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Why Constitutional Theory Matters to Constitutional Practice (And Vice Versa)

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WHY CONSTITUTIONAL THEORY MATTERS TO CONSTITUTIONAL PRACTICE (AND VICE VERSA)*

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> Hostility to theory usually means an opposition to other people's theories and an oblivion of one's own.[1]
>
> [T]he claim that you are not being theoretical only makes you all the more theoretical, since the claim of the refusal of theory is itself a theoretical position.[2]

What does it mean to "interpret" a text? What is a "text"? Is interpretation a constrained or unconstrained activity? If constrained, what are the constraints?

Such questions constitute a principal area of inquiry in a wide variety of discourses, including theology, philosophy, and law. Theories of interpretation (including anti-theories),[3] in the sense of systematically elaborated answers to these questions, are among the most hotly debated topics in contemporary intellectual life.

Is this concern with the nature of interpretation simply an academic fashion? Or are real-world, flesh-and-blood consequences at stake in debates about interpretation? If so, what are those consequences?

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1. This is described as "Eagleton's Law" in Ruthven, *Where Logic Rules*, TIMES LIT. SUPP., Aug. 21, 1987, at 892. *Cf.* T. EAGLETON, LITERARY THEORY: AN INTRODUCTION (1983).

2. Miller, *But Are Things as We Think They Are?*, TIMES LIT. SUPP., Aug. 9, 1987, at 1104.

3. *See* AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM (W. Mitchell ed. 1985); Knapp & Michaels, *Against Theory 2: Hermeneutics and Deconstruction*, 14 CRITICAL INQUIRY 49 (1987).

Against the background of my work in constitutional theory,[4] the particular question I address in this essay is whether anything of consequence is at stake in debates about *constitutional* interpretation. Whether anything important is at stake in debates about other sorts of interpretation, for example, literary interpretation, is a question I must leave to others.

Constitutional practice—by which I mean, roughly, discourse about the constitutional legitimacy of political institutions and policies—is certainly consequential in real-world terms: Constitutional discourse (reasoning, argument) influences judges to decide constitutional cases one way rather than another. In this essay I argue that constitutional theory matters to constitutional practice, and hence to judicial decisions.

After some preliminary observations about texts and interpretation generally, I indicate how the two principal contending theories, "originalism" and "nonoriginalism," answer the question of what it means, or at least *should* mean, to "interpret" the Constitution. (Originalism and nonoriginalism are each partly a theory of constitutional interpretation and partly a theory of proper judicial role. The question of interpretation and the question of judicial role are inextricably linked.) I then explain why constitutional-theoretical debate, in particular originalist/nonoriginalist debate, matters to constitutional practice—and why constitutional practice matters to constitutional theory.

I

By "text" I mean simply "object of interpretation." If one wants to reserve "texts" for some subset of objects of interpretation—for example, for written objects like poems,[5] and perhaps also for some unwritten objects, like paintings or sonatas—one can refer to other kinds of objects of interpretation as "text-analogues." Nothing of consequence depends on the terminology.

To say that something—marks on a page, colors on a canvas, sounds, whatever—is a "text" (and not just marks on a page, etc.) is to say that something is meaningful: meaning-ful, i.e., full of mean-

4. *See* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); M. PERRY, MORALITY, POLITICS, AND LAW, ch. 6 (1988). I want to say something about what might seem to some to be an excessive and unseemly self-reliance in this essay: I wrote this essay against the background of my other constitutional-theoretical work; indeed, I wrote it as something of an appendix to that work, and, so, I have thought it useful, even important, to refer to relevant passages in that work at several points.

5. "Text" is defined in 11 THE OXFORD ENGLISH DICTIONARY 238 (1933) as, *inter alia*: "The wording of anything written or printed; the structure formed by the words in their order; the very words, phrases, and sentences as written."

ing. For a person to say that something is a text when that something is not (yet) meaningful to her—perhaps because it is written (constructed, composed) in a language or code she does not understand—is for her to conclude, perhaps only tentatively, that it is a text to someone, that it is, potentially at least, meaningful to someone, perhaps even to her.

Given the variety of objects for interpretation, can anything useful be said about interpretation generally? Can we say what it means to "interpret" a text in the sense of *any* text, or can we say only what it means to "interpret" a specific kind of text? What do any of the following activities have in common, if anything, with any of the others: a critic interpreting a film, a homilist interpreting a scriptural passage, a biochemist interpreting laboratory data, a parent interpreting a child's facial expression, a pianist interpreting a concerto, an ethicist interpreting a moral tradition, an actor interpreting a dramatic role, a person whose sight has just been restored interpreting a flood of visual sense impressions, an anthropologist interpreting a ritual, a judge interpreting a constitutional provision, and so on?

At least a few useful things *can* be said about interpretation which will serve us when we consider the debate between originalism and nonoriginalism.

To try to "interpret" a text (or text-analogue) is to try to understand something that is, at the beginning, at least somewhat strange or alien; discern its meaning (or meanings, which may be varied); grasp its intelligibility(ies) (a basic aspect of which is the thing's embeddedness in a context). To try to interpret is to try to render intelligible, to contextualize in the sense of "place in a context."[6]

And to understand is to interpret. *All* understanding, even natural-scientific understanding, despite now-discredited positivist pretensions to the contrary, is interpretive or "hermeneutic." "Every time we act, deliberate, judge, understand, or even experience, we are interpreting. To understand at all is to interpret."[7]

None of this is to deny that there are significant differences among the various interpretive activities listed above (a critic interpreting a film, etc.), but only to observe there is something all such activities have in common.

