiry into the past, the entire project becomes an undertaking in artifice, because the identification, selection, and characterization of traditions cannot be accomplished without human judgment. Those judgments are for the most part camouflaged by the appearance of neutrality.

A number of historians have argued that the Supreme Court is guilty of "the creation of history a priori by what may be called 'judicial fiat' or 'authoritative revelation'. . . ."[180] At best, the Justices are not very good

177. Even Justice Brennan, who in *Abington School District v. Schempp* declared that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems," went on to inquire instead whether "the practices here challenged threaten those consequences which the Framers deeply feared"—an intentionalist inquiry in its own right. 374 U.S. 203, 234, 236 (1963) (Brennan, J., concurring). Thus, while intent of the Framers can be sought through sources other than tradition, I suggest that tradition necessarily carries with it an element of intentionalism as used by courts and scholars.

178. Robert W. Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647, 648 (1985); *see also* Brest, *The Misconceived Quest*, *supra* note 7 (arguing that originalism is untenable approach); Farber, *supra* note 24, at 1087-97 (listing methodological and normative weaknesses of originalism); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (arguing that interpretivists' view of constitutional adjudication is too narrow); Posner, *supra* note 24, at 1373-82 (criticizing and questioning Bork's originalism). *But see* Kay, *supra* note 36; Scalia, *supra* note 7 (discussing defects of non-originalism).

179. *See* John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 523 (1964) ("A past use, is locked to a past time, and as such does not bind the present unless the present chooses to be so bound.").

180. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122; *see also* ROBERT L. SCHUYLER, THE CONSTITUTION OF THE UNITED STATES: AN HISTORICAL SURVEY OF ITS FORMATION 92 (1923) ("Unfortunately a knowledge of American history has not yet been made a prerequisite for admission to the Supreme Court."); Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 64-65 (1963) (criticizing Justice Black's use of history in Engel v. Vitale, 370 U.S. 421 (1962)); Wofford, *supra* note 179, at 528 ("[J]udges should avoid the language of the historian.").

historians, and at worst, they engage in "law-office history"[181]—"the selection of data favorable to the position being advanced" without evaluation of their relevance or accuracy. But my point is less cynical and perhaps more descriptive: I argue that, even with the most noble of aspirations, a judge is incapable of ascertaining a definitive answer to a constitutional question by examining history and tradition. All efforts to marshal tradition for such a purpose result in the construction of history, or the invention of tradition.[182] Even historians engage in this invention, and just as "[t]hey might as well be aware of this dimension of their activities,"[183] so too might judges acknowledge their role in the creation, dismantling and restructuring of images of the past.

The construction of history in the analysis of legal issues is itself an ancient tradition.[184] Since John Marshall's time, the Court has written scores, perhaps hundreds, of cases that have been attacked on historical grounds, sometimes by historians,[185] sometimes by dissenting Justices.[186] I do not ask that the Court simply cut short its longstanding, legitimacy-enhancing, public-pleasing practice and stop using history in its analysis of constitutional law. All that I suggest is that the Court be frank about its limitations; that it

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181. Kelly, *supra* note 180, at 122 n.13.

182. *See* Hobsbawm, *supra* note 20, at 13 (arguing that history that becomes "part of the fund of knowledge or ideology of [a community] is not what has actually been preserved in popular memory, but what has been selected, written, pictured, popularized and institutionalized by those whose function it is to do so").

183. *Id.*

184. *See* BRUCE LINCOLN, DISCOURSE AND THE CONSTRUCTION OF SOCIETY: COMPARATIVE STUDIES OF MYTH, RITUAL, AND CLASSIFICATION 15-17 (1989). Lincoln discusses a mid-seventeenth-century debate in England regarding the expansion of suffrage to all adult males without regard to social status. One camp vigorously invoked tradition "'beyond which no memory of record does go,'" in support of limiting suffrage to propertied classes. The opponents dismissed that tradition as a result of the Norman Conquest, and relied on an earlier, unrecorded tradition—ostensibly prior both in time and in stature—of egalitarian rights to suffrage. The exchange, then, focuses on the fascinating questions of when relevant time begins, the creditability of written documents, and the use of what a prominent historian has called "bogus 'history'" to construct a sociopolitical norm appropriate to the present day. These are the very questions the Court faces when it relies on tradition to resolve a constitutional question.

