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THE PROCESS OF CONSTITUTIONAL INTERPRETATION: A SYNTHESIS OF THE PRESENT AND A GUIDE TO THE FUTURE

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I. INTRODUCTION

In late twentieth century America, we are again witness to an escalating and often discomforting debate about the interpretation of our Constitution.¹ This debate, in its origins as old as the Constitution itself, has gained new impetus from social and political developments of recent years. Such reawakening and the resulting concerted emphasis on the interpretive process is, of course, entirely appropriate. Interpretation, after all, goes to the heart of the matter. It is through the process of interpretation that we give meaning and therefore life to the Constitution. And by giving life to the Constitution through interpretation, we determine who we are as a people governed by it.

The current debate, however, is not without its downside. As it has lifted study of the interpretive process to new levels of sophistication, this debate about a public document belonging to us all is becoming the exclusive province of academic experts. Commentators from law, philosophy, and other disciplines propose new theories and approaches for developing constitutional mean-
ing through interpretation, other commentators critique these proposals, and yet other commentators (or the original proposers) critique the critiques. As the debate has progressed, it has become increasingly abstract and esoteric as commentators sometimes address themselves only to other well-versed academics. The differences and contradictions among theories have become magnified, while the common ground is sometimes lost in the shuffle. Theories have too often been insufficiently related to practice. Attention has focused too much on the theoretical conundrums that inhibit progress, and too little on suggestions for incremental steps that might be taken to further understand or improve the interpretive process.

This Article provides a counterbalance to these trends in the constitutional interpretation debate. First, the Article is addressed not only to academic experts but also to practicing lawyers, law students, government officials, and academics who are interested but not expert in the process of constitutional interpretation. Second, the Article emphasizes the common ground or agreement about interpretation as much as the disagreements, and offers a synthesis of the interpretive process that charts the common ground and models the best of current understanding. Third, the Article relates theory to practice by exploring the ramifications of this synthesis for courts, other interpreters, and those making or critiquing constitutional arguments in practice. Fourth, the Article suggests specific steps that we might take, building on the synthesis, to further our understanding of and improve the functioning of the process of constitutional interpretation.

To accomplish these goals, the Article proceeds largely by constructing a descriptive theory that provides an account of the interpretive process as it actually exists in practice and an account of the disagreements that have developed concerning this process. In addition, the Article includes some normative theory prescribing how the interpretive process should function in areas where

2. In so doing, this Article indirectly addresses the "commensurability" or "coherency" problem that is often attributed to constitutional law—that is, the problem arising from an absence of any cohesive plan for interrelating the various types of constitutional law arguments or the various parts of the interpretive process. See, e.g., Fallon, A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987). In its descriptive aspects, this Article suggests that the commensurability problem is not as great as sometimes asserted; in its prescriptive aspects, this Article suggests ways to better fit the pieces together to alleviate the problem that does exist.
there is considerable doubt and disagreement about its workings, or where the apparent practice, in the author's view, is misguided or underdeveloped. In these areas, the Article seeks to select, from among the plausible descriptive theories, the one that "guides future conduct in the most normatively attractive way."  

II. Who Interprets the Constitution, and How?

The process of constitutional interpretation, as developed in this Article, is the process by which "official interpreters" apply the Constitution to, and thereby resolve, particular problems regarding the scope and allocation of governmental power and the rights of individuals. There are two foundational questions to ask about this process: who are the official interpreters of the Constitution, and how do these interpreters undertake to interpret the Constitution? This Article places more emphasis on the second question, which is implicated to a greater degree in the concerns expressed in the Introduction. It will be apparent that the two questions are interrelated, and that exploration of the second ("how") question must at points intersect consideration of the first ("who") question.

A. Who Interprets the Constitution?

Regarding the first foundational question, it is clear that the federal and state courts are not the only official interpreters of the Constitution. The Constitution's empowerment provisions are addressed to all three branches of government that are empowered, not just the judicial branch. The Constitution's individual rights provisions are addressed to all policy-making agencies and officials of government—federal, state, and local—that are lim-
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ited by these provisions. Moreover, the Constitution itself requires the President, the members of Congress, the members of the state legislatures, the state governors, and all other executive officials of the federal and state governments to take an oath to support the Constitution. Since all are bound to uphold the Constitution, all are responsible for interpreting it insofar as constitutional questions arise in the course of their official duties. In this sense, members of the United States Congress may be considered official constitutional interpreters, as may the President, heads of cabinet departments, members of a state legislature, and the governor of a state. By extension, other officers or agencies that exercise delegated federal or state governmental power—such as members of a city council or commissioners of a federal or state administrative agency—may also be considered official constitutional interpreters.

Although it has become increasingly clear since the famous 1803 case of *Marbury v. Madison* that the United States Supreme Court is, for most purposes, the Constitution's ultimate in-

7. U.S. Const. art. VI, cl. 3.
10. In contrast to "official interpreters," there are also "unofficial interpreters" of the Constitution. They are the practitioners and commentators—private individuals who have no governmental authority to interpret the Constitution but whose work influences the official interpretation by the force of its reasoning and the weight of its supporting research. Practicing lawyers commonly fulfill this role. Equally important, law professors, philosophers, historians, political scientists, social scientists, and members of other academic disciplines may be unofficial interpreters. Moreover, each generation of citizens, individually or collectively in "interpretive communities," may also influence the official interpretation. For a discussion of interpretive communities, see Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983). See also McDougall, *Social Movements, Law, and Public Policy: A Clinical Dimension for the New Legal Process* (to be published in 75 Cornell L. Rev.) (discussing the "interpretive community" and the related concept of the "implementive community").
11. 5 U.S. (1 Cranch) 137 (1803).
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B. How Is the Constitution Interpreted?

The second foundational question about the interpretive process concerns how the Constitution is interpreted. Since the late 1950's, and especially in the 1980's, the writings of scholars and jurists have expanded the list of theories responding to this question. What in earlier times was a debate about strict versus liberal construction of the Constitution, or judicial restraint versus

12. See generally L. Tribe, American Constitutional Law §§ 3-7 to 3-9, 3-13 to 3-17 (2d ed. 1988).
13. See, e.g., United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.").
16. The most influential among the earlier writings include Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Black, The Bill of Rights, 35 N.Y.U. L. Rev. 865 (1960); and A. Bickel, The Least Dangerous Branch (1962). For examples of writings in the 1980's, see supra note 1.
judicial activism, has given way to a more helpful and sophisticated debate about "originalism" versus "nonoriginalism" or "interpretivism" versus "noninterpretivism." 17

The purpose of this Article is not to review all of this commentary, which is far too voluminous, or to critique the work of any particular theorist. Rather, this Article will briefly survey the theoretical debate, assess where matters stand on the "how" question, and fashion a perspective that may help us move from theory to practice and from present to future. In so doing, particular attention will be given to the pervasive problem of value judgment in constitutional interpretation. To pursue these purposes, the "how" question will be restated as follows: What are, and should be, the sources for constitutional interpretation; and what are, and should be, the interpretive approaches that emerge from these sources?

III. SOURCES OF CONSTITUTIONAL INTERPRETATION

In law, as in other disciplines concerned with interpretation, sources of interpretation may be classified as either primary or secondary. Primary sources in law are the root sources—the original raw material from which all interpretation derives. Each such source must stake its own claim to legitimacy based on the authoritativeness of the material and interpretive approaches it encompasses. Secondary sources in law are those derived from the primary sources; their legitimacy depends on the authoritativeness of the primary sources on which they are based.

In studying constitutional interpretation it is helpful to maintain this distinction between primary and secondary sources, although not all commentators do so. 18 There are only four sources that plausibly qualify as primary sources for constitutional inter-

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18. See, e.g., P. Bobbitt, supra note 1; W. Murphy, J. Fleming & W. Harris, supra note 1; Fallon, supra note 2 (each of which treats together various constitutional arguments based on primary and secondary sources).
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interpreters to consult. These four sources are constitutional text,\textsuperscript{19} original constitutional history, the inferences to be drawn from the overall structure of the Constitution, and the values that are embedded in or reflected in the Constitution ("constitutional values"). The major secondary source is precedent that is derived over time from the four primary sources.\textsuperscript{20} The most accessible and most utilized body of precedent, of course, is that which courts develop on a case-by-case basis and adhere to under the doctrine of stare decisis.\textsuperscript{21} Precedent, however, may also be developed by other constitutional interpreters. The Congress may create precedent, for example, when it accepts or rejects a bill provision or amendment partly on the basis of documented constitutional issues. A President may create precedent when vetoing a bill for constitutional reasons. An Attorney General may create precedent when issuing an opinion resolving constitutional issues. Even without such formal documentation, the consistent practices of other government branches concerning their powers may form a type of precedent. In The Steel Seizure Case, Justice Frankfurter emphasized the precedential force of such practices: 

"[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power . . .’ 