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6. My former colleague Carol Rose has suggested that "this 'placing in context'—and even more, 'locating in a different context'—is what Gadamer has in mind in saying that the quintessence of interpretation is translation. From the Latin *translatio*: 'to move something from one place to another.' "

7. D. TRACY, PLURALITY AND AMBIGUITY (1987).

To try to "interpret" a text is not necessarily to try to understand it in the way the author of the text intended that it be understood. First, as some of the interpretive activities listed above illustrate, not every text has an author—at least, not every text has an author in the conventional sense that some texts do. Second, even a text that has an author in the conventional sense can be understood in a way the author did not intend. Such an understanding is a misunderstanding only if the aim is to ascertain what the author intended the text to mean. But sometimes that is demonstrably *not* the aim of an interpreter. It is not invariably the aim of an interpreter of a scriptural passage, for example, or of a constitutional provision, to ascertain what the author intended the text to mean. Sometimes the interpreter's aim is not "what the author intended it to mean" but "what it means."

What an author intended a text to mean may for one reason or another be impossible to ascertain. But it doesn't follow that the text doesn't have an ascertainable meaning. A text can be meaningful independent of the author's intended meaning. Indeed, given that not every text has an author in the conventional sense, a text can be meaningful even if there is no author and therefore no author's intended meaning. But even if a text has an author in the conventional sense, what the author intended the text to mean—that is, to mean *to me*, as one of its readers—is not necessarily what the text does in fact mean to me, after I've struggled to read, to interpret/understand, it.

Is interpretation then an unconstrained activity—"arbitrary" or "willful"? Can an interpreter make a text mean whatever she wants it to mean? A few brief comments about the matter of interpretation and constraint are in order.

Imagine that you see in front of you something you conclude to be a small rubber ball. To see something as a small rubber ball is an act of interpretation. No human act is unconstrained. Every human act, including every act of interpretation, is constrained, even if the crucial constraints are sometimes "internal" (e.g., one's values) rather than "external" (e.g., inadequate lighting) and even if the constraints can't be specified. Moreover, to interpret something as one thing rather than another might be to make a mistake. To interpret something as a parachute rather than as a small rubber ball might be to make a fatal mistake.

Assume that the small rubber ball is one with which we can play any of several games. The ball does not itself constrain us to play a particular game. To say "let's play ball" without otherwise indicating which game is not necessarily to suggest that a particular

game be played; it may be to suggest merely that some game be played—presumably one that can be played with the ball. (Of course, to say "let's play ball" may *in context* suggest that a particular game be played.) As contemporary debates in constitutional theory illustrate, the constitutional text is one with which we (in particular, the Court) can play more than one game.[8]

Of course, our decision to play with the ball does rule out some games: those that require a different sort of ball and those that aren't played with a ball. One can't do just anything with a ball—use it for a parachute, for example. Similarly, the constitutional text does not itself constrain us to play a particular game, although, of course, our decision to interpret *the Constitution* does rule out some interpretive games—those that require a different sort of text. It is difficult to see how three actors could interpret the Constitution in the sense they could interpret Sam Shepard's *True West* on stage.

Suppose we do indeed decide to play a particular game. That decision is constrained and constraining: constrained just as every act is constrained, and constraining us to engage in the practices—to "follow the rules"—constructive of the game in question.

II

What is the originalist game—the interpretive game that, according to originalism, the Court should play with the constitutional text? And what is the nonoriginalist game I'd have the Court play? (I hope it's clear I'm not using "game" in any demeaning or pejorative sense.)

I've discussed originalism and nonoriginalism at length elsewhere. Here, against the background of, and in part drawing on, that fuller discussion, I want merely to sketch enough of the two positions to clarify the disagreement between them with respect to the nature of constitutional "interpretation."

In American political-legal culture it is axiomatic that the Constitution is authoritative—indeed, supremely authoritative—in con-

8. *See* D. KELSEY, THE USES OF SCRIPTURE IN RECENT THEOLOGY 151 (1975):

> [A] theologian's remark "Scripture is authority for theology," said in reference to biblical texts taken as scripture, is like a boy's exclamation "Come on, let's play ball," said in reference to a ball not evidently designed for use in any one ball-game in particular. It no more makes a claim about the texts than the boy's exclamation does about this ball; rather, it self-involvingly invokes an activity. In saying "Scripture is authority for theology," the theologian commits himself to participate in one or another of a family of activities called "doing Christian theology." Moreover, he thereby acknowledges and commits himself to observing a rule governing the practice of theology (on certain understanding of "theology"): In defending theological proposals, scripture shall be used in such a way that helps authorize the proposals.

stitutional adjudication.[9] That is, it is axiomatic that constitutional cases should be decided on the basis of the Constitution. Thus, in deciding constitutional cases judges should interpret the Constitution. This much is common ground between originalism and nonoriginalism.

