MEMORANDUM

To: Participants in the Schmooze

From: Jim Fleming

Date: November 20, 2006

Re: My ticket of admission

I enclose a chapter from a forthcoming book I have co-authored with Sotirios A. Barber, *Constitutional Interpretation: The Basic Questions* (Oxford University Press, forthcoming 2007). Let me say a few words to situate this chapter in the book as a whole.

In *Taking Rights Seriously*, Ronald Dworkin famously argued that fidelity in interpreting the Constitution as written calls for a fusion of constitutional law and moral philosophy. Our book takes up that call, arguing for a philosophic approach to constitutional interpretation. In doing so, we systematically critique competing approaches – textualism, consensualism, originalism, structuralism, doctrinalism, minimalism, and pragmatism – that aim and claim to avoid a philosophic approach. We show that, contrary to their claims and pretensions, these approaches cannot avoid philosophic reflection and choice in interpreting the Constitution.

At the same time, we do not argue for the exclusivity of the philosophic approach. Indeed, we contend that fidelity in constitutional interpretation requires a fusion of philosophic and other approaches, properly understood. Within such a fusion, we would understand text, consensus, intentions, structures, and doctrines not as alternatives to but as sites of philosophic reflection and choice about the best understanding of our constitutional commitments.

The enclosed Chapter 6 critiques narrow or concrete originalism (which we distinguish from broad originalism and abstract originalism). It should be clear how it relates to our topic of discussion: "An Eighteenth Century Constitution in a Twenty-First Century World." I have included the table of contents to give you an idea of where this chapter (indicated in bold font) fits into the book as a whole. I would be happy to provide a copy of the entire book to anyone who wishes to see it.

Constitutional Interpretation: The Basic Questions

Sotirios A. Barber & James E. Fleming

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Narrow Originalism/Intentionalism

Suppose we knew the intentions (or original meanings or original understandings¹) of the men who wrote or ratified the Fourteenth Amendment. Would this knowledge help us decide – in a manner that avoids the need for philosophic reflection and choice – whether a woman has a right to terminate a pregnancy or marry someone of a different race or of the same sex – whether, that is, the government needs a compelling reason to deny a woman these choices? Yes, says contemporary intentionalism, most often called "originalism" (we shall use the terms interchangeably), a position whose popularity with the ideological conservatives who now dominate the federal bench has made it the subject of exhaustive scholarly analysis. In this chapter, we'll address a relatively *narrow or concrete originalism*; in the next chapter, we'll turn to a relatively *broad originalism*; we'll distinguish both from abstract originalism that is equivalent to the philosophic approach. Originalism/intentionalism, narrow or broad, provides no escape from philosophic choice, for it is only through philosophic argumentation that one can answer questions that must be answered before the historical search for intentions can even begin. And, once that search begins, only through the philosophic approach can we decide what those intentions are.

I. Prior Philosophic Questions about Intentions

These prior questions are philosophic questions of different kinds. They include who we ought to count as "framers" for constitutional purposes. (Some or all members of the Philadelphia Convention? Members of the state ratifying conventions? Public opinion of the

1780s and the 1860s?) Our prior questions also include what counts as evidence for original intention. (Official records and documents – the constitutional text, for example? Private correspondence by members of the Philadelphia Convention and the state ratifying conventions? The social practices of the 1780s and the 1860s, by this or that description of those practices? What historians say about the social practices, statute books, and common law of the relevant time? Philosophic works influential at the relevant time? The aspirations of those eras, by this or that account of those aspirations?) We further must consider the questions of what an intention is, the sense in which a group of people (as distinguished from an individual) can have an intention, and whether to count what Ronald Dworkin has called an intention's *concrete* aspect or its *abstract* aspect.² Should we say, on the concrete side, that a framer who referred to "fair trials" or "commerce" or "military forces" intended no more than the specific steps he thought constituted procedural fairness, the specific activities known to him as commercial, or the specific kinds of military force known to him at the time? Can we reasonably avoid saying, on the abstract side, that a framer speaking of fairness or commerce or military force must be understood as referring to things whose meaning is determined by their nature (or the best understanding of them), not by his concrete expectations or understandings? How else would we explain the universal agreement that Congress needed no constitutional amendment to establish an air force?

We can't find answers to these prior questions in framers' intentions, of course, for we must decide these questions before commencing the quest for framers' intentions.³ Acknowledging the force of these criticisms, leading conservative thinkers like Charles Fried and Richard Posner have rejected intentionalism for substantive arguments of their own about what the Constitution ought to be read to mean.⁴ Robert Bork clings to intentionalism

for judges, even if not for theorists like himself (in the sense that he acknowledges that theorists must make arguments for intentionalism, not merely make the circular assertion that the framers intended intentionalism). He asserts that intentionalism would be mandatory for judges even if the framers had not intended it for them. Bork supports intentionalism for judges, not because anyone intended intentionalism for judges, but because he feels intentionalism best serves an imperative of democracy, namely, restraints on judicial discretion. But because Bork's view of democracy is controversial and lacks a clear source in either constitutional text or judicial tradition, it is either arbitrary or dependent on a philosophic argument, an argument about what democracy ought to mean that neither he nor any other originalist has made.

