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GETTING BEYOND FORMALISM IN CONSTITUTIONAL LAW: CONSTITUTIONAL THEORY MATTERS

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A belief in formalism dominated jurisprudence during the nineteenth century. Principles of law were seen as existing as part of the natural law and the role of judges was to discover them. Judging was conceived as a relatively mechanical act of applying law to the facts of the particular case. Formalism has an enormous allure, and it is easy to understand why people would want to believe in it. Formalism promises objective law. Formalism offers the hope that law truly can be separated from politics and that this can be a nation governed by laws, not by people.

During the early twentieth century, legal realists demolished formalism as the dominant legal theory.[1] The realists demonstrated that all legal rules are value choices. For instance, a tort law that makes recovery difficult for injured workers because of doctrines like assumption of the risk, contributory negligence, and the fellow servant rule reflects judges' choices to favor employers over employees. Benjamin Cardozo said that "the demon of formalism tempts the intellect with the lure of scientific order" and when "judges are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance."[2]

The legal realists taught us that judging is inherently discretionary. This hardly seems profound, yet it was an attack on the very foundations of jurisprudence. I

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1. For an excellent summary of the legal realists' critique of formalism, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1970, at 183-230 (1990).

2. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66-67 (1921), *quoted in* Horwitz, *supra* note 1, at 190.

always have had the sense that the power of the realists' critique of formalism, in part, was its confirming what people already knew; it was pointing out that the emperor really had on no clothes. Any nineteenth-century reader of *Marbury v. Madison*,[3] *Dred Scott v. Sanford*,[4] and *Plessy v. Ferguson*[5] surely recognized that the Justices in those cases made value choices.

Now, a century after the legal realists' attack on formalism, we all surely would say that formalism is gone. Everyone recognizes, of course, that the values of the judges making the decisions largely determines all law, and particularly constitutional law. Supreme Court rulings in important constitutional cases — whether the Boy Scouts can exclude gays,[6] or whether states can prohibit partial birth abortions,[7] or whether the government can give aid to parochial schools[8] — reflect the Justices' ideologies.

But this is not at all how the Justices, or often even academics, describe constitutional law today. Quite the contrary, they purport that Justices are not making value choices, but instead are discovering and applying objective principles. Justice Scalia, for example, consistently has expressed the view that Justices' own values should play no role in constitutional law. He declared that "a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."[9] He said that for judges to impose "our personal preferences" is "to replace judges of the law with a committee of philosopher-kings."[10]

My thesis is that the continuing allure of formalism dominates constitutional law. This has led to the continuing misguided quest for value-neutral judging. The result has been purported adherence to undesirable theories of judging and interpretation. Value choices are hidden rather than defended and made explicit. Constitutional law is all about value choices in giving meaning to the majestic document written over 200 years ago. These choices should be transparent and explicit; they should be debated and discussed. They are the content of constitutional law.

In this paper, I make four points. First, the power of formalism causes a constant quest for value-neutral judging. Second, the quest for value-neutral judging has led to the use of constitutional theories that are formalistic and misguided. Third, value choices in constitutional adjudication are inevitable and desirable. Finally, constitutional theory provides a vocabulary and basis for dialogue about these value choices.

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3. 5 U.S. (1 Cranch) 137 (1803) (creating authority for judicial review of statutes and executive actions).

4. 60 U.S. (19 How.) 393 (1856) (invalidating the Missouri compromise and holding that slaves are property and not persons).

5. 163 U.S. 537 (1896) (upholding separate but equal as not violating the Equal Protection Clause).

6. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that Boy Scouts of America may exclude homosexuals based on freedom of expressive association).

7. Stenberg v. Carhart, 530 U.S. 914 (2000) (declaring unconstitutional Nebraska law prohibiting partial birth abortions).

8. Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (allowing the government to provide instructional equipment to parochial schools).

9. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

10. Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (plurality opinion).

Simply put, this paper seeks to answer the question: Why are repudiated constitutional theories, like originalism, still followed despite devastating critiques? My answer is that the allure of formalism is overwhelming and until it is overcome, Justices and scholars will try in vain to produce objective theories of constitutional interpretation. Among other evils, this obscures rather than illuminates the value choices that are the inevitable basis and substance of constitutional law.