It is *not* axiomatic, however, *what* it means to say that the Constitution is authoritative. According to originalism, what does it mean to say that the Constitution is authoritative; and, relatedly, what does it mean to "interpret" the Constitution? What does it mean to say that the Constitution is authoritative, and to "interpret" the Constitution, according to nonoriginalism?

All agree that the Constitution is a text, that *those* "marks on a page" are meaningful. What the Constitution means, to the originalist, is what it originally meant. Its meaning to the originalist is its original meaning. For the originalist, to enforce the Constitution is to enforce it as originally understood (by the ratifiers, or the framers and ratifiers).

For originalism, then, to "interpret" the Constitution is to ascertain the original meaning—the norm the textual provision at issue was originally understood to signify—and then to apply that norm to the conflict at hand. Thus, for originalism, the interpretation of a constitutional provision comprises two interpretive moments: a moment in which the original meaning/understanding of the provision is ascertained to the extent possible and a second moment in which the significance of that meaning for the conflict at hand is ascertained.

One meaning of the constitutional text, to the nonoriginalist, is the original meaning. To the nonoriginalist, however, that is not the only meaning of the text. To many Americans, including me, the constitutional text is more than one thing. It is a communication to us from the ratifiers and framers. *And*, in virtue of a role it has come to play in the life of our political community—a role not necessarily foreseen, much less authorized, by any group of ratifiers and framers—the Constitution is *also* a symbol of fundamental aspirations of the political tradition. Thus, were someone to ask me

9. *See* Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95 (1987): "[F]or all the ballyhoo, overall approaches differ far less than might appear. Both Judge Robert Bork and I, for example, . . . start with the recognition that any 'legitimate theory of constitutional adjudication begins from the premise that the Constitution is law,' and that it must therefore provide genuine constraints on choice." (Quoting Bork, *Original Intent and the Constitution*, HUMANITIES, Feb. 1986, at 22.) *Cf.* Dworkin, *The Bork Nomination*, NEW YORK REV., Aug. 13, 1987, at 3, 10: "[Judge Bork's] writings show no developed political philosophy . . . beyond frequent appeals to the truism that elected legislators, not judges, ought to make law when the Constitution is silent. No one disputes that, of course; people disagree only about when the Constitution *is* silent."

what the equal protection clause means, I might say: "As a communication to us from the ratifiers and framers of the fourteenth amendment, it means . . . but as a symbol of a fundamental aspiration of our political tradition, it means, it has come to mean, more than that; it means . . . ." There is, after all, no rule that a text must be one and only one thing to a person. Things are not so simple. Like some other texts (like every other text?), the constitutional text is polysemic.

To the nonoriginalist, then, unlike the originalist, what the Constitution means is not merely what it originally meant. Some provisions of the constitutional text have a meaning *in addition to* the original meaning: Some provisions signify fundamental aspirations of the American political tradition. Not every provision of the text signifies such aspirations, but some do. The least controversial examples of such provisions are probably the first amendment, signifying the tradition's aspirations to the freedoms of speech, press, and religion; the fifth amendment, signifying the aspiration to due process of law; and the fourteenth amendment, signifying the aspirations to due process of law and to equal protection of the laws.[10]

For nonoriginalism, then, to "interpret" some provisions of the Constitution is in the main to ascertain their aspirational meaning

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10. Whether a particular constitutional provision is aspirational can be controversial, of course. To say—whether from the perspective of a participant observer in the political-legal culture, which is the judge's perspective, or from the perspective of the outsider, like de Tocqueville—that a particular provision does not signify a fundamental aspiration of the American political tradition is to say either, or both, of two things: (1) that the provision does not signify an aspiration; (2) that the aspiration the provision signifies is not now, if it ever was, a fundamental aspiration of the tradition.

Nonoriginalism does not hold that every worthwhile aspiration is necessarily a fundamental aspiration of the tradition, much less signified by some provision of the constitutional text. Nor does it hold that every fundamental aspiration of the tradition is necessarily signified by some provision of the text. It does not even hold that every aspiration of the tradition signified by some textual provision is necessarily worthwhile. Why should a judge bring to bear, in constitutional cases, *only* aspirations signified by the text? Why not all fundamental aspirations, even those not signified by the text? Indeed, why not all worthwhile aspirations, even those not-fundamental aspirations of the American political tradition? If someone wants to claim that a judge should bring to bear all fundamental aspirations, or even all worthwhile aspirations, I want to hear the argument. (*Inter alia*, I'm curious to hear what fundamental aspirations are not signified by the text, and also what worthwhile aspirations are not fundamental aspirations of the tradition.) *My* argument is merely that a judge should bring to bear, in constitutional cases, only aspirations signified by the text.

However, although I'm arguing that a judge should bring to bear only aspirations signified by the Constitution (as distinct from all fundamental aspirations or all worthwhile aspirations), I'm *not* arguing that she should bring to bear *every* aspiration signified by the Constitution. As I remarked a moment ago, nonoriginalism does not presuppose that every aspiration signified by the Constitution is necessarily worthwhile. If a judge believes that an aspiration signified by some provision of the constitutional text is not worthwhile, then she has no reason to bring that aspiration to bear. She may, consistently with her oath, pursue the originalist approach to adjudication under the provision in question.

and then to bring that meaning to bear—that is, to answer the question of what significance, if any, the aspiration signified by the relevant provision has for the conflict at hand, what that aspiration means for the conflict at hand, what that aspiration if accepted requires the court to do with respect to the conflict at hand.[11] Thus, for nonoriginalism no less than for originalism, the interpretation of a constitutional provision comprises two interpretive moments: a moment in which the aspirational meaning of the provision is ascertained and a second moment in which the significance of that meaning for the conflict at hand is ascertained.

