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An Analysis of Current Theories of Constitutional Interpretation

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PREFACE

I wrote this thesis as part of the requirement of the University Honors Program at Southern Illinois University. The purpose of this paper is to describe and explain the many different theories of constitutional interpretation. I have placed all theories discussed in one of two categories: interpretist or noninterpretivist. This paper also attempts to analyze the way in which these theories of constitutional interpretation are implemented by the United States Supreme Court Justices who advocate them. The conclusion which I will reach is that, while a United States Supreme Court Justice may advocate a certain theory of constitutional interpretation, the one which he actually uses in deciding constitutional issues depends upon "whose ox is being gored." Finally, a suggested model of constitutional interpretation is offered. This model is not offered as a compromise between the theories previously discussed. It is offered because it is the one that is currently being used by United States Supreme Court Justices and it seems to be working fairly well.

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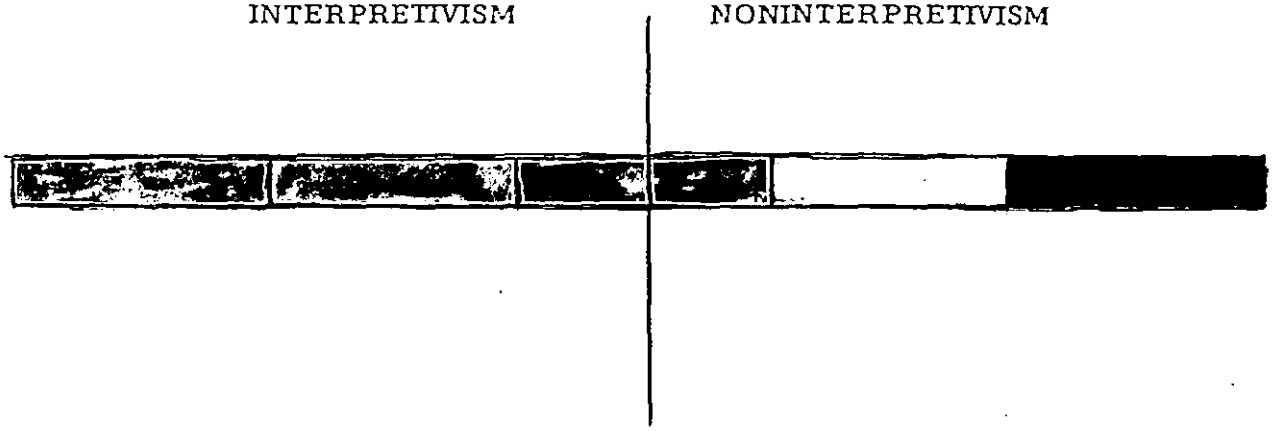
INTRODUCTION

In the field of constitutional law, there has recently been a debate over how much discretion should be afforded to judges who are interpreting the Constitution. This debate centers around the question, as phrased by Thomas C. Grey, "whether the constitutional text should be the sole source of law for the purposes of judicial review or whether judges should supplement the text with an unwritten constitution that is implicit in precedent, practice and conventional morality.[1] There are a number of approaches which address this question. These conceptions can be divided into two basic categories: interpretivism and noninterpretivism. These two categories, which have been referred to as originalism and nonoriginalism by some,[2] each have many different theories which vary according to the amount of discretion they will allow the Court in interpreting the U. S. Constitution.

For purposes of this paper the two categories will be referred to as interpretivism and noninterpretivism and all the theories which are discussed fall into one of these two major categories. For the purposes of this paper, an interpretivist shall be defined as any theorist who, "accords binding authority to the text of the Constitution or the intentions of its adopters"[3] and a noninterpretivist is defined as those who believe that, along with the constitutional text and the intentions of the Framers and ratifiers, other sources are also relevant in constitutional interpretation. A diagram which shows all of the constitutional theories discussed in this paper is included on page two.

DIAGRAM OF THEORIES



TEXTUALISM

ORIGINALISM

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INTERPRETIVISM

The proponents of the interpretivist theory, which include former Attorney General Edwin Meese, Judge Robert Bork and Raoul Berger, have reawoken this argument of constitutional interpretation by arguing that the current United States Supreme Court has overstepped its power by handing down interpretations of constitutional issues which cannot be discovered within the four corners of the Constitution.[4] The supporters of this theory, however, vary greatly in the degree of discretion they will allow courts in deciding constitutional issues.

TEXTUALSIM

The theory of constitutional interpretation which allows the courts the least amount of discretion is referred to as strict textualism by some[5] and literalism by others.[6] According to Cole, "Literalism is asserted as requiring that all constitutional interpretation consider only the text of the Constitution."[7] This theory of constitutional interpretation was explained by Mr. Justice Owen Roberts in United States v. Butler 297 U.S. 1, 56 S.Ct. 312, 318 (1936):[8]

> There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the the article of the Constitution which is invoked beside

> the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The power it has, if such it may be called, is the power of judgment.

Justice Hugo Black was also a supporter of literalism. He argued, "that judicial review is illegitimate if it is based on anything else other than the text of the constitution."[9] Black, the principal exponent of literalism, supported this theory because he believed "that this approach would curb the appetite of judges to go outside of the Constitution and impose their own preferences, dressed up either as natural law or due process."[10] He did not want judges to be able to base their decisions on such vague grounds as what is fair, reasonable, fundamental, or decent. He wanted judges to "follow what our Constitution says, not what judges think it should have said."[11] While this theory, that judges should apply only what the Constitution says and not look outside of it, may seem perfectly logical at first, it is simply not possible in most cases. Textualism works only when the constitutional provisions meaning is clear.[12] For some provisions of the Constitution, this is all that is needed. For example, the constitutional provision which states, "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[13] A statute which attempted to vary the nature of proof necessary in treason cases would clearly violate this constitutional provision.[14] Most theorists would agree that in this example, the words of the Constitution are all that should be used in deciding a case. Most problems arise in dealing with the more general provisions of the Constitution such as "due process"[15] and "equal protection".[16] It has

been recognized by most modern theorists that phrases such as these cannot be said to have one clear meaning that judges can simply apply in all cases which arise. In fact most modern scholars do not even consider literalism as a possible method of constitutional interpretation. Professor Paul Brest is quoted as saying,[17]

> I have devoted very little attention to the most extreme form of strict textualism — literalism. A thorough-going literalist understands a text to encompass all those and only those instances that come within its words read without regard to its social or perhaps even its linguistic context. Because literalism poorly matches the ways in which we speak and write, it is unable to handle the ambiguity, vagueness and figurative usage that pervades natural languages, and produces embarrassingly silly results.