I. The Power of Formalism and the Quest for Value-Neutral Judging

A belief in formalism was very much evident in constitutional decisions during the early part of the twentieth century. In *South Carolina v. United States*,[11] the Court declared: "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted it means now."[12] In *United States v. Butler*,[13] the Court stated: "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of government has only one duty — to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former."[14] Indeed, the *Lochner* era, which lasted from the late nineteenth century until 1937 and saw the invalidation of hundreds of laws, was based on the Justices' view that they "were restoring the natural order which had been upset by the legislature."[15]

Even after the great shift in constitutional law in 1937, the quest for value-neutral judging continued. During the 1950s and 1960s, scholars called for "neutral principles" of constitutional law. Professor Herbert Wechsler criticized landmark decisions like *Brown v. Board of Education*,[16] and *Shelley v. Kramer*[17] as lacking sufficient foundation in neutral principles.[18] The quest for neutral principles in constitutional law was a search for value-neutral judging; it was an attempt to provide objective principles of constitutional law.

Yet, critics rightly pointed out that this was an impossible quest. There are no such things as "neutral" principles. Whether to uphold segregation or require desegregation, whether to allow or prohibit enforcement of racially restrictive covenants, inescapably involves the Justices making value choices. If there are "principles," it is not clear from where they derive. The Constitution commands that states not deny equal protection of the laws, but it tells nothing about what practices violate this dictate.

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11. 199 U.S. 437 (1905).
12. *Id.* at 448.
13. 297 U.S. 1 (1936).
14. *Id.* at 62.
15. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 579 (2d ed. 1988).
16. 349 U.S. 294 (1955).
17. 334 U.S. 1 (1948).
18. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 30, 32 (1959).

In the 1980s and the 1990s, the quest for formalism was most evident in the rhetoric of conservative Justices and scholars. Justice Scalia has been the most forceful advocate of this. In addition to his quotations above, Justice Scalia has expressed this view in other cases[19] and in a book, *A Matter of Interpretation: Federal Courts and the Law*.[20] In it he expressly rejects the idea of a "Living Constitution."[21] He argues that the meaning of the Constitution is "static" and writes:

> As soon as discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that this is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy.[22]

But Justice Scalia is not alone. Justices rarely admit their decisions are a result of value choices they are making as to the appropriate content of the Constitution. Countless law reviews are filled with articles defending theories of interpretation that purport to take discretion away from the Justices. For instance, Professor Joseph Grano, one of the most powerful advocates of originalism, wrote that "article III should not be read as authorizing a methodology of judicial review that permits the federal judiciary to constitutionalize moral values or principles of justice not fairly inferable from the written Constitution's text or structure."[23] Professor Grano says that judges should "seek to bind the present and the future only by value judgments that the various framers of our Constitution actually have enshrined in the Constitution."[24]

This is all about an ongoing search for formalism. Justice Scalia frequently attacks, in the most pointed of language, the Justices with whom he disagrees. He speaks of how a majority opinion "has no foundation in American constitutional law and barely pretends to."[25] He talks about how "one must grieve for the Constitution" because of a majority's approach.[26] He calls the approaches taken in majority opinions "preposterous"[27] and "ridiculous" and "so unsupported in reason and so absurd in application [as] unlikely to survive."[28] He speaks of how a majority opinion "vandaliz[es] . . . our people's traditions."[29] All of this is his objecting that the majority opinions rest on value choices, while he purports to be

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19. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990).

20. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

21. *Id.* at 41-44.

22. *Id.* at 45.

23. Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 7 (1981).

24. *Id.* at 75.

25. Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).

26. Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

27. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 735 (1994) (Scalia, J., dissenting).

28. Grady v. Corbin, 495 U.S. 508, 542, 543 (1990) (Scalia, J., dissenting).

29. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 163 (1994) (Scalia, J., dissenting).

following the original meaning in a value-neutral fashion. All of it is about using formalist assumptions to criticize realist decision making. Of course, it also is all about a caustic, conservative Justice attacking decisions he just dislikes.