As I've indicated, for both originalists and nonoriginalists constitutional interpretation can be understood (analytically, if not, or not always, phenomenologically) as comprising two interpretive moments. Whereas the first moment yields a norm to be applied, the second moment yields the significance of that norm for the conflict at hand. In the second moment the norm yielded in the first moment is specified, it is rendered more determinate. We might say that in the first moment the objective is the "preliminary" meaning of the constitutional provision, and in the second moment the objective is the "final" meaning—final, that is, for the purposes of the case at hand. Whereas the preliminary meaning is relatively general, abstract, formal, verbal, the final meaning is relatively particular, concrete, substantial, existential.

The distinction between "preliminary" meaning and "final" meaning is not the same as the sharp distinction between "meaning" and "application." Reliance on the former distinction is not inconsistent with David Hoy's point, in criticizing the latter distinction, that "[i]n finding that the text is at all intelligible, the moment of application . . . has already taken place for us. A text only makes

11. It seems invariably (though not necessarily) the case that the aspirational meaning of a constitutional provision, like the free speech clause of the first amendment, has grown out of the original meaning. The aspirational meaning has emerged over time—in the course of constitutional adjudication and, more generally, of political discourse, including political discourse precipitated by constitutional conflict and adjudication—as a progressive generalization of the original meaning. (We need not fear that the aspirational meaning of the Constitution might permit what the original meaning forbids. As a progressive generalization of the original meaning, the aspirational meaning does not permit what the original meaning forbids, though it forbids some of what the original meaning permits.)

The point bears amplification: Constitutional adjudication in particular and political discourse in general are principal matrices of the Constitution's aspirational meaning to us; and constitutional precedent and, more generally, the ways in which political controversies, especially major ones, have been resolved—the story of the New Deal, for example, comes to mind—are principal shaping influences on the contours of that meaning. Which constitutional provisions signify aspirations? How can a judge know? One important place to look, though not the only place, is constitutional case law, constitutional "precedent," not because such materials are necessarily authoritative, but because they are informative, illuminating as to which provisions are aspirational and as to the content of the aspirations.

sense insofar as it inheres in a context, and for us even to be able to understand the text at all, we must presuppose an understanding of that context. . . . [A] text is never apprehended independently of a context, but . . . any understanding of the text has already found that the text applies in a shared context."[12]

My problem with the meaning/application distinction—at least in the conventional version Hoy takes on, according to which meaning is meaning and application is application and never the twain shall meet—is not only that meaning already always involves application (Hoy's point), but also that application is always a further specification of meaning. Consider, for example, the principle that government may not deny anyone the equal protection of the laws. To say, in response to the question "What does the principle mean?," that government may not discriminate on the basis of race—or, more generally, that government may not discriminate on the basis of an "irrational prejudice"—is to begin to specify the meaning of the principle. For a court to conclude, in the context of a case, that the equal-protection principle forbids government to segregate public schools on the basis of race, or to outlaw interracial marriages, or to fence small-group homes for the mentally retarded out of residential neighborhoods, is to specify the meaning of the principle even further. In terms of the preliminary meaning/final meaning distinction, for both originalists and nonoriginalists final meaning is always a specification of preliminary meaning.

Although, as I said, originalists and nonoriginalists agree that the constitutional text is authoritative in constitutional adjudication, they strenuously disagree about what it means to say that the text is authoritative. They disagree about that, we can now see, because they disagree about the meaning of the text. Whereas to the originalist the meaning of the constitutional text is singular—the meaning of the text is the original meaning—to the nonoriginalist the situation is more complicated. For reasons I've given elsewhere,[13] a nonoriginalist judge *is* interested in the original meaning of the Constitution; to her, too, one meaning of the text is the original meaning. But to a nonoriginalist judge that is not the text's only meaning. For the originalist, the constitutional text is authoritative in the sense that the original meaning is authoritative. For the nonoriginalist, some provisions of the text are authoritative in the sense that their aspirational meaning—the aspirations they signify—is authoritative. To a nonoriginalist judge, the authoritative

12. Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479, 493 (1988).

13. *See* M. PERRY, MORALITY, POLITICS AND LAW, 150-51 (1988).

meaning of some provisions of the constitutional text is not their narrow original meaning, but a broader present meaning—their aspirational meaning.

III

With this sketch of originalism and nonoriginalism, and of the difference between them, now behind us, let's turn to the question-in-chief: How does constitutional theory matter to constitutional practice, if at all? In particular, how does the originalism debate about constitutional interpretation matter to constitutional practice? What is the real-world importance, the "cash value," of constitutional-theoretical debate? Why should anyone care about constitutional theory (other than, of course, the theorists themselves)?