ORIGINALISM

All other theories which can be placed in the interpretivism category allow the courts to look beyond the simple words of the Constitution and look to what the Framers or ratifiers intended those words to mean in order to decide a certain provisions meaning. These theories, often referred to as originalism, moderate originalism, conceptualism, or simply interpretivism, "recognize the Constitutional text as binding, but look beyond the mere textual language to the meaning that the Framers or the ratifiers intended."[18] One of the most common theories of constitutional interpretation, which is referred to as intentionalism by some[19] and originalism by others,[20] falls into this category. Brest says of this theory, "By contrast to the textualist, the intentionalist interprets a provision by ascertaining the intentions of those who adopted it. The text of the

provision is often a useful guide to the adopters' intentions, but does not enjoy a favored status over the other sources."[21] Brest supports a certain kind of intentionalism which he has developed himself and termed "moderate originalism." Under this theory, the text of the Constitution is treated as authoritative, but many of its provisions are treated as inherently open-textured."[22] He states that "the original understanding continues to be important in applying moderate originalism, however, judges are more concerned with the adopters' general purposes than with their intentions in a very precise sense."[23] Even though Brest describes "moderate originalism" as his own theory, separate from originalism, the two theories seem to overlap in many ways and both seem similar to the theory that Robert Bork advocates in his essay, "Original Intent: The Only Legitimate Basis for Constitutional Decisionmaking." In this article he states,[24]

> It is important to be plain at the outset about what intentionalism means. It is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers. In so narrow a form the philosophy is useless. Since we cannot know how the Framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.

He further states, "There is a version that is adequate to the task,"[25] and he uses a quote from Dean John Ely to demonstrate this version.[26]

> What distinguishes interpretation [or intentionalism] from its opposite is the insistence that the work of the political branches is to be invalidated only in accord with the inference whose starting point, whose underlying premise is fairly discoverable in the Constitution. That

> the complete inference will not be found there — because the situation is not likely to have been foreseen — is generally common ground.

In his article, "The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review", Erwin Chemerinsky defines three different theories which can be found to fall within the interpretivist category. The first of these theories, literalism, was already discussed above. His second theory, originalism, borrows its definition from Paul Brest who defined originalism as "any approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters."[27] This definition, which was used earlier to define the general category of interpretivism, was not used by Brest to describe a specific theory, but was instead used by him as a general heading under which he describes different methods of originalism, one of which is the one he comes to favor — moderate originalism.

Yet, Chemerinsky finds originalism, under the same defintion as used by Brest, to be different from literalism and a third theory which he called "conceptualism." This third theory seems to be very similar to the theory that Paul Brest supported as "moderate originalism." Chemerinsky says that conceptualism "requires the Court to determine the underlying purpose of a constitutional provision and to apply this purpose in developing modern governing principles."[28] He says that this differs from his theory of originalism because conceptualism does not require that the Court follow the Framers' specific intentions. Instead, the "Justices are asked to identify

the underlying "concepts" of a provision and to use it in formulating modern "conceptions" to guide decisionmaking.[29]

EVALUTION OF INTERPRETIVISM

These overlapping definitional problems make it very difficult to discuss the arguments why one interpretative theory should be favored over another. Because of this problem, and also because these theories are very similar, the arguments shall first be made for and against the originalist theory in general and then I will address the individual arguments of whether the adopters or Framers specific or general intentions should be followed.

One of the arguments used by those who argue for the originalist theory is that this theory of constitutional interpretation was intended in the Constitution. Clifford Wallace, in his article, "Interpreting the Constitution: The Case for Judicial Restraint," argues that the Framers recognized the importance of interpreting the Constitution according to original intent. He quotes Madison as saying, "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, [nor] for a faithful exercise of its powers."[30] Wallace further argues that originalism was intended by the Framers by quoting Jefferson as saying, "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption — a meaning to be found in the explanations of those who advocated . . . it."[31]

Those who oppose originalism argue that the Framers did not include in the Constitution any rules as to how it should be read, so it cannot

be assumed that they felt that it should be interpreted in an originalist manner. They argue that even if it can be proven that some Framers did support original interpretation, it cannot be assumed that all of the Framers intended this or that all of the adopters of the Constitution even considered how the document would be interpreted. Professor Paul Brest in his article "The Misconceived Quest" argues:[32]

> The practice of statutory interpretation from the 18th through at least the mid-19th century suggests that the adopters assumed — if they assumed anything at all -a mode of interpretation that was more textualist than intentionalist. The plain meaning rule was frequently invoked; judicial recourse to legislative debates was virtually unknown and generally considered improper. Even after reference to extrinsic sources became common, courts and commentators frequently asserted that the plain meaning of the text was the surest guide to the intent of the adopters. This poses obvious difficulties for an intentionalist whose very enterprise is premised on fidelity to original understanding.

Professor Cole also points out that at the time the Constitution was drafted judicial interpretation was more textualist than intentionalist. He states, "It would appear, therefore, that a strong case could be made for the proposition that the Framers and ratifiers did not intend that the Constitution be interpreted in accord with any particular meaning of the drafters."[33] He further states that "the Framers' use of broad, general terminology in both the Constitution and the Bill of Rights would seem to strenghten this proposition."[34]

A second argument that is used by advocates of originalism is that because they are considering the intentions of those who framed and ratified the Constitution, this method of judicial review is compatible with democratic theory while noninterpretivists theories are not. Many judges and scholars have argued that the principle of majority rule is sacrificed if judicial decisions are based upon values that are not stated or implied in the Constitution. They claim that democracy requires unelected judges to defer to the decisions of popularly elected officials unless there is a clear violation of rights protected by the Framers of the Constitution.[35]

Supporters of originalism also argue that using the Constitution and the intentions of its Framers does not violate democracy because it was ratified by over a majority of all Americans and in modern times all Americans have given their consent to the Constitution as it is by living under the Constitution as it is and not changing it. This argument, often called the argument from contract, states that "the Constitution of the United States is understood as a sort of (social) contract (1) between the states and the national government, (2) among the three branches of the national government, and (3) between the people and those who govern them."[36] Thomas Grey, in his article "Do We Have an Unwritten Constitution?" says of the originalist theory (as supported by Meers, Bork, Linde and Ely)[37]

> The chief virtue of this view is that it supports judicial review while answering the charge that the practice is undemocratic. Under the pure interpretive model, when a court strikes down a popular statute or practice as unconstitutional, it may always reply to the resulting public outcry: 'We didn't do it — you

> did." The people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.