II. The Quest for Value-Neutral Judging Leads to Undesirable Methods of Constitutional Decision Making

The desire for formalism in constitutional law manifests itself in a quest for predetermined principles of constitutional law from which Justices can reason in relatively determinate ways with results that are external to the Justices' own values. Consider three of the leading theories in this regard, how they purport to do this, and how they inevitably fail. My critiques of these theories are familiar, so I am relatively brief here, but my point is that all are still pursuing a formalism that never can be realized.

A. Original Intent

First, there is the constant search for framers' intent and the use of originalism as a basis for constitutional interpretation. Justices continue to invoke the framers' views as authoritative. Yet, many have exposed the inherent flaws of originalism.[30] Originalism assumes there is a framers' intent waiting to be discovered that is at all relevant to modern issues.

Recently, I had the experience of being a framer. I served as chair for two years of an elected commission to draft a new Charter for Los Angeles.[31] In California, a city's Charter is very much like a Constitution: it creates the institutions of government and allocates power among them; the City Council cannot change its provisions, except through an elaborate amendment process. Immediately after the voters adopted the new Charter, interpretive questions arose. For instance, the Charter was to go into effect on July 1, 2000, except for one section, creating neighborhood councils, that was to be implemented immediately in 1999.[32] The Charter provides that the new Department of Neighborhood Empowerment was to operate according to the personnel rules provided for in the Charter.[33] But the question was whether this was to be the rules of the old Charter or the new Charter for the year of transition. Everyone asked, "what did you intend?" The answer, of course, was that we never thought about it.

Recently, there was a lawsuit over a provision of the Charter. The prior Charter had been amended to create term limits, which specified that a person could serve no more than two terms in the City Council but that terms prior to 1993 did not

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30. For particularly powerful critiques of originalism, see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980); Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985).

31. I have written about this experience in Erwin Chemerinsky, *Further Reflections of a Framer, The Los Angeles Charter Reform Experience*, 3 GREEN BAG 2d 125 (2000); and Erwin Chemerinsky, *On Being a Framer: The Los Angeles Charter Reform Commission*, 2 GREEN BAG 2d 131 (1999).

32. LOS ANGELES CITY CHARTER § 109.

33. *Id.* § 902.

count for this purpose. The new Charter said that a person could serve no more than two terms;[34] the "grandfather clause" was eliminated. A former City Councilman, Mike Woo, who served from 1985 to 1993, decided to run again. Under the old Charter, he would be eligible; under the new Charter he is not. He filed a lawsuit and both sides asked me about the intent behind the provision. The honest answer is that we never thought about a situation like this. We had thought that everyone protected by the grandfather clause already had served their two additional terms. A Mike Woo situation never occurred to us. He sued and lost in the state trial court; the court relied on the literal language of the new Charter, which provided for a maximum of two terms.[35] However, the California Court of Appeal ruled in his favor, concluding that the voters meant to keep the old Charter's grandfather clause.[36] The voters received in the mail a 134 page document with two columns of single-spaced type per page. I find it hard to believe that a single voter, except maybe Mike Woo, thought about this issue in voting for the new Charter.

Over and over again during the past eighteen months since the Charter was adopted, I have received questions from City officials as to what we intended with a particular provision. Most often, we never thought about the issue raised in the question. Sometimes, when I recall a clear intent, I have found that city officials who don't like my answer will call other Commissioners until they find one who has a recollection they prefer.

Charter reform in Los Angeles occurred between 1997 and 1999 and still there is no clear, identifiable intent as to many questions that arise now. Nor is there original intent to be discovered for constitutional issues being considered by the courts today. Framers' intent is created from statements that had nothing to do with the questions now being decided.

Besides, even if framers' intent could be discovered, there is a major assumption that the framers' desired that their views be controlling. Scholars, such as Jefferson Powell, have forcefully argued that the framers never wanted their conceptions to be authoritative.[37] Powell writes:

> It is commonly assumed that the "interpretive intention" of the Constitution's framers was that the Constitution would be construed in accordance with what future interpreters could gather of the framers' own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect. Of the numerous hermeneutical options that were available to the framers' day — among them the renunciation of

34. *Id.* § 206.