What precisely is constitutional "theory"? "Theory" can mean different things.[14] Although theory does not invariably matter to practice, it sometimes does. Consider, for example, two contending epistemological theories in the philosophy of science: realism and conventionalism. Each theory constitutes a position on the issue of the relation, if any, between the fruit of (natural) scientific practice—i.e., scientific "truth" or "knowledge"—and reality as it is in itself, independent of however anyone, including any scientist, perceives or conceives it. As it happens, neither theory is of much consequence to contemporary scientific practice. No particle physicist, for example, is better of *qua* particle physicist for informing herself about, much less adopting a position with respect to, realist/conventionalist debates in the philosophy of science. Scientific practice under-determines the choice between realist and conventionalist theories, it does not presuppose either a realist or a conventionalist position. So, theory does not always matter to practice.

But constitutional theory is different. It *does* matter. In contrast to realist and conventionalist theories in the philosophy of science, both originalism and nonoriginalism are primarily justificatory theories. Each aims to justify or revise (critique, reform, reject) constitutional practice. Of course, each must characterize (and therefore interpret) the particular practice it then tries to justify or revise, but the characterization is part of the normative enterprise. Such theory is of great consequence to the practice that is its concern. Every judge who must sometimes adjudicate constitutional conflicts is better off *qua* judge for attending to constitutional-theoretical debates about constitutional interpretation.

14. *See* Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1779 (1987).

Constitutional practice—that is, particular interpretive styles of or approaches to, constitutional discourse—often presupposes either an originalist or a nonoriginalist position. It often presupposes either an originalist or a nonoriginalist conception of proper judicial role.

Constitutional theory, then, like normative political theory generally (of which it is a part), and unlike epistemological theories in the philosophy of science, is based upon a justificatory argument. A constitutional theory is an argument for or against a particular interpretive style of constitutional discourse that has been put in question, a style whose political-theoretical propriety or "legitimacy" has, for one reason or another, been challenged.[15] It aims to justify or revise a particular style of constitutional discourse. Because a particular interpretive style entails a particular judicial role—the role constituted in part by the style—a constitutional theory is partly a political-theoretical argument about proper judicial role. An interpretive style of constitutional discourse whose legitimacy is suspect—and the judicial role it partly constitutes—is harder to maintain and easier to oppose, politically as well as intellectually, if there is no plausible justification for it, and easier to maintain and harder to oppose if there is.

So, while theory does not always matter to the practice that is its concern, constitutional theory matters to constitutional practice. No particle physicist would be rejected as unfit for membership on the Board of the National Science Foundation because of her position on epistemological issues contested in the philosophy of science. Robert Bork, however, *was* rejected as unfit for membership on the Supreme Court principally because of his originalist position on issues contested in constitutional theory. His theoretical position, unlike the particle physicist's, was relevant precisely because it mattered to, it had implications for, his practice—*disturbing* implications, in the view of many who voted against then-Judge Bork.

To say that constitutional theory matters to constitutional practice is not to say that constitutional theory of every sort matters to constitutional practice of every sort. If the original understanding of Congress's power "to regulate commerce among the several states," for example, was as broad or indeterminate as some historians have suggested,[16] then it is difficult to see how the original understanding differs in relevant respects from the present

15. *Cf.* Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777, 777 (1987): "My primary argument is that constitutional theory matters in the way that a fairly high fever matters—though it has no independent significance, it is a symptom of an underlying disorder in the body politic."

16. *See, e.g.*, Stern, *That Commerce Which Concerns More States Than One*, 47 HARV.

understanding. That in the eighteenth century the framers and ratifiers of the Constitution could not have imagined how in the twentieth century Congress would use its commerce power does not entail that the original understanding of the commerce clause was different in relevant respects from the present understanding. Of course, there can still be basic disagreement as to how "activist" or how "deferential" the Supreme Court should be in enforcing the provision—for example, in enforcing the commerce clause against Congress. Should a Justice vote to strike down congressional legislation as *ultra vires* under the commerce clause if she believes that Congress has exceeded its commerce power or only if she believes that no one could reasonably conclude otherwise?

Such a debate about proper judicial role is not, however, the debate between originalism and nonoriginalism. The originalist/nonoriginalist contest is a different debate about proper judicial role—a debate about whether in constitutional adjudication judges should privilege the original understanding of a constitutional provision or, instead, the broader aspirational understanding. That contest is consequential in real-world terms only with respect to constitutional provisions whose original understanding is not practically equivalent to their present understanding.

IV

Contemporary constitutional theory—as the centrality of the originalist/nonoriginalist debate illustrates—is principally concerned with interpretation of provisions whose original and present understandings are different. Two such provisions are due process clause and the equal protection clause of the fourteenth amendment. A concrete illustration of how constitutional theory matters—in particular of how the contest between originalism and nonoriginalism matters—might be useful at this point. I want to indicate how the originalism debate matters to interpretation of the due process and equal protection clauses.

First, the equal protection clause. There's no dispute about what the equal protection clause says. In the words of section one of the fourteenth amendment: "[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws." The dispute is about what the equal protection clause means.[17] The

L. REV. 1335 (1934). (I don't mean to suggest, however, that the position on the original understanding of the commerce clause defended by Stern and others is not controversial.)