Though authoritative and more frequently cited than primary

\textsuperscript{19} In a broad sense, the text is always the source of constitutional interpretation, since interpreters are almost always seeking to give meaning to a particular portion of the text. In the narrower sense used here, however, text is a source only insofar as meaning is discernible from the text language itself rather than from the history, structure, or value system surrounding the language.

\textsuperscript{20} Precedent as a secondary source may serve many important purposes in constitutional argument. It is the source of holdings of "cases on point" and analogous cases—the hard law whose discovery is a joyous occasion for groping law students and harried practitioners. It is also a source of more abstract concepts and principles of law, of information on the institutional considerations that shape a particular interpreter's role and competence within the constitutional system, and of information on which adjudicative and "constitutional" facts are relevant to particular constitutional issues. Moreover, precedent is a critical source of information as to which primary interpretive sources and approaches are most suitable for particular constitutional clauses.


sources, precedent as a secondary source has no legitimacy independent of the primary sources themselves. Hence, the primary sources provide the focal point for this Article.

Although most commentators would acknowledge the legitimacy of the first three interpretive sources (text, history, structure), and many would acknowledge the legitimacy of the fourth (values), there is neither a consensus on how to describe and package the range of interpretive sources, nor a uniform understanding of the appropriate use of these sources. Just as there are strict and liberal textualists, for instance, there are strict and moderate originalists; and there are values interpreters who would substantially confine the circumstances in and means by which they identify values as well as those who would engage in wide-ranging explorations of moral goodness. Nevertheless, each of the four sources identified above is represented in opinions of the United States Supreme Court and is reflected in the growth of constitutional law. Each also has its strong supporters among the commentators on constitutional interpretation. Moreover, each can be differentiated from the others and be seen to complement the others in terms of their roles and methodologies. Taken together, then, these four sources provide an appropriate basis for a model of constitutional interpretation.

IV. APPROACHES TO CONSTITUTIONAL INTERPRETATION

From the four primary sources of constitutional interpretation emerge four interpretive approaches or methodologies for deriving meaning from the Constitution: the textual approach, the historical approach, the structural approach, and the values approach. These four approaches, in turn, provide the basis for four generic

23. This position has ramifications, of course, for the issue of when judicial precedent may be overruled. The central problem is this: Suppose a contemporary court determines that a long-standing precedent, upon reexamination, is not supported by the primary interpretive sources; should the court therefore overrule the precedent, or should it allow the precedent to stand because an overruling would be too disruptive of settled expectations? In the abstract, the position on primary and secondary sources would support the overruling alternative, but an analysis of the four interpretive approaches, infra Parts IV-V, suggests that the conditions for overruling long-standing precedent would rarely exist in the real world. See infra Part V(9).

24. See P. Bobbitt, supra note 1; W. Murphy, J. Fleming & W. Harris, supra note 1; Fallon, supra note 2. See also M. Tushnet, supra note 1. But see P. Brest, supra note 5, at 2, 7 (identifying the same four interpretive sources discussed in this Article and using them as the organizational structure for Part I of the book).
types of constitutional argument: arguments from text, arguments from history, arguments from structure, and arguments from values.26

A. Textual Approach

The first approach, textual interpretation, has its source in the written text of the Constitution. The focus is on the language itself, not on the intentions of the Drafters that may lurk behind the language, and the search is for the meaning that words convey to a reader unfamiliar with the Drafters’ intentions.26 The promise of the textual approach lies in the common core of meaning that particular usages of particular words and phrases may convey. At least some words and phrases, it is argued, are sufficiently clear that almost everyone would agree on their meaning in at least some of their applications. Common examples include the numerical phrases in the Constitution, such as the clause specifying that a person must be at least thirty-five years of age to be eligible for the Presidency.27 Other words and phrases, although less clear, nevertheless convey sufficient sense to narrow the range of possible meanings they could have in concrete situations; thus, to a lesser extent and in varying degrees, such language also constrains the interpreter. One recent prominent example is the word “person” in the fourteenth amendment, which the Supreme Court, using a textual approach, has construed to exclude the unborn.28

A number of questions immediately arise concerning this interpretive approach.29 For instance, the meaning of words can change over time; thus the meaning attributed to a particular word at the time the constitutional provision was drafted may

25. These generic forms of constitutional argument may be supported with secondary as well as primary sources. The secondary source of precedent, for example, may provide the most concrete evidence of the import of text language, the lessons of history, the inferences drawn from structures, and the values that are rooted in the Constitution. For other types of argument that supplement these four generic types, see Fallon, supra note 2, at 1204-09, 1262-68; Lyons, Derivability, Defensibility, and the Justification of Judicial Decisions, 68 Monist 325, 330-32 (1985).


27. U.S. CONST. art. II, § 1, cl. 5.


differ from the meaning attributed to that word today. Should the words of the written Constitution be understood according to the original meaning that drafters or readers of the late eighteenth century gave them, or according to the meaning that a contemporary reader would give them? Moreover, some words may have technical as well as common sense meanings, or literal as well as figurative meanings. Ready examples of the former include the phrase “privileges and immunities” in article IV and the fourteenth amendment, the word “speech” in the first amendment, and the word “jury” in the sixth amendment. Examples of the latter include the word “necessary” in the necessary and proper clause, the word “papers” in the fourth amendment, the phrase “life and limb” in the fifth amendment’s double jeopardy clause, the word “writings” in the copyright clause, and the word “coin” in the clause authorizing Congress to “coin money.” For constitutional words that arguably share such double meanings, which meaning is to be attributed to them? Similarly, if context must be considered in order to import meaning into certain words or phrases, what is the appropriate context in which to understand constitutional words—that of the drafters, the members of the legal and governmental community, or the reasonable person within the surrounding community of understanding?

Even if we satisfactorily answer questions such as these, there


31. Compare Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (quoting Eisner v. Macomber, 252 U.S. 189, 220 (1919) (Holmes, J., dissenting)) (A constitutional amendment “should be read in a ‘sense most obvious to the common understanding at the time of its adoption’. . . . For it was for public adoption that it was proposed.”) with Katz v. United States, 389 U.S. 347, 350-53 (1967) (holding that FBI phone tapping constituted a “search and seizure” within the meaning of the fourth amendment).

32. U.S. CONST. art. IV, § 2, cl. 1; amend. XIV, § 1.

33. U.S. CONST. amend. I.

34. U.S. CONST. amend. VI.


36. U.S. CONST. amend. IV.

37. U.S. CONST. amend. V.


40. See supra text accompanying note 31.
are still evident limitations to the textual approach, recognition of which would counsel against reliance on language alone to solve most constitutional problems. Much language in legal documents, and certainly in the Constitution, is a product of compromise that may reflect or leave room for varying viewpoints. There may be no common viewpoint and no single meaning embodied in particular words or phrases chosen by the Drafters. Moreover, drafters of language (and certainly the Drafters of the Constitution) may have worked with highly imperfect concepts and highly complex ideas. Such concepts and ideas often cannot be captured precisely in words. It may thus be unrealistic to expect that the Constitution's language can reveal all the contours or content of the concepts and ideas being expressed.

For these reasons and others, commentators often refer to the inherent "indeterminacy" of language, suggesting that words have varying degrees of "open texture" within which meaning may be indeterminate or must be ascertained by resort to sources other than the language.\footnote{See H.L.A. Hart, The Concept of Law 121-27 (1961).} Chief Justice Marshall included an early recognition of this phenomenon in \textit{McCulloch v. Maryland} when he stated: "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea."\footnote{McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819).} This problem of indeterminancy or open texture is exacerbated in the Constitution because so much of the language is used to forge general principles regarding rights and powers rather than specific rules for the solution of concrete problems. In this sense, the Drafters may have made deliberate use of the open texture of language, using words with no precise and fixed meaning, so as to allow future interpreters a range of discretion in attributing specific meanings to words in unforeseen circumstances. The Constitution's due process clauses, for example, can be said to reflect such purposive vagueness, as can the equal protection clause, the cruel and unusual punishment clause, and other human rights clauses.