35. Woo v. Superior Court, 100 Cal. Rptr. 2d 156, 161 (Cal. Ct. App. 2000); *see also* LOS ANGELES CITY CHARTER § 206.

36. *Woo*, 100 Cal. Rptr. 2d at 163-64.

37. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 886 (1985).

> construction altogether — none corresponds to the modern notion of intentionalism.[38]

Even if there is a framers' intent to be found, and even if the drafters wanted their views to be controlling, originalism assumes that this is a desirable method of constitutional interpretation. The world of 1787, or 1791 when the Bill of Rights was adopted, is so radically different from today as to make their views irrelevant or even pernicious in our modern world.

Originalists generally defend their theory based on a claim that noninterpretivist judicial review is "inconsistent with democratic self-government."[39] They define democracy as majority rule and see noninterpretive judicial review as being inconsistent with this.[40]

Originalists assert, but do not justify, this definition of democracy. As I have argued extensively elsewhere, this definition of democracy is not axiomatic and indeed, I believe, is incorrect.[41] Over a decade ago, I wrote: "[T]he framers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-majoritarian features. Even more importantly, the Constitution exists primarily to shield some matters from easy change by political majorities."[42] I argue that the proper definition of American democracy must include not only the procedure of majority rule, but also the substantive values contained in the Constitution. Non-originalist judicial review advancing these values is thus consistent with this alternative, broader definition of democracy. In other words, from this perspective, "judicial review enhances democracy because it safeguards the substantive values that are part of democratic rule."[43]

All of these are familiar critiques of originalism. Yet, despite being irreparably criticized as a viable theory of constitutional interpretation, it is still evident in Supreme Court decisions. Its allure is its promise of formalist constitutional law.

B. Original Meaning

Consider a second major theory that is advanced — Justice Scalia's constitutional meaning approach. Justice Scalia argues for a constitutional jurisprudence based on "original meaning." He carefully distinguishes this from an approach that searches for "original intent." He is clear that he is not searching for or relying upon the framers' intent.[44] He writes: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[45]

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38. *Id.* at 948.

39. Grano, *supra* note 23, at 8; *see also* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA L.J. 1 (1971).

40. *See e.g.*, Grano, *supra* note 23, at 56-57.

41. *See, e.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74-77 (1989).

42. Chemerinsky, *Foreword*, *supra* note 41, at 74, 75.

43. *Id.* at 76.

44. SCALIA, *supra* note 20, at 38.

45. *Id.*

How is this original meaning found? Justice Scalia's book does not elaborate an answer, but his many decisions indicate that Justice Scalia looks to the text of the Constitution and to practices that existed at the time the Constitution was ratified. For instance, in *Printz v. United States*,[46] the Court declared unconstitutional certain provisions of the Brady Handgun Violence Prevention Act[47] and held that forcing state and local law enforcement personnel to conduct background checks before issuing permits for firearms violates the Tenth Amendment.

Justice Scalia, writing for the majority, said that "[b]ecause there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of the Court."[48] Justice Scalia began by reviewing the experience in early American history and found no support for requiring states to participate in a federal regulatory scheme. As to history, Justice Scalia said that Congress, in the initial years of American history, did not compel state activity and since "early Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."[49]

Similarly, in other cases, Justice Scalia expressly bases his understanding of "original meaning" on the practices that occurred at the time the relevant constitutional provision was adopted. For instance, in *McIntyre v. Ohio Elections Commission*,[50] Justice Scalia dissented from the Court's holding unconstitutional a law that prohibited the distribution of anonymous campaign literature.[51] Justice Scalia focused on the practices at the time the Constitution was written in urging upholding the Ohio law. More recently, Justice Thomas, joined by Justice Scalia, used this approach to argue for greater constitutional protection for the content of documents under the Fifth Amendment.[52]

Original meaning is a quest for objective principles that do not exist. First, the search for original meaning in contemporaneous practices assumes that the Constitution sought to codify those particular behaviors. Yet, there is no basis for this assumption. Even if a particular practice was universal at the time the constitutional provision was drafted and ratified, that still does not establish that the framers meant for the Constitution to enshrine that behavior. It certainly is possible that the framers might have wanted to embody a specific practice in the Constitution, but it also is possible that the framers wanted the constitutional provision to disapprove the practice or that the framers simply did not think one way or another about the specific practice when they adopted the particular constitutional provision.