17. To ask about a constitutional provision—or about any text—"What does it say?" is not the same as asking "What does it mean?" Yet, if what the provision says is sufficiently familiar (like a speed limit law) in the relevant community—if what it says is not alien or

phrase "the equal protection of the laws," unlike (for example) the phrase "thirty-five years of age," has no consensual or canonical meaning in the American political-constitutional community. Although it is difficult to say precisely how the equal protection clause was originally understood by those in the Congress who proposed it and those in the states who ratified it, it seems unlikely that the clause was understood to do more than forbid any state to discriminate on the basis of race (or, perhaps, of race or national ancestry).[18] The present, aspirational understanding of equal protection is broader. According to this broader understanding, no

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strange—then we shouldn't be surprised if the question "What does it mean?" elicits the impatient reply "It means what it says!" Of course, this is not to deny that to say of the speed-limit law "It means what it says!" is to interpret the law/text, just to emphasize what the question "What does it mean?" is a real and explicit one when what the text says is at least a little alien or strange in the relevant community. To say of the equal protection clause that it means what it says is not very helpful, because in the American political-constitutional community the equal protection clause has no consensual or canonical meaning. What the clause says is more than a little alien or strange. Thus, the need to interpret the clause, to render it more familiar and hence usable, is obvious (in a way that the need to interpret the speed-limit law is not obvious).

18. Dworkin's suggestion that the framers of the equal protection clause of the fourteenth amendment should be understood to have constitutionalized "the principle that government should not act out of prejudice against any group of citizens"—a principle, Dworkin emphasizes, that applies to everyone, women and homosexuals included, and not just to racial minorities (Dworkin, *supra* note 9, at 8)—seems to me less sensitive to available historical materials and more likely an instance of wishful thinking than Bork's suggestion that the framers of the equal protection clause should be understood to have constitutionalized a principle against discrimination or prejudice on the basis of race. The *reductio ad absurdum* of Dworkin's way of (man)handling history is the suggestion that the framers of the equal protection clause—and of the first amendment and indeed of all constitutional provisions pertaining to human rights—should be understood to have constitutionalized the principle that "government should not act unjustly." For a concise but powerful criticism of this aspect of Dworkin's theory of interpretation, *see* Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 LAW & PHILOSOPHY 419, 425 n.14 (1987).

So, a sophisticated originalism, sensitive to the insights of hermeneutics, readily acknowledges that the judge can never retrieve the actual "original understanding," anymore than one person can come to see the world through another person's eyes (even if the other person is a contemporary). The sophisticated originalist is fully aware that the best the judge can do is construct an imagined "original understanding" by means of a counterfactual speculative act—the hypothetical conversation—that is sensitive to available historical materials. But, for the originalist, the best the judge can do is quite good enough. *Cf.* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 377 (1981):

> Although the difficulties of establishing original intent are formidable, they are by no means intractable. Significant difficulty in historical reconstruction is not present with respect to some constitutional provisions, and with respect to others it is at least partially ameliorated by the extensive body of precedent accumulated over the years by courts nearer in time to the origins of the relevant provision. Most importantly, the language of the Constitution itself remains. Whatever the difficulties, the language itself constitutes the best evidence of original intention. In any event, the core question remains: do the basic postulates of the constitutional order require that the court undertake the task of ascertaining original intent, *as best it can*?

Trying to arrive at the original understanding, in the sense and way just indicated, is a far cry from, and far more legitimate (the originalist will want to insist) than pursuing an

state may discriminate against any person within its jurisdiction on the basis of any "irrational prejudice."[19]

Discrimination (by a state) based on sex, for example, simply does not implicate, much less violate, the equal protection clause as originally understood. In effect, section one of the fourteenth amendment, as originally understood, provides, in relevant part: "[N]or shall any state discriminate against any person within its jurisdiction on the basis of race." Thus, contemporary constitutional doctrine regarding sex-based discrimination (for example) cannot be justified on the basis of the equal protection clause as originally understood. However, such discrimination does indeed implicate and sometimes may even violate the broader, aspirational understanding of equal protection.[20]

There is a real—and quite consequential—difference between, for example, constitutional reasoning that takes as its basic point of departure the principle that government may not discriminate on the basis of race and constitutional reasoning that takes as its point of departure the broader principle that government may not discriminate on the basis of any "irrational prejudice." It is difficult to see how the former principle can ground a discursive challenge to discrimination based on sex. Isn't it almost certainly the case that if the fourteenth amendment only said instead that government may not discriminate on the basis of race, the Court would not have invalidated, in the name of that clause—the no-racial-discrimina-

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interpretive path that rejects the "in principle authoritativeness of the original understanding, which is what nonoriginalists do.

19. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985).

20. Critics of the originalism/nonoriginalism distinction implausibly minimize the difference between the originalist interpretive style—the originalist approach to interpretation of a provision like, for example, the equal protection clause—and the nonoriginalist interpretive style/approach. They therefore minimize the difference between the products of the two approaches—between the original meaning of such a provision and the present, aspirational meaning. In terms of the two interpretive moments that constitutional interpretation comprises, critics of the originalism/nonoriginalism distinction minimize the difference between the "preliminary" meaning, to an originalist, of a constitutional provision like the equal protection clause and the "preliminary" meaning of the provision to a nonoriginalist.