Assume, however, that some philosopher had successfully shown that democracy demands intentionalist judges. Bear in mind that a successful theory of democracy would have to contend not that the theorist's private version of democracy demands intentionalist judges, but that *democracy itself* demands intentionalist judges and that the moral weight of democracy overpowers all competing considerations to make intentionalism for judges a constitutional imperative. (To satisfy yourself of the validity of these requirements on our theorist, imagine your reaction to someone who said, "You should adopt my theories of democracy and of what's good and right because my theories are *my* theories.") And if our philosopher had made the requisite case, she would then have to show whether originalist judges should seek what Dworkin calls the framers' *abstract intentions* or their *concrete intentions*.

As we consider these options, keep sight of where we are in this discussion. We seek an approach to constitutional meaning in controversial cases, and we've seen that plain

words textualism and consensualism can't work in such cases. The problems of these approaches and the discovery that they are bottomed on controversial philosophic assumptions argue for a fusion of constitutional law and political philosophy. We have acknowledged objections, however, that such a fusion may be undemocratic, un-American, dangerous, and ultimately fruitless. So now we're seeking an approach that avoids these risks. Intentionalism or originalism may be such an approach. But that prospect can't be established by an intentionalist argument. Intentionalism must be defined and defended by a philosophic argument. Intentionalist theorists can't escape the burdens and responsibilities of philosophic reflection and choice. Intentionalism's only hope is that *judges* can escape the burdens and responsibilities of philosophic reflection and choice. And so, again, assume the theorists have done their philosophic work successfully – assume they've shown who ought to count as framers, what should count as evidence of their intentions, how to deal with disagreements among leading framers, and so forth. Intentionalist theorists still would face the question – a philosophic question – of what kind of intention their judges should seek: abstract intentions or concrete intentions?

Should intentionalist judges assume the framers intended to refer to the *concepts* of "due process" and the rest, in which case the framers' intentions would be *abstract intentions*? Or did the framers intend to refer to their *conceptions* of "due process" and the rest, in which case their intentions would be *concrete intentions*? To answer this question, constitutional theorists will have to show whether abstract intentionalism or concrete intentionalism is better or worse in light not of some arbitrary standard like what just happens to be this or that conception of democracy, but in light of what's really good or right or democratic, as best we can tell. In practice, this means offering what one's audience can

count as good reasons for concluding that intentionalism for judges is as good, right, or democratic an approach to constitutional interpretation as is presently feasible.

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II. Political Philosophy, Abstract Originalism, and Textualism Revisited

Our philosophic defender of intentionalism or originalism can argue for *abstract* originalist judges without any sense of alienation from what she's arguing for. The reason is that abstract originalist judges, just like their philosophic defenders, would accept Dworkin's call for a fusion of constitutional law and political philosophy. *Abstract originalism is for all intents and purposes equivalent to the philosophic approach*. And both are equivalent to textualism, properly understood (as distinguished from the plain words version of textualism we have criticized in Chapter 5). Let us explain.

The words and phrases of the constitutional document express a relatively clear set of intentions and meanings *if* by meanings we mean general concepts or ideas and *if* by intentions we mean abstract intentions.⁸ We have clear evidence in the constitutional text that, through their representatives or the framers, "We the People of the United States" intended to provide "due process of law," "equal protection of the laws," regulations of "commerce" and other things in a complex institutional scheme for achieving "Justice," "the common defence," "the general Welfare," and the other goods or ends listed in the Preamble. These expressions are as clear as they can be if they are taken to refer not to anyone's version of due process, equal protection, and the rest but to due process itself, equal protection itself, and so on. But if the framers intended the *concept* of due process itself, as distinguished from some *conception* of that concept, they had to intend a role for political philosophy in constitutional interpretation, for philosophic reflection and debate is the best way to approach the meaning and scope of due process, equal protection, and the

Constitution's expressed ends.

Because constitutional provisions like due process are expressed as general concepts, the constitutional text itself is evidence that the framers' intentions were abstract. Thus, the Constitution does not define its terms or give examples of their proper applications. None of its terms comes wrapped in quotation marks. None of its standards is referred to as uniquely "ours." The Constitution doesn't say, for example, that equal protection envisions no more than equality before the law, as distinguished from social and economic equality. Nor does it say that the persons promised equal protection are of African descent only. The Constitution's language doesn't exclude white persons from equal protection, or female persons, or unborn persons, or poor persons, or even corporate persons, if these entities are in fact persons or if there are reasons in justice and goodness for treating them as persons. As Dworkin was the first to suggest, the Constitution's use of general, undefined, and unillustrated terms can be judged a failure of draftsmanship only if we assume that the draftsmen didn't want justice, due process, and the blessings of liberty themselves as much as they wanted to impose *their conceptions* of these things on future generations.

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III. Concrete Intentionalism

Though there's no support for the concrete view of the framers' intentions in the constitutional text itself – or in the literature of the American founding¹² – a concrete intentionalist judge would have to act as if she believed there were. In one of the paradoxes of her position, the concrete intentionalist judge must insult the motives or deprecate the intelligence of the framers even as she upholds their authority, for she must say, in effect, that their expressed concern for fairness and other goods (as opposed to their mere conceptions of them) was either rhetorical or delusional. She would have to say that they

intended *their* conception of justice even if (1) that conception was seen as unjust at the time or if (2) it should prove unjust later and if (3) intending injustice is itself unjust

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A second paradox of concrete intentionalism is its separation from its justification, for, as we have seen, only a moral argument can defend concrete intentionalism, yet the concrete intentionalist judge must, if she can, ignore moral considerations in declaring the law and stick to concrete historical intentions, however offensive they may be. And she must do so despite evidence, in both the constitutional text and in the record we have of the public arguments and the personal correspondence of any figure who might be called a framer, that the constitutional text refers to moral concepts and the framers saw themselves as engaged in something other than an exercise in authoritarian self-assertion.