Certainly in situations calling for interpretation of open-textured clauses, and often in interpreting more specific clauses, we cannot derive answers to concrete problems solely by reference to language. We must look to other sources.
B. Historical Approach

The second approach to constitutional interpretation, the historical approach, uses original history as its source. This approach focuses on the concept of "Framers' intent," the presumed key (along with text) to the "original understanding" of the Constitution's provisions. The historical interpreter searches for this original understanding and seeks to follow it in resolving contemporary problems. Under the narrower version of this approach, the interpreter's task is to resolve a particular dispute in the same way that the "Framers" resolved it or would have resolved it had the dispute come before them during their debates. Under the broader version, the task is to discover the principles that the Framers used or would have used to resolve a particular type of dispute, or would have wanted interpreters to use if such a dispute were to arise in the future.4

There are three historical periods within which the interpreter searches for original understanding: the period of the framing of the original Constitution, the period of the framing of the Bill of Rights, and the period of the framing of the post-Civil War amendments (the thirteenth, fourteenth, and fifteenth amendments). In each period the focus is on what the Framers did, said, and thought, gleaned not only from records of the drafting, adoption, and ratification processes, but also from the relevant historical context.

Contemplation of this historical approach reveals substantial theoretical problems and substantial limits on its usefulness.44

The threshold question is this: Why should the Framers' intentions, apart from those embodied in the text itself, be authoritative in constitutional interpretation? If the Framers accepted racial segregation or gender discrimination or capital punishment, for example, why should we be bound by their views? The People

43. For examples of such uses of history by the United States Supreme Court, and debate on whether the narrower or broader version of historical interpretation should apply, see Marsh v. Chambers, 463 U.S. 783 (1983) (holding that the Nebraska legislature's chaplaincy practice does not violate the establishment clause); Williams v. Florida, 399 U.S. 78, 86-103 (1970) (holding that the sixth amendment guarantee of trial by jury does not require that membership be fixed at twelve). See also id. at 122-29 (Harlan, J., dissenting).

who adopted the Constitution adopted only the written text, not any separate intentions of the Framers. This text does not tell us that later generations are to be bound by the Framers’ intent, nor is there even a “Framers’ intent” that later generations must follow the Framers’ intent. Why then, should later generations be bound? Is it because such a rule inevitably conduces to the public good? Is it because such a rule is a reliable and revealing key to discovering meaning? Any such claims must take account of the fact that the various framer groups were not representative cross-sections of American society then or now. The Framers did not include blacks, other minorities, women, or unpropertied persons. Any such claims must also account for the fact that the Framers could not have envisioned many of the intervening developments that have shaped the country from 1787 until now and provided the context in which current interpretive problems arise. As Justice Oliver Wendell Holmes remarked, “[w]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”

From the threshold question of authoritativeness, other questions about the historical approach follow. First in order, who were the Framers? The question must be asked separately for each of the three historical periods. For the original Constitution, for instance, were the Framers those who actually drafted the language? Or all those who signed the document in Philadelphia? Or all delegates who attended at least some sessions of the Convention? Or did the Framers also include the delegates to the state ratifying conventions whose actions made the Constitution the law of the land? Most commentators, and apparently the United States Supreme Court, now acknowledge that the Framers include not only those who participated in the drafting and approval process but also those who participated in the ratifying conventions. The theoretical and practical difficulties involved in the search for Framers’ intent increase with this broadened

47. See, e.g., Rotunda, supra note 45.
definition of the group.

The next question is whether the Framers had a collective state of mind capable of ascertainment, either as to the general principles underlying constitutional provisions or as to specific rules for resolving particular problems. If there was no collective state of mind, or if it cannot be perceived from our late twentieth century perspective, then the Framers' intent as a source for interpretation is elusive at best, misleading and fruitless at worst. It is said that the debates and decisions of deliberative bodies such as the Constitutional Convention are so influenced by political compromise and inconsistent mixtures of principle and expedience, so subject to unexpressed intentions and purposive vagueness, that no collective state of mind can be discerned for many matters of enduring importance. Moreover, once the Ratifiers are included in the group whose collective mind is sought, the search becomes even more complicated—not only because there were separate conventions in each of the states but also because the official proceedings of the Constitutional Convention were sketchy, unreliable, and were not transmitted to the state ratifying conventions. There was thus no official mechanism for informing these state conventions of the Drafters' intentions.

The next question concerns documentation. If there is a collective state of mind that is theoretically ascertainable, then some reliable historical record must be found or reliably reconstructed before Framers' intent can meaningfully guide interpretation. On this point, commentators have argued that the historical record is sparse and often less than enlightening—especially if the Ratifiers are included among the Framers. As Justice Jackson re-

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49. The Constitutional Convention in Philadelphia was conducted in secret sessions. No system of press coverage or other external monitoring of the convention existed. 1 The Records of the Federal Convention of 1787 xi (M. Farrand ed. 1937) [hereinafter The Records]. Indeed, the delegates to the convention did not give any extended attention to the maintenance of official records of their debates, motions, and votes. As a result, some votes on motions were recorded without statement of the question being voted upon, and some of the debates were missing. Id. at xiii. There is no indication that these incomplete official records of the convention were sent to the individual state ratifying conventions. See 1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 349-75 (J. Elliot ed. 1836) [hereinafter The Debates].

50. See generally The Records, supra note 49, at xi-xiv; 1 The Debates, supra note 49, at v-vii. Regarding the Bill of Rights, the U.S. House of Representatives did keep official
marked, "[j]ust what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."

Last is the question of generality or abstraction. In a situation where there is a collective state of mind for which we have or can reconstruct a reliable historical account, the interpreter must determine the level of generality or abstraction on which to address and apply the historical data. Suppose the data can be read to suggest two different Framers' intents on a particular subject—one specific and concrete, grounded in the realities of the Framers' own time period, the other more general and abstract, looking toward yet unknown future realities. Which intent should guide constitutional interpretation? Suppose, for example, an interpreter is considering the constitutionality of the practice of opening legislative sessions with a prayer by a chaplain. Should the interpreter rely on the specific historical data suggesting that the Framers of the first amendment religion clauses accepted this practice? Or should the interpreter glean from history the broad underlying purposes that the Framers may have attributed to the clauses—purposes that may be undercut by current practices of legislative prayer?

Such choices between levels of abstraction themselves create difficult interpretive problems with no easy answers. Even if one can determine a basis for choosing between the specific and the general, either choice presents further problems. If one declines to generalize, using history only to find specific answers to specific problems that the Framers resolved or envisioned, little or no guidance will be available for most contemporary constitutional issues. If one generalizes, there must be some basis for determin-

records of the votes, motions, and debates. 1 ANNALS OF CONG. 660-77 (J. Gales ed. 1789). The U.S. Senate, however, kept no official records of the Bill of Rights because the Senate met behind closed doors until February 20, 1794, the first Session of the Third Congress. 3 ANNALS OF CONG. 48057 (1791). See also R. BERNSTEIN, ARE WE TO BE A NATION? 264-67 (1987); Huston, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1 (1986).


52. See, e.g., Fallon, supra note 2, at 1198-99, 1215-17; Bennett, supra note 26, at 461-72; Dworkin, supra note 48, at 469, 488-97.

53. Compare the Burger majority opinion with the Brennan dissent in Marsh v. Chambers, 463 U.S. 783 (1983); compare also the Hughes majority opinion with the Sutherland dissent in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
ing a stopping point. Does the history of the fourteenth amendment equal protection clause, for example, indicate the presumptive invalidity of discrimination against blacks only, or of all race discrimination, or also of all race-like discrimination? If the latter, how race-like must the discrimination be in order to be invalid?