185. *See* MILLER, *supra* note 11, at 39-148 (criticizing Court's historical accuracy in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Myers v. United States, 272 U.S. 52 (1926); Near v. Minnesota, 283 U.S. 697 (1931); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Bell v. Maryland, 378 U.S. 226 (1964); Baker v. Carr, 369 U.S. 186 (1962); Wesberry v. Sanders, 376 U.S. 1 (1964)); Kelly, *supra* note 180, at 123-58 (criticizing Court's historical accuracy in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895); 158 U.S. 601 (1895); De Lima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Massachusetts v. Mellon, 262 U.S. 447 (1923); Myers v. United States, 272 U.S. 52 (1926); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); United States v. Butler, 297 U.S. 1 (1936); Lochner v. New York, 198 U.S. 45 (1905); Muller v. Oregon, 208 U.S. 412 (1908); Adamson v. California, 332 U.S. 46 (1947); Baker v. Carr, 369 U.S. 186 (1962); Everson v. Board of Educ., 330 U.S. 1 (1947); Brown v. Board of Educ., 345 U.S. 972 (1953); Bell v. Maryland, 378 U.S. 226 (1964); Griswold v. Connecticut, 381 U.S. 479 (1965)).

186. *See, e.g.*, Myers v. United States, 272 U.S. 52, 282-91 (1926) (Brandeis, J., dissenting).

make an honest effort to bring together all available considerations; and that it then do the best that it can under the circumstances to answer the question before it. Once the Court accepts the possibility that there may not be a "correct" answer, "dictated" by tradition, it will free itself to acknowledge the subjective nature of history, the elusive quality of clear, consistent traditions, and the utter inescapability of judgment in interpretation.

Thus far, the Court has been reluctant to abandon its traditionalist inclinations and has embraced external authority to ease the pain of growth. But the price of valuing tradition over insight is a failure to mature: "Immaturity is the inability to use one's own understanding without the guidance of another."[187]

F. *Tradition as Obligation*

One theory supporting traditionalism does not suffer from the weaknesses of intentionalism. Professor Anthony Kronman resurrects the philosophy of Edmund Burke in a plea for renewed reverence for the past in our constitutional jurisprudence.[188] "The partnership among the generations," he writes,

> . . . depends for the attainment of its ends on each generation's treating the achievements of its predecessors as something inherently worthy of respect. It is only on that condition—on the basis of a traditionalism which honors the past for its own sake—that the world of culture can be sustained.[189]

For Burke and adherents of this view, tradition has a place in constitutional interpretation simply because it is the past.[190] Its authoritative force is inherent and direct. Translated into the language of constitutional interpretation, the argument is that current judgments about the role of government under the Constitution must be made in conformity with the traditions of society. It suggests blind obedience.

This is an idea that Holmes called "revolting."[191] Professor Kronman's rationale is attractive, however: unlike the "'flies of a summer,'"[192] who "are

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187. IMMANUEL KANT, *An Answer to the Question: 'What is Enlightenment?', in* KANT'S POLITICAL WRITINGS 54 (Hans Reiss ed. & H.B. Nisbet trans., 1970).

188. Kronman, *supra* note 162, at 1048-49.

189. *Id.* at 1068.

190. *See* David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1058-59 (1991) (describing "historicist" thinking as revering the past for its own sake, to exclusion of everything since, including present need; condemning this view as "impossible" because "it is the present need that opens up our vista on the past").

191. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Holmes, *The Path of the Law*, *supra* note 97, at 469.