Michael Perry, in his article, "The Authority of Text, Tradition and Reason: A Theory of Constitutional Interpretation," says that these two arguments, the argument from contract and the argument from democracy, are two separate arguments and "to succeed (or fail) in meeting one does not entail success (or failure) in meeting the other."[38] He makes this point by saying:[39]

> The issue of 'activist' or 'nonoriginalist' judicial review and democracy might engage even in a society without a written constitution and therefore without ratifiers, if that society (1) is committed to democratic government but (2) has an electorally unaccountable judiciary that opposes itself, in the name of some 'fundamental' but unwritten law, to the electorally accountable branches of government. By contrast, the argument from contract is available only in a society, like ours, with a written constitution (and therefore Framers). The success or failure of the argument from democracy depends upon which conception of democracy one wishes to employ. . . To presuppose the authoritative status of a particular conception is to beg the question. One must argue for a particular conception. (To argue for a particular conception of democracy, of judicial role within the overall governmental apparatus, is to argue for a particular conception of constitutional text and interpretation, namely, the conception entailed by the judicial role in question.)

Perry also says of the argument from contract,[40]

> The argument from contract is predicated on the originalist conception of the text.

> Again, however, that conception of the text is not axiomatic for the American political tradition. Any conception of the text must be defended; an argument in support of the originalist conception that proceeds by reference to the ratifiers' understanding is, of course, question-begging.

Perry goes on to conclude that "the argument from contract, like the argument from democracy, reduces to whatever contingent, speculative, provisional, and revisable arguments can be given in support of the originalist conception of constitutional text and judicial role."[41]

Another problem pointed out by opponents of originalism is: whose intent is relevant for the purposes of this interpretive theory, the Framers' or the ratifiers'?[42] The Constitution makes its own adoption contingent on "The Ratification of the Conventions of nine states . . . ."[43] Thus it would seem that the intent of the state conventions would be relevant to the originalists in the application of their interpretive theory. This same principle would also seem to apply to Constitutional amendments because as the Constitution states:[44]

> The Congress. . . shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislature of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress.

John Hart Ely also recognizes the problem of determining whether the Framers' or the ratifiers' intent is relevant. In his article "Constitutional

Interpretivism: Its Allure and Impossibility", he states,[45]

> Congress' role in the process of constitutional amendment is solely, to use the Constitution's word, one of 'proposing' provisions to the states: to become law such a provision must be ratified by three quarters of the state legislatures. Now obviously there is no principled basis on which the intent of those voting to ratify can be counted less crucial in determining the 'true meaning' of a constitutional provision than the intent of those who proposed it.

John Hart Ely also recognizes the difficulty in ascertaining the intentions of the ratifiers. He goes on to state:[46]

> That, however, gets to be so many different people in so many different circumstances that one cannot hope to gather a reliable picture of their intentions from any perusal of the legislative history. (To complicate matters further, state ratification debates, assuming there are debates often are not even recorded.) Thus the only reliable evidence of what 'the ratifiers' thought they were ratifiying is obviously the language of the provisions they approved. The debates (or for that matter other contemporary sources) can serve the 'dictionary function' of resolving ambiguities . . . but that function fulfilled, the critical record of what was meant to be proposed and ratified is what was proposed and ratified.

Other evidence given to support the theory that the intentions of the ratifiers should be given priority over the intentions of the Framers' is given by Cole in his article, "Constitutional Interpretation: A Bicentennial Reflection." In this article he quotes a passage from a letter from James Madison to Andrew Stevenson which states, "I cannot but highly approve

the industry with which you have searched for a key to the sense of the Constitution, where alone the true one can be found, in the proceedings of the Convention, contemporary [sic] expositions [The Federalist] and, above all, in the ratifying conventions of the States."[47] From this and other evidence, Cole goes on to conclude that, "[i]t would certainly appear that the originalism which looks beyond that which was proposed and ratified, would require one to look to the ratifiers' intent, not the Framers' intent. Certainly, both the constitutional text and the commentators' comments indicate that the ratifiers' intent is to be preferred over that of the Framers."[48]

If it is the ratifiers' intent which is relevant rather than that of the Framers, this poses an even bigger problem for originalists. How is the relevant intent to be discovered, assuming it is discoverable? Cole points out a major problem this presents for the originalist theory by stating, "in order for originalism to be a viable interpretive theory, evidence of a firm intent must be available, the evidence must be sufficient to render the interpretation of 'intent' credible. Furthermore, the 'intent' must distinguish adequately between the adopters' personal views about an issue and their intentions concerning its constitutional resolution."[49]

Paul Brest, in his article "The Misconceived Quest", argues that under the theory which he calls intentionalism, it is the adopters' intentions which must be ascertained in order to interpret the Constitution. In defining who the adopters were, Brest states,[50]

> The adopters of the Constitution of 1787 were some portion of the delegates to the Philadelphia Convention and majorities

> or supermajorities of the participants in the ratifying conventions in nine states. For all but one amendment to the Constitution, the adopters were two-thirds or more of the members of each House of Congress and at least a majority of the state legislatures.

He further states,"For a textual provision to become part of the Constitution, the requisite number of persons in each of these bodies must have assented to it. Likewise, an intention can only become binding — only become an institutional intention — when it is shared by at least the same number of adopters."[51] Brest goes on to explain that, "if the only way a judge could ascertain institutional intent were to count individual intention-votes, her task would be impossible . . . . Therefore, an intentionalist must necessarily use circumstantial evidence to educe a collective or general intent."[52] Brest goes on to explain how interpreters often treat the writings or statements of the Framers of a provision as evidence of the adopters' intent. Of this method he says, "This is a justifiable strategy for the moderate originalist who is only concerned with the Framers' intent on a relatively abstract level of generality — abstract enough to permit the inference that it reflects a broad social consensus rather than notions peculiar to a handful of the adopters. It is a problematic strategy for the strict originalist."[53]

Cole is also aware of this problem. In the same essay which was quoted above, he states,[54]

> Assuming that it is possible to distinguish between an adopter's personal views and his intentions concerning the constitutional resolution of the issue, which is doubtful when one recognizes the political nature of such intentions

> and decisions, some commentators would then require the interpreter to resolve the issue based on what the adopter would have done if faced with a modern-day problem — a problem which could not have been imagined in the world of the adopter.