If our argument to this point is right, the theorist who defends concrete intentionalism contends, in effect, that justice or the people's happiness or some other good demands the kind of democracy in which judges sworn to uphold the Constitution ignore undeniable features of the Constitution's language and tradition together with the people's need to see authority in a favorable moral light. She contends that justice demands that courts uphold admittedly unjust conceptions of constitutional provisions in the teeth of textual and historical evidence supporting a different approach. She contends, in brief, that justice at the wholesale level can demand injustice at the retail level.

Don't assume that no one can defend such a position. Some have argued, for example, that although Jim Crow was admittedly unjust and, at the time of Brown v. Board of Education (1954),¹³ beyond the political mobilization required to amend the Constitution to overrule Plessy v. Ferguson (1896)¹⁴ through the stringent procedures of Article V, *Brown* was bad news for a nation that has much to fear from rule by unelected judges.¹⁵ So it may

be possible to argue that a greater justice (freedom from judicial imperialism) justifies living with courts that enforce injustice (Jim Crow). And if we've seen why defenders of concrete intentionalism can't themselves be concrete intentionalists, we have yet to see why judges can't be concrete intentionalists.

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To prepare for the final round with concrete intentionalism, we must be specific about what a concrete intention might be. Current thinking among intentionalists has settled on two or three answers. One has judges applying the *definitions* that the framers attached to particular constitutional terms. ¹⁶ A second answer has judges adopting the *general outlook or mindset* of the framers. ¹⁷ A third version of concrete intentions would have judges looking for the framers' actual or clearly planned *applications of the specific constitutional provisions* to specific situations. ¹⁸ Although most intentionalists have all but abandoned this third possibility, we shall have to discuss it.

The *framers' mindset* version of concrete intentionalism (the second version above) can hardly free judges from philosophic choices in hard cases; it can only hope that modern judges view modern problems as *the framers would have done today*. Modern judges, like the framers, would still claim an interest in justice itself – as per the implicit claim in the Constitution's language, the political rhetoric of the ratification period, and the public-spirited rhetoric that is typical of politicians and officials everywhere and at all times. (We are aware of no private correspondence from anyone usually identified as an American founding father or as a framer or ratifier of any constitutional provision that frankly urges the ratification of an admittedly unjust, arbitrary, or purely self-serving provision.) And if modern judges made this claim in good faith, they would remain ready to replace worse conceptions of constitutional provisions with better ones, as long as they thought like the

framers when deciding what the better ones would be. Since deciding what's better would involve philosophic responsibilities, modern judges would bear those responsibilities, if only as the framers would have.

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But had the framers been interested more in justice than in anyone's particular version of justice – as their rhetoric and the language of the Constitution indicates – then the decisive fact of the framer's mindset would be their interest in justice. So, judges with the framers' mindset would also be interested mostly in justice. This would mean that judges who would think like the framers would forget the framers and concentrate on the morally best interpretations that constitutional language plausibly could bear. Mindset originalism thus turns out to be a variation on abstract originalism, and both are equivalent to the philosophic approach, the bête noire of those who style themselves originalists.

From conceptions as mindsets, concrete intentionalists can move to conceptions as definitions or verbal entities (our first possibility above): the more or less specific definitions allegedly held by the framers. An example of such a definition would be equal protection defined as equality for black Americans in civil rights only, with civil rights defined to include nothing beyond (1) the right to equal benefits (like police and fire protection) under laws designed to protect persons and property, (2) an equal right to contract with other persons for goods and services, (3) and equal access to the civil courts.²⁰ This intentionalist says, in effect, that in hard cases involving the Equal Protection Clause, judges should ignore the constitutional definiendum – equal protection – and concentrate on what research into the historical record reveals as the definiens – equal access to the courts, equal right to contract, and so on.

Objections to this approach replay the difficulties of intentionalism generally. How

do we decide whose definition to count and what evidence to derive definitions from? How can we attribute just one definition in the face of apparent disagreements among the founding's leading figures?²¹ If we assumed these problems resolved, we would still face the question of what it means to employ someone's definition. Are we faithful to someone's definition of X when we confound the definition with what it is supposed to be a definition of? When intentionalists ignore the definiendum, they no longer treat the definiens as a definiens. When we define, we define *something*, and a definition can't be known as the definition of something if we ignore the thing to be defined. This seems a feature of our ordinary linguistic practice. Another such feature is our understanding that definitions can be inadequate or wrong, and that when definition is our aim, we should replace worse definitions with better ones when better ones appear. To replace "equal protection" with "equal access to the courts" and the like is therefore not to define "equal protection," it is to ignore it. By keeping both the definiendum and the proposed definiens in mind, we see that the proposed definiens is revisable. A concrete intentionalism that confounds definiendum and definiens thus deviates from a linguistic practice that treats definitions of equal protection and similar terms as no more than revisable theories of their nature.²² A definitional approach, properly conceived, thus argues for the same result as a mindset approach, properly conceived: a fusion of constitutional law and political philosophy.