192. Kronman, *supra* note 162, at 1048 (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 192-93 (C. O'Brian rev. ed. 1969) (1790)).

in every generation all that they can be,"[193] humans have the capacity to build on the accomplishments of their ancestors and even to contemplate, as in the case of the great cathedrals, a project that will surely take more than one lifetime to complete. Government is a kind of cultural endeavor as well,[194] and citizens have an obligation to give binding authority to what has gone before. This obligation rests not on deontological or utilitarian concerns, such as fairness or predictability in the law, but rather, on duty arising out of "a partnership . . . between those who are living, those who are dead, and those who are to be born."[195]

This justification for traditionalism has much to recommend it, not the least important of which is that it supplies a logically coherent theory. My rejection of this theory, consequently, is based not on any inherent flaws, but on the premises it posits and the consequences it generates. When Professor Kronman describes the human creature as inexorably controlled by the past, and argues that "respect" for the past is that which "establishes our humanity in the first place," he overlooks (or undervalues) another equally essential attribute of humanity: the capacity of discernment and judgment. The two can be reconciled only if one's theory of tradition allows for consciously selective adherence to past practice insofar as it is consistent with contemporary principle. Thus, if Kronman is arguing only that the past is important, and should be recognized as part of what makes us who we are today, then I believe the theory is unassailable. But if, as I suspect, the contract argument is designed to support a presumptively dominant role for the past, then I think it deeply underestimates what human culture can be. The consequences of such a theory suggest loss, for all but the founding generation, of the freedom to develop human wisdom and act upon it.[196]

II. A DIDACTIC CONSTITUTION

> [H]istoric continuity with the past is not a duty, it is only a necessity.[197]

I have looked at *how* tradition is used; it remains to consider *why*. I would like to begin this part of my discussion by responding to a question raised by Professor Sanford Levinson. He postulates that "the very existence of written

193. Kronman, *supra* note 162, at 1050.

194. *Id.* at 1057.

195. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 85 (J.G.A. Pocock ed. 1987) (1790).

196. *See* ARENDT, *supra* note 161, at 232 ("[N]othing threatens the very achievements of revolution more dangerously and more acutely than the spirit which has brought them about.").

197. OLIVER W. HOLMES, *Learning and Science* (Speech at a dinner of the Harvard Law School Association in honor of Professor C.C. Langdell, June 25, 1895), *in* COLLECTED LEGAL PAPERS 138, 139 (1920).

constitutions with substantive limitations on future conduct is evidence of skepticism, if not outright pessimism, about the moral caliber of future citizens." He asks, "[E]lse why not simply enjoin them to 'be good' or 'do what you think best'?"[198]

I suggest that the existence of the written Constitution of the United States is as much the polar opposite of the skeptical or pessimistic as is education itself. Education is a profoundly optimistic endeavor, and so too was the Framers' undertaking to provide a political education to their progeny. They did not nihilistically leave a command to "do what you think best" for future generations who would have no way to respond to the instructions, doomed either to failure or to a relativist world in which the concept of "good" had no meaning or an infinite number of meanings. (Would a mother entreat her child to "be good" without ever having defined the term?) The Framers demonstrated a belief, almost Darwinian in its implications, that each generation could avoid the task of determining from scratch what is "best" politically, and instead would have the opportunity to start from the point at which the prior generation had left off. They envisioned the possibility of progress.

In that spirit, I would like to consider a better role for tradition in the development of constitutional law. The role I suggest departs from what we tend to think of as "interpretation"—which has come to mean something akin to "explanation."[199] It is more faithful, however, to the etymological origins of the term "interpret,"[200] and, more importantly,[201] to the nature of the enterprise as it should be.

First, the interpreter must articulate the constitutional question to be addressed, and consider the context in which the question arises, with respect to a specific portion of the Constitution, the rest of the Constitution, the historical setting in which the relevant portions arose, and whatever prior or subsequent traditions may shed any light on the practice at issue. The nature of this process of acquisition of information is very like the process that the intentionalist engages in.[202] The sweep of the net, however, is much broader, because the underlying theory animating the search is not a quest to determine

198. Levinson, *Law as Literature*, *supra* note 149, at 375.

199. From the Latin *explanare*, "to lay out flat." RANDOM HOUSE DICTIONARY, *supra* note 14, at 681.

200. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 685, 1534 (1976). "Interpret" derives from the Latin *interpretari*, which means to act as a go-between, a negotiator.