These conceptual and practical difficulties with the historical approach do not completely undermine its role in interpretation; however, they do suggest that the interpreter must be most circumspect in considering when and how to use history. Original history may be helpful for some constitutional problems but not for others. Even for those problems where history may be helpful, its role should be far more modest than is sometimes claimed. Finally, it should be used in conjunction with text, structure, and values, rather than as an end in itself.

C. Structural Approach

The third approach to interpretation is the structural approach, the source of which is the overall governmental structure that the Constitution establishes. The focus is on the document as a whole rather than on any particular word or phrase. The key is to identify and understand constitutional mechanisms and relationships and the political principles that underlie them. The interpreter then draws inferences from that structure— inferences about how particular constitutional problems should be resolved in order to maintain the integrity of the structure or uphold the political principles upon which the structure is based. The structural approach, therefore, requires the interpreter to work with the concepts of federalism and separation of powers and with political principles regarding representative democracy and constitutionalism.

The classic illustration of the structural approach is Chief Justice Marshall's 1819 opinion in *McCulloch v. Maryland*, which

54. See infra Part V(5).
55. See infra Part V(2).
56. See infra Part V(6).
relied on inferences drawn from both the federal/state structure of the Constitution and the separation of powers relationship between Congress and the Supreme Court to uphold Congress' incorporation of the Bank of the United States\(^5\) and invalidate Maryland's tax on the bank.\(^6\) In modern times, a leading use of structural interpretation has been in cases concerning state power to regulate interstate trade, where the Supreme Court has inferred that our nation is a single economic unit in which "the peoples of the several states must sink or swim together."\(^61\) Although courts have used structural interpretation primarily to resolve power questions such as these, some commentators have also used it to resolve human rights questions.\(^62\)

As with textual and historical interpretation, there are substantial limitations to the use of the structural approach. Different interpreters may have different understandings of the very same mechanism or relationship. Underlying principles may be unclear, or competing principles which speak to the same issue may exist. Thus, for some problems there may be a range of possible inferences that can be drawn from structure. For other problems there may be no sound inference to be drawn, since structural arrangements do not sufficiently address the matter. Such potential for conflicting or inadequate viewpoints exists, as does a potential for manipulation, because the structural approach requires the interpreter to work at a relatively high level of abstraction. As with the textual and historical approaches, interpreters will often be unable to rely on the structural approach alone to solve constitutional problems.

D. **Values Approach**

The fourth approach to constitutional interpretation is the values approach, the source for which I will cautiously call "constitutional values." Others have called this approach the "fundamen-
tal rights” approach,63 or the “ethics” approach,64 or in its broadest manifestation, the “noninterpretivist” approach.65 However labeled, this approach has been used primarily for individual rights problems; it has been in ascendancy since the 1954 decision in Brown v. Board of Education66 outlawing de jure racial segregation in public education, and it reached a zenith in 1973 in Roe v. Wade67 invalidating statutes broadly regulating the availability of abortions.

The values approach entails a search for the Constitution’s elemental principles and the values they serve. Once identified, such basic values can be used as guides, or “reference points” for interpretation. The interpreter then resolves the problem in a manner that will uphold the identified value as against other values or interests that may be at stake.

The values approach is premised on a candid acknowledgment that the Constitution is a product of value judgments and that constitutional interpretation consequently requires resort to values. As one commentator has concluded, “[j]ust as the Constitution cannot be value-free, so our understanding of it must be informed by reflection on the principles it serves.”68 The Constitution’s preamble itself provides strong support for this notion. It sets out goals that embody values—for example, to “secure the Blessings of Liberty”69—and makes clear that fulfillment of these goals and promotion of these values is the Constitution’s task. Likewise, numerous constitutional provisions following the preamble are express invocations of values—for example, the prohibition on “cruel and unusual punishments.”70


64. Bobbitt, Constitutional Fate, 58 TEX. L. REV. 695, 726-51 (1980).

65. M. Perry, supra note 1; Grey, supra note 17.


69. The Preamble to the U.S. Constitution reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

70. U.S. CONST. amend. VIII. See, e.g., infra note 87 and accompanying text.
In considering the values approach, two threshold questions arise: What kind of values qualify for use as reference points? And where may the interpreter search for these values? How one views the legitimacy and utility of this approach will depend in large part on the answers to these questions.

Regarding the first question, this much is clear: the eligible values must be public values; personal or other private values do not count. They must be national values; regional or state or interest group values do not count. They must be real values based on the shared cultural and political experience of our people; artificial constructs or abstractions do not count. They must be enduring or "reflectively held" values; mere transitory or popular values do not count.

The second question—where may the interpreter search for such values—occasions a variety of answers. Certainly the text, original history, and structure of the Constitution are an appropriate and useful focus of the search. The text of the first amendment, for example, expressly recognizes values of freedom of expression and freedom of religion, and by implication a value of freedom of association; the text of the fourteenth amendment expressly recognizes a value of equality under law. In such situations, however, the text establishes only a guidepost; it does not map out the contours of the terrain. In some circumstances, origi-

71. Brest, supra note 63, at 1107.
72. As with the historical approach, there is an ongoing debate about the generality with which a value is stated. See supra text accompanying notes 52-53. In Bowers v. Hardwick, 478 U.S. 186 (1986), for example, the Court considered the constitutionality of Georgia's criminal sodomy statute as applied to consensual homosexual sodomy. Justice White, for the majority, stated that the privacy value at stake concerned only the "right to engage in homosexual sodomy." Id. at 191. Justice Blackmun, in dissent, rejected this view and argued that the privacy value at stake concerned the "interest all individuals have in controlling the nature of their intimate associations with others." Id. at 206. Similarly, in Michael H. v. Gerald D., 109 S. Ct. 2333 (1989), the Court considered the constitutionality of a California paternity statute as applied to a man claiming to be the natural father of a child born while the mother was married to another man. Justice Scalia, for a plurality, stated that the privacy value at stake concerned only a natural father's "parental rights over a child born into a woman's existing marriage with another man." Id. at 2343. Justice Brennan, in dissent, rejected this view and argued that the value at stake concerned "a parent and child in their relationship with each other." Id. at 2352. Justice Scalia suggested a methodology for determining the level of generality that would sharply limit the degree of generalization. Id. at 2344 n.6. Only one Justice expressly endorsed this suggestion. See id. at 2346-47 (O'Connor, J., concurring in part); id. at 2347 (Stevens, J., concurring in judgment); id. at 2349-55 (Brennan, J., dissenting); id. at 2360 (White, J., dissenting).
nal history may enhance our understanding of these textual values. The fourteenth amendment's history, for example, helps us understand the equality value in the context of racial subjugation. Further, structure may provide insight into values apart from text. Structural inference, for instance, is the source of a personal mobility value (freedom of travel), and a value of participation in representative government. In effect, the interpreter gathers evidence from all these sources and weaves it together to develop a value assessment in each particular case.

In other circumstances, the reliance on text, original history, and structure as the source of values is less direct, or the reliance is on a source external to the Constitution. Some commentators, for instance, have argued that the Declaration of Independence is a source of values that inform constitutional interpretation. In a broader vein, it has been argued that the Constitution arises from a "set of philosophic presuppositions" that are the source of constitutional principles and ideals. Similarly, it has been suggested that "implicit background assumptions against which the Constitution was drafted" provide a source of values. Another commentator has argued that values may be derived from "the entirety of our history," as it reveals "ideas in motion" and from which we extract "elements of experience and strains of thought that appear most relevant to our own time." Finally, it has been

75. J.H. Ely, supra note 1, at 73-79.
77. Id. at 75. See also J. Arthur, The Unfinished Constitution: Philosophy and Constitutional Practice (1989), which emphasizes the historical and contemporary competition between the Federalist and the Republican political philosophies, both of which are presented as "conceptions of government" giving rise to commitments and ideals that influence constitutional interpretation. The author apparently treats these two conceptions of government as distinct interpretive approaches in and of themselves; the better view, however, is that they are sources of values that are used as reference points under the values approach to interpretation.
78. Epstein, Foreword to S. Macedo, supra note 44, at xiv. Freedom to travel among the states may be one example of such an implicit background assumption. See United States v. Guest, 383 U.S. 745, 757-58 (1966). Privacy of the marital relationship may be another example, as Justice Douglas may have considered when he stated in Griswold v. Connecticut, 381 U.S. 479, 486 (1965): "We deal with a right of privacy older than the Bill of Rights . . . ." For evidence of an express background assumption, see U.S. Const. art. I, § 9, cl. 2, which apparently assumes the existence of the privilege of the writ of habeas corpus and thus merely prohibits its suspension.
argued that values arise from a “variety of philosophical and religious systems of moral thought and belief”—a source of values acknowledged as “extra-constitutional” in nature.80 Among judges, probably the most-quoted on this point is the second Justice Harlan, who identified tradition as the source of values, specifically “the traditions from which [this country] developed as well as the traditions from which it broke.”81

When the evidence of a link between the value and the Constitution is weak, especially when the claim is that the value source is wholly unconnected to the Constitution, the values approach generates controversy of major proportions. The argument goes like this: The only values we can uphold are those the Framers constitutionalized themselves. We cannot expand their values or add new values never conceived by them. Thus any approach relying on values not clearly found in text, original history, or structure is illegitimate.