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46. 521 U.S. 898 (1997).
47. 18 U.S.C. § 922 (1996).
48. *Printz*, 521 U.S. at 905.
49. *Id.*
50. 514 U.S. 334 (1995).
51. *Id.* at 371.
52. *See, e.g.*, United States v. Hubbell, 530 U.S. 27, 39-49 (2000) (Thomas, J., concurring) (using framers' intent to justify a conclusion about the Fifth Amendment's protection for documents).

Nor are practices soon after the enactment of the provision necessarily useful in determining its meaning. It certainly is possible that subsequent practice reflects the framers' understanding of what was constitutionally permissible under the new provision. But it also is possible that the framers meant the amendment to outlaw the practice, but the political realities were that in governing they saw no alternative but to engage in the forbidden behavior. There is a fundamental difference between constituting a government and governing. Governing may not necessarily reflect the choices made in creating a government. The Alien and Sedition Act of 1798 might be indicative that the framers of the First Amendment, many of whom were still in Congress, meant to allow punishment of seditious libel. But it also might mean that those with political power and an incentive to use it acted differently than when they were creating the government.

It seems even more dubious to rely on the absence of a practice in the first Congresses to establish a constitutional limit. In *Printz v. United States*, Justice Scalia's majority opinion stressed the absence of Congressional compulsion of states in the early Congresses as evidence of the meaning of the Tenth Amendment and the scope of Congress' powers.[53] There are countless reasons why the federal government did not require state action then — including that they did not think of the possibility, or that they thought that direct federal action could best achieve their goals, or that they sought to establish the federal government's own authority to act, or that political pressures at the time prevented specific mandates. To infer rejection of Congressional power from inaction is to assume the truth of one explanation to the exclusion of all others. The absence of a particular practice at a specific time does not mean that those then in power thought it unconstitutional. There are many alternative explanations for why a type of law was not used at a given moment.

Second, the search for original meaning in contemporaneous practices assumes a unanimity, or near unanimity, about what was occurring at the time of the ratification of the Constitution. As to most issues, this rarely was present. The result is that the Court simply looks back and finds some practices to support the conclusions it wants to reach. More than a quarter of a century ago, Alfred Kelly complained of what he called "law office" history practiced by the Supreme Court.[54] Practices contemporaneous to the drafting and ratification of the Constitution often varied. The Court picks and chooses from its reading of history and selects those practices that confirm the conclusion it wants to reach. The Court purports that history is the basis for the discovery of its conclusion, when in reality history seems to be no more than a part of the justification for conclusions reached on other grounds.

Third, it is not desirable to have the practices of a vastly different time over 200 years ago govern the modern world. A commitment to following contemporaneous historical practices would lead to abhorrent conclusions. Justice Brennan explained this when he stated:

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53. *Printz*, 521 U.S. at 907-08.

54. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

> [D]uring colonial times, pillorying, branding, and cropping and nailing of the ears were practiced in this country. Thus, if we were to turn blindly to history for answers to troubling constitutional questions, we would have to conclude that these practices would withstand challenge under the cruel and unusual clause of the [E]ighth [A]mendment.[55]

Under Justice Scalia's philosophy of original meaning, *Brown v. Board of Education* was clearly wrongly decided.[56] The same Congress that approved the Fourteenth Amendment also voted to segregate the District of Columbia public schools.[57] I believe that any philosophy of constitutional interpretation that tells us that the Court wrongly decided *Brown* is simply unacceptable.

Moreover, for so many constitutional cases, there is no original meaning to be found. An example of the absurdity of the search for original meaning where none exists can be found in a decision from last Term in which Justice Scalia joined Justice Thomas' majority opinion in *Florida v. White*.[58] The issue was whether a warrantless seizure of an automobile violates the Fourth Amendment. Justice Thomas began his legal analysis by stating: "In deciding whether a challenged governmental action violates the Fourth Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed."[59] He then goes on and describes a broad automobile exception to the Fourth Amendment's warrant requirement. Is it possible to even read this without laughing; how can an original meaning of the Fourth Amendment be found as to car searches?