201. Lest I succumb to the siren song of originalism as well!

202. It is subject, therefore, to many of the same errors that have been discussed above. Yet, because no single historical fact or specifically-defined tradition is dispositive of any issue, but instead all pieces of information contribute to a much larger body of relevant information, the interpreter is much less likely to be misled by a piece of history read out of context. This interpreter would have room in her analysis for conflicting traditions, as well, and thus would not be subject to the hypocrisy that characterizes so much of the invocation of tradition today. *See* Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 694-95 (1991) (making semantic claim that originalist/non-originalist distinction is not helpful, but not claiming that underlying differences in perspective on interpretative process have also disappeared).

what specific individuals intended by specific language, or what decisions others have made on difficult matters of judgment—"some idealized ancestral compulsion."[203] Rather, it is an attempt to garner understanding from the experiences of the ages. Thus, by letting go of the deterministic goals for tradition, the interpreter can consider, even embrace, divergent traditions and seek new understanding in diversity. A tradition becomes relevant if it provides her with some insight into the problem at hand.[204]

Naturally there will be choices to be made regarding which traditions to consider and how much weight to accord them. I have no formulaic solution to that problem. In my own defense, I can only emphasize that anyone who professes to have such a solution is simply masking the judgments that will inevitably be involved. I suggest an approach that brings each judgment out into the open to be exposed to criticism and perhaps correction in the political process. By candidly acknowledging and celebrating the exercise of judgment, we can actually increase the possibility of accountability and ultimately hope to reduce the power of idiosyncratic decisionmaking.

Having acquired a sense for what the relevant traditions are,[205] the self-conscious interpreter must confront the traditions of which she is a part. She may do this consciously or unconsciously, but this step is not optional.[206] For purposes of constitutional analysis, however, it is preferable that she do it overtly. For once the interpreter acknowledges that there are multiple, perhaps conflicting, traditions surrounding any given issue, and that "tradition" cannot by itself provide the "right answer" to any question, it becomes particularly important for her to make explicit the bases for her interpretation. This inquiry is not the same as the search for consensus, which has been proposed as a substitute for the search for Framers' intent.[207] Rather, it involves self-examination, with the broadest possible definition of the "self," to include the community and society of which the interpreter herself is a part, recognizing that she is simultaneously a part of multiple communities, and that the traditions of some of those communities may conflict with the traditions of others.[208] The final step of this epistemic endeavor is to bring together the teacher and the student into some form of reconciliation with respect to the constitutional language.[209]

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203. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 110 (1962).

204. In a forthcoming paper, I explore in greater detail the tracing of traditions and the reconciliation of conflicting traditions. *See* Brown, *supra* note 12.

205. What constitutes a relevant tradition, of course, has been highly controversial. *See supra* notes 182-87 and accompanying text.

206. *See* Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1610 (1989) ("We can only understand the Constitution through the prejudices, prejudgments, and pre-understandings supplied by the tradition of interpretation in which we participate.").

207. *See* Friedman, *supra* note 151, at 653-54; Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237, 1245 (1990).

208. *See supra* text following note 151.

209. *Cf.* Perry, *supra* note 152, at 564 ("The polity must respond to the incessant prophetic call of the

As an illustration of how an interpreter would adopt the approach I have outlined, consider the question of whether the Equal Protection Clause should prohibit a state from barring women from various privileges of social participation. A traditionalist response is expressed in the famous 1873 concurring opinion in *Bradwell v. Illinois*,[210] which upheld a state's refusal to license a woman to practice law: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. . . . And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."[211]

Even as the conception of the role of women in society began to change, the Court adhered to a traditional view in its interpretation of the Constitution. In 1948, it stated that "[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."[212] And even in 1961, the Court discounted the "enlightened emancipation of women from the restrictions and protections of bygone years" in light of the fact that "woman is still regarded as the center of home and family life."[213]