There is, however, another side to the argument. The text of the Constitution itself, it is argued, anticipates the later development and refinement of values reflected in constitutional text, history, and structure, and perhaps even the identification of new values consistent with those reflected. The ninth amendment, for example, states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” thus suggesting the existence of rights beyond those stated in the text.82 The fourteenth amendment provides that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,”83 but does not state what those “privileges” and “immunities” are. The Constitution’s preamble lists the establishment of “justice” and the securing of “blessings of liberty” among the Constitution’s goals—both appeal, it might be said, to broad enduring values to be developed by later interpreters.

80. M. Perry, supra note 1, at 109; see also M. Perry, Morality, Politics & Law: A Bicentennial Essay (1988).
83. U.S. Const. amend. XIV, § 1.
Moreover, the language of many individual rights clauses—especially the clauses protecting freedom of speech and press, free exercise of religion, due process of law, equal protection of the laws, and freedom from cruel and unusual punishments—can be read to leave much developmental work to future generations. These so-called “open-textured” or “open-ended” clauses—termed “invitational” clauses in this Article—document values and invite later interpreters to develop them by making more refined value judgments over time in particular circumstances. The Supreme Court, from time to time, has forthrightly acknowledged the developmental role played by these invitational clauses. Speaking of equal protection and due process, for example, the Court emphasized that:

In determining what lines are unconstitutionally discriminatory we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

Addressing the cruel and unusual punishment clause, and constitutional rights generally, the Court stated:

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care and provision for events of good and bad tendencies of which no prophecy can be made.

Again, speaking of the cruel and unusual punishment clause, the Court remarked:

Moreover, the Eighth Amendment’s proscriptions are not limited to those practices condemned by the common law in 1789. . . . Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the “evolving standards of decency that mark the progress of a maturing soci-

86. Weems v. United States, 217 U.S. 349, 373 (1910) (citation not provided).
ety." In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects.87

And speaking of due process, the Court said:

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."88

Under this latter view of constitutional values, the "Constitution is not stuffed but pregnant with meaning," and it is left to interpreters to give birth to that meaning and conscientiously nurture it over time.89

Aside from such theoretical arguments, there is also a very practical question about the values approach that is especially pertinent to individual rights cases: Can individual rights under the Constitution, as we know them, be further supported and developed without resort to a values approach? Some commentators have answered this question in the negative.90 The case of Brown v. Board of Education91 is often used as the classic illustration.

The result in this case, it is argued, is not evident from the text of the equal protection clause, the history of the clause's adoption, or the constitutional structure; instead, the Court developed the equality value by making a value judgment about racial segregation in public education—a judgment different from the fourteenth amendment Framers' judgment concerning the amendment's immediate effect.92 Similar arguments have been made to explain many of the Supreme Court's opinions on gender discrimination, freedom of speech and press, and the right to privacy.93 If

90. See, e.g., M. PERRY, supra note 1, at 61-45; Grey, supra note 17, at 710-14.
93. See, e.g., Grey, supra note 17, at 711-13; see generally M. PERRY, supra note 1; J.W.
these arguments are correct, then the absence of a values approach would make our future constitutional law much different from what it is today.

V. Tentative Conclusions About the Constitutional Interpretation Process

Based on the above characterizations of interpretive sources and approaches, what conclusions might be drawn about the process of constitutional interpretation? Among the varieties of approaches and contending arguments, we need to find the common ground, fit together the pieces of this puzzle as best we can, and better relate theory to practice.

These are the conclusions:

1. Of all the interpretive approaches, the textual approach has the least disputed claim to legitimacy. The text is the only interpretive source that was presented to the various ratifying bodies for approval and the only source that was adopted. Most constitutional issues implicate one or more specific clauses of the text; thus text usually provides the authoritative starting point, and continuing reference point, for interpretation. The text is also a controlling source for interpretation; no other source may be used to contradict it. But the enlightenment gained from the text will vary from clause to clause and problem to problem, and in most situations the text itself will not resolve the issue being addressed. In cases that count, therefore, the text must be used in conjunction with one or more other interpretive sources.

2. The historical approach is fraught with theoretical and practical problems that challenge its legitimacy. Yet the courts, and many commentators, continue to ascribe some interpretive role to this approach. If refined and limited in response to the useful critiques that have been made, the historical approach can retain a plausible claim to legitimacy within a narrowed range of operation and expectation.

For instance, many of the historical approach's difficulties can be ameliorated by adopting more modest and less dispositive objectives. Occasionally a search of original history, in conjunction with text, may provide an answer to a specific constitutional

Hurst, Dealing With Statutes 99-106 (1982).

94. See, e.g., the critiques cited supra note 44.
question concerning a practice steeped in history.95 In most circumstances, however, if history speaks at all to an issue, it is in a different way. History may be searched, in conjunction with other sources, not for specific answers but for a reflection of principles that may have undergirded the Framers' deliberations—principles of enduring vitality that provide guidelines for later interpreters but do not bind them to the Framers' reactions to the particular issues of the times.96 It would therefore be inappropriate, in most circumstances, to argue that the Framers prejudged for all time the particular result to be reached for particular problems whose latter-day ramifications they could not have perceived. Instead, the better argument, in most circumstances, is that the Framers' deliberations rested on various broad judgments and presuppositions that provide touchstones for later-day constitutional decisionmaking.97

3. Structural interpretation is probably better established, and more often used by courts, than is commonly recognized. Despite its long history dating from at least 1803 in Marbury v. Madison,98 and despite its current resurgence in separation of powers99 and state autonomy cases,100 the theoretical base and the methodological problems of structural interpretation have not been studied as often or as comprehensively as the other interpretive approaches. The particular methodology of the structural approach has not been fully refined and articulated. Consequently, the full potential of structural interpretation has yet to be tapped.

Further study of this approach should be a priority for commentators. We need to know more about techniques for drawing inferences from constitutional structure, about the process of rea-

95. See, e.g., cases cited infra note 126; see also In re Winship, 397 U.S. 358, 361-64 (1970) (holding that proof beyond a reasonable doubt is required during the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult).

96. Such an approach to history would be akin to searching for a general rather than a specific framer's intent; see supra text accompanying notes 52-53.

97. So understood, the historical approach would partially overlap the structural and values approaches, and original history could yield evidence for use in applying these latter two approaches. See supra text accompanying notes 73-81; infra Part V(6).