Cole goes on to explain that other definitions of moderate originalism or originalism would limit the interpreter to interpretive events and transactions with which the adopter was familiar. To illustrate that result of such a theory Cole quotes Professor Brest as saying "[e]ven if such an approach were coherent . . . it would produce results that even a strict intentionalist would likely reject: Congress could not regulate any item of commerce or any mode of transportation that did not exist in 1789; the first amendment would not protect any means of communication not then known."[55] Cole goes on to state that "Brest argues that a more coherent position regarding 'when' the adopters' intent must be ascertained requires that such intent be translated to address contemporary problems.[56] Cole quotes Brest as saying, "[w]hen the interpreter engages in this sort of projection she is in a fantasy world more of her own than of the adopters' making."[57] Cole goes on to conclude that, "[i]t certainly must be recognized that with this theory of interpretation as defined by Professor Brest, substantial subjective discretion will be exercised by the interpreter in translating the adopters' intent."[58] So that even though proponents of originalism may argue that their theory of judicial review is justifiable because they are following the adopters' intent, this still leaves the door open for the Court to interject its own personal view.

NONINTERPRETIVISM

The recent dispute between former Attorney General Meese

and Supreme Court Justice Brennan has rehashed the longstanding argument between interpretivists and noninterpretivists. Justice Brennan says of the interpretivist argument,[59]

> There are those who find legitimacy in fidelity to what they call 'the intentions of the Framers.' In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effecacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked with humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principles to specific, contemporary questions.

Brennan goes on to advocate the noninterpretive model by saying,[60]

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our times. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.

Noninterpretivism, like interpretivism, also contains many different theories. Noninterpretivists all believe that, along with the

constitutional text and the intentions of the Framers' and ratifiers', other sources are also relevant in constitutional interpretation. These theories also vary according to the amount of discretion that the court is allowed in interpreting the Constitution.

CONCEPTUALISM

Conceptualism, a theory which was discussed earlier, may be seen as being on the borderline between interpretivism and noninterpretivism. As was stated earlier, this theory "requires the Court to determine the underlying purpose of a constitutional provision and to apply this purpose in developing modern governing principles."[61] This theory is also referred to as "moderate originalism." In discussing the problem with the interpretive model of discerning the intentions of the Framers', it was pointed out that this is less of a problem for the conceptualist theory than for the originalist theory because this theory allows the Court to "determine an underlying concept for the textual provision and to apply that concept as 'Twentieth Century Americans.'"[62] While this aspect of conceptualism may make it easier to solve the problem of determining the adopters' intentions, it creates another problem. Because conceptualism is indeterminate, "it allows judges to interpret open-ended constitutional provisions to establish concepts which may be effected by the judges' predilections."[63] Conceptualism must be considered to be on the borderline between interpretivism and noninterpretivism because it deals with the general concepts intended by the adopters and applies them to todays modern problems. This mix on interpretivism and noninterpretivism is illustrated

by a quote from Professor Brest.[64]

> The moderate originalist acknowledges that the text and original history are often indeterminate and that the elaboration of constitutional doctrine must often proceed by adjudication based on precedent, public values and the like. But adjudication may not proceed in the absence of authorization from some original source, and when the text or original history speaks clearly it is binding.

Conceptualism as a theory of constitutional interpretation is obviously very popular among modern theorists. It answers the question posed to originalists, how are the adopters' intentions to be ascertained? Yet it does not allow courts total discretion in deciding constitutional issues because as pointed out above in the quote from Paul Brest "adjudication may not proceed in the absence of authorization form some original source."[65]

FUNDAMENTAL LAW

Some nonoriginalists feel that the Court should not be limited in their interpretation to the text of the Constitution and the basic concepts which were envisioned by its adopters'. Grey and Jacobsohn, for example, claim that " the natural rights tradition of the 18th century created a reservoir of legally binding principles that could be drawn upon by judges as an unwritten constitution, supplementary to the written one."[66] Thomas Grey, in his article "Do We Have an Unwritten Constitution?" explains this view by stating, "it does not deny that the Constitution is a written document, expressing some clear and positive restraints upon governmental power. Nor does it deny that part of the business of judicial review consists

of giving effect to these explicit commands."[67] He goes on to explain that "[w]here the broader view of judicial review diverges from the pure interpretive model is in its acceptance of the court's additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."[68]

Grey and others argue that this is the method of constitutional interpretation which is currently being used by the United States Supreme Court to decide many recent constitutional issues including the recent abortion cases and it seems to be working fairly well. Grey goes on to argue that if the Court were to actually employ a pure interpretive model, many long established individual rights would no longer exist. Grey states:[69]

> there is serious question how much of the law prohibiting state racial discrimination can survive honest application of the interpretive model. It is clear that the equal protection clause was meant to prohibit some forms of discrimination, most obviously those enacted in the Black Codes. It is equally clear from legislative history that the clause was not intended to guarantee equal political rights, such as the right to vote or to run for office, and perhaps including the rights to serve on juries.

Grey also states that under the interpretive model, "modern applications of the Bill of Rights based on their capacity to grow or develop with changing social values would have to be discarded."[70] Grey goes on to conclude that, "it should be clear that an extraordinarily radical purge of established constitutional doctrine would be required if we candidly and consistently applied the pure interpretive model."[71]

Louis Fisher points out that this idea of fundamental law has been recognized by many Supreme Court Justices. He quotes Chief Justice Marshall's statement in Fletcher v. Peck in which he stated that "there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded."[72] Fisher also quotes Justice Johnson in the same case as saying, "I do not hesitate to declare, that a state does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things, a principle which will impose laws even on the Deity."[73] From this it is clear that principles of "fundamental law" have been applied by certain Justices in some cases and as Grey states it is also quite possible that if "fundamental law" had not been applied and the pure interpretive model had, rights that are now taken for granted would have never been recognized.