What relevance is original meaning in deciding First Amendment issues such as whether the government can prohibit indecent speech over the internet,[60] or how the government can regulate commercial speech,[61] or what types of campaign finance regulation reform are permissible.[62] All of these involve issues about which there is just no original meaning to be found. The only way to find an original meaning would be to state it at such a high level of abstraction that the Court could invoke it to support any conclusion at which the Court wants to arrive.

Justice Scalia's purported search for original meaning provides little constraint on his decision making. That is why, almost without exception, he can follow his original meaning philosophy and come to the conservative results he prefers.

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55. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 327 (1986).

56. 349 U.S. 294 (1955).

57. *See* RONALD DWORKIN, LAW'S EMPIRE 360 (1986). This legislation was later declared unconstitutional in *Bolling v. Sharpe*, 347 U.S. 497 (1954). *But see* Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that the framers of the Fourteenth Amendment did intend to desegregate public schools).

58. 526 U.S. 559 (1999).

59. *Id.* at 562-63.

60. Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

61. Greater New Orleans Broad. v. United States, 527 U.S. 173 (1999).

62. *See, e.g.*, Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) (upholding state law limiting contributions to political candidates).

Another Justice could follow original meaning and use it to justify liberal results. Justice Scalia's constitutional jurisprudence falsely assumes an ascertainable original meaning that can be determined from historical practices and wrongly assumes it should control modern constitutional decision making.

C. Tradition

A third appeal for external principles of constitutional law is tradition. Some, often including the Supreme Court, say that tradition should be a, or even *the*, guide in interpreting the Constitution.[63] The Court in recent years has rejected protection of fundamental rights if they are unsupported by the text, the framers' intent, or tradition.

For example, in *Bowers v. Hardwick*,[64] the Court ruled that the right to privacy under the Constitution does not include a right for consenting adults to engage in homosexual oral or anal sexual activity, even in the privacy of their own homes.[65] Justice White, writing for the majority, said the Court should protect rights as fundamental only if they are supported by the Constitution's text, the framers' intent, or a tradition of being safeguarded. He said: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[66] White said neither the text nor tradition justified finding a fundamental right to engage in homosexual activity. He stated:

> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty is, at best, facetious.[67]

63. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting); Adamson v. California, 332 U.S. 46, 59-68 (1947) (Frankfurter, J., concurring) (describing tradition as the basis for interpreting due process).

64. 478 U.S. 186 (1986).

65. *Id.*

66. *Id.* at 194.

67. *Id.* at 192-94.

More recently, in *Washington v. Glucksberg*,[68] the Court rejected a constitutional right to physician-assisted suicide because the right is not in the text, intended by the framers, or reflected in an unbroken tradition.[69]

The Court may look at tradition, like framers' intent or practices when the Constitution was adopted. However, it should not make tradition — or its absence — determinative in constitutional interpretation. First, generally traditions are not waiting to be discovered; traditions are interpretations of history. A tradition or absence of tradition can be found in support of almost any practice. In *Bowers*, the Court could have emphasized the tradition of a near majority of states since 1961 that eliminated their laws prohibiting private consensual homosexual activity or the tradition of such laws early in American history. In *Glucksberg*, the Court could have stressed the tradition of protecting liberty for fundamental decisions concerning life and death or the tradition of laws prohibiting aiding a suicide.

It all depends on the level of abstraction at which the tradition is stated.[70] If the tradition is stated abstractly enough, any right can be made consistent with it. At the highest level of abstraction, the framers desired to protect human freedom and to advance liberty and equality. Besides, United States history is so diverse that the Court can find almost any value in some tradition. As the historian Garry Wills observed, "Running men out of town on a rail is at least as much a part of American tradition as declaring unalienable rights."[71]

Second, the focus on tradition confuses descriptive and normative inquiries. Tradition can tell us what was done, but it cannot inform us as to what is a desirable interpretation of the Constitution. For example, in dissent in *Bowers v. Hardwick*, Justice Blackmun argued that the tradition of laws prohibiting homosexual activity was not a sufficient basis for finding them to be constitutional. He wrote: "Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'"[72]

My objection is to seeing tradition as a method of interpretation that makes value choices by the Justices unnecessary. Yet, this is how it is presented. For example, in his concurring opinion in *Griswold v. Connecticut*,[73] Justice Goldberg argued for using the Ninth Amendment to protect a right to privacy and stated that tradition makes it unnecessary for Justices to make value choices. He wrote:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) . . . as to be ranked as fundamental.' The inquiry is whether a right involved 'is

68. 521 U.S. 702 (1997).