98. 5 U.S. (1 Cranch) 137 (1803).


soning from inferences once they are drawn, about the levels of abstraction at which inferences may appropriately be drawn,\textsuperscript{101} and about the role of structural inference in individual rights cases.\textsuperscript{102}

4. The values approach holds the promise of playing the leading role in the future development of constitutional law. It has become and should remain the predominant approach for individual rights questions, especially under the invitational clauses, and also has potential applications to power questions. This approach brings to center stage what should be in the spotlight: the critical questions of values that are at the core of most constitutional issues. Applying the values approach, the interpreter can focus forthrightly on these questions, rather than clouding them with speculations about specific Framers' intent\textsuperscript{103} or technical parsing of less-than-enlightening reasoning from precedent. Such a direct focus on value questions will also obligate the interpreter to justify the result reached in terms of competing values,\textsuperscript{104} thus encouraging a more precise identification of these values and a clearer demonstration of how the value being upheld is derived from the Constitution (or, for a noninterpretivist, a clearer demonstration of why the value should be upheld even if not derived from the Constitution). To realize the potential of the values approach, we need to understand more about constitutional values. We need to further investigate the values that are served by the Constitution and its structures and processes.\textsuperscript{105} We need to identify these values more clearly, to better understand how they are derived from the Constitution, and to better comprehend how they have been developed over time and may further be refined in the future. It is one thing, for example, to assert that "personal privacy" is a constitutional value; it is quite another to identify the particular aspects or zones of privacy that implicate constitutional values, to demonstrate their emanation from the Constitution, and to critique their evolution over time.\textsuperscript{106}

\textsuperscript{101} See supra notes 52-53 and accompanying text; supra note 72.
\textsuperscript{102} See supra note 62 and accompanying text.
\textsuperscript{103} See supra text accompanying notes 52-53.
\textsuperscript{104} See infra Part VI(2).
\textsuperscript{105} See Lyons, supra note 44, at 751-56.
\textsuperscript{106} Consider, for example, the Supreme Court’s performances in the line of privacy cases beginning with Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965) (finding a zone of marital privacy that encompasses the decision to use contraceptive devices in the home), and continuing through Stanley v. Georgia, 394 U.S. 557, 564-66 (1969) (first
In addition to such study of values, we must progress toward a resolution of the "interpretive"/"non-interpretive" debate if the values approach is to reach its full potential. The dichotomy that commentators have developed between interpretive and noninterpretive approaches to value questions (or between constitutional and "extra-constitutional" values) has sharpened perspectives on a central question of constitutional law. The light cast by this debate, however, is revealing a large middle ground where distinctions between interpretivism and noninterpretivism are not apparent and where the real issues concern how to interpret the Constitution, not whether to do so.

To claim this middle ground, one must affirm, as interpretivists would, that values must be derived from the Constitution; extra-constitutional values do not count. Any contrary conclusion which frees interpretation from its anchor in the Constitution would allow interpretation to drift in the currents of time and circumstance, thus undermining its stability and authoritativeness. At the same time, one must affirm, as non-interpretivists would, that constitutional values are not fixed for all time according to the dimensions they may have had at the creation of the Constitution or its amendments. As the Supreme Court has emphasized, the provisions of the Constitution "are organic living institutions [whose] significance is vital not formal [and] is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Thus constitutional values may be developed and refined over time, as interpreters encounter new circumstances and new knowledge not extant at the time of the Constitution's framing. Through the experience

amendment protects the right to receive information and ideas, regardless of their worth, and to be generally free from governmental intrusions into the privacy of one's thoughts), Eisenstadt v. Baird, 405 U.S. 438 (1972) (protection of contraceptive use is not limited to the marital relationship, but extends to the individual, married or single), Roe v. Wade, 410 U.S. 113, 152-56 (1973) (right of privacy, from wherever founded, encompasses a woman's decision whether or not to terminate her pregnancy), Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-67 (1973) (the Stanley "zone of privacy" for private thoughts exists only in the privacy of the home), and Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (right of privacy does not extend to sexual conduct between consenting homosexuals, even in the privacy of the home).

107. See supra notes 17, 65 and accompanying text.


110. See generally Bennett, supra note 26, at 461-72.
of such successive new encounters,\textsuperscript{111} and through the progress of the human mind,\textsuperscript{112} interpreters may better understand the ramifications of constitutional values and discover their previously unexplored dimensions.\textsuperscript{113} The anchor line tethering our vessel of values may thus become encrusted with layers of life experience, becoming longer and stronger due to human progress, but remaining solidly embedded in the Constitution.

Furthermore, for the values approach to realize its full potential, we must enhance our understanding of the levels of abstraction at which values may be stated. As with the historical and structural approaches, attention to this problem of abstraction or generalization is a key to effective use.\textsuperscript{114} By their very nature, values must be stated with some degree of abstraction. Values capture fundamentals, not details, and translate into general principles, not specific and narrow rules. The fundamentals captured by and principles derived from values should be sufficiently general or abstract to maintain a timeless quality, providing guidance over the long range of varying and yet-to-be-perceived conditions.\textsuperscript{115} On the other hand, constitutional values must be capable of concrete application to specific cases. Values cannot be stated so abstractly that they lose their capacity to meaningfully guide interpreters and constrain interpretive judgments. Using privacy as an illustration, to state the constitutional value simply as "personal privacy" would be overly abstract; to state it as "pri-

\begin{itemize}
\item \textsuperscript{111} Regarding judicial encounters, the Court has usefully described the process as one of examining "the underlying principle . . . in the crucible of litigation." Wallace v. Jaffree, 472 U.S. 38, 52 (1985).
\item \textsuperscript{112} In a related context, Thomas Jefferson argued [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under regimen of their barbarous ancestors. XV THE WRITINGS OF THOMAS JEFFERSON 40 (A. Lipscomb ed. 1903).
\item \textsuperscript{113} According to Justice Cardozo, "[s]tatutes are designed to meet the fugitive exigencies of the hour . . . . A constitution states or ought to state not rules for the passing hour, but principles for an expanding future." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921).
\item \textsuperscript{114} See supra note 72; notes 52-53 and accompanying text; text accompanying note 101.
\item \textsuperscript{115} Regarding the dangers of overly specific and narrow, or timebound, statements of values, see Michael H. v. Gerald D., 109 S. Ct. 2333, 2349-55 (1989) (Brennan, J., dissenting).
\end{itemize}
vacy of procreative choice,””116 or “privacy of intimate personal associations,””117 or “privacy of the home,””118 though still abstract, is much more meaningful.

5. Although the textual approach controls the other three approaches, no one of these other three—historical, structural, values—necessarily controls or has priority over the others. In practice, these approaches are often used in combination with each other and with the textual approach. The historical approach will be more pertinent in some cases than in others, depending on the extent to which the current conditions at issue are analogous to original historical practices or concerns and the extent to which an historical record of these practices or concerns may be discerned. The structural approach will be more pertinent in some cases than in others, depending on the extent to which the particular problem at issue implicates the interrelationships among elements of the constitutional structure. The values approach will be more pertinent in some cases than in others, depending on the extent to which the clause to be interpreted embodies broad value judgments—as the invitational clauses clearly do.

The numerical clauses such as those setting the minimum ages for the President,119 a Senator,120 and a Representative,121 because of the specificity of their language, illustrate the predominance of text and leave little room for other interpretive approaches. Other clauses, such as the bill of attainder clauses,122 ex post facto clauses,123 habeas corpus clause,124 and self-incrimination clause,125 whose language suggests technical meanings known to the Framers, may be interpreted with considerable reliance on history.126 For most power clauses, such as the commerce

119. U.S. CONST. art. II, § 1, cl. 5.
120. U.S. CONST. art. I, § 3, cl. 3.
122. U.S. CONST. art. I, § 9, cl. 3; art. I, § 10, cl. 1.
123. U.S. CONST. art. I, § 9, cl. 3; art. I, § 10, cl. 1.
125. U.S. CONST. amend. V.
structural considerations are particularly important due to the federalism or separation of powers contexts in which federal power issues must be considered. For a rights clause with open-textured language, such as the due process and equal protection clauses, the values approach may be predominant because the clause's language suggests but does not explicate a value whose protection is the clause's mission. In general, then, the applicability and force of particular interpretive approaches will vary with the clause at issue and the problem to be addressed. The interpreter's task is to make use of whichever approach or approaches best illuminates the problem at hand.

6. Just as there is no predetermined pecking order among the historical, structural, and values approaches, there are no crisp boundary lines separating these three approaches from one another or from the textual approach. The intent of the Framers, for instance, may be gleaned not only from historical sources but also from the clear implications of the text itself. Inferences to be drawn from the Constitution's structure may be discoverable in part from an exploration of history or from the political values that underlie the structure. Values may be identified in large part through evidence gleaned from text, history, and structure. Thus, although one approach may prove more useful than the others in a particular situation, interpreters should not apply the historical, structural, or values approaches in isolation from one another, any more than they should apply them in isolation from the text. As one commentator has remarked, "[n]o sane judge or law professor can be committed solely to one approach. Because there are many facets to a single constitutional problem and . . . many functions performed by a single opinion, the jurist or commentator uses different approaches as a carpenter uses different tools, and often many tools, in a single project."