SYMBOLISM

The same overlapping definitional problem which was noted in discussing the interpretivist theories is also encountered in discussing the noninterpretivists theories. The third theory of noninterpretivism seems to be very similar to the fundamental law theory, but it seems to give the court even more discretion in deciding constitutional issues. Symbolism is broadly defined as "a theory of constitutional interpretation that allows the Court to utilize fundamental aspirations of American history and tradition (as 'found' by the Court) in determining the constitutionality of actions of the government's political branches."[74] The main proponent of symbolism, Professor Michael Perry, asserts this theory as follows:[75]

> Just as there is not plausible textual or historical justification for

> noninterpretive review, there is likewise no airtight textual or historical justification of most interpretive review. There is, however, a compelling functional justification for interpretive review — specifically, a justification based on the function the practice serves in our system of government. If noninterpretive review also serves a crucial governmental function that no other practice can realistically be expected to serve, and serves it in a manner that accommodates the principle of electorally accountable policymaking, that function constitutes the justification for the practice. Noninterpretive review involves the definition, elaboration, and enforcement of values beyond merely those constitutionalized by the Framers . . . It is the function of deciding what rights, beyond those the Framers' specified, that individuals should and shall have against the government.

Three noninterpretive theories, which are defined by Chemerinsky in his article which was cited earlier, are all very similar to the broad definition of symbolism which is used by Professor Perry. The first of these is "cultural values" which "requires the Court to use basic social values not expressed in the constitutional text as the basis for constitutional interpretation."[76] As Cole says, "[t]his indeterminate theory of interpretation places no meaningful limitation upon the Court's discretion in that cultural values can be identified to support almost every conclusion."[77]

A second theory similar to symbolism which Chemerinsky describes and which is also supported by John Ely, is "process-based modernism." This theory "permits the Court to decide cases on the basis of contemporary

values, but limits such discretion to improving the process of representation or adjudication."[78] Chemerinsky explains that under this theory "the Court is obligated to use the originalism paradigm except for matters that relate to fair processes of government. In this area, the Court may act on norms not mentioned in the Constitution or intended by the Framers."[79] Cole points out a major problem with this theory by stating, "[o]ne should recognize, however, that a broad judicial interpretation of "fair process" would serve to give extensive discretion to the interpreter."[80]

The third theory identified by Chemerinsky which can also be seen as having characteristics similar to symbolism is "open-ended modernism." Open-ended modernism allows the Court "to interpret all constitutional provisions on the basis of contemporary values that the Justices regard as worthy of constitutional protection. The only limit under this approach is that the Court may not act contrary to the text of the Constitution."[81] Under this theory "[t]he Court is accorded great discretion in determining which values are so important that they should be constitutionalized and therefore immunized from majority pressures."[82]

All of these theories, which can be grouped under the general heading of symbolism, allow the Court to interpret the broad provisions of the Constitution, the ones which Perry states have "symbolic meaning" to fit our modern society and changing cultural values. But many argue that decisions of this nature should be left up to the electorally accountable officials. Perry says in response to the claim that his theory is undemocratic, "we should not assume that the value of electoral policymaking is more

desirable than other fundamental values — for example, protection of individual rights."[83]

The many different theories of constitutional interpretation range from allowing the Court to use the Constitution only and no external materials to allowing the Court to basically ignore the Constitution and to decide constitutional issues solely in terms of our modern societal values. While neither of these theories is likely to ever actually be implemented by the Court, the way in which the Court decides constitutional issues is likely to vary greatly according to what theory they use in their interpretation. And the theory which they use in their interpretation is also likely to vary as it has in the past. As Cole quotes Professor Perry as saying, "[c]onstitutional theory is, alas, an inconclusive enterprise . . . . The issue of judicial review can be settled only tentatively — never for all time."[84]

CONSTITUTIONAL THEORIES IN PRACTICE

In considering interpretivism and noninterpretivism as viable theories of constitutional interpretation, it is important to consider how each theory is implemented by the United States Supreme Court Justices. Craig R. Ducat, in his book Modes of Constitutional Interpretation, defines three different approaches which the Court can take in interpretive constitutional issues: absolutism, balancing of interests and preferred freedoms. The first of these modes, absolutism, is the traditional theory of judicial review which was articulated by Chief Justice Marshall in Marbury v. Madison. At the heart of the absolutist tradition is the concept of Rule

of Law. Ducat states, "Rule of Law mandates the decision of controversies objectively according to general, impartial, and fixed rules which do not acknowledge the individual identity of or personal consequences for particular litigants before a court."[85] Ducat further states, "[t]he keystone in the representation of judicial decision-making, offered by the Rule of Law tradition, is the firm belief that judges merely apply law, they do not make it."[86]

Justices who support the textualist approach in interpreting the Constitution will be most likely to employ the absolutist mode of constitutional interpretation. This can be illustrated by reviewing a portion of the quote from Mr. Justice Roberts in United States v. Butler which was cited earlier:[87]

> There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down.

Justices who follow originalism in its strictest form also use the absolutist mode of constitutional interpretation. Those who use a strict originalist appproach to interpreting the Constitution believe that the intentions of the Framers, when they speak clearly, must be followed in order to properly interpret the Constitution. This belief, if followed by Justices, would mandate the use of the absolutist mode of interpretation. Craig Ducat points out in his essay "Constitutional Interpretation" that two tools of

constitutional interpretation that are used by the absolutists are the "plain meaning rule" and the "intentions of the Framers." He states:[88]

> The former signifies the notion that the words of the Constitution are to be taken at face value and are to be given their 'ordinary', 'accepted' meaning; the latter requires fidelity to what those who wrote the Constitution intended its provisions to mean. By relying upon these two tools, advocates of the traditional theory of constitutional interpretation seek to constrain the judges to act onlyas faithful conduits of the document and thus effect the reality of constitutional rather than judicial supremacy.

The second mode of constitutional interpretation described by Ducat is the balancing of interests approach. Justices who use this approach believe that courts are political institutions. For the interest balancer, every case presents a conflict of competing social interests among which a choice must be made. Under this approach, "a statute is presumed to be constitutional which means that the burden of proof rests on the attacking party. The burden can be successfully discharged only by showing that the law in question is unreasonable; that is, the enactment is arbitrary, capricious, or patently discriminatory.

Many modern judges and scholars, such as William Rehnquist, Robert Bork and Raoul Berger, claim to follow this mode of constitution interpretation and also claim to support originalism. They state that "democracy requires unelected officials to defer to the decisions of popularly elected officials unless ther is a clear violation of rights protected by the Framers of the Constitution."[89] Following this premise it can be assumed that judges who advocate an originalist theory of constitutional interpretation

would follow a interest balancing mode of constitutional interpretation.