69. *Id.*

70. *See* LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION (1991).

71. GARRY WILLS, INVENTING AMERICA xiii (1978).

72. *Bowers*, 478 U.S. at 199 (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

73. 381 U.S. 479 (1965).

> of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'[74]

The quest is for value-neutral judging in constitutional law. Originalism, original meaning, and tradition are all about that pursuit.

III. Value Choices Are Inevitable and Desirable In Constitutional Law

The emperor really has no clothes. Justices inescapably must — and should — make value choices in interpreting the Constitution. This is not to say that constitutional law is a matter of whim; but it is to say that each Justice must make value choices in deciding the appropriate meaning of constitutional provisions and how to apply them. Deciding whether the term liberty protects a right to engage in private homosexual activity or a right to abortion or a right to physician-assisted suicide inherently requires a value choice. Rejecting a right is every bit as much a value choice as finding it. Ultimately, the role of the Justice is to decide what he or she believes is the best meaning of the Constitution and then write an opinion justifying that view.

This, of course, is what constitutional law always has been about. My central position is that it is desirable for society to have an institution, such as the judiciary, that is accorded great discretion in imparting specific, modern content to constitutional provisions. The Supreme Court's role in interpreting the general language of the Constitution is to identify those values so important that they should be protected from majority rule. I readily concede that this involves judicial choices about what values to safeguard. Judges certainly can look to the framers' intent and the original meaning and tradition, but none of these sources are authoritative or binding. Ultimately, Justices must decide, to the best of their ability, what are the values worthy of constitutional protection in interpreting words such as "liberty" and "equal protection." It is not a matter of subjective preference in the sense of whim; it is Justices being responsible for articulating and defending, based on all available sources, what they regard as the appropriate content of the Constitution's language.

In this section, I simply want to make the point that value choices are inherent in constitutional decision making. First, value choices are inevitable in deciding the meaning of particular constitutional provisions. Much of the Constitution is written in open-textured language using phrases such as "commerce . . . among the several States,"[75] "necessary and proper,"[76] "freedom of speech,"[77] "due process of law,"[78] "liberty,"[79] "tak[ing],"[80] "equal protection,"[81] and "cruel and unusual

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74. *Id.* at 493 (Goldberg, J., concurring).

75. U.S. CONST. art. I, § 8, cl. 3 ("To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.").

76. *Id.* § 8, cl. 18 ("To make all Laws which shall be necessary and proper").

77. *Id.* amend. I.

78. *Id.* amend. V, amend. XIV, § 1.

79. *Id.* pmbl. ("in order to . . . secure the Blessings of Liberty").

80. *Id.* amend. V ("nor shall private property be taken for public use, without just compensation").

punishment."[82] How should the Court decide the content and meaning of these and other similar clauses that are found throughout the Constitution? How should the Court decide what is "commerce among the states," or what is a "taking," or what constitutes "cruel and unusual punishment"?

There is no doubt that this open-textured language is what has allowed the Constitution to survive for over 200 years and to govern a world radically different from the one that existed when it was drafted. But it is this very nature of the Constitution that requires that courts may use value choices in interpreting it and in deciding its meaning.

Consider a simple example. Does a neutral law of general applicability, such as a law that prevents Native Americans from using peyote as required by their religions, violate the Free Exercise Clause?[83] This requires the Court make a value choice, weighing the importance of protecting minority religions from government burdens with the desire to defer to majority rule. The Court cannot resolve the issue without a value choice.

Second, even when a right exists, the Court must make value choices in deciding whether there has been an infringement. When is the government's action sufficiently intrusive as to be an infringement and warrant justification? Is repealing laws that protect gays and lesbians from discrimination and precluding the enactment of additional laws to be regarded as discrimination?[84] Is there an infringement of the First Amendment when the government prohibits recipients of federal funds from providing abortion counseling or referrals?[85] These questions necessitate value choices.