7. There are no bright-line guides for applying any of the four interpretive approaches that would shield interpreters from exercising discretion or making value judgments. Despite the claims

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127. U.S. Const. art. I, § 8, cl. 3.
129. U.S. Const. amend. XIV, § 1.
of some originalists, there is no approach capable of deciding a range of real-life issues that can lay claim to complete objectivity or value neutrality. Thus, the lure of achieving this goal provides no basis for rejecting some approaches or embracing others. All four approaches, given their limits, are subject to some charge of subjectivity or indeterminacy; all will therefore engender some controversy because all allow some room for judgment that, in an imperfect world, may be subject to abuse.

Even the strict originalist who follows only the text and the Framers' intent makes value judgments on several levels, all of which may be influenced by the personal values of the interpreter. Since neither the Constitution's text nor its original history tells us how to interpret the Constitution, the strict originalist's decision to use only text and history as interpretive sources is the first act of judgment. Subsequently, the strict originalist encounters choices regarding the selection and weighing of historical sources— which intellectual construct of collective intent to utilize, which account of the Framers' intent to apply, and whether and how much to generalize from the specifics of text and history. All these choices require acts of judgment. Further, if these choices dissuade the originalist from limiting government power or recognizing rights, leaving these matters to the political process, yet another judgment has been made—a judgment in favor of majoritarianism over minority rights.

8. We should not be uncomfortable or surprised that constitutional interpretation inevitably involves continuous judgment, not only concerning the interpretive approaches to apply to particular issues but also concerning the competing values at stake in particular cases. As lawyers know from experience, and as legal philosophers have argued, our law is characterized by degrees of uncertainty and malleability. They have been prominent characteristics of the common law. They have been characteristics of constitutional law from the very beginning, as illustrated by the still-debated Marbury v. Madison, which recognized judicial review of congressional acts despite the absence of the practice in the constitutional text establishing the courts' powers. In the real

131. See, e.g., Fallon, supra note 2, at 1209-17.
132. See generally Lyons, supra note 44, at 91-95. Regarding the Constitution's rejection of any clear preference for majoritarianism over minority right, see S. Macedo, supra note 44, at 21-31.
133. 5 U.S. (1 Cranch) 137 (1803).
world of constitutional practice, as in Chief Justice Marshall's world, we search within the range of plausible meanings for the one answer that best responds to the totality of insights from the interpretive sources and other relevant considerations. Recognizing that "law is the imperfect creation of imperfect human beings . . . [and that] law is an art, not a science," we seek what is possible, coming as close to the ideal as we can but knowing we will never reach it.

9. As the four primary approaches to interpretation are applied over time, by courts and other official interpreters, precedents are created. These precedents, especially those of the courts, become the more concrete and more frequently utilized source of law, and the lawyer's day-to-day tools of the trade. Since precedent as a secondary interpretive source remains dependent on the primary sources for its validity, it also remains subject to overruling if on reconsideration it is found to be unsupported by the primary sources. When, however, these primary sources are used according to the interpretive approaches set out above, the conditions for overruling long-standing precedent, especially judicial precedent, rarely exist in the real world.

Most arguments suggesting the invalidity of long-standing precedent are originalist assertions that a line of precedent conflicts with a specific expressed intent of the Framers. If the role of original history is limited and a more abstract concept of Framers' intent is emphasized, as suggested above, many such originalist arguments are undercut. Other bases for overruling precedent are values arguments to the effect that a line of precedent is based on some value not found in the Constitution. Under the values approach suggested above, such arguments have force only in clear and extreme cases. This is because the values approach—and the historical and structural approaches insofar as they purport to identify values of the Framers or infer political values from the constitutional structure—view interpretation as an evolutionary process of enlightenment and refinement.

134. See infra Part VI(2).
136. See supra note 4 and accompanying text.
137. See supra Part III.
138. See supra Part V(2), (5), (6).
139. See supra Part V(4).
such a process, each new precedent need not be grounded directly and completely in the original primary sources in order to be valid. It is sufficient if each new precedent is grounded in prior precedent whose unbroken line reaches back to the primary sources. Through this line of precedent, original constitutional values are refined over time; the understanding thus gained may support new precedents in ways not always clear from the original value in its undeveloped state.\textsuperscript{141} Like the branches of a tree, which owe their life and character to their roots but are also sustained by a trunk and limbs, precedents owe their authority to their roots of primary sources but are also sustained by the trunk and limbs of earlier precedents. Like the branches of a tree, which develop and refine the tree far beyond its roots, precedents develop and refine the Constitution far beyond its original primary sources.\textsuperscript{142}

VI. IMPROVING THE PROCESS OF CONSTITUTIONAL INTERPRETATION

The constitutional interpretation process, as this Article envisions it, is the object of ongoing and escalating debate. Through this debate, the theoretical foundations of constitutional interpretation have expanded in breadth and complexity, and sometimes uncertainty. Although this Article has made suggestions for accommodation of competing viewpoints, and has sought to alleviate complexity and uncertainty, the synthesis leaves some questions unresolved and answers to others incomplete. We are not likely in the near future to achieve consensus on these remaining questions. How, then, should we respond to this situation? What can we do to capitalize on the constructive aspects of the debate—to answer some of the legitimate criticisms of interpretation, to extract more of the potential from our constitutional system, and to keep moving forward even amid disagreements concerning the ideal to which we aspire?

The first task we can undertake is to search together for the common ground in the debate and to seek reconciliation of contending viewpoints whenever appropriate. Included in the tentative conclusions about constitutional interpretation were some

\textsuperscript{141} Cf. Bennett, \textit{supra} note 26, at 474-85.

\textsuperscript{142} For an analysis of other considerations that may militate against the overruling of long-standing judicial precedent, see Monaghan, \textit{Stare Decisis and Constitutional Adjudication}, 88 COLUM. L. REV. 723 (1988).
suggestions for accomplishing this task.\textsuperscript{143} Proceeding from that base, further suggestions are set out below:

1. Although there is room for difference of opinion on interpretive approaches and their applications to particular issues, we should nevertheless recognize minimum criteria to which all constitutional interpreters are held. Interpreters should have some coherent theory or basic principles that provides a framework for their interpretation, and that addresses matters of sources and approaches. Interpreters should consistently apply their theory or basic principles and should be open to reworking them on the basis of new insights. Adherence to these minimums will maintain conditions conducive to continuing dialogue through which further insights may be born.

2. There should be increased emphasis on the need for and process of justification—the process by which constitutional interpreters justify the results that they reach in particular cases or regarding particular problems. This process of justification requires the interpreter to support his or her judgment by reference to "[normative] criteria intrinsic to the processes of constitutional decisionmaking."\textsuperscript{144} "[T]he notion of justification, as opposed to explanation, implies that the reasons supporting a decision be 'good' reasons, and this in turn requires norms or rules for determining what counts as a 'good' reason."\textsuperscript{145} Thus, to justify a decision, the interpreter must account for the primary sources of interpretation that he or she has utilized. The interpreter must also account for the following: the application and force of precedent, the factual circumstances concerning the parties, their dispute and their contending interests, the broader "constitutional facts" that illuminate the societal setting and give context to the dispute,\textsuperscript{146} any institutional considerations regarding the interpreter's role and competence within the constitutional system that influence the interpretation, and the reasoning processes by

\textsuperscript{143} See supra Part V.

\textsuperscript{144} P. Brest, supra note 5, at 3; see also Cox, Foreword to The Supreme Court 1965 Term: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 98 (1966).

\textsuperscript{145} Fiss, Foreword to The Supreme Court 1978 Term: The Forms of Justice, 93 Harv. L. Rev. 1, 13 (1979).

which these pieces are woven together to achieve the result.\textsuperscript{147} Regardless of whether the interpreter is a court, such justification should be set forth in a written opinion.