To avoid this result, our intentionalist might resort to the framers' actual or planned *applications* of constitutional provisions (our third possibility above). He might say, for example, that equal protection would not prohibit segregated schools because the framers of the Fourteenth Amendment allowed segregated schools and discussed no plans to outlaw them.²³ Modern intentionalists shy away from this position for compelling practical reasons.

Consistently applied, a framers'-application approach would disable governmental powers as well as individual and minority rights.²⁴ A framers'-application approach might undermine not only the constitutionality of the nation's labor laws and social welfare programs; it also would undermine the legality of NASA and the Air Force, federal laws against drug abuse, interstate kidnapping, and racketeering, executive agreements with foreign nations, presidential vetoes on grounds unrelated to the preservation of presidential powers, and many other practices of modern government.²⁵

Beyond these practical problems lies a theoretical problem with a framers'application approach: applications of constitutional provisions are *events*, not verbal entities,
and only verbal entities can function as norms for guiding conduct or as premises that justify
legal decisions. To be useful in constitutional interpretation, therefore, the events in question

– the framers' applications of constitutional provisions – would have to be *described*.

Because any event can always be described in different ways, because descriptions are
contextual, and because different descriptions can justify different legal outcomes,
controversial choices among alternative descriptions are unavoidable.

Let us be specific about what descriptions we shall need. Applications of constitutional provisions are events of a kind called *actions*. These actions apply constitutional provisions to concrete acts or practices of government to determine the constitutionality of those acts or practices. The Equal Protection Clause, for example, would be applied to the practice of racially segregating public schools to determine the constitutionality of that practice. The act of applying the Equal Protection Clause would consist of two steps: interpreting the Clause and describing the practice of segregation in terms relevant to one's interpretation of the Clause. These two steps can be represented as

the premises of a syllogism – with the major premise stating a rule or principle of law and the minor premise a description of the act or practice to which the law applies – and the conclusion represents the decision of the instant case. How, then, would we represent the framers' application of the Equal Protection Clause to the practice of racially segregating public schools?

The framers of the Fourteenth Amendment (some or all of them) might have described their own action as excluding segregated schools from the prohibitions of the Equal Protection Clause. We shall assume this for present purposes. The actual words of the Clause, however, can hardly be reduced to "permit segregated schools." We can represent the framers' action as a legal syllogism whose major premise is that the Equal Protection Clause prohibits state governmental actions that harm racial minorities invidiously. The minor premise of the framers' action, on our present assumption, was not a statement about the law of the Constitution; it was a statement about the world. We can formulate their minor premise to say that segregation of the races does no unique harm to racial minorities – that is, if segregation harms anyone, it harms whites as well as blacks. From the major and the minor premises together the holding follows: segregation doesn't deny equal protection.

Because this is a plausible way to represent what the framers did, we can say that the *Brown* Court didn't change the framers' view of the *law* when it rejected the framers' view of the *world* (together with the view of *Plessy* that the regime of "separate but equal" did not harm blacks²⁶). Let us assume that the Equal Protection Clause meant the same to both sets of interpreters: states may not harm racial minorities in special ways.²⁷ But the view of the world had changed between the 1860s, when the Clause was ratified, and the 1950s, when the issue of segregated schools came before the Court. The framers (we are assuming for the

sake of argument) thought that forced segregation didn't hurt blacks any more than it hurt whites. The *Brown* Court found otherwise through an argument that used scientific evidence to confirm the testimony of common sense: forced segregation of the races in modern America did indeed harm racial minorities invidiously. The old major premise then combined with the new minor premise to outlaw forced segregation. On this account of what the framers actually did, the *Brown* Court did not depart from the framers' view of the law, and this description seems as fair as any to the historical record. No less an originalist than Robert Bork has used a similar argument to rationalize his approval of *Brown*.²⁸ What is more, our argument accords with that of the joint opinion in Planned Parenthood v. Casey (1992), that *Brown* was justified in overruling *Plessy* because of a change in understanding of the facts about the world.²⁹

A heroic (or diehard) strain of originalism might try to prove its originalist bona fides by declaring *Brown* a mistake and by insisting that judges adopt the framers' view of the world in addition to the framers' view of the law. They might say that *as a matter of law*, segregation is not harmful – regardless of the scientific or common sense evidence to the contrary – and that segregation will remain harmless *as a matter of law* until the law is changed by formal constitutional amendment. But prudent originalists can't welcome a strategy that serves only to expose the high costs of originalism. It's hard to argue that the framers or anyone else could acquire either the right or the power to establish not only the law but also the facts of life. It's hard to argue that our constitutional system can't operate without resort to descriptions of the world repulsive to science and common sense. Tradition itself is one of the things that makes these arguments hard to advance.³⁰ The nation's Enlightenment tradition places a heavy burden on any suggestion that the facts of life can

be determined by fiat or that the Constitution forces judges to falsify the world. Sometimes we can change the facts of life by altering their causes. But to alter causal relationships successfully, we usually have to understand them first. Laws that force us to falsify reality cripple our hopes for shaping reality, and there's no good reason to view the Constitution as such a law.