The next mode of constitutional interpretation which Ducat describes is the preferred freedoms or strict scrutiny approach. This approach was developed because of a major problem with the interest balancing approach — the problem of permanent minorities. The interest balancers' "regard for all social interests as pretty much equal and interchangeable and its ready application of the maximizing criterion resulted in what critics saw as the exploitation of vulnerable minorities by a persistent majoritarianism."[90] Under this theory all statutes are not presumed to be constitutional. Instead the Court applies a 3-part test which is set out as follows:[91]

1. Where legislation abridges a preferred freedom on its face, the usual presumption of constitutionality is reversed; that is, legislation directly infringing a fundamental freedon is assumed to be constitutional until the government demonstrates otherwise.
2. the government must show that exercise of a fundamental freedom presents a clear and imminent danger; or, in other words, the state must establish that the legislation advances a "compelling interest."
3. The legislation must be narrowly drawn so as to present a precise response to the problem, and must not impair basic liberties by its overbreadth; that means, the regulatory policy at issue must constitute the least restrictive alternative.

Justices who follow a preferred freedoms approach would seem

most likely to be advocates of the symbolism theory as defined by Perry under which certain provisions of the Constitution have "symbolic meaning." This mode of constitutional interpretation is also likely to be used by Justices who support the fundamental law theory of interpretation described earlier because this theory acknowledges "the Court's additional role as the expounder of basic national ideals of individual liberty and fair treatment."[92] It seems that a Justice who believed this would be in favor of allowing the Court to establish certain "fundamental freedoms" that are favored over other freedoms. This theory would probably also be used by Justices who advocate John Ely's theory — process-based modernism because this theory "permits the Court to decide cases on the basis of contemporary values, but limits such discretion to improving the process of representation of adjudication"[93] Also, under the preferred freedoms approach the "preferred freedoms" obtain their status from immediate association with the maintenance of the democratic process."[94]

From this it would seem fairly easy to figure out what constitutional theory a Justice follows if you know what mode of constitutional interpretation he uses or to figure out what mode he will use in deciding a particular constitutional issue if you know what constitutional theory he advocates, but this is not always the case. As Phelps and Gray point out in their "The Jurisprudence of Willliam Rehnquist: The Relevance of Constitutional Theory," there are two kinds of constitutional theory. There is a substantive understanding of what the Constitution means and there is an instrumental, or interpretive theory of how one should go about ascertaining the Constitution's meaning. As

Phelps and Gray state:[95]

> The two kinds of theory are different, though they need not be mutually exclusive. A Justice might decide constitutional cases in decidedly atheoretical ways, being neither coherent in substance nor consistent in the mode of interpretation. Or a Justice might have a very coherent substantive understanding of the Constitution, yet not incorporate any consistent interpretive approach in arriving at his or her conclusions. 'Strong' constitutional theory, however, requires that a Justice not only develop a firm, sure sense of what the Constitution means, but also be able to ground any conclusions in a well-articulated interpretive theory. Such a theory of the Constitution is 'strong' because its interpretive validity reinforces its substantive conclusions.

Phelps and Gray contend that while William Rehnquist's opinions have very coherent substantive conclusions, he does not follow a coherent interpretive theory. They allege that while Rehnquist alleges he follows the originalist theory, a theory which closely resembles the theory they term the historical argument, his opinions use argument from all five of the different interpretive theories they define.

The five different categories of interpretive theory which Phelps and Gray use in their study are textual argument, historical argument, structural argument, doctrinal argument and extrinsic argument. They state that the "[t]extual argument takes as its authority the Constitution itself and grounds itself in the 'plain meaning of the words'."[96] This textual argument is identical to the theory of textualism defined earlier. Their theory of historical argument is also similar to the theory of originalism defined

earlier. This theory "maintains that the historically demonstrable intentions of the Framers should be binding on contemporary interpreters of the Constitution."[97] The structural argument defined by Phelps and Gray "gives substantial deference to the text and history of the Constitution. But instead of focusing on the meaning of isolated words and phrases of the Constitution, a structuralist would be more interested in the overall design and purpose of the constitutional enterprise."[98] The doctrinal argument, as defined by Phelps and Gray, "largely ignores the text of the Constitution and the intentions of the Framers. Doctrinal argument derives from a commitment to the rule of law — a rule of law constructed from the body of past judicial decisions."[99] Finally, the extrinsic argument "allows a Justice to stray farthest from the constitutional text in justifying his opinion. Advocates of extrinsic argument believe that constitutional jurisprudence is principally concerned with allocating values."[100]

In conducting their study, Phelps and Gray analyzed every paragraph of every opinion Rehnquist wrote in constitutional cases from 1973 to 1978. In this study, three coders were to independently assign each paragraph from these opinions to one of seven cateogries. Five of these categories are the five different interpretive theories which have already been discussed. The sixth category, statement of facts, is to "include paragraphs that discuss the facts of the case and its litigation history."[101] The seventh category, nonconstitutional argument, should "include arguments and discussions that are unrelated to the constitutional matters at hand. These paragraphs might deal with matters of statutory construction, or rules of procedure, or administrative law."[102]

This study by Phelps and Gray provides some surprising results. For example, "Rehnquist's constitutional rhetoric is grounded to a great extent (73.2%) upon doctrinal authority.[103] While this is very much in keeping with the balancing of interests approach, it contradicts his own assertions that "precedent ought not to prevail when the text, history, or structure of the Constitution indicate otherwise.[104] Another surprising finding made by Phelps and Gray is that "Rehnquist seems remarkably unwilling to use textual, historical, or structural argument to any great degree."[105]

It is very surprising that Rehnquist used these three theories all together barely 10 percent of the time in the constitutional opinions covered in this study. The two other arguments, doctrinal and extrinsic, are used by Rehnquist nearly 90 percent of the time. It is very surprising that Rehnquist, an avid supporter of originalism, would be deciding cases on the basis of these two arguments rather than the three that more closely resemble the type of interpretive theory which he says he uses.

Explanations for these results that were offered by Phelps and Gray are first of all that "as the corpus of Supreme Court decisions on constitutional matters has expanded the range of opportunities for Justices to engage in constitutional entrepreneurship has narrowed."[106] They state also that possibly "this particular mix of cases did not focus on the core of Rehnquist's constitutional values, therefore not engaging his constitutional theory."[107] Neither of these seem like valid explanations for the grave disparity between the theory of constitutional interpretation which

Rehnquist says that he supports and the approach of constitutional interpretation he actually uses. The second explanation offered by Phelps and Gray is highly unlikely since they analyzed all 135 opinions which Rehnquist wrote in constitutional cases from the beginning of the 1973-74 Supreme Court Term to the end of the 1977-78 Term.[108] What seems much more likely is that Rehnquist does not actually incorporate the theory of constitutional interpretation which he allegedly supports. Therefore, while the constitutional decisions he reaches may be coherent, the approach which he uses in interpreting the Constitution is not.