The difference in interpretive style/approach and the attendant difference in product/meaning ought not to be minimized. They are differences that matter—differences that make a difference. As I indicated earlier, in trying to get at the preliminary meaning of a constitutional provision—here, the equal protection clause—the originalist asks, first, how was the clause originally understood, what was its original meaning. In trying to get at the final meaning of the clause—final for purposes of the case at hand—she then inquires what the clause, as originally understood, means in the context of the case at hand. The nonoriginalist asks, with an eye on relevant precedent, not how was the clause originally understood, but how has the provision come to be understood. She then inquires what the clause, as now understood, means in the context of the case at hand. Clearly, the question "how was *X* originally understood? is not the same as the question "How has *X* come to be understood?" Nor is the answer to the first question necessarily the same as the answer to the second.

tion clause—classifications based on sex? (Notice, in that regard, that the "as is enjoyed by white citizens" language of section 1981 and 1982 of Title 42 of the United States Code—provisions that derive from the Civil Rights Act of 1866—has effectively tied those provisions to race discrimination alone.)[21] Well, given the originalist approach to the fourteenth amendment, the equal protection clause *is*—is tantamount to—a no-racial-discrimination clause; it means no more than that government may not discriminate on the basis of race. With respect to the equal protection clause and several other important constitutional provisions regarding human rights, the distinction between originalism and nonoriginalism is consequential in real-world terms.

Now, the due process clause. Again, the dispute is not about what the clause says but about what it means. Section one of the fourteenth amendment says, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." The phrases "liberty" and "due process of law," like the phrase "the equal protection of the laws" but unlike the phrase "thirty-five years of age," have no consensual or canonical meaning in the American political-constitutional community. Although it is difficult to say precisely how the due process clause was originally understood by those in the Congress who proposed it and those in the states who ratified it, the clause was certainly not understood to be as broad as it is today. According to its present broad, aspirational meaning, the due process clause governs not merely adjudicative actions but legislative actions as well, not merely rule application but rule making. On this understanding, "due process of law" involves not merely constitutionally adequate ("due") adjudicative procedures but constitutionally legitimate ("due") legislative process as well, in the sense of legislative process that honors certain basic principles regarding human dignity. It's safe to say that a statute criminalizing abortion, or the use of contraceptives, or homosexual intimacy, does not implicate, much less violate, the constitutional prohibition against deprivation of "life, liberty, or property, without due process of law" as originally understood. But such a statute does indeed implicate and may even violate the broader, aspirational understanding of "liberty" and "due process."

Here, then, are two important examples of how constitutional theory—of how the choice between an originalist approach and a

21. Section 1982, for example, provides that: "All citizens of the United States shall have the same right, in every State and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." (My thanks to Gene Nichol for this point.)

nonoriginalist approach to interpretation of major constitutional provisions regarding human rights—matters to constitutional practice. Such examples call to mind the congressional hearings on Robert Bork's nomination to the Supreme Court. Before his nomination, Bork, first as a law professor and then as a federal judge, had expressed deep skepticism about the constitutional pedigree of doctrines like, for example, due process regarding reproductive rights. Of course, given his originalism, the resistance Judge Bork encountered in the hearings is also easy to understand. As the politicians who voted to reject Judge Bork's nomination understood—indeed, as the forces responsible for Judge Bork's nomination in the first place understood—constitutional theory matters.[22]

V

Finally, I want to relate my pro-theory position to the anti-theory positions of Stanley Fish and Mark Tushnet, both of whom have argued—each for different reasons—that theory doesn't matter.

First, Fish. It bears emphasis that a constitutional theory is not a "theory" in Stanley Fish's strong sense of the term: "an abstract or algorithmic formulation that guides or governs practice from a position outside any conception of practice. A theory, in short, is something a practitioner consults when he wishes to perform correctly, with the term 'correctly' here understood as meaning independently of his preconceptions, biases, or personal preferences."[23] Constitutional theories are not meant to be such

22. In helpful correspondence, Rogers Smith has suggested "giv[ing] some concrete examples of what we would do differently in reaching a decision if we adopted one constitutional theory rather than another—what sorts of things we could and should look at, what sorts of principles and arguments we could and should use. . . . For example: if in adjudicating [the constitutionality of school segregation under the equal protection clause] I thought the intentions of the clause's authors mattered most, I would look at historical evidence of what they said and did on the subject. If I thought the ratifiers' intent mattered, I would look at different historical documents. If I thought the textual language as it would ordinarily have been understood at that time mattered, I would look at contemporary dictionaries and examples of uses of the term. If I thought evolving social mores should give meaning to the clause, I would try to identify, measure, or predict them. If I thought, as I do, that the equal protection clause requires us to judge if public institutions are reinforcing relative inequalities to such an extent that some persons do not have meaningful capacities to pursue or exercise fundamental liberties, then I would not only have to indicate what I take to be fundamental liberties and why, I would also have to look at empirical evidence on current conditions to determine if such extensive relative disparities do in fact exist. I think people will see that constitutional theories matter much more readily if [one] spell[s] out the quite different inquiries they call for in reaching a decision." Letter from Smith, to author (May 13, 1988).

23. Fish, *supra* note 14, at 1779. See *id.* at 1777-79. Nor are epistemological theories in the philosophy of science "theories" in Fish's strong sense: They do not dominate scientific practice. See notes 14-18 and accompanying text.

It bears emphasis, too, that a constitutional theory is not necessarily the sort of "grand"

theories or, therefore, to matter in the way such theories would matter, if they existed. (Do such theories exist? If they do, they are certainly not the sort of theories that should be taken seriously. Fish has picked an easy, but inconsequential, target.)[24]

As I've indicated, a constitutional "theory" is best understood as a justification for or critique of some contested style of constitutional practice (discourse). (As Fish acknowledges, "the word 'theory' is often used in other, looser ways . . .").[25] It is one thing to engage in the practice, another to engage in an effort to justify the practice. For a judge engaged in the process of deciding a constitutional case, what is the relation between, on the one hand, her present activity of engaging in a constitutional practice and, on the other, the separate activity—whether someone else's or her own at an earlier time—of trying to justify the practice? The relation is not the one Fish rejects: that the judge consults the theory "when she wishes to perform correctly, that is, independently of her preconceptions, biases, or personal preferences." The relation, rather, is that the effort to justify the practice may well have led the judge to choose or shape the style of constitutional discourse—in which she's now engaged.

Is it the case, then, that in *that* sense (i.e., the sense that an effort to justify a practice may lead one to choose one practice rather than another, or to shape a practice one way rather than another) constitutional theory dominates, that it is prior to, constitutional practice? The relation between constitutional theory and constitutional practice is more complex than that.

Mark Tushnet has recently commented on one prominent "reason for thinking that constitutional theory matters," namely, that constitutional theory "affects how judges will decide certain kinds of controversial cases. Thus, a judge who accepts Attorney General Edwin Meese's jurisprudence of original intent, for example, would be less likely to sympathize with claims for substantial protection of novel forms of expressive activity than would a judge who accepted a different theory of constitutional interpretation."[26] Tushnet is skeptical: "The difficulty with this suggestion is that the most likely causal connection runs from prior political predisposi-

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or "foundationalist" theory Dan Farber has recently criticized. *See* Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988). (It seems to me that my constitutional theory has much more in common with Farber's "pragmatist" approach to constitutional adjudication than with "grand theory.") Compare *id.* with M. PERRY, MORALITY, POLITICS, AND LAW ch. 6 (1988).

24. *See* Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987); Schlag, *Theory and the Uses of Dennis Martinez*, 76 GEO. L.J. 53 (1987).

25. Fish, *supra* note 14, at 1779.

26. Tushnet, supra note 15, at 778.

tion to preferred constitutional theory, rather than from theory to outcome."[27]

I'm enough of a realist to be sympathetic to Tushnet's point. Constitutional practice probably often dominates constitutional theory in the way Tushnet indicates. Judges probably often gravitate to theories that support what they want to do—that is, to theories that support the interpretive styles of discourse they want to engage in. It is nonetheless true that, as I said earlier in this essay, an interpretive approach to constitutional discourse whose legitimacy is suspect is harder to maintain and easier to oppose, politically as well as intellectually, if there is no plausible justification for it, and easier to maintain and harder to oppose if there is. Tushnet seems to recognize as much when he writes that "constitutional theory matters because it is one of the structures that defines the limits of our political discussions."[28] If a contested interpretive style of constitutional discourse cannot be justified, if it lacks an adequate supporting theory, then its appeal in the public square is diminished. If, however, it has an adequate theory, or to the extent it does, its credibility is enhanced.

In the title to this essay, I indicate that not only does constitutional theory matter to constitutional practice, but vice versa. Constitutional practice matters to constitutional theory. Indeed, there is an even deeper sense than Tushnet's in which constitutional practice dominates constitutional theory. As I've explained elsewhere, a constitutional theory—an effort to justify a particular interpretive style/judicial role—must rely in significant part both on (1) claims about what sorts of judicial decisions have been and likely would be the consequence of the style/role at issue, and on (2) evaluative judgments about the political-moral "rightness" or "correctness" of those decisions.[29] A constitutional theory is incomplete to the point of being useless if it doesn't include arguments about the good the judiciary has achieved, on balance—and the good it will likely achieve, on balance—in employing the style at issue. In that sense, a constitutional theory relies on the very constitutional practice it seeks to justify. But there's no troublesome circularity here: It's quite natural to rely, in part, on the (actual and likely) consequences of a practice in the course of trying to justify the practice.

However, there is considerably more to a justification of a disputed interpretive style of constitutional discourse than such claims and judgments about judicial decisions. As my own effort to justify

27. *Id.* at 778-79.
28. *Id.* at 787.
29. *See* M. PERRY, *supra* note 23, at 166-69.

nonoriginalist constitutional discourse illustrates, such a justification comprises arguments about a variety of other matters: for example, the moral character of our political tradition and community, the nature of politics, the tension between our commitment to "popular sovereignty" and our commitment to "liberty and justice for all," and judicial self-restraint.[30]

Therefore, neither constitutional practice nor constitutional theory is either prior or posterior to the other. The relation between constitutional theory and constitutional practice is one of interdependence: A constitutional theory is an effort to justify a constitutional practice—to justify, that is, a particular interpretive style/judicial role. And, as I just indicated, we rely on constitutional practice—we rely, that is, on historical and predictive claims and on moral judgments about the consequences of the style/role at issue—as a part of our constitutional-theoretical enterprise, or justificatory effort.

That's why constitutional theory matters to constitutional practice. And vice versa.

30. *See id.*, ch. 6.