Of these three statements, the analysis in *Bradwell* is the closest to a sound approach to constitutional adjudication. This may come as a surprising endorsement; Justice Bradley's concurrence is indeed famous, but not, as far as I know, for being right. What Justice Bradley did right, however, was that he did not discount the force of present tradition in rigid deference to past tradition.[214] The other two opinions acknowledged changing social mores but discounted their importance on the ground that the Constitution should keep change at bay. That is the greatest evil of traditionalism.[215]

Imagine a judge attempting to determine, in 1993, whether the Equal Protection Clause bars the military from excluding women from combat. The prior roles of women in society are relevant to the constitutional inquiry, as is the strong probability that no one who drafted, supported, or even contemplated the Fourteenth Amendment conceived that it might ever dismantle the then-existing social construction of women's physical and political identity. The first step of the analysis, a historical inquiry, would no

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text, must recall and heed the aspirations symbolized by the text, and thus must create and give . . . meaning to the text, as well as take meaning from it.").

210. 83 U.S. (16 Wall.) 130, 139 (1873) (Bradley, J., concurring).

211. *Id.* at 141-42.

212. Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (upholding state law prohibiting woman from serving as bartender unless wife or daughter of male owner).

213. Hoyt v. Florida, 368 U.S. 57, 61-62 (1961).

214. This is debatable; even in 1873, there may have been ample basis for infusing old tradition with newer insight into the role of women. But at least semantically, Justice Bradley adhered to the idea that present-day tradition—not just past—might, in fact, be relevant to the inquiry. I admit to giving the opinion the benefit of the doubt on this point.

215. *See* PELIKAN, *supra* note 13, at 65 ("Tradition is the living faith of the dead, traditionalism is the dead faith of the living.").

doubt reveal a deep commitment in this country, at least from its inception, to the tradition of equality of treatment and of opportunity, coupled with an equally- or more-profoundly entrenched tradition of secondary status for women. The judge would also discover a longstanding societally-sanctioned American tradition of judicial noninterference in military matters,[216] as well as perhaps earlier inconsistent traditions according full rights to citizen militia under the Jeffersonian Republican vision of military service.[217] An intentionalist, particularly one committed to restraining tradition within its most specific confines, would stop there. She would perhaps acknowledge the conflicting traditions, perhaps not, and would choose the one that she felt was a truer reflection of the meaning of the text, and have her answer.

The constitutional interpreter committed to the cognitive element of interpretation would go on from there. She would examine the role of women, both in and out of the military, from the late nineteenth century to the present day. She might find that the role of women had changed somewhat over time, that more and more obstacles to women's opportunity had been lifted, but that the military had maintained a longstanding and uninterrupted objection to the use of women in combat. She would also examine the traditions surrounding the concept of equality in our society—the other relevant set of traditions in the effort to understand the Constitution's promise of equal protection in this context. And she would examine the traditions that had brought her to where she is: traditions of expanding roles for women in the workplace, in politics, in every aspect of community life. Then the real work of interpretation would begin.

The job of the interpreter is to learn whatever truth is to be found in this vast collection of words, conduct, and tradition. She must transform white noise into communication. This transformation is done through every epistemic device available: by syllogism, by metaphor, by induction—whatever will allow her to bring the past and the present together into a coherent whole. For example, she could draw a syllogism to compare the class of persons permitted to serve in combat in 1789 or 1866 and their counterparts in modern society. Alternatively, she could fashion a syllogistic examination of America's place in the world with respect to granting equality of treatment: as America stood to the rest of the world in 1789 or 1866, so should America stand to the rest of the world in 1993 with regard to its understanding of equality. There need be no a priori commitment to a single level of generality.

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216. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986); Chappell v. Wallace, 462 U.S. 296, 300 (1983); Rostker v. Goldberg, 453 U.S. 57, 70-71 (1981); Orloff v. Willoughby, 345 U.S. 83, 92 (1953).