IV. What Is the New Originalism? Same as the Old Originalism?

Many self-styled originalists are at pains to differentiate themselves from concrete originalists (like Raoul Berger) and to insist that their versions of originalism are not vulnerable to common criticisms of concrete originalism.³¹ Keith Whittington openly professes a new originalism in an article entitled, appropriately enough, The New Originalism.³² One might think that the new, improved originalists would be scholars and jurists who seek to reconstruct originalism to correct the theoretical flaws of the old originalism, or at least to bolster it against powerful criticisms. But Whittington, with startling and refreshing frankness, provides a rather different account: He says that the new originalists are conservatives in power, whereas the old originalists were conservatives in the minority! His account of the old originalism is that it emerged as a conservative reaction against the Warren Court, and was mostly negative and critical of Warren Court decisions like Griswold v. Connecticut (1965), recognizing a right of privacy, and early Burger Court decisions like Roe v. Wade (1973), protecting the right of a woman to terminate a pregnancy.³³ Now that conservatives are in power and have control of the judiciary, Whittington says, originalists need to move from being largely reactive and critical to developing "a governing philosophy appropriate to guide majority opinions, not just to fill dissents."34 Enter the new originalism.

The new originalism as a governing conservative constitutional theory, Whittington suggests, "is less likely to emphasize a primary commitment to judicial restraint," the leading aim of the old originalism. Indeed. First, "there seems to be less emphasis on the capacity of originalism to limit the discretion of the judge." Second, "there is also a loosening of the connection between originalism and judicial deference to legislative majorities." Instead, "[t]he primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism." In sum, Whittington argues, the new originalism "does not require that judges get out of the way of legislatures. It requires that judges uphold the original Constitution – nothing more, but also nothing less." We have always known this – that originalism is not fundamentally a theory of "judicial restraint" or democratic majoritarianism – but rather a program for upholding the Constitution as originalists conceive it. Still, it's good to hear it proclaimed by the leading theorist of the new originalism.

How, then, does the new originalism view the Constitution? In his book, *Constitutional Interpretation*, Whittington seeks to reconstruct originalism and rescue it from the flaws of the old originalism (or, he says, its supposed flaws).³⁷ Immediately below, we will assess his work, but here we preview the punch line of our critique. Whittington once introduced an article with a quotation from a song by the rock and roll band The Who.³⁸ To encapsulate our critique of Whittington's originalism, we too invoke a line from a Who song. The song is "Won't Get Fooled Again"; the lyric is "Meet the new boss. Same as the old boss."³⁹ This line is apt not only because it suggests that the new originalism suffers from the same flaws as the old, but also because the notion of "boss" calls to mind the authoritarianism of originalism, old and new. (Fittingly, a recent article in the *New York*

Times reported that this song by The Who is the top conservative rock song of all time, as chosen by *National Review*.⁴⁰)

A. Interpretation ≠ Originalism

Originalists sometimes claim or assume that interpretation necessarily entails originalism, ranging from naive or crude to sophisticated versions of this claim. This move is most famously illustrated in the old, discredited dichotomy of "interpretivism" versus "noninterpretivism." People who now call themselves originalists used this dichotomy to load the dice in favor of interpretivism, saying that they were the ones who believe in "interpreting" the Constitution, while the others advocate "noninterpreting" it (remaking or changing it).

As stated above, Whittington's project in *Constitutional Interpretation* is to reconstruct originalism. His first move is to concede points to critics of originalism. For example, he more forthrightly grapples with arguments Dworkin has made about interpretation than any other originalist.⁴² Unlike Bork and Scalia, he doesn't simply hurl insults about Dworkin being a "noninterpretivist" or even a heretic or expatriate who would subvert the Constitution.⁴³ For example, Whittington appears to concede that Dworkin (and Thomas Grey) are right in saying that "We are all interpretivists" and that the real question is not whether we should interpret or not, but rather *what* the Constitution is and *how* should we interpret it?⁴⁴ Thus, Whittington appears to concede that Dworkin has advanced a conception of interpretation that is an alternative to originalism.

What is more, Whittington's project in his companion book, *Constitutional Construction*, is to broaden constitutional discourse to include two ways of elaborating constitutional meaning: not only *interpretation* by courts (the characteristic preoccupation

of the old originalists) but also construction outside the courts by legislatures and executives. 45 He explains: "Unlike jurisprudential interpretation, construction provides for an element of creativity in construing constitutional meaning. Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, whether the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules."46 But then, just when it begins to look like Whittington is developing a constitutional theory - of interpretation and construction - that might be safe for people who are not concrete originalists, he makes the two key moves. The first move is to say that what people like Dworkin (and us) call *interpretation* is really *construction*, and therefore is appropriate for legislatures but not for courts. 47 That is, he tries to deflect the force of Dworkin's criticisms of originalism by saying that Dworkin's conception of interpretation more properly should be understood as a theory of construction, which would be appropriate for legislatures, not courts. This is Whittington's more sophisticated version of Bork's and Scalia's claims that Dworkin is advocating judicial legislation – judges making law, not interpreting law.

Whittington's second move is to say that a commitment to interpretation necessarily entails a commitment to originalism. Indeed, Whittington practically revives a version of the discredited distinction between interpretivism and noninterpretivism. He writes that his "account of originalism largely assumes a prior commitment on the part of constitutional theorists, judges, and the nation to constitutional interpretation." He continues: "If we are to interpret, then I believe we must be originalists." That is, interpretation = originalism. He adds: "But we may not want to interpret.... We may want to engage in a 'text-based social practice,' but that is not the same thing as being committed to interpretive fidelity."