Third, inevitably in constitutional law courts must face the question of what, if any, government justifications are sufficient to permit the government to interfere with a fundamental right or to discriminate. Even though the First Amendment says that Congress shall make "no law" abridging freedom of speech, the Court has never regarded that provision as an absolute. Although the Fourteenth Amendment says that states shall not deny any person equal protection of the laws, inevitably states must draw distinctions among people. The question is whether the government's action is sufficiently justified and whether the means are adequately related to the ends. This obviously entails value choices.

It is interesting that Justices and scholars have focused on developing theories for answering the first question — whether a right exists. But they have ignored the value choices inherent in deciding whether there is an infringement and whether a justification is sufficient. The quest for a new formalism is as misguided as the formalism of a century ago. Both are an impossible and misdirected quest for value-neutral judging.

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81. *Id.* amend. XIV, § 1.

82. *Id.* amend. VIII.

83. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (free exercise clause is not violated by a neutral law of general applicability).

84. *See* Romer v. Evans, 517 U.S. 620 (1996).

85. *See* Rust v. Sullivan, 500 U.S. 173 (1991).

IV. Getting Past Formalism: Developing a Constitutional Jurisprudence

There is a great cost to pretending that judging in constitutional cases can be value neutral. Value choices are hidden and implicit. The preferable alternative would be for the value choices to be transparent and explicit. This would facilitate discussion and debate among Justices and the legal community.

Consider a simple example. Over the last several years, the Supreme Court has dramatically increased state sovereign immunity.[86] Ultimately, the issue is a value choice between the importance of state immunity and of state accountability. Yet, this value choice is hardly apparent from reading the Court's decisions. The Court bases its decisions, such as in *Alden v. Maine*, on history and tradition, avoiding recognizing or defending its obvious value choice. The Court never faces the fundamental question: why is it more preferable, as a matter of constitutional law, for states to have sovereign immunity when sued for violating federal law than it would be for states to be amenable to lawsuits?

I believe that in interpreting the Constitution it is appropriate for the Court to protect values that are not clearly stated in the text or intended by the framers or traditionally protected. I believe that non-originalist decisions safeguarding the right to marry,[87] the right to custody of one's children,[88] the right to control their upbringing,[89] the right to procreate,[90] the right to purchase and use contraceptives,[91] and the right to abortion[92] were correct. None of these can be defended based on text, intent, or tradition.

Lest this be dismissed as just the views of an unquestionably liberal academic, consider the words of three Supreme Court Justices. In *Planned Parenthood v. Casey*,[93] the joint opinion of Justices O'Connor, Kennedy, and Souter expressly considered and rejected the argument that the Constitution is limited to moral values and principles fairly attributable to the text or intent or tradition.[94] They wrote:

> It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution

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86. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (states cannot be sued for violating the Age Discrimination in Employment Act); Alden v. Maine, 527 U.S. 706 (1999) (states cannot be sued in state court without their consent).

87. Loving v. Virginia, 388 U.S. 1 (1967).

88. Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975) ("constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised'").

89. Troxel v. Granville, 530 U.S. 57 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

90. Skinner v. Oklahoma, 316 U.S. 535 (1942).

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

92. Roe v. Wade, 410 U.S. 113 (1973).

93. 505 U.S. 833 (1992).

94. *Id.* at 847-49.

> that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause. . . . Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.[95]

Constitutional jurisprudence should be about discussing what values are worthy of protection from democratic majorities, what constitutes an infringement of these rights, and what justifications are sufficient to sustain government actions. The Justices should express and defend the value choices made in answering these questions. No longer should Justices obscure these choices by pretending that they make no value choices and that they can base decisions solely on fragments of quotes from framers or ambiguous traditions.

Conclusion

Formalism always is tempting. In this article, I have written about the "new" formalism in constitutional law — the ongoing quest for value-neutral judging. My central point is that there is no great Oz behind the curtain. Constitutional law always has and always will involve Justices making value choices. Constitutional theory should be a debate about these choices and their appropriate content. No matter how much we want to pretend to the contrary, there is nothing else.

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95. *Id.*