217. *See generally* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 193-200 (1957) (discussing roots of American military tradition before Civil War).

The point is that the Constitution has much to teach us about general concepts, such as equality.[218] "[H]istory is philosophy teaching by examples."[219] It is up to us to learn what we can and to bring our new perspective—a product of our own traditions—to those lessons to produce an answer to specific problems that is neither the Framers' nor the interpreter's alone. It is a compromise (literally, a sending forth together)[220] of past and present.[221]

Far from being superfluous, tradition turns out to provide the point of departure, the terminus, and the path between. What distinguishes this cognitive approach to tradition from the approach used by the Supreme Court, in any of its modes, is that in the cognitive approach tradition is ever present but never decisive. It is the vessel by which we seek the learning experience of understanding.[222] Tradition defines both the teacher and the student, and mediates the consensus between the two.

The metaphor of parenthood is useful to illustrate the relationship between the Framers and their traditions, on the one hand, and any generation of current interpreters, on the other. When parents set out to teach their children what they will need to make their way in the world, parents usually do not choose rules that will require their children to return home and ask the parents to resolve each issue that may come up in the future. Indeed, fostering such lifelong dependency might well be considered parental failure. The goal of the responsible parent is rather to teach the first principles, with an eye toward preparing the child to make decisions for herself, always with the hope that those decisions will reflect the values, experiences, and insights of her parents. The mature and healthy young adult draws heavily on the teachings of her parents, but ultimately thinks out her problems for herself.

Maturity does not lie in the child's ability merely to obey her parent's command. Nor does maturity lie in the child's ability to embark on a great investigation into what her parents would have said if they had thought about the problem that now faces the child. Maturity lies in the child's ability to

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218. *See* ELY, *supra* note 135, at 88-89 (discussing pervasiveness of principle of equality of process throughout Constitution).

219. VISCOUNT BOLINGBROKE, 1 LETTERS ON THE STUDY AND USE OF HISTORY 14 (London, T. Cadell 1752).

220. *See* RANDOM HOUSE DICTIONARY, *supra* note 14, at 421, 1548.

221. In some respects this approach resembles Gadamer's description of hermeneutic understanding. *See* HANS-GEORG GADAMER, TRUTH AND METHOD (Garrett Barden & John Cumming eds. & trans., 1975) (1960). While it would certainly be useful to study the application of Gadamer's insights to the practice of constitutional interpretation, that is not my goal here. *See generally* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988). My objective is a much more limited examination of the role of tradition in constitutional interpretation, although the work that others have done with Gadamer's hermeneutics has assisted the development of my own ideas. *See* GEORGIA WARNKE, GADAMER: HERMENEUTICS, TRADITION AND REASON (1987); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

222. *See* HERBERT J. MULLER, THE USES OF THE PAST: PROFILES OF FORMER SOCIETIES 32-33 (1952) ("Our task is to create a 'usable past,' for our own living purposes.").

consider, for example, that she was taught not to steal, and to move on, using her own powers of cognition to resolve her own problems. For example, if she found a wallet in the street she would consider her parents' admonition and thoughtfully apply that rule to the present context: "The rule against stealing shows me that there must be some importance in people's relationships to their property, and in their relationships to one another, and also some value in our observing respect for those relationships, and so I will not keep this wallet, but will try to return it to its owner." That is maturity, it is cognition, and it reflects successful teaching.

I give the Framers credit for being the successful, rather than the failing, kind of parents. I believe that the last thing they would want us to do is to turn to them and "ask" them to resolve our contemporary problems for us, as the originalists would have it when they inquire how the Framers would have answered a particular question of constitutional law.[223] Nor do I think that the Framers would be proud to see us merely apply their words to modern issues with the non-originalists' elusive compromise, "How would the Framers have answered this question if they had lived *today*?" Both approaches require a violent uprooting of people from their own times and traditions in ways that are at best fictional and at worst evasive of responsibility.[224] I think that the Framers would be most satisfied if we, like the child who worked out the matter of the lost wallet, grasped the general, philosophical, and moral aspects of their teaching and the first principles of a democratic government, and applied them to our modern-day issues. In this way, we would adhere to those lessons and vindicate the Framers' traditions in ways they may never have contemplated. The purpose of the Constitution, I argue, is to instruct us in the political and philosophical principles that the Framers felt would enable us to resolve our problems.[225] Those principles, themselves not immune from debate at their conception or today, are embodied in the Constitution.