Another example of a Supreme Court Justice whose theory was not congruent with his practice was Mr. Justice Black. Black is often noted for saying "freedom of speech is absolute" but "the cumulative effect of his time, place and manner qualifications on speech -- the factors which add something to 'speech' so that it becomes 'conduct' — shrink the scope of protected expression to a remarkable degree."[109] Also as Louis Fisher points out about Mr. Black,[110]

> He urged us to 'follow what our Constitution says, not what judges think it should have said.' But the Constitution says nothing about an indigent's right to counsel, segregated housing, segregated schools, or many other issues that Black agreed to decide. Although he spoke the language of a literalist, at the same time he fought vigorously for the incorporation doctrine, which now applies most of the National Bill of Rights to the states. Like other judges, Black looked outside the Constitution for guidance.

As these two examples indicate even Supreme Court Justices

who seem to follow a very coherent method of constitutional interpretation may not always practice what they preach. So the particular constitutional theory which a Justice advocates may not be the one which he actually implements in all cases and the way in which constitutional issues are decided probably has more to do with "whose ox is being gored"[111] than the Justices' views on how the Constitution should be interpreted.

A SUGGESTED MODEL FOR CONSTITUTIONAL INTERPRETATION

I have pointed out many different interpretive and noninterpretive theories and have also pointed out certain defects in all of these theories. So, what theory should be followed in deciding constitutional issues? I suggest that no one theory should be followed. Since the Constitution contains some provisions that speak very specifically and some provisions that speak very generally, different approaches in constitutional interpretation are needed in different circumstances.

I believe that the Court should follow a model similar to the one suggested by Charles Cole at the end of his article "Constitutional Interpretation: A Bicentennial Reflection." This theory satisfies the need for a balanced approach to constitutional interpretation.

According to this theory, "[w]hen the Court deals with the Constitution's definitive provisions, the text is determinate and should be supremely authoritative."[112] In these circumstances the Court would employ the textualist theory described earlier.

Next, in dealing with the more general provisions of the Constitution and where the text is not determinate, "[t]he interpreter should not look within himself to interpret the provision but should seek to ascertain

the adopters' intent."[113] This inquiry should consider both the Framers' and the ratifiers' intent, with emphasis, where possible on the ratifiers' intent. "The Framers' and/or ratifiers' intent should consider contemporary circumstances in the interpretive process, whether the interpreter is concerned with the commerce clause or individual rights."[114] The difficult if not impossible task is obtaining the ratifiers' group intent.

This difficult task poses a serious problem in the application of original intention. In the words of Justice Brennan, "[i]nterpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized."[115]

The essential question involved, which was pointed out earlier but has not been completely answered is this: how much discretion should the Court have in interpreting the Constitution?[116] If the Court employs a theory which goes beyond the text of the Constitution and the specific intentions of its Framers, which I believe is necessary in properly interpreting the Constitution in modern times, then it is important that this theory grant the Court as little discretion as possible.

Professor Perry's theory, symbolism, allows the Court "to utilize fundamental aspirations of American history and tradition."[117] On the other hand, conceptualism, a theory which was also discussed earlier, recognizes that "adjudication may not proceed in the absence of authorization from some other original source, and when the text or original history speaks clearly, it is binding."[118]

Although some theorists criticize those who offer a balanced model which falls between textualism and symbolism, this model is not offered as a compromise. It is offered because it is the one that the Court generally uses and must use. Textualism and originalism are not always consistent with the needs of an enduring Constitution.[119] Symbolism and fundamental rights allow the Court in many instances to ignore the Constitution. But conceptualism is a theory which has worked and will continue to do so. "An honest, straightforward application of conceptualism will gain respect for the Court — Not diminish it."[120]

ENDNOTES

[1]Thomas C. Grey. "The Constitution as Scripture," Stanford Law Review 37 (November 1984): 1.

[2]Paul Brest, "The Misconceived Quest for Original Understanding," Boston Law Review 60 (March 1980): 204.

[3]Darrell McGraw, "The Role of Original Intent in Reading a Two Hundred Year Old Constitution," West Virginia Law Review 90 (Fall 1987): 19.

[4]Louis Fisher, "Methods of Constitutional Interpretation: The Limits of Original Intent," Cumberland Law Review 18 (Winter 1988):45.

[5]Charles D. Cole, "Constitutional Interpretation: A Bicentennial Reflection," Cumberland Law Review 18 (Winter 1988): 9.

[6]Erwin Chemerinsky, "The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review," Texas Law Review 62 (April 1984): 1234.

[7]Cole, "Constitutional Interpretation,"1.

[8]United States v. Butler, 297 U.S. 1, 62-63, 56 S.Ct. 312, 318.

[9]Fisher, "Methods of Constitutional Interpretation," 45.

[10]Fisher, "Methods of Constitutional Interpretation," 45.

[11]Fisher, "Methods of Constitutional Interpretation," 45-46.

[12]Cole, "Constitutional Interpretation," 6.

[13]Cole, "Constitutional Interpretation," 10.

[14]Cole, "Constitutional Interpretation," 10

[15]U.S. Constitution, amend. V. sec. 1

[16]U.S. Constitution, amend. XIV, sec. 1

[17]Brest, "The Misconceived Quest," 222.

[18]Cole, "Constitutional Interpretation," 13.

[19]Brest, "The Misconceived Quest," 209.

[20]Cole, "Constitutional Interpretation," 13.

[21]Brest, "The Misconceived Quest," 209.

[22]Brest, "The Misconceived Quest," 223.

[23]Brest, "The Misconceived Quest," 223.

[24]Robert Bork, "Original Intent: The Only Legitimate Basis for Constitutional Decision-making," The Judge's Journal 26 (Summer 1987): 14.

[25]Bork, "Original Intent," 15.

[26]Bork, "Original Intent," 15.

[27]Chemerinsky, "Asking the Wrong Question," 1234.

[28]Chemerinsky, "Asking the Wrong Question," 1234.

[29]Chemerinsky, "Asking the Wrong Question," 1235.

[30]Clifford Wallace, "Interpreting the Constitution: The Case for Judicial Restraint," Judicature 71 (August-September 1987): 82.