3. We should better describe and understand the external constraints on judges and other constitutional interpreters. The four interpretive approaches above, when properly understood and honored, are themselves constraints. The process of justification, resulting in written opinions available for public scrutiny, is also a constraint.\textsuperscript{148} In addition, there are and must be other conventions and official checks within our system—supportive of and often accounted for within the justification process—that inhibit interpreters from writing their own values into the Constitution and that otherwise protect interpretation from being pervasively subjective and ad hoc.\textsuperscript{149} Examples of conventions include \textit{stare decisis},\textsuperscript{150} case-by-case adjudication, the preference for disposing of cases on nonconstitutional grounds,\textsuperscript{151} the presumption of constitutionality and accompanying responsibility of measured deference to policy judgments of the political branches, and the methods of legal argument.\textsuperscript{152} The official checks are the checks and balances arising from the federal constitutional system of separated powers and the parallel state systems. To respond to critiques that constitutional interpretation is too subjective, and especially that the values approach is too subjective, further study of the roles and impact of such systemic conventions and checks is needed.

4. We should more actively seek the assistance of disciplines other than law in studying the theory and practice of constitutional interpretation. Each of the four approaches to interpretation is ripe for further study by the professionals whose expertise is most implicated. Linguists, philosophers of language, historians, political scientists, political philosophers, and moral philoso-


\textsuperscript{149} See generally Bennett, supra note 26; Fiss, supra note 4; Wechsler, \textit{The Courts and the Constitution}, 65 Colum. L. Rev. 1001 (1965).

\textsuperscript{150} See generally Schauer, supra note 21.


\textsuperscript{152} See, e.g., N. MacCormick, supra note 147, at chs. VI-VIII; see also Wechsler, supra note 16.
phers can all make important contributions. Historians, for instance, can expand our understanding of the "background assumptions" and "philosophical presuppositions" that underlie the original Constitution, the Bill of Rights, and the post-Civil War amendments. The methods of legal reasoning in constitutional cases could also be the object of further study by other disciplines; legal philosophers have performed that function for legal interpretation generally, and could enhance our understanding by further specific application of their insights to constitutional interpretation. Moreover, we need to know more about the constraints on constitutional interpreters: what constrains them, to what extent, and with what impact on the development of the law. We also need to know more about how the answers to such questions may differ depending on whether the interpreter is a court, a legislature or legislative committee, or some other government agency or official. With respect to such matters, political scientists, psychologists, sociologists, and anthropologists have important contributions to make.

The following suggestions are a package, focused more directly on the problem of value judgment in constitutional law. Insofar as value judgments may present problems of subjectivity and anti-majoritarianism, we should not respond by seeking to cleanse the process of any capacity for value judgment; such a task is fruitless, for value judgment is an inevitable and desirable aspect of constitutional law. We should instead respond by expanding and strengthening the base from which value judgments are derived. Suggestions 5 through 8 point in this direction.

5. We should seek to expand the precincts of the interpretation process. Most official interpretation in our system, historically and at present, is done by courts. Most commentators on constitutional interpretation focus on the work of the courts, yet—as discussed above—the Constitution is directed to and binding upon all branches of government, at federal, state and local levels, not just the judiciary.

Thus all government officials and all government agencies

153. See supra notes 77-78 and accompanying text.
154. For one promising new approach that may shed some light on these matters, see Bloomfield, Constitutional Values and the Literature of the Early Republic, 11:4 J. Am. Culture 53 (1988).
155. See supra note 9.
156. See supra Part II(A).
should be constitutional interpreters insofar as their official duties involve them in questions about the Constitution’s meaning. We should insist that they take responsibility for understanding and adhering to the Constitution in their daily activities. In this way, we can expand the range of viewpoints that enter the interpretation process and bring the Constitution closer to the people by bringing it closer to their representatives.

6. We should emphasize the importance of critically examining the relevant qualifications of persons who are nominated for high-level government offices, the duties of which include constitutional interpretation. The most obvious example, of course, is the appointment and election of judges—especially United States Supreme Court Justices. While it may be inappropriate for the President or the Senate to question Supreme Court candidates concerning the substantive results they would reach in particular cases, it is surely appropriate to question candidates on the process by which they would reach such results. Moreover, because value judgments are a central feature of constitutional interpretation, it is appropriate and necessary to ascertain the candidate’s capacity for long-range vision—both backward and forward—that sensitive value judgment requires.

Such questions and evaluations should also be an important focus for high-level judicial appointments throughout federal and state court systems, as well as a background for dialogue on state elections for high-level judgeships. Since interpretation is not the exclusive province of the judiciary, similar considerations should also play a role in the election and appointment of individuals to high-level political and administrative offices whose responsibilities may entail a substantial measure of constitutional interpretation.

7. Regarding the courts in particular, we can seek to broaden the perspectives that courts bring over time to interpretation. Now as in the past, judges as a group are not a representative cross-section of American society. Judges are more white, more male, and more upper-class, than society in general. Thus, if

158. See supra Part V(4).
value judgments are influenced by the life experiences of inter-
preters, we should strive through appointive and electoral pro-
cesses to have judges as a group more nearly reflect the life ex-
perience of all of American society.

8. We should seek to make constitutional law and the inter-
pretive process more accessible to those who are not experts—the
non-lawyers, the non-academicians, and citizens in general. The
Constitution emanates from and serves the People. In each gen-
eration, the citizens representing the People should contribute to an
ongoing public dialogue on the meaning of the Constitution. Each
generation’s perceptions, expressed through “interpretive com-
munities” or otherwise, and the “inner experience” of each
generation’s citizens, should help shape our understanding
of public values. To facilitate this process, we must enhance both
the opportunities for public dialogue and the capacity of the Peo-
ple to participate effectively in it.

The current debate on constitutional interpretation may not al-
ways serve these objectives. To the extent the debate takes place
on a highly theoretical level, it may be too esoteric to engage the
People; to the extent it is a debate among academic lawyers and
other academic experts, the circle may be too small to encompass
the People. We therefore need supplementary initiatives to
broaden the debate into genuine public dialogue. The suggestions
above point to some possibilities. Holding interpreters to the obli-
gation of the justification, available in written and publicly avail-
able opinions, would enhance the informational base for dia-
logue. Inviting a broader array of disciplines to contribute to the
debate would expand the circle. Extending the precincts of the inter-
pretive process beyond the courts would bring the Consti-
tution closer to the People’s representatives and thus closer to the

160. On the importance of public dialogue, see M. Tushnet, supra note 1, at 317-18;
161. See supra notes 4 and 10.
162. See D. Granfield, The Inner Experience of Law: A Jurisprudence of Subjectiv-
ity (1988).
163. Assistance from other disciplines would also be helpful in pursuing this challenge.
See supra Part VI(4). Broadcast and print journalists, mass communications experts, edu-
cators, and political scientists, among others, could make contributions. See Some Recent
164. See supra Part VI (2).
165. See supra Part VI (4).
166. See supra Part VI (5).
People. Raising questions about constitutional interpretation and constitutional values in the context of selecting judges and public officials would both inform and engage the public while providing a forum for expanded dialogue.167

VII. CONCLUSION

We now ride astride a great resurgence of interest in the process of constitutional interpretation. The debate has been extensive and complex, the disagreements have been sharp, and the uncertainties engendered by the debate have been uncomfortable. Yet there is no need to be perplexed in the face of complexity, or immobilized in the face of disagreement, or disheartened or skeptical in the face of uncertainty.

To counteract such tendencies, this Article has provided four antidotes. In a style accessible to non-experts, it has developed a synthesis and model by which the interpretive process may be better understood. It has demonstrated that there is ample common ground upon which the interpretive process rests, thus providing a more focused perspective from which to view the disagreements. It has related theory to practice by exploring the actual work of the United States Supreme Court and the practical ramifications of interpretive theory for both official and unofficial interpreters.168 Finally, it has set out some suggestions to guide future development of the interpretive process.

No matter how far into the Constitution’s future we project, the interpretive process will not yield certainty of results or unanimity of viewpoint—nor should we wish it to do so. Nurtured with the best lines of theory and the best patterns of practice, the process will yield a workable constitutional system capable of continuing incremental development. With enhanced understanding of and respect for the process, and broadened participation in it, we will progress toward fulfillment of the Constitution’s promise.

167. This may be the most valuable contribution and lesson of the Senate hearings on President Reagan’s nomination of Robert Bork to be an Associate Justice of the United States Supreme Court. See S. Exec. Rep. No. 7, 100th Cong., Sess. 1 (1987).
168. See supra notes 4 and 10 and accompanying text.