That is, the people who want to do that are not interpreting. Here he echoes the discredited old charge that anyone who is not committed to an originalist conception of interpretive fidelity is a "noninterpretivist."

We want to step back for a moment and offer a hypothesis about what Whittington is doing. Our suggestion is that in responding to critiques of the old originalism, Whittington tried to expand the realm of constitutional discourse to include constitutional construction outside the courts; but he did so in order to justify narrowing constitutional interpretation *inside the courts* to originalism. All of this was a rhetorically effective way of seeming to agree with arguments that no originalist could answer, while deflecting those arguments and reinstating positions that no originalist can defend. Whittington sketches a notion of constitutional construction by legislatures and executives, and gives such historical examples of it as the impeachment of Justice Samuel Chase in 1804-05, which helped establish subsequent understandings of the purpose and limits of federal impeachment power and the nullification crisis of 1832-33, which promoted more decentralizing conceptions of federalism.⁵⁰ Yet he does not articulate criteria for distinguishing kinds of decisions that are appropriately made by courts through "interpretation" and kinds of decisions that should be left to legislatures and executives through "construction." Nor does he answer the question why courts should limit themselves to what he calls "interpretation" rather than "construction." As stated above, he throws out the old originalist claims about "judicial restraint" and "democratic majoritarianism." All that is left is his assumption that interpretation necessarily entails originalism.

Whittington's distinction between interpretation and construction is a distraction from the basic questions. The distinction was originally motivated by his early interest in

restraining what was then a liberal federal judiciary – not the discovery of constitutional meaning. Moreover, as Whittington treats the distinction, it is useless to us because he himself says that both construction and interpretation are methods of elaborating constitutional meaning. From Whittington's own use of the distinction, interpretation is mere discovery and application of noncontroversial constitutional provisions (like those relating to the frequency of elections and the ages of officials), while construction occurs when controversial ideas whose meaning cannot be reduced to uncontroversial legal rules (equal protection, due process, and the like) are elaborated and applied.⁵¹ "Construction" (Whittington's approach to hard cases) thus does the work that "interpretation" does in this book. Whittington's "construction" is equivalent to what we dub (in Chapter 11) the pragmatist view of interpretation – essentially a policy-making process of the kind one leaves to legislatures, which is precisely what Whittington wanted to do before the Bush White House and Senate populated the federal judiciary with conservatives. Finally, we've never seen anyone use the distinction consistently. The terms "construction" and "interpretation" are freely used as synonyms for each other in *The Federalist* and throughout constitutional history and commentary before Whittington. One need only recall Chief Justice John Marshall's famous statement in McCulloch v. Maryland (1819) that resolution of the question whether Congress had the power to establish a bank depended upon "a fair construction of the whole instrument."52

B. Fidelity to the Constitution As Written

Originalism, old and new, makes a virtue of claiming to exile moral and political philosophy from the province of constitutional interpretation. That is neither possible nor desirable, nor is it appropriate in interpreting our Constitution, which establishes a scheme

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of abstract aspirational principles and ends, not a code of detailed rules. Interpreting our Constitution with fidelity requires judgments of moral and political philosophy about how those principles are best understood.

Originalism, old and new, misconceives fidelity in constitutional interpretation. Under the best conception of fidelity – fidelity to the Constitution *as written* – we conceive fidelity as *honoring* our aspirational principles – the principles to which we as a people aspire, and the principles for which we as a people stand – rather than as *following* selective historical practices and selective concrete original understandings, which surely have failed to realize our aspirations.⁵³ Ironically, in the name of interpretive fidelity, originalists would enshrine an authoritarian constitution which defies justification and which the framers didn't write and the ratifiers didn't ratify – a constitution which does not deserve our fidelity. The philosophic approach, because it accepts the Constitution's actual language and therewith the moral justification that the framers and the founding generation claimed for themselves, has no choice but to interpret – and exhorts us to interpret the Constitution so as to make it the best it can be. The philosophic approach thus offers hope that the Constitution may deserve the fidelity that it claims to deserve.

From what we've seen so far, therefore, narrow or concrete originalism/intentionalism (whether old or new) has no successful argument against Dworkin's showing that the Constitution, as written, demands a fusion of constitutional law and political philosophy. We'll have to see, in Chapter 7, whether originalism has still further arguments and whether yet another kind of originalism, *broad originalism*, can succeed where the others have failed.