It has been said that one person cannot do science.[226] Its norms issue "from the growth of a scientific tradition and . . . this means that they are the result of experience, communication and consensus among scientists."[227] I argue that the same is true of constitutional law.[228] One person cannot do constitutional law. It is an interaction among the text, the traditions, the

223. Although I do not believe that what the Framers wanted is necessarily dispositive, I cannot resist the legitimacy-enhancing mention of Framers' intent when it goes my way any more than anyone else can.

224. *See* Luban, *supra* note 190, at 1058 ("Traditionalism denies the modernist predicament instead of facing up to it.").

225. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1978) (describing the parent's wish that "the family be guided by the *concept* of fairness, not by any specific *conception* of fairness").

226. *See* Karl-Otto Apel, *The A Priori of Communication and the Foundation of the Humanities*, *in* UNDERSTANDING AND SOCIAL INQUIRY 292, 299 (Fred R. Dallmayr & Thomas A. McCarthy eds., 1977).

227. WARNKE, *supra* note 221, at 117 (describing Apel's view of science).

228. I do not claim, in the Langdellian tradition, that law *is* a science, *see* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983), but simply that this observation about science illustrates the point about constitutional law.

interpreter, and the theory.[229] The notion that tradition sits on a pedestal above reason, judgment, theory, and perhaps even text, is inimical to this interactive vision of constitutional interpretation. The richness and value of tradition itself are cheapened by arguments that pluck it out of the realm of judgment and claim to overwhelm all other authorities that might shed light on the constitutional text.

This view does not purport to respond to the nihilist's critique that when judges are left to rely on nothing but their own judgment there are an infinite number of "right answers." Rather, it acknowledges that to the extent the Nietzchean critique is valid for any mode of interpretation, it is valid for all, and this approach is no more vulnerable to the attack than any other. Indeed, I argue that by confronting forthrightly the factors that enter into judgment, judges may create the possibility of a more accountable interpretation than those claiming the illusory veil of determinacy.

First, the interpreter's own traditions will shape the inquiry.[230] Through the interpreter, the perspectives and lessons of the present find their way to the mediation process. This proposition does not mean that the judge should conduct a poll to determine what the consensus of society is on some issue or what the Framers "would have done" if they had lived today. The problems with such an approach are numerous and profound: How does a judge determine social consensus? Why should a judge be permitted to serve as a clearinghouse for popular opinion?[231] Why should the intent of some mythical "Framers," transported two centuries into the future, have any bearing on the law of the land? What constitutes a consensus, and whose views count in determining it?[232] These and many other ominous questions face anyone who would advocate interpreting the Constitution according to some present-day gauge of popular viewpoint.[233] Rather, I suggest that the interpreter will

229. *See* ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 18 (1975) ("[T]heory [is] neither the master, nor the witness, but the accomplice of history.").

230. Incidentally, it is significant that the choice of judges under the Constitution—and therefore the selection of one factor in the analysis—is a political choice. In my view, the identity of the interpreter matters very much; the understanding gained and the consensus reached with the text will vary from interpreter to interpreter. If the identity of the interpreter did not matter—that is, if a determinate or "neutral" or "objective" answer existed, I doubt that the Framers would have subjected the selection of judges to two levels of political scrutiny. *See* Bennett, *supra* note 178, at 656 (criticizing view that because a judge's values will be a product of his own traditions, judgment is adequately restrained).

231. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 81-82 (1992) (raising questions about Justice Scalia's reliance on modern consensus in interpreting First Amendment and Takings Clause).