[31]Wallace, "Interpreting the Constitution," 82.

[32]Brest, "The Misconceived Quest," 215-216.

[33]Cole, "Constitutional Interpretation," 18.

[34]Cole, "Constitutional Interpretation," 18.

[35]Chemerinsky, "Asking the Wrong Question," 1208.

[36]Michael J. Perry, "The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation," Southern California Law Review 58 (January 1985) 583.

[37]Thomas C. Grey, "Do We Have an Unwritten Constitution?" Stanford Law Review 27 (February 1975): 705.

[38]Perry, "Text, Tradition, and Reason," 584.

[39]Perry, "Text, Tradition, and Reason," 583.

[40]Perry, "Text, Tradition, and Reason," 586.

[41]Perry, "Text, Tradition, and Reason," 587.

[42]Cole, "Constitutional Interpretation," 14.

[43]U.S. Constitution, art. VII

[44]U.S. Constitution art. V

[45]John Hart Ely, "Constitutional Interpretation: Its Allure and Impossibility," Indiana Law Journal 53 (Spring 1978): 419.

[46]Ely, "Allure and Impossibility," 419.

[47]Cole, "Constitutional Interpretation," 16.

[48]Cole, "Constitutional Interpretation," 16.

[49]Cole, "Constitutional Interpretation," 16.

[50]Brest, "The Misconceived Quest," 214.

[51]Brest, "The Misconceived Quest," 214.

[52]Brest, "The Misconceived Quest," 214.

[53]Brest, "The Misconceived Quest," 214.

[54]Cole, "Constitutional Interpretation," 17.

[55]Cole, "Constitutional Interpretation," 17.

[56]Cole, "Constitutional Interpretation," 17.

[57]Cole, "Constitutional Interpretation," 17.

[58]Cole, "Constitutional Interpretation," 17.

[59]The Federalist Society, The Great Debate: Interpreting Our Written Constitution, (Washington, D.C.: The Federalist Society, 1986), 14.

[60]The Federalist Society, The Great Debate, 17.

[61]Chemerinsky, "Asking the Wrong Question," 1234.

[62]Cole, "Constitutional Interpretation," 21.

[63]Cole, "Constitutional Interpretation," 21.

[64]Brest, "The Misconceived Quest," 237.

[65]Brest, "The Misconceived Quest," 237.

[66]Gary Jacobsohn, "The Extra-Textual in Constitutional Interpretation," Constitutional Commentary 1 (Winter 1984): 21.

[67]Grey, "Unwritten Constitution?" 706.

[68]Grey, "Unwritten Constitution?" 706.

[69]Grey, "Unwritten Constitution?" 712.

[70]Grey, "Unwritten Constitution?" 712.

[71]Grey, "Unwritten Constitution?" 713.

[72]Fisher, "Methods of Constitutional Interpretation," 54.

[73]Fisher, "Methods of Constitutional Interpretation," 54.

[74]Cole, "Constitutional Interpretation," 25.

[75]Cole, "Constitutional Interpretation," 25-26.

[76]Chemerinsky, "Asking the Wrong Question," 1235.

[77]Cole, "Constitutional Interpretation," 26.

[78]Chemerinsky, "Asking the Wrong Question," 1236.

[79]Chemerinsky, "Asking the Wrong Question," 1236.

[80]Cole, "Constitutional Interpretation," 26.

[81]Chemerinsky, "Asking the Wrong Question," 1236.

[82]Chemerinsky, "Asking the Wrong Question," 1236.

[83]Cole, "Constitutional Interpretation," 28.

[84]Cole, "Constitutional Interpretation," 28.

[85]Craig Ducat, Modes of Constitutional Interpretation, (St. Paul: West Publishing Co., 1978), 44.

[86]Ducat, Modes of Interpretation, 47.

[87]United States v. Butler, 297 U.S. 1, 62-63, 56 S.Ct. 312, 318 (1936).

[88]Craig Ducat and Harold Chase, Constitutional Interpretation, (St. Paul: West Publishing Co., 1983), 58.

[89]Chemerinsky, "Asking the Wrong Question," 1208.

[90]Ducat, Modes of Interpretation, 193.

[91]Ducat, Modes of Interpretation, 201.

[92]Chemerinsky, "Asking the Wrong Question," 1236.

[93]Ducat, Modes of Interpretation, 238.

[94]Glen A. Phelps and John B. Gates, "The Jurisprudence of William Rehnquist: The Relevance of Constitutional Theory," paper presented at Midwest Political Science Association Meeting, Chicago, Illinois, April 1989, 5.

[95]Phelps and Gates, "The Jurisprudence of Rehnquist," 13.

[96]Phelps and Gates, "The Jurisprudence of Rehnquist," 6.

[97]Phelps and Gates, "The Jurisprudence of Rehnquist," 6.

[98]Phelps and Gates, "The Jurisprudence of Rehnquist," 7.

[99]Phelps and Gates, "The Jurisprudence of Rehnquist," 7.
[100]Phelps and Gates, "The Jurisprudence of Rehnquist," 7.

[101]Phelps and Gates, "The Jurisprudence of Rehnquist," 12.

[102]Phelps and Gates, "The Jurisprudence of Rehnquist," 12.

[103]Phelps and Gates, "The Jurisprudence of Rehnquist," 13.

[104]Phelps and Gates, "The Jurisprudence of Rehnquist," 13.

[105]Phelps and Gates, "The Jurisprudence of Rehnquist," 16.

[106]Phelps and Gates, "The Jurisprudence of Rehnquist," 16.

[107]Phelps and Gates, "The Jurisprudence of Rehnquist," 16.

[108]Phelps and Gates, "The Jurisprudence of Rehnquist,"12.

[109] Ducat, Modes of Interpretation, 109.

[110]Fisher, "Methods of Constitutional Interpretation," 45-46.

[111]Ducat, Modes of Interpretation, 44.

[112]Cole, "Constitutional Interpretation," 28.

[113]Cole, "Constitutional Interpretation," 29.

[114]Cole, "Constitutional Interpretation," 29.

[115]Cole, "Constitutional Interpretation," 12.

[116]Cole, "Constitutional Interpretation," 30.

[117]Cole, "Constitutional Interpretation," 30.

[118]Brest, "The Misconceived Quest," 237.

[119]Cole, "Constitutional Interpretation," 30.

[120]Cole, "Constitutional Interpretation," 30-31.

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