Notes to Chapter 6

- 1. Some originalists in recent years have emphasized the "original meaning" or the "original understanding" of the framers and ratifiers, as distinguished from the intentions of the framers. See, e.g., Antonin Scalia, A Matter of Interpretation 16-18, 37-38 (1997); Robert H. Bork, The Tempting of America 143-45 (1990). Through this shift in nomenclature, they presumably hope to avoid some of the criticisms of and problems with framers' intentions as a source of constitutional meaning. The distinction between intention and meaning is a refinement that cuts no ice of interest to us. Everyday speakers of a language confound "meaning" with "intent" because speakers normally pick a word because they intend to convey what the word is generally taken to mean. "What do you intend?" is thus often equivalent to "What do you mean?" Our critiques of narrow originalism in this chapter and of broad originalism in Chapter 7 apply not only to versions of originalism that stress framers' intentions but also to versions that speak of original meanings and original understandings. For economy of expression, we shall speak for the most part of framers' intentions, but we wish to make clear that we use that term interchangeably with original meanings or original understandings.
 - 2. Ronald Dworkin, A Matter of Principle 48-50 (1985).
- 3. See id. at 34-57; Walter F. Murphy, Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?, 87 Yale Law Journal 1752 (1978).
- 4. Charles Fried, Order and Law 55-88 (1991); Richard A. Posner, *What Am I? A Potted Plant? The Case Against Strict Constructionism*, The New Republic, Sept. 28, 1987, at 23; Richard A. Posner, *Bork and Beethoven*, 42 Stanford Law Review 1365 (1990).
 - 5. Bork, *supra* note 1, at 154-55.
 - 6. See Chapter 2.
- 7. One of us has reservations about whether we should use the term "abstract originalism" in this context. *See* James E. Fleming, Are We All Originalists Now? I Hope Not!, unpublished manuscript presented as the Alpheus T. Mason Lecture in the James Madison Program at Princeton University. In this book, however, we shall put those reservations aside.
- 8. Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 7-12 (1996); Ronald Dworkin, Life's Dominion 132-44 (1993).
 - 9. Contra Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
 - 10. *Contra* Slaughterhouse Cases, 83 U.S. 36, 81 (1872).
 - 11. Ronald Dworkin, Taking Rights Seriously 134-37 (1977).

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- 12. See H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harvard Law Review 885 (1985); James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Texas Law Review 1 (1986).
 - 13. 347 U.S. 483 (1954).
 - 14. 163 U.S. 537 (1896).
- 15. See Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 407-18 (1977).
- 16. See Bork, supra note 1, at 143-45; Scalia, supra note 1, at 37-38, 44-46; Antonin Scalia, Originalism: The Lesser Evil, 57 University of Cincinnati Law Review 849, 852, 856-60, 863-64 (1989).
- 17. See Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 University of Chicago Law Review 1484 (1987); Michael W. McConnell, On Reading the Constitution, 73 Cornell Law Review 359 (1988); Michael W. McConnell, The Role of Democratic Politics in Transforming Moral Convictions into Law, 98 Yale Law Journal 1501 (1989); Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Virginia Law Review 947 (1995).
 - 18. See Berger, supra note 15.
- 19. See Michael S. Moore, A Natural Law Theory of Interpretation, 58 Southern California Law Review 277, 340-41 (1985); Sotirios A. Barber, The Constitution of Judicial Power 131-35 (1993).
 - 20. *See* Berger, *supra* note 15, at 166-92.
- 21. Attributing one definition to disagreeing parties would usually mean subsuming their disagreements under terms broader than their clashing conceptions. If one definition of free speech united Hamilton and Madison despite their disagreement about the constitutionality of the Sedition Act, then that definition did not eliminate the disagreement between Hamilton and Madison. Nor can knowledge of that definition remove the need for reflection and choice between Hamilton's theory and Madison's.

One definition can occupy the same level of generality as the contending conceptions only if one of the contending parties thought he opposed the other but really didn't. Thus an observer might conclude that although Madison thought he opposed Hamilton's definition of "necessary and proper," he really didn't, for the weight of the evidence shows that Hamilton's theory of the Necessary and Proper Clause was essential to what Madison thought more important than preserving states' rights: preserving the Union. Judgments like these force the observer into fresh philosophic and scientific reflections because politicians typically say that things like justice and the people's happiness are the most important things (see, e.g., The Federalist Nos. 45 & 51 (Jacob E. Cooke ed., 1961)), and the observer now assumes that the framers' real definitions and intentions are what conduce to justice and

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happiness (which they said were most important), notwithstanding what the framers believed about their definitions and intentions at the time.

Rejecting this quest for real as opposed to self-apparent definitions and intentions forces an observer back to the strategy of attributing definitions broader than the contending conceptions, which forces the observer to choose one of the contending conceptions.

- 22. Moore, *supra* note 19, at 296-97, 340-41.
- 23. Berger, *supra* note 15, at 117-33.
- 24. See McConnell, The Role of Democratic Politics in Transforming Moral Convictions into Law, supra note 17, at 1533; Robert H. Bork, Foreword to Gary M. McDowell, The Constitution and Contemporary Constitutional Theory x (1989); Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law 57-58 (1986).
 - 25. Stephen Macedo, The New Right v. The Constitution 25, 35 (1987).
 - 26. 163 U.S. at 551.
- 27. We put to one side the raging theoretical debate concerning the best understanding of the Equal Protection Clause whether it embodies a principle of opposition to caste systems (an anticaste principle) or a principle of racial neutrality and the possibility that a shift from the latter to the former may have occurred between *Plessy* and *Brown*.
 - 28. Bork, *supra* note 1, at 81-84.
 - 29. 505 U.S. 833, 862-63 (1992).
- 30. Nature and logic may be others. The perceived nature of nature makes it implausible that we can change the world just by some legal declaration that the world is changed. And it would be self-contradictory to say: "It's a fact of life that the facts of life depend entirely on the judgments of some political authority."
- 31. There is an argument that even Scalia is a new originalist. In *Originalism: The Lesser Evil, supra* note 16, at 861, Scalia rejects "strong medicine originalism," which he associates with Berger roughly, originalism that is prepared to swallow the bitter pill of following whatever historical research shows to be the concrete framers' intention, even if, e.g., it entails that *Brown* was wrongly decided. Instead, he embraces "fainted-hearted originalism," *id.* at 863-64: originalism with a dose of evolutionary intent to the Constitution, or a "trace of constitutional perfectionism," e.g., *Brown* was rightly decided. Furthermore, Scalia has supplemented originalism with his understanding that the Constitution includes certain traditions, understood as specific historical practices as distinguished from abstract aspirational principles. Michael H.v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion). Thus, Scalia incurs the charge by Bork that he

is a conservative constitutional revisionist, that is, a new originalist. *See* Bork, *supra* note 1, at 235-40.