232. I disagree with the suggestion that a judge should roughly determine whether enough people agree on an issue to constitute a legislative majority, and if so, follow their wishes. *See* Hill, *supra* note 16, at 1253-54. While I applaud Professor Hill's effort to wrest the focus of constitutional interpretation away from the Framers' intent and move the focus forward in time, the consequences of imposing a second opportunity for self-interested game playing in the lawmaking process seem unattractive, at best.

233. *See* Sandalow, *supra* note 8, at 1062-64 (denying existence of inviolable "core of meaning" that would provide either floor or ceiling on reach of constitutional provisions in face of divergence of "contemporary values").

use judgment to gauge and evaluate the lessons of present tradition.[234] Because different interpreters reflect different aspects of contemporary tradition, and thus bring different influences to the interpretative process, the political branches, representing the people, should consider these factors in selecting judges.

A second source of influence to inform constitutional interpretation comes from the text itself and the lessons that it, considered in logical and historical context, can reasonably be read to impart. In its teaching function, the text as well as its own history "exercises a constraining influence on interpreters."[235] Finally, the specific language at issue itself serves at least a "limiting function" in narrowing down the class of acceptable answers to a constitutional question.[236] The possibility of more than one correct answer does not degrade the process into a random, chaotic, or meaningless exercise. It merely demonstrates that, no matter how hard we try to avoid it, we must ultimately let judges judge, and hope that the constitutional process of influence and accountability will take care of the rest.[237]

Nor is this approach without a final cause of its own. It is predicated on a commitment to progress in the political growth of the nation. Growth and maturation imply a development from one state to another, with overtones of improvement over time. Of course, growth can become malignancy if allowed to continue in uncontrolled ways that threaten the vitality of the organism itself. But the therapeutic value of tradition (appropriately conceived), combined with the principled consideration of progress within the tradition, is the best prevention of that disease.

III. CONCLUSION

Behind every bush lurks an originalist. Even where we may least expect it—among liberals as well as conservatives, judicial activists as well as proponents of judicial restraint—we see the rhetoric of tradition either expressly or implicitly accompanying a "quest" for original intent. I put quotes around "quest," because in most cases, by the time tradition comes into the analysis the quest is long over. Tradition is no longer, if it ever was, the powerful iconic beacon of societal truth, but is more accurately an apologia invoked to defend some predetermined (and unacknowledged) choice. Those who profess to elevate tradition to a level beyond intellect, imbuing it with

234. *See* BICKEL, *supra* note 203, at 108 ("[H]istory cannot displace judgment."); Powell, *supra* note 24, at 660 ("[H]istorical research itself, when undertaken responsibly, requires of the interpreter the constant exercise of judgment.").

235. Eskridge, *supra* note 221, at 627.

236. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 427 (1985).

237. It cannot be denied, for better or worse, that federal judges are amenable in various ways to political influence. *See, e.g.*, Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 777-80 (1992).

determinative power beyond that of human judgment, are responsible for its devaluation.

Tradition is human. It is just as indeterminate, self-contradictory, incalculable, inexplicable, and generally elusive as any other human artifact. Not surprisingly, tradition cannot be magically transformed into a fixed measure of constitutional truth; to try to do so trivializes tradition. Of course often both sides of a dispute can find historical evidence to support their arguments.

And therein lies the tremendous value of tradition. It represents the judgments of earlier generations, revealing choices they have made and values they have adopted. Tradition thus has the capacity to teach us from where we have come, and to cast light on where we may go. It can enrich our understanding of our own world by allowing us to see the possibilities, the consequences, and the limits of human experience. The value of tradition is that it supplies the potential for insight.

Insight is not an attribute associated with youth. Children may be precocious, intuitive, sensitive, or even perceptive, but rarely would we say they have insight. Insight is not a birthright; it is earned through education. Tradition is the basis for that education. As our constitutional society matures, we should have the self-confidence to allow ourselves the indulgence of insight, gained from the benefit of a didactic Constitution and the traditions that have grown up under its influence. Insight without tradition is unimaginable, but the jurisprudence of constitutional law has too long known tradition without insight.