32. Keith E. Whittington, *The New Originalism*, 2 Georgetown Journal of Law & Public Policy 599 (2004). Randy Barnett might also be viewed as a new originalist. See Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 89-130 (2004). Barnett accepts a well-known criticism of efforts to find the Constitution's meaning in the applications that the framers allegedly had in mind. He agrees with an argument by Paul Brest that it would be impossible to combine into one coherent intention the subjective expectations of numerous drafters and state with any confidence what they jointly would have said about problems beyond their capacity to foresee. *Id.* at 90 (citing Paul Brest, *The* Misconceived Quest for the Original Understanding, 60 Boston University Law Review 204 (1980)). Barnett remains an originalist, however, for the following four reasons. He believes that (1) word meanings change with the passage of time; (2) constitutions are written to limit the choices of future interpreters; (3) interpreters not bound by "original meanings" will be free to do as they wish; and (4) fidelity to the Constitution as written is fidelity to "original meanings." Id. at 94-109. Barnett proposes a new and more "moderate originalism," which he distinguishes from the old or "strict originalism." The old originalism he calls "original intent originalism," and the new originalism is "original meaning originalism." The latter originalism is immune from the criticisms of the old originalism, he contends, because it doesn't have to "aggregate" and apply numerous subjective intentions; it can find constitutional meaning in the ordinary public meanings of words and phrases, as recorded in sources like old dictionaries and documents. Id. at 93.

From this alone it should be evident that there's nothing really new about Barnett's originalism. Like Whittington, whom he follows (see *id.* at 119-21), Barnett offers a disguised form of the old originalism. For relying on old dictionaries and documents is relying on the historical definitions and applications of words, rather than the nature of the things they signify (or are ordinarily understood to signify). It is because Barnett assumes that there is no "nature" for a word to signify – because he might assume, for example, that "frogs" and "justice" refer not to frogs and justice (the real things or presumed real things) but to what people believe about frogs and justice – that he can say that separation from original meanings (definitions and applications) leaves interpreters free to do as they wish, thus frustrating the regulatory function of law. One who believed that these words picked out real things about which anyone can err could accept a continuing obligation to strive self-critically for the truth about or best understanding of these things. Such a person would not agree that her choice was between old meanings (definitions/applications) and freedom to decide as she wished, whatever she might wish.

- 33. Whittington, *The New Originalism*, *supra* note 32, at 599-604.
- 34. Id. at 604.
- 35. Id. at 608.
- 36. Id. at 608-09.

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- 37. *Id.* at 605; Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 160-61 (1999) [hereinafter Whittington, Constitutional Interpretation].
- 38. Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 William & Mary Law Review 2093, 2094 (2002) (beginning with an epigraph, "This is no social crisis. Just another tricky day for you," from the song, *Another Tricky Day*, by Pete Townshend, on The Who, Face Dances (1981)).
 - 39. The Who, Won't Get Fooled Again, on Who's Next (1971).
- 40. Ben Sisario, *Listening to Rock and Hearing Sounds of Conservatism*, New York Times, May 25, 2006 (reporting on a list of the "top 50 conservative rock songs of all time," as chosen by *National Review*).
- 41. See, e.g., Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stanford Law Review 703, 703-04 (1975); John Hart Ely, Democracy and Distrust 1 (1980).
- 42. See, e.g., Whittington, Constitutional Interpretation, supra note 37, at 182-87; Keith E. Whittington, Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation, 62 Review of Politics 197 (2000) [hereinafter Whittington, Dworkin's "Originalism"].
- 43. See Bork, supra note 1, at 136 ("subversion"), 213-14 ("revisionism"), 352 ("heresies"); Scalia, supra note 16, at 854 (referring to Dworkin, an American citizen, as "Oxford Professor (and expatriate American)").
- 44. See Whittington, *Dworkin's Originalism*, supra note 42, at 197-98; Whittington, *The New Originalism*, supra note 32, at 606-07; Whittington, Constitutional Interpretation, supra note 37, at 164-65.
- 45. Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning 1-19 (1999) [hereinafter Whittington, Constitutional Construction].
 - 46. *Id.* at 5.
- 47. See Whittington, Constitutional Interpretation, *supra* note 37, at 54, 58, 206-12; Whittington, *The New Originalism*, *supra* note 32, at 611-13.
 - 48. Whittington, *The New Originalism*, *supra* note 32, at 612.
 - 49. *Id.* at 612-13.
 - 50. Whittington, Constitutional Construction, *supra* note 45, at 17-18.
 - 51. See Whittington, Constitutional Interpretation, supra note 37, at 5-14.

- 52. 17 U.S. 316, 406 (1819).
- 53. For the distinction between these two conceptions of fidelity in constitutional interpretation, see James E. Fleming, Securing Constitutional Democracy: The Case of Autonomy 226-27 (2006); James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham Law Review 1335, 1354-55